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**9.1 INTRODUCTION**

Economic, social and cultural (ESC) rights include a number of entitlements, such as the right to work and the enjoyment of just and favourable conditions of work; the right to form and join trade unions; the right to social security; the protection of the family, mothers and children; the right to an adequate standard of living, which includes adequate food, clothing and housing and continuous improvement of living conditions; the right to the highest attainable standard of mental health; the right to education; and the right to participate in cultural life and enjoy the benefits of scientific progress. All these are protected under ICESCR.

Several differences are traditionally cited to distinguish the disparate legal nature of ESC and civil and political rights. Whereas states are obliged to implement the latter immediately, most ESC rights are subject to progressive realisation under the terms of the ICESCR. Moreover, because civil and political rights are considered negative obligations and thus generally only require entrenchment in the legal order of states, they are justiciable and

enforceable before the courts. On the other hand, a number of states suggest that ESC rights are not justiciable, not only because they are not immediately realisable but also because their implementation requires funds and resources which parties may not possess. Thus, resource scarcity is a significant impediment to the fulfilment of ESC rights, but is also a justification for those states that are unwilling to invest money in social welfare services, especially towards the vulnerable, marginalised and the indigent. These issues will be explored in detail in this chapter.

It will also be demonstrated that ESC rights are by no means the poor relative of civil and political rights. In fact, many of the latter are meaningless without ESC rights. By way of illustration, the right to life is to some degree dependent on adequate food and water, decent housing and health-care. Equally, a decent education is a good platform for an informed exercise of the freedom of expression. It will be shown that ESC rights are not vague obligations but to a large degree are now susceptible to qualitative and quantitative measurement. One of the sections in this chapter analyses in detail the advancement of indicators and benchmarks that have developed since the mid-1990s in order to set out realistic targets for states with a view to assessing their performance.

The final sections of the chapter concentrate on four distinct ESC rights: the right to education, the right to health and the rights to food and water. These should be read together with the right to development where it is explained that most developmental objectives generally overlap with ESC rights. There it will be demonstrated that several ESC rights that are not perceived as justiciable in certain nations were brought before the courts as necessary extensions of other justiciable civil and political rights (indirect justiciability).

## 9.2 BRIEF HISTORICAL CONTEXT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

ESC rights are clearly recognised in articles 22–7 of the UDHR as well as article 55(a) and (b) of the UN Charter and were later elaborated in more detail in the ICESCR. Yet, even to this day scholars argue about the intention of the drafters of the ICESCR, which were at the time divided into two political camps, socialist or Soviet-bloc nations, on the one hand and Western liberal states on the other. For the socialist bloc the provision of a comprehensive and free social welfare system encompassing all ESC rights was a natural extension of its political ideology and state organisation. Most liberal democracies conditioned ESC rights, such as that of work and adequate living standards, on the forces of free market economics, which rested on private initiative, non-state interference and the promotion of entrepreneurship. The idea was that a well-functioning market economy would generate enough

jobs and wealth for all members of society to enjoy high quality ESC benefits. Some liberal democracies, but certainly not all, put in place a social safety net for those unable to take advantage of the bounties of the free market system.

As a result, most liberal states objected to the assimilation of ESC rights with civil and political rights, at least in terms of their implementation.<sup>1</sup> The USSR at the time argued that ESC rights should be immediately enforceable and justiciable, which was vehemently opposed by the USA, its Western allies and most developing nations. Thus, the USA and its allies pressed the Commission on Human Rights to remove ESC rights from the text of the impending covenant that it was in the process of drafting. When the matter came to the General Assembly it swiftly overturned the Commission's decision<sup>2</sup> and subsequently the Commission prepared a single draft covenant containing seventy-three articles governing both ESC and civil and political rights. It was at this point that the heated debates between the two political camps intensified, leading to a compromise solution whereby ESC rights were to be incorporated in a covenant that was distinct from civil and political rights.<sup>3</sup> Scholars such as Whelan and Donnelly attribute this Western persistence to technical questions of legal implementation (namely objections to justiciability and immediate implementation), rather than substantive ideological concerns.<sup>4</sup> The truth lies somewhere in the middle. Whereas it is true that ESC rights were not central to certain liberal states<sup>5</sup> – a prime example being the lack of welfare for the multitude of victims of the Great Depression in the USA<sup>6</sup> – they none the less accepted and protected most ESC rights in their legal systems; yet, their conception of fulfilment was fundamentally different from that of the USSR. Standing out among

<sup>1</sup> A. Kirkup and T. Evans, 'The Myth of Western Opposition to Economic, Social and Cultural Rights? A Reply to Whelan and Donnelly', *HRQ* 31 (2009), 221, 228–9.

<sup>2</sup> UNGA resolution 421(V) (4 December 1950).

<sup>3</sup> UNGA resolution 543(VI) (5 February 1952), noting however that ESC and civil and political rights are interconnected and interdependent.

<sup>4</sup> D. J. Whelan and J. Donnelly, 'The West, Economic and Social Rights and the Global Human Rights Regime: Setting the Record Straight', *HRQ* 29 (2007), 908.

<sup>5</sup> S. L. Kang, 'The Unsettled Relationship of Economic and Social Rights in the West: a Response to Whelan and Donnelly', *HRQ* 31 (2009), 1006, at 1007–8. Other liberal democracies, such as Germany, have elevated universal social welfare to a constitutional principle. Article 20(1) of Germany's Basic Law (the *Grundgesetz*) establishes the so-called *Sozialstaatsklausel*, or social state principle which obliges the government to provide the minimum core ESC rights so that people can live with dignity. The Federal Constitutional Court (the *Bundesverfassungsgericht*) has interpreted this minimum core to include essential foodstuff, housing, clothing and healthcare (BVerfGE 82, 60 (80), 1990). This has given rise, among other things, to a constitutional entitlement to a minimum of benefits, as decided by the Federal Administrative Court (BVerwGE 1, 159 (1954)).

<sup>6</sup> It should be noted, however, that in direct response to the Great Depression the Roosevelt administration implemented a set of economic programmes between 1933 and 1936 whose aim included, among other things, the provision of relief to the poor and the unemployed.

its other liberal counterparts, particularly the set of countries that now form the EU, the USA has been nothing less than vociferous in proclaiming that ESC rights are not rights at all but goals which states aspire to achieve. By way of illustration, in response to an OHCHR questionnaire in 2007 on the domestic implementation of the right to water, the US position paper bluntly conceded that its government ‘does not share the view that a right to water [broadly understood] exists under international human rights law’.<sup>7</sup> Such a position expressed by the world’s superpower certainly hampers efforts to give prominence to ESC rights worldwide but has not halted the tide of laws, constitutional amendments and judicial pronouncements in many parts of the globe to bring about the justiciability of ESC rights.

As will be explained in following sections, the perceived legal differences between civil and political and ESC rights was ultimately reflected in their respective monitoring in the two covenants. Whereas the implementation of civil and political rights is monitored by the HRCtee, whose mandate is derived from the ICCPR itself, the drafters of the ICESCR decided against a monitoring mechanism and naturally objected to the possibility of an optional protocol giving rise to individual complaints. When the ICESCR came into force in 1976, ECOSOC set up working groups composed of government experts to assist with the review of country reports. Their operation was generally considered unsatisfactory, leading one group in 1985 to propose transforming the existing system into a committee of independent experts. This suggestion was endorsed by ECOSOC which went ahead and set up the CESCR.<sup>8</sup> Although it was only provided with the power to review the parties’ periodic reports and offer non-binding recommendations, it has gone ahead and issued general comments, in the mould of the Human Rights Committee, and in more recent years these comments have slowly began to use the language of ‘violations’ attributable to actions and omissions of states parties.<sup>9</sup>

### 9.3 PROGRESSIVE REALISATION AND THE NATURE OF STATE OBLIGATIONS

The nature of obligations addressed to states in their implementation of ESC rights is predicated in article 2(1) of the ICESCR, which reads as follows:

<sup>7</sup> ‘Views of the USA on human rights and access to water, submitted to OHCHR’ (June 2007), para. 4. It did, however, go on to say that water rights are an important part of water governance in the USA and a complex array of entitlements exist primarily at the state level.

<sup>8</sup> ECOSOC resolution 1985/17 (28 May 1985).

<sup>9</sup> See e.g. CESCR Concluding Observations on Israel, UN Doc. E/C12/1/Add 27 (4 December 1998), para. 11, in respect of Israel’s alleged discriminatory practices between Jewish and Palestinian property rights.

Each state party to the present Covenant *undertakes to take steps*, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to achieving *progressively* the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures [emphasis added].<sup>10</sup>

This language is in stark contrast to the obligations contained in article 2(1) of the ICCPR, which stipulates that each party undertakes to ‘respect *and ensure* to all individuals ... the rights recognised in the present Covenant’, as well as article 2(3) according to which parties undertake to ‘ensure that any person whose rights or freedoms ... are violated shall have an effective remedy’. Therefore, it would seem that the rights in the ICESCR are framed as goals that are to be achieved progressively, contingent on the maximum use of a nation’s available resources. In addition, whereas the ICCPR directly addresses its intended rights-holders (i.e. ‘everyone shall have the right’), the ICESCR does so through the medium of the state (i.e. ‘state parties to the present Covenant recognise the right of everyone’). As a result, it has been questioned whether an obligation that is not immediately enforceable, not overtly justiciable and which is contingent on available resources can ever give rise to an entitlement at all.

It is beyond doubt that ESC rights are binding on states. This is true not only in respect of those obligations that are subject to immediate implementation but in respect of all rights.<sup>11</sup> This is so because every right in the ICESCR entails obligations of conduct and obligations of result. These may further be broken down to three further levels of obligation, namely to respect, protect and fulfil. The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right, such as by denying or impeding access or enforcing discriminatory practices. The obligation to protect requires states to take measures that prevent third parties from interfering with the right. In relation to the right to health, for example, this includes the adoption of legislation or other measures ensuring equal access to healthcare and health-related services provided by third parties; ensuring that the privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; and controlling the marketing of medical equipment and medicines by third

<sup>10</sup> This definition is essentially reproduced with minor variations in article 26 of the ACHR, 36 UNTS 1144, as well as article 1 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) (1989) 28 *ILM* 156.

<sup>11</sup> ESC rights that have been recognised by the CESCR as being of immediate application include articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3). CESCR General Comment 3: nature of ICESCR obligations, UN Doc. E/1991/23 (14 December 1990), paras. 5, 7; CESCR General Comment 9: domestic application of ICESCR, UN Doc. E/C12/1998/24 (3 December 1998), para. 10.

parties. Finally, the obligation to fulfil requires the adoption of appropriate legislative, administrative, budgetary, judicial, promotional and other measures.<sup>12</sup>

As far as the duty to fulfil is concerned, the CESCR has iterated that it involves an obligation to facilitate and a duty to provide. Facilitation requires the creation of appropriate conditions that lead to the enjoyment of the right in question, such as the establishment of a national health policy in respect of the right to health. The duty to provide requires states to provide the commodity that is the essence of a particular right (e.g. water, food, health services) 'whenever an individual or group is unable, for reasons beyond their control' to enjoy the right by the means at their disposal.<sup>13</sup> This is no doubt a controversial point of view because it is said to ignore the fundamental premise of the ICESCR, i.e. progressive realisation. None the less, the CESCR's view is in full conformity with the accepted position that water and food, among other things, should not be treated as commodities but as means necessary for survival and welfare.

In respect of those ESC rights that require the state to provide a resource (e.g. water) or a service (e.g. healthcare) the CESCR has formulated a set of criteria against which the obligation to fulfil should be assessed. The first concerns availability of the resource in question. Water, for example, must be sufficient and continuous for consumption, sanitation, cooking and other purposes. The second is quality, meaning that it should be safe. The third is accessibility, without discrimination, which consists of physical, economic and information accessibility.<sup>14</sup>

The concept of progressive realisation of the rights guaranteed in the Covenant derives from the reality that most, if not all, states are unable to provide the entire range of ESC rights, at least with immediate effect, because of resource constraints. Unlike civil and political rights, which are generally viewed as requiring negative obligations of non-interference (e.g. right to life, freedom of expression, freedom of assembly) and are thus (erroneously) seen as devoid of implementation costs,<sup>15</sup> ESC rights are positive in nature and are not susceptible to implementation without significant resources.<sup>16</sup> As a result, states have been unwilling to assume the onerous obligations associated with

<sup>12</sup> CESCR General Comment 14: right to health, UN Doc. E/C12/2004 (11 August 2000), paras. 33–6.

<sup>13</sup> CESCR General Comment 12: right to food, UN Doc. E/C12/1999/5 (12 May 1999), para. 15; CESCR General Comment 14, para. 37; CESCR General Comment 15: right to water, UN Doc. E/C12/2002/11 (20 January 2003), para. 25.

<sup>14</sup> CESCR General Comment 15, para. 12.

<sup>15</sup> This is not however true. States are under an obligation to take positive measures to protect civil and political rights. For example, there exists an obligation to protect the right to life and other personal freedoms by maintaining an effective police force or by averting deadly terrorist attacks. See section 15.4.

<sup>16</sup> In a subsequent section we shall, however, explore the CESCR's 'violations' approach in identifying the negative components of ESC rights.

ESC rights if not accompanied by the condition that their realisation would be progressive, as opposed to immediate. No doubt this saving clause has been abused and has served as a basis for justifying inaction, principally through claims of state indigence.<sup>17</sup> In most cases where such claims have been made, the state in question has been responsible for widespread corruption, clan favouritism and large-scale human rights abuses.

In *Bermúdez Urrego v. Transmilenio* a disabled person argued that the public transport system of Bogota provided no accessibility for wheelchair users. In discussing possible remedies for the violation of the petitioner's freedom of movement, the Colombian Constitutional Court held that freedom of movement in this context was a progressive right, subject to two important observations. First, a right is not considered progressive simply because it entails a positive action on behalf of the state. The protection of some rights may, in some circumstances, be so urgent as to warrant an immediate response. Secondly, that a right is to be ensured progressively does not mean that it cannot be enforced. The Court emphasised that 'taking rights seriously equally demands taking their progressive nature seriously'. It held that: (1) the progressive definition of the level of enjoyment of a right cannot continuously exclude certain groups of the population (such as disabled persons); (2) the state must gradually make advances as to the fulfilment of the right; and (3) the state may define the level of fulfilment that it is prepared to ensure, albeit rationally, and this must be made public by legislation and the right itself must be made justiciable.<sup>18</sup>

Article 2(1) of the ICESCR envisages progressive realisation of rights through the 'taking of steps' 'by all appropriate means'. The Committee has rightly commented that:

While the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.

The fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of ESC rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. *It thus imposes an obligation to move as expeditiously as possible towards that goal* [emphasis added].<sup>19</sup>

<sup>17</sup> See S. Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', *HRQ* 20 (1998), 81, at 94.

<sup>18</sup> *Bermúdez Urrego v. Transmilenio*, T-595/2002.

<sup>19</sup> CESCR, General Comment 3, paras. 2, 9.



That states are under an obligation to implement ESC rights, even if these have not been rendered justiciable, follows from their indivisibility from civil and political rights. People are living organisms, composed of myriad functions that are inseparable from the whole. In this sense, the right to life is not meaningful only when the state refrains from killing or protects individuals from crime, as this is simply one of the many dimensions of life. Others include access to food and water for immediate survival. When bare survival has been achieved living a decent life that amounts to well-being<sup>20</sup> (which includes adequate access to housing, healthcare, education and other things) is important because without well-being political rights seem luxurious and theoretical pursuits to those who cannot afford to provide the bare essentials for their families. It is for this reason that most, if not all, ESC rights have been rendered justiciable by domestic and international judicial bodies as necessary correlations of civil and political freedoms and entitlements. In subsequent chapters this indirect justiciability will be demonstrated in respect of the right to development,<sup>21</sup> the right to a healthy environment<sup>22</sup> and the right to be free from corruption.<sup>23</sup> The IACtHR is among those international tribunals that have provided a broad interpretation to civil and political rights so as to encompass by extension ESC rights. In the *Street Children* case state agents of Guatemala were found to have practised abhorrent systematic violence against abandoned street children, including executions and torture. The Court employed articles 4 (right to life) and 19 (rights of the child) of the American Convention in order to construct the right to a dignified existence which it stipulated should be guaranteed by the state. It found that in the case at hand Guatemala had deprived street children of the minimum conditions for a dignified life and prevented them from the full and harmonious development of their personality.<sup>24</sup>

Finally, brief mention should be made to the link between the right to development and the implementation of ESC rights. The former refers to the constant improvement of the well-being of peoples through an enabling environment that is respectful of all human rights, which include ESC rights. The realisation of the right to development requires domestic as well as international action, in the same manner that ESC rights in article 2(1) of the

<sup>20</sup> Well-being is a central notion in the pursuit of the right to development, which is explained in section 12.2.

<sup>21</sup> Section 12.3.1. <sup>22</sup> Section 12.8. <sup>23</sup> Section 12.7.

<sup>24</sup> *Villagrán Morales et al. v. Guatemala*, IACtHR Ser. C, no. 63 (19 November 1999, paras. 144, 191; in its Advisory opinion on *Juridical Condition and Human Rights of the Child*, OC-17/02, IACtHR Ser. A, no. 17 (28 August 2002), para. 84, it was held that a dignified life for children separated from their families encompassed the right to education and the right to health. See J. L. Cavallaro and E. Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas', *Hastings Law Journal* (*Hastings L. J.*) 56 (2004), 217, at 272, who argue in favour of an expansive construction of the right to life and property in order to encompass a large number of ESC rights.



ICESCR and 56 of the UN Charter are dependent also on international assistance and cooperation. International assistance is typically provided through a range of multilateral partnerships for the financing of development, discussed elsewhere in this book,<sup>25</sup> as well as through technical cooperation and the delivery of capacity-building expertise.

#### 9.4 RESOURCE IMPLICATIONS: THE OBLIGATION TO UTILISE 'MAXIMUM AVAILABLE RESOURCES'

Article 2(1) of the ICESCR, as do other instruments related to the fulfilment of economic and social rights,<sup>26</sup> stresses that states are obliged to realise ESC rights by making the maximum use of their available resources. No doubt, although the resources of one nation will vary, and sometimes staggeringly so, from those of another, the assessment of a nation's available resources and its maximum utilisation of these resources towards implementing a particular right may be measured by reference to objective criteria. First of all, it is crucial to define and ascertain a state's available resources. The question is by no means simple, since one could argue that human capital, intellectual property rights, uncollected taxes and government loans, among other matters, may fall within the purview of public resources. Economists generally contend that a country's available resources should not be measured only by the ratio of governmental expenditure to gross domestic product (GDP), which represents the market value of a country's products and services in any one year. Available resources should also include development assistance, borrowing and running a deficit, as well as the monetary space made possible by central banks by, for example, currency devaluations, fluctuation of interest rates and others. This is referred to as the fiscal space diamond.<sup>27</sup>

The maximum utilisation of these resources raises a number of compelling arguments. For example, is a country justified for failing to allocate funds to implement basic ESC rights on the ground that it is obliged to service its

<sup>25</sup> See section 12.4.

<sup>26</sup> Article 4, CRC; article 4(2), CRPD. See also CtRC, General Comment 5: general measures of implementation, UN Doc. CRC/GC/2003/5 (27 November 2003), paras. 6–8, 51. The CtRC has criticised most countries for their failure in this regard. See Concluding Observations on Slovenia, UN Doc. C/CRC/15/ADD.230 (26 February 2004), para. 15, which called for the development of a 'systematic and detailed allocation of resources in order to provide a clear picture of trends in budget allocations and [which] ensures that resources are made available ... to the maximum extent of available resources in order to meet the needs of all children and correct poverty-related disparities'.

<sup>27</sup> See UNDP, 'The fiscal space challenge and financing for MDG achievement', available at: [http://content.undp.org/go/cms-service/stream/asset/?jsessionid=axMCGVWNrEb4?asset\\_id=2223965](http://content.undp.org/go/cms-service/stream/asset/?jsessionid=axMCGVWNrEb4?asset_id=2223965), at 7.

foreign debt which accounts for 90 per cent of its annual resources? If rights are truly indivisible and interdependent then the right to life is of equal value with the right to a free education, adequate housing, health and food, which cannot be denied on account of debt servicing.<sup>28</sup> The CESCR has pointed out the minimum requirements for the implementation of ESC rights, irrespective of a country's financial situation. These consist of the so-called minimum core obligations, which will be discussed in the next section, consisting of the minimum essential levels pertinent to each right.<sup>29</sup> Resource constraints can under no circumstances be claimed as a justification to deny implementing the minimum core. Moreover:

even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.<sup>30</sup>

No doubt, states have often claimed that although they are utilising the maximum of their resources these are none the less insufficient.<sup>31</sup> In most cases, however, they do not make the best use of their resources and this is something that is often pointed out by judicial institutions and intergovernmental entities. One poignant example concerns the distributive failures of so-called regressive tax regimes. These generally rely on the assumption that the rich will invest money in the economy if their personal and property taxes are reduced, taking into account that they already pay corporate tax and provide jobs to the masses. As a result, regressive regimes balance their shortfall by imposing higher taxes on goods and services, which are, however, consumed by low- and middle-income households. Thus, they generate inequitable outcomes and fail to distribute wealth across the population because the poor end up paying more of their income on taxes than the rich.<sup>32</sup> Countries adhering to regressive regimes are clearly not making maximum use of their resources and should consider reverting to progressive taxation where the wealthy are taxed according to their real income.

There is some debate about whether the assessment of resource availability and its appropriate utilisation should be a justiciable matter, in addition to encompassing unavoidable political considerations. The CESCR, although admitting that determinations of this nature are not ordinarily justiciable,

<sup>28</sup> See section 12.6 for a discussion of debt relief and human rights.

<sup>29</sup> CESCR, General Comment 3, para. 10.

<sup>30</sup> CESCR, General Comment 3, para. 12.

<sup>31</sup> See R. Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realising Economic, Social and Cultural Rights', *HRQ* 16 (1994), 693.

<sup>32</sup> The German Federal Constitutional Court has held that the state's power of direct taxation – as opposed to indirect taxation – cannot be used to deprive people of the means for their 'existential minimum' (BVerfGE 82, 60(85), BVerfGE 87, 153(69)).

has gone on to say that courts are already involved in a considerable range of matters encompassing resource implications and possess the authority to do so 'within the limits of the appropriate exercise of their functions of judicial review'.<sup>33</sup> None the less, there exists a significant thread of jurisprudence in constitutional democracies whereby domestic courts have questioned the authority of the state to divert resources for the implementation of particular ESC and ordered their redirection or suggested the need for reforms.<sup>34</sup> By way of illustration the South African Constitutional Court in the *Treatment Action Campaign* case decided that the non-public availability of a drug that was found to prevent the transmission of HIV from mothers to babies was unreasonable and breached the right of poor mothers and their newborns to effective healthcare.<sup>35</sup>

Similarly, the Argentine Supreme Court has issued orders in a long list of cases to public authorities and hospitals demanding that they provide HIV and other life-saving medication and treatment to the indigent.<sup>36</sup> In the same fashion the Colombian Constitutional Court has issued *amparo* and *tutela* injunctions, which are intended to protect people from unlawful and arbitrary governmental acts through urgent judicial review.<sup>37</sup> The right of *amparo* is stipulated in article 25(1) of the American Convention on Human Rights. In the *Rivera* case the Constitutional Court ordered a lower court to determine whether the petitioner was in a situation of 'absolute indigence' for the purpose of providing him with free medical treatment. The test for indigence was found to be premised on (1) absolute incapacity to sustain oneself by one's own means; (2) the existence of a vital need which,

<sup>33</sup> CESCR, General Comment 9, paras. 10 and 14.

<sup>34</sup> In *Campaign for Fiscal Equality v. State of New York* 100 N.Y. 2d 893 (2003) the New York Court of Appeals suggested that New York state reformed its school finance system so that it could provide a sound basic education to all of its districts. Upon the state's failure to implement any reforms, the court ordered that US\$5.6 billion be allocated to annual school-operating expenses and another US\$9.2 billion for a five-year capital projects programme. The state's appeal against the order was rejected. *Campaign for Fiscal Equity v. State of New York* 861 N.E. 2d 50 (N.Y., 2006). This led the New York governor in early 2007 to adopt the State Education Budget and Reform Act which envisaged significant state-wide increases in education aid.

<sup>35</sup> *South African Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721.

<sup>36</sup> *Campodónico de Beviacqua, Ana Carina v. Ministerio de Salud y Banco Drogas Neoplásicas*, Judgment (24 October 2000). A year earlier, the Venezuelan Supreme Court in *Cruz Bermúdez and Others v. Ministerio de Sanidad y Asistencia Social*, Judgment no. 916 (15 July 1999), ordered the distribution of HIV drugs to 170 indigent sufferers.

<sup>37</sup> In *Restrepo and López v. Salud Colmena*, T-849/2001 two HIV sufferers were denied testing since they were not included in the mandatory state-financed health plan. Neither could afford to pay for the tests. On the basis of the right to life the Constitutional Court held that diagnostic tests were essential to protect the right to health of HIV patients, being necessary to monitor the progress and effectiveness of HIV treatments. Thus, it ordered the private hospital (Salud Colmena) to carry out these tests free of charge, further authorising it to charge this additional cost to a government fund.

left unsatisfied, would seriously injure human dignity; and (3) the material absence of family support. If all three conditions were found to have been satisfied the lower court could order the state to contribute to that person's sustenance.<sup>38</sup>

As a result, it is wrong to suggest that courts are ill placed, or that they do not possess the authority, to question and annul budgetary decisions that affect the implementation of ESC rights. In fact, an important function of judicial review is to prevent the implementation of government acts that carry a financial impact on rights.

## CASE STUDY 9.1

### United States budget allocated to primary and secondary education

In 2004 the USA ranked eighth in its commitment to public education spending. In 2003–4 it spent US\$472.3 billion, which represented almost 6 per cent of the country's GDP. This appears to demonstrate a significant commitment to government-funded education, although the numbers are deceptive. The level of public funding for education is dependent on local property taxes, not on a system of wealth redistribution that promotes equal quality of education for all children irrespective of income. As a result, wealthier neighbourhoods generate more money for public schools than low-income and deprived neighbourhoods. It is estimated that affluent public schools spend US\$15,000 for each student, whereas poorer schools can only afford an amount close to US\$4,000. It is evident that school districts with the largest percentage of minority students receive the least amount of general education revenues.<sup>1</sup>

Under the terms of the ICESCR the USA would have failed to utilise its maximum available resources to fulfil the right to education because of the discrimination inherent in the current system of public education funding.

<sup>1</sup> Center for Women's Global Leadership, 'Maximum Available Resources and Human Rights: Analytical Report' (2011), 7.

## 9.5 MINIMUM CORE OBLIGATIONS

In one of its first general comments the CESCR made it clear that, at the very least, states are under an obligation to ensure the satisfaction of the minimum essential levels of each ESC right. It has referred to these as minimum core obligations.<sup>39</sup> By way of illustration, in cases of severe food

<sup>38</sup> *Rivera* case, T-533/1992. This is in conformity with case T-426/1992 which reproduces the German doctrine of 'minimum level of existence' (*Existenzminimum*).

<sup>39</sup> CESCR, General Comment 3, para. 10.

shortages or serious epidemics threatening the very existence of a population, or a group thereof, the state is obliged to provide essential foodstuffs and vaccine or other healthcare. Although minimum core obligations are not derogable,<sup>40</sup> in extremes cases where 'every effort has been made to use all the resources [at the disposal of a state] in an effort to satisfy, as a matter of priority, minimum core obligations' the state in question is not considered at fault.<sup>41</sup>

It has been suggested that minimum core obligations anticipate three accomplishments: (1) provision of a specific direction in the implementation of ESC rights by disassembling the inherent relativism of their otherwise 'progressive realisation'; (2) advancement of a baseline level of protection irrespective of socio-economic policies and disparate levels of available resources; and (3) signalling an acceptable global redistributive debate.<sup>42</sup> At the same time, however, what remains unanswered is whether the minimalist approach associated with minimum core obligations presupposes differentiated standards between developed and developing countries. Some critics have further argued that the continued insistence on the performance of developing states, in respect of assessing minimum core obligations has steered focus away from low- and middle-income classes in the developed world.<sup>43</sup> To respond to the question of whether differentiated standards are justified – which necessarily poses a relativist dimension – one must first assess the values pertinent to human existence recognised under general international law. The majority of the globe's population still live in abject poverty, suffering unnecessary deaths from diseases, infections and malnourishment. The Human Development Index (HDI) has consistently emphasised that human development and well-being should be measured on the basis of longevity, knowledge and decent living standards.<sup>44</sup> Under this light, a needs-based core minimum set of obligations premised on the preservation of bare survival would not meet the HDI threshold and is in any event antithetical to the notion that the right to life is not exhausted by biological survival alone but is instead multidimensional. As a result, several scholars have rejected the needs-based approach, arguing in favour of value-based core minimum obligations by putting emphasis on what it means to be human, encompassing within their methodology the notions of dignity, equality and freedom.<sup>45</sup>

<sup>40</sup> CESCR, General Comment 14, para. 18. <sup>41</sup> CESCR, General Comment 3, para. 10.

<sup>42</sup> K. Y. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *Yale J. Int'l L.* 33 (2008), 113, 121–2.

<sup>43</sup> M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press, 1995), 143–4.

<sup>44</sup> UNDP, *Human Development Report* (Oxford University Press, 1990), 11.

<sup>45</sup> See Young, above note 42, 128–38.

This line of thinking seems to conform more closely to the CESCR's approach, given that its formulation of core minimum obligations in respect of rights such as that of water require much more than the formulation of needs-based policies by states parties.<sup>46</sup> The Committee is not alone in its value-based conception of the minimum core. In fact, the German Constitutional Court has long developed the doctrine of 'minimum level of existence' (*Existenzminimum*), whereby the state is constitutionally obliged to establish a social welfare system that enables people to live with dignity.<sup>47</sup> Equally, in the USA the courts have employed their power of judicial review in order to suggest budgetary reforms that overturn existing economic and social policies, as is the case with the discrepancy in quality of public secondary education offered to underprivileged classes.<sup>48</sup> The courts were not merely content that children attended school but emphasised that the level of secondary education should be such as to prepare students for higher education and render them capable of competing in the employment market.<sup>49</sup> This by no means suggests a bare minimum.

The implementation of minimum core obligations does not always require the infusion of tangible resources but may instead simply need on a change of policies. By way of illustration, food and employment security in poor nations could be significantly boosted by the protection of small-scale farming, access to subsidies or micro-financing and insistence on local consumption with a view to minimising cost. In this manner valuable foodstuffs would not be exported cheaply out of countries reliant on them for their well-being and farmers could continue to grow their produce without fear of being outpriced or taken over by large collectives.<sup>50</sup>

Despite the fact that core minimum obligations must be construed as value based rather than needs based, in emergency situations it is not expected that the state should implement the higher thresholds of ESC rights. In the *Grootboom* case, which concerned the eviction of homeless people from their informal settlements, the South African Constitutional Court held that even though the government was working towards a housing policy to provide adequate, low-cost housing for the poor, it was under a legal duty to accommodate as a matter of priority the 'absolutely homeless'.<sup>51</sup>

<sup>46</sup> CESCR, General Comment 15, para. 37. <sup>47</sup> BVerfGE 1, 97 (104); BVerfGE 45, 187 (229).

<sup>48</sup> *Campaign for Fiscal Equality v. State of New York* 100 N.Y. 2d 893 (2003).

<sup>49</sup> The House of Lords in *R v. East Sussex Council ex parte Tandy* [1998] 2 All ER 769 adopted a similar stance in a case where a disabled child who was unable to physically attend school had his home tuition hours slashed from five to three by his local council on financial grounds. The Lords argued that although the Council was entitled to choose how to best spend its resources, it was none the less obliged to offer all children a 'suitable education', as per section 298 of the Education Act 1993.

<sup>50</sup> See section 17.3.1, dealing with globalisation.

<sup>51</sup> *Government of South Africa and Others v. Grootboom and Others*, 2001 (1) SA 46 (CC).

## 9.6 JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The concept of justiciability refers to the capacity of a particular claim to receive judicial scrutiny or determination on the basis of mandatory rather than discretionary rules.<sup>52</sup> The capacity or not of an applicant to entertain the claim (legal standing) is irrelevant to the justiciability of the claim itself. The right to water, as indeed all ESC rights, constitutes a legitimate claim and, as already pointed out, confers both rights and obligations. For some time, especially during the deliberations on the drafting of the ICESCR, it was contended that ESC rights did not possess a justiciable character. In order to justify this line of thinking it was argued that these were not in fact rights entailing legal entitlements but rather policy directives, or that their progressive realisation rendered them non-susceptible to judicial determination,<sup>53</sup> or finally that the courts could not possibly have a say on how governments determined their fiscal priorities. In the *Nigerian Education* case, for example, the government claimed that education was not a legal entitlement for its citizens and that as a result of widespread corruption it lacked the funds necessary to cover the shortfall of its educational budget, effectively denying large numbers of children the right to education. The ECOWAS court confirmed that the right to primary education was both justiciable and binding on Nigeria irrespective of the resources available to it.<sup>54</sup>

These types of anti-justiciability claims led a number of countries to avoid adopting legislation that would have made ESC claims justiciable before local courts. The Swiss Federal Supreme Court, for example, determined that the rights enshrined in the ICESCR were not justiciable because they did not manifest the characteristics of directly applicable norms.<sup>55</sup> Such arguments focusing on the alleged absence of direct applicability tend to bypass the fact that the rights in question are in one way or another enshrined in the national constitution, and in any event it is not all that hard to conceptualise the right to health in respect of a sufferer requiring specific treatment or of

<sup>52</sup> See M. J. Dennis and D. P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?', *AJIL* 98 (2004), 462, at 474–5, who take a narrow view, arguing that a claim should be considered justiciable only where its adjudication contributes to a practical result that is susceptible to implementation. For a comprehensive analysis of many of the cases cited in this section, see ICJ, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (2008).

<sup>53</sup> This argument was rejected by the Colombian Constitutional Court, especially in situations where the government has not taken the requisite steps to fulfil the right in question: *Bermúdez Urrego v. Transmilenio*, T-595/2002.

<sup>54</sup> *Social and Economic Rights Action Center (SERAC) v. Federal Republic of Nigeria and Universal Basic Education Commission*, ECW/CCJ/APP/07/10, Judgment, 6 December 2010.

<sup>55</sup> *T v. Neuchâtel County Compensation Bank*, Judgment, 20 July 1995.



a destitute child in need of food and shelter. Even so, through a process of strategic litigation initiated mainly by human rights NGOs, local courts have been urged to entertain claims based on the violation of economic and social rights, whether directly or by reference to civil and political rights. We have explained elsewhere in what manner the Indian Supreme Court subsumed the right to a healthy environment, adequate housing and other matters under the right to life. The Inter-American Court and Commission of Human Rights have adopted a similar methodology in respect of ESC rights that are not written into the American Convention. In *Bosico v. Dominican Republic*, for example, two Haitian children born in the Dominican Republic were denied birth certificates and nationality by the authorities of that country and as a result were not allowed to attend school and were deprived of a juridical personality. The Court found a violation of article 3 (right to juridical personality), article 19 (children's rights) and article 20 (right to nationality), among others, in order to affirm the obligation of states to provide without discrimination an education that is free and which fosters children's intellectual development.<sup>56</sup>

In countries where ESC rights have found their way into national constitutions<sup>57</sup> the courts have developed a significant string of jurisprudence which confirms their justiciable character, as we have already demonstrated earlier in this chapter. Of course, it should be pointed out that the courts are not necessarily the best forum for implementing ESC rights, as this is a job best suited to the executive power of central and regional governments by means of action plans and practical measures, such as the supply of drugs and housing. None the less, a free and independent judiciary plays an important role in clarifying the exact content of obligations, monitoring their implementation against possible discrimination, and determining the validity of omissions to fulfil based on reasonableness and proportionality. The last two principles, whether directly or indirectly, have been invoked by a number of courts in order to assess the propriety of governmental restrictions upon ESC rights and have been further incorporated in article 8(4) of the 2008 Optional Protocol to the ICESCR.<sup>58</sup> The South African Supreme Court has been instrumental in this regard, particularly through its much celebrated *Grootboom* judgment, but similar decisions have been reached elsewhere. In the *Multiple*

<sup>56</sup> *Girly Yean and Bosico v. Dominican Republic*, Judgment, 8 September 2005, Ser. C, no. 130, para. 185. See M. F. Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', *HRQ* 29 (2007), 431, at 445–51.

<sup>57</sup> For example, Colombian Constitution, chapter II, articles 42–77.

<sup>58</sup> This stipulates that in the examination of individual communications for violations of ESC rights, the CESCR shall 'consider the reasonableness of the steps taken by the state party ... bearing in mind that the state party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant'.

*Sclerosis* case, the Argentine Supreme Court was called upon to decide the validity of a regulation issued by the Ministry of Health which excluded multiple sclerosis treatment from the country's mandatory minimum health insurance plan. This regulation affected sufferers who were already encompassed under the plan and the Court deemed it unreasonable and contrary to the right to health.<sup>59</sup>

A poignant facet of ESC rights is the obligation incumbent on states to refrain from deliberately imposing retrogressive measures, such as would reverse any achievements made in the realisation of a particular right.<sup>60</sup> Retrogressive measures essentially deny existing rights-holders their legitimate entitlements, and many states during the post-2008 global financial crisis justified cuts to pensions, education and health by reference to spiralling public debt. By 2011 the Greek government, in order to secure international funds and avoid bankruptcy, slashed civil service pensions by more than 30 per cent and increased property and fuel taxes and began to charge for otherwise subsidised medicines. These measures adversely affected the living conditions of the infirm, the elderly and low-income households. Retrogressive measures have been successfully challenged before national courts, particularly in the areas of pensions, healthcare and education.<sup>61</sup>

Finally, it should be remembered that because justiciability does not only encompass claims against public authorities, the actions and omissions of private actors may also equally be challenged before the courts. Although non-state actors are not charged with specific ESC obligations under the ICESCR or general international law, to the extent that they effectively discharge economic and social rights in substitution for the state they have been viewed by some courts as legitimate duty-holders and have thus accepted the justiciability of claims brought against them. In *Etcheverry v. Omint* the applicant, who was an HIV sufferer, was provided membership to a private health plan by his employer. When he later became redundant he sought to continue his membership through private funds but the insurance company refused. The Argentine Supreme Court held that private health providers were under a duty to protect the right to health of their customers and that their special relationship was not simply of a contractual nature.<sup>62</sup> International bodies dealing with ESC rights claims but with no jurisdiction against non-state actors, such as the European Committee of Social Rights, will typically find that the state concerned has violated its obligations under the European

<sup>59</sup> *Asociación de Esclerosis Múltiple de Salta v. Ministerio de Salud-Estado Nacional* (*Multiple Sclerosis* case) judgment (18 December 2003).

<sup>60</sup> CESCR, General Comment 3, para. 9.

<sup>61</sup> The Latvian Constitutional Court, Judgment no. 2009/4301 (21 December 2009) and the Romanian Constitutional Court, Judgment no. 872 (25 June 2010) held that pension cuts implemented on the basis of loan agreements with the IMF were unconstitutional.

<sup>62</sup> *Etcheverry v. Omint Sociedad Anónima y Servicios*, Judgment (13 March 2001).

Social Charter by failing to take action against recalcitrant private actors.<sup>63</sup> This alternative is also open to national courts through the function of judicial review.

The following sections discuss the two available international quasi-judicial mechanisms that deal with individual and collective complaints associated with violations of ESC rights; the Optional Protocol to the ICESCR and the European Social Charter. In addition to these, the San Salvador Protocol on Economic Social and Cultural Rights establishes a weak periodic reporting mechanism, as well as an outlet for individual communications but only in respect of two specific rights (article 19(6)): the right to form and participate in trade unions under article 8(a) and the right to education in accordance with article 13. Finally, the ACHPR incorporates ESC rights and does not distinguish their justiciable character from that of other rights. As a result, individual communications are available in respect of any violations.

### 9.6.1 Individual communications and the ICESCR Optional Protocol

As has already been explained, on account of the unique legal nature of ESC rights (i.e. their progressive realisation, resource constraints and other matters), it was inconceivable to the majority of states during the drafting of the Covenant that a body equivalent to the UN HRCtee could receive individual communications. This was further reinforced by the fact that it was doubted whether the rights in the Covenant were justiciable in the first place before the parties' domestic courts. With the issue of non-justiciability having long been disposed of the idea of a complaints procedure began to be discussed within the UN in 1991 and in 2001 the Commission on Human Rights appointed an independent expert on the Question of an Optional Protocol to the ICESCR.<sup>64</sup> The baton was later passed to a working group<sup>65</sup> and following a series of high-level discussions the text of the Protocol was adopted by the UN General Assembly in late 2008.<sup>66</sup> This was by no means a smooth ride and despite the strong consensus from many quarters there was also significant dissent, with some commentators claiming that empowering a committee with powers over the implementation of ESC rights risks

<sup>63</sup> The CESCR in its General Comment 19 (right to social security), UN Doc. E/C12/GC/19 (4 February 2008), para. 65, noted that a state violates its duty to provide social security where it fails to adequately regulate the activities of private companies that deny this entitlement to rights-holders.

<sup>64</sup> Comm HR resolution 2001/30 (20 April 2001).

<sup>65</sup> Comm HR resolution 2003/18 (22 April 2003).

<sup>66</sup> For a background to events and discussions leading to its adoption, see C. de Albuquerque, 'Chronicle of an Announced Birth: the Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: the Missing Piece of the International Bill of Human Rights', *HRQ* 32 (2010), 144.

establishing a judicially controlled command economy through a counter-democratic process (i.e. a quasi-judicial or other adjudicatory institution).<sup>67</sup>

The Protocol envisages three particular types of communication: individual or group complaints, inter-state communications and an inquiry procedure. The idea behind all three is for the target state to reach a settlement with the complainant or consider reforming those laws and institutions that are found to infringe a particular right. This non-confrontational character of the procedures is reinforced by the fact that the CESC's recommendations are not meant to be binding. Under article 2, communications may be received by, or on behalf, of individuals or groups of individuals, implying that the procedure is open to minority groups, indigenous persons, trade unions and even NGOs. Significantly, and in line with the jurisprudence of other international tribunals, the violation need not have taken place on the territory of the state party but may occur in any place where the party exercises effective control.<sup>68</sup> A communication is admissible if it does not reveal that the author has suffered a clear disadvantage; even so the Committee may still consider the communication if it raises a serious issue of general importance.<sup>69</sup> Following the admissibility stage the Committee will examine the communication and at the same time it will transmit it to the target state for further statements and explanations.<sup>70</sup> Upon examination the Committee transmits its views, along with its recommendations, to the parties. The target state must give due consideration to the views and recommendations of the Committee and come back within six months with a response on any subsequent action taken.<sup>71</sup>

Given the sparse use made of inter-state complaints before other human rights mechanisms, it would be unlikely that this one would constitute a shining exception. Finally, the inquiry procedure is triggered by the receipt of reliable information indicating grave or systematic violations of ECS rights, upon which the CESC will invite the target state to cooperate in the examination of available information and submit its observations. Like the other two procedures, this one is also confidential and upon reaching its findings the CESC will transmit its views to the state concerned, to which it has six months to respond.<sup>72</sup>

### 9.6.2 The European Committee of Social Rights

Within the context of the Council of Europe a relatively vibrant and successful mechanism came into existence following the adoption of the European Social Charter in 1961. Unlike the ICESCR, which addresses a broad

<sup>67</sup> Dennis and Stewart, above note 52, 466.

<sup>68</sup> M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford: Hart, 2009), 34.

<sup>69</sup> Article 4, Optional Protocol.

<sup>70</sup> Article 6, *ibid.*

<sup>71</sup> Article 9(1) and (2), *ibid.*

<sup>72</sup> Article 11, *ibid.*

range of economic and social rights, the Charter largely protects labour and workplace-related rights, though it also encompasses the right to protection of health and to social security,<sup>73</sup> among others. The Charter is monitored by the ESCR which is composed of independent experts. Member states are under an obligation to submit a report every two years discussing the measures they have taken to protect and fulfil the rights stipulated in the Charter, which the Committee duly evaluates. The other function of the Committee is to receive collective complaints alleging unsatisfactory application of the Charter. Such complaints can only be submitted by international organisations of employers and trade unions, NGOs listed under the CoE and representative national organisations of employers and trade unions within the jurisdiction of the targeted state party.<sup>74</sup> Individual communications are not available under the Charter.<sup>75</sup>



## QUESTIONS

- 1 **Some liberal democracies take the view that persons who do not contribute to the economy by working and paying taxes and other contributions are not entitled to public goods such as healthcare, water and housing. Discuss by reference to the role of the state.**
- 2 **By setting out minimum core obligations the citizens of developed nations risk being disadvantaged because the focus of minimum core obligations is on what poor nations can provide for their people. Discuss.**
- 3 **Country A has limited resources and is poor. In designing its national educational plan it reckons its people would benefit if it were to educate more scientists, particularly doctors, nutritionists, agricultural experts and others so that it can offer a better life for its people. In doing so the government is forced to cut educational funding from all remote villages. It justifies this decision by claiming that 95 per cent of rural children ultimately end up as farmers and that therefore providing them with six years of education is a waste of money that could be better spent on training much needed scientists. In any event, this will help rural populations because they will have access to much improved healthcare, housing, water and crop management. Is this exclusion justified under human rights law?**
- 4 **It is not the place of the courts to decide on budget allocation because this involves executive considerations. Discuss whether the courts' ordinary judicial review powers cover, or should cover, budgetary matters that affect the**

<sup>73</sup> Articles 11 and 12, European Social Charter, CETS no. 35.

<sup>74</sup> Article 1, 1995 Additional Protocol to the European Social Charter, CETS no. 158.

<sup>75</sup> See generally, G. de Búrca and B. de Witte, *Social Rights in Europe* (Oxford University Press, 2005).

enjoyment of civil and political and ESC rights. Would the denial of elections be a plausible justification to a claim that a government does not have enough money to hold them? Why should a similar argument refusing to uphold fundamental ESC rights be any different?

- 5 The new mantra in the post-2008 financial crisis era is that governments should reduce their deficits by drastically curbing public spending. This entails loss of work for many, the charging of end-user fees for services that would otherwise be free, such as healthcare, and the reduction of social welfare services to the vulnerable. Is economic recovery and growth under these terms compatible with fundamental ESC rights? If not, design a brief policy that conforms to social justice, respects ESC rights and yet is financially viable.

## 9.7 INDICATORS AND BENCHMARKS FOR MEASURING COMPLIANCE

One of the shortcomings associated with the monitoring of states' obligations to respect, protect and fulfil human rights is the lack of verifiable quantitative criteria through which to measure with some degree of accuracy success and failure. This shortcoming is even more visible in the field of ESC rights which encompasses mostly positive obligations required to realise the various entitlements. The idea of introducing practical indicators as a tool for measuring the implementation of rights has been discussed since the early 1990s<sup>76</sup> but it was not until the specific recommendations of Paul Hunt, a UN special rapporteur, that the move to indicators started to become more methodical, informed and streamlined. Human rights indicators are specific information on the state of an event, activity or outcome related to human rights norms and standards which are used to assess and monitor the promotion and protection of rights.<sup>77</sup> In large part this information is of a quantitative character in the form of numbers and percentages. Examples include the percentage of persons covered by social security, access to healthcare, education enrolment rates and the number of women with a fixed income.

The formulation of indicators is subject to several considerations. First, indicators must be anchored in the normative content of particular rights, as opposed to simply reflecting the socio-economic or developmental content of the right. By way of illustration, health indicators compiled by the WHO serve largely different objectives from indicators assessing implementation of the right to health. The latter are not intended to determine the general levels

<sup>76</sup> See, for example, the Vienna Declaration and Program of Action, world conference on human rights, UN Doc. A/CONF 157/24 (1993), para. 98.

<sup>77</sup> Report on Indicators for Monitoring Compliance with International Human Rights Instruments, UN Doc. HRI/MC/2006/7 (11 May 2006), para. 7.

of health in a particular nation, but rather to assess to what degree adequate healthcare is available, accessible and known to the population.<sup>78</sup> As a result, human rights indicators require ascertaining the various attributes of rights, which are generally found in the definitions of international treaties and their elaboration by their respective treaty bodies. The attributes of the right to food, for example, are found in article 11 of ICESCR and General Comment 12 of the CESCR on the right to adequate food. They consist of nutrition, food safety and consumer protection, food availability and food safety.<sup>79</sup> These, in turn, are derived from the CESCR's recognition that economic and social rights must be available, accessible (physically and economically, non-discriminatory and people must be well informed) and of a decent quality.<sup>80</sup>

The second consideration is to avoid divorcing cross-cutting human rights norms in the choice of indicators, as would be the case if one were to distinguish non-discrimination, equality, participation, indivisibility and empowerment instead of considering them as elements of a single unit.<sup>81</sup> Without these all other rights are rendered meaningless. In fact, the OHCHR conceded that many of the assessments made by development agencies with regard to North Africa and Arab regions prior to the uprisings of 2011 failed to take adequate account of the increasing inequality and social injustice prevailing there.<sup>82</sup>

It is now well settled that human rights indicators are structured along the lines of a tripartite configuration: they are *structural*, *process* and *outcome*-based.<sup>83</sup> Structural indicators reflect the ratification/implementation of legal instruments and the establishment of institutional mechanisms, such as justiciability and access to justice more generally and the enactment of relevant laws. *Process*-based indicators reflect the degree to which laws are transformed into concrete policies, as is the case with national health and educational plans, universal immunisation programs, public interventions and other matters. *Outcome*-based indicators reflect attainments in the realisation of human rights. Outcome indicators may, however, be misleading because they are results which could well have arisen for other reasons. For example, an increase in life expectancy need not necessarily be the result of universal immunisation, but also that of better nutrition, access to clean water, improved health awareness, education and other things. Thus, process indicators are in a sense more important for the enjoyment of a right than

<sup>78</sup> P. Hunt, The Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/58/427 (10 October 2003), para. 10.

<sup>79</sup> Report on Indicators, para. 15.

<sup>80</sup> See, for example, CESCR General Comment 15, para. 12, referring to the right to water.

<sup>81</sup> Report on Indicators, para. 13.

<sup>82</sup> ECOSOC, Report of the OHCHR, UN Doc. E/2011/90 (26 April 2011), para. 10. The World Bank's country brief on Tunisia is specifically mentioned.

<sup>83</sup> Report on Indicators, paras. 16–19.



outcome indicators. It is also essential for all indicators to be disaggregated, that is to account specifically for disadvantaged and marginalised groups, women, children, minorities, to distinguish low-income people from the middle- and high-income and others so as to be able to assess disparities in the enjoyment of particular rights between various segments of the population.<sup>84</sup>

As has already been explained, indicators serve to confer objective attributes on the various human rights. Once these have been clearly set out their realisation must be measured against individualised benchmarks. These benchmarks will vary from country to country on the basis of available resources and technical capacity and will serve to commit each country to the particular performance standard agreed. By way of illustration, if an outcome indicator for the right to adequate housing demands that affordable and decent accommodation be made available to 80 per cent of low-income households, an appropriate and realistic benchmark for developing country X may be an increase of ten percentile points every year over a period of ten years. On the other hand, industrialised country Y, 75 per cent of whose low-income population enjoys subsidised, cheap or public accommodation, may adopt a benchmark of covering its 5 per cent shortfall within the space of a year. It is crucial to point out that benchmarks are set out in consultation with target states on the basis of their capabilities and certainly never unilaterally. This process is typically referred to as scoping. This process of consultation is also envisaged in respect of indicators, for the sole reason that because they are not expressly written into treaties, states parties may end up refusing to be bound by them. Otherwise, indicators relate to objective elements emanating from the very nature of rights. There are of course a limited number of situations where indicators are only contextually and not universally specific, as is the case with particular diseases and epidemics.<sup>85</sup> It is important to emphasise that the data by which the satisfaction of the benchmarks are to be assessed can be sought from government sources, intergovernmental organisations and NGOs.<sup>86</sup>

In practice, there is no standard set of indicators applicable to each ESC right, apart from the few indicators stipulated in the ICESCR.<sup>87</sup> As a result, the CESCR does not measure obligations on the basis of predefined lists of criteria, as is otherwise the case with the indicators and benchmarks elaborated

<sup>84</sup> Ibid., para. 31. CtEDAW General Recommendation 9 (1989) emphasises the need for disaggregated data in order to understand the precise situation of women.

<sup>85</sup> ECOSOC Report 2011, para. 14.

<sup>86</sup> Ibid., para. 17.

<sup>87</sup> Article 12 ICESCR mentions reductions to stillbirth rates and infant mortality in relation to the right to health, whereas article 10(f) CEDAW refers to reduction of female student drop-out rates in respect of the right to education.

in the context of the MDGs, which have been accepted by all participants to the process.<sup>88</sup> In fact, in a number of its general comments, the CESCR has called on parties to consider obtaining guidance on appropriate indicators from specialist bodies such as the WHO, the Food and Agriculture Organisation (FAO), the ILO and others.<sup>89</sup> As a result, although the indicators originally developed by these organisations were not geared towards the realisation of human rights, they have subsequently gone on to initiate workshops in order to formulate indicators premised on a human rights approach. Whether these are adopted as they are or undergo a process of transformation in order to bring them into line with the requirements of ESC rights, which seems more likely, is something that only time will tell.<sup>90</sup>

## CASE STUDY 9.2

### Indicators on the right to food<sup>1</sup>

List of illustrative indicators on the right to adequate food (UDHR, Art 25) (\*MDG related indicators)

	Nutrition	Food Safety and Consumer Protection	Food Availability	Food Accessibility
Structural	<ul style="list-style-type: none"> <li>International human right treaties, relevant to the right to adequate food ratified by the State</li> <li>Date of entry into force and coverage of the right to adequate food in the Constitution or other forms of superior law</li> <li>Date of entry into force and coverage of domestic laws for implementing the right to adequate food</li> <li>Number of registered and/or active non-governmental organisations (per 100,000 persons) involved in the promotion and protection of the right to adequate food</li> </ul>	<ul style="list-style-type: none"> <li>Time frame and coverage of national policy on food safety and consumer protection</li> <li>Number of registered and/or active civil society organisations working in the area of food safety and consumer protection</li> </ul>	<ul style="list-style-type: none"> <li>Time frame and coverage of national policy on agricultural production and food availability</li> <li>Time frame and coverage of national policy on drought, crop failure and disaster management</li> </ul>	
	<ul style="list-style-type: none"> <li>Time frame and coverage of national policy on nutrition and nutrition adequacy norms</li> </ul>			
Process	<ul style="list-style-type: none"> <li>Proportion of received complaints on the right to adequate food investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded to effectively by the government</li> <li>Net official development assistance (ODA) for food security received or provided as a proportion of public expenditure on food security or Gross National Income</li> </ul>	<ul style="list-style-type: none"> <li>Proportion of targeted population that was brought above the minimum level of dietary energy consumption* in the reporting period</li> <li>Proportion of targeted population covered under public nutrition supplement programmes</li> <li>Coverage of targeted population under public programmes on nutrition education and awareness</li> <li>Proportion of targeted population that was extended access to an improved drinking water source* in the reporting period</li> </ul>	<ul style="list-style-type: none"> <li>Disposal rate or average time to adjudicate a case registered in a consumer court</li> <li>Share of public social sector budget spent on food safety and consumer protection advocacy, education, research and implementation of law and regulations relevant to the right</li> <li>Proportion of food producing and distributing establishments inspected for food quality standards and frequency of inspections</li> <li>Proportion of cases adjudicated under food safety and consumer protection law in the reporting period</li> </ul>	<ul style="list-style-type: none"> <li>Proportion of female headed households or targeted population with legal title to agricultural land</li> <li>Arable irrigated land per person</li> <li>Proportion of farmers availing extension services</li> <li>Share of public budget spent on strengthening domestic agricultural production (e.g. agriculture-extension, irrigation, credit, marketing)</li> <li>Proportion of per capita availability of major food items sourced through domestic production, import &amp; food-aid in the reporting period</li> <li>Cereal import dependency ratio in the reporting period</li> </ul>
	<ul style="list-style-type: none"> <li>Share of household consumption of major food items for targeted population group met through publicly assisted programmes</li> <li>Unemployment rate or average wage rate of targeted segments of labour force</li> <li>Proportion of targeted population that was brought above the poverty line in the reporting period</li> <li>Work participation rates, by sex and target groups</li> <li>Estimated access of women and girls to adequate food within household</li> <li>Coverage of programmes to secure access to productive resources for target groups</li> </ul>			
Outcome	<ul style="list-style-type: none"> <li>Prevalence of underweight and stunting children under-five years of age*</li> <li>Proportion of adults with body-mass index (BMI) &lt; 18.5</li> </ul>	<ul style="list-style-type: none"> <li>Number of recorded deaths and incidence of food poisoning related to adulterated food</li> </ul>	<ul style="list-style-type: none"> <li>Per capita availability of major food items of local consumption</li> </ul>	<ul style="list-style-type: none"> <li>Proportion of population below minimum level of dietary energy consumption* / proportion of undernourished population</li> <li>Average household expenditure on food for the bottom three deciles of population or targeted population</li> </ul>
	<ul style="list-style-type: none"> <li>Death rates, including infant and under-five mortality rates, associated with and prevalence of malnutrition (including under- overnutrition and inadequate intake of nutrients)</li> </ul>			
24.4.08	All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in metasheets			

<sup>1</sup> Report on Indicators, 24.

<sup>88</sup> See section 12.3.

<sup>89</sup> CESCR, General Comment 15, para. 53.

<sup>90</sup> See FAO, Voluntary guidelines to support the progressive realisation of the right to adequate food in the context of national food security, available at: [www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm](http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm), and the seventeen housing rights indicators developed by UN-HABITAT, available at: [www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1749](http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1749).

## 9.8 THE RIGHT TO HEALTH

Just like every ESC other right, health is a necessary condition for the achievement of all other civil and political as well as economic and social freedoms and entitlements. Yet, although all nations aspire to have healthy populations that are productive they are at the same time weary of investing a large part of their GDP in health-related expenditures because of the spiralling costs of healthcare and related rights. As a result, a number of countries have turned to private health provision in order to redistribute public wealth in other areas of concern. The obvious problem in such cases is that if the right to health is deemed to exist, then those who cannot afford to go private will suffer ill health or even lose their lives.

Article 12(1) of ICESCR gives rise to a 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.<sup>91</sup> It is evident that the Covenant does not articulate a right to be healthy, which cannot be guaranteed even by the best possible medical attention.<sup>92</sup> Rather, it recognises the right to enjoy high standards of health, which represents a wholly different proposition that is largely dependent on a series of positive obligations. These obligations are of a twofold nature: on the one hand, they require the provision of adequate healthcare services, while on the other oblige the authorities to satisfy the underlying determinants of health, including basic shelter, food, water, sanitation, safe working environment, freedom from pollution, disease prevention and others.<sup>93</sup> This definition of the right to health with its two corresponding components is somewhat broader than the definition of 'health' found in the preamble to the Constitution of the WHO, which defines health as a 'state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.<sup>94</sup> Although health and well-being can never adequately be subject to quantitative computation, health indicators can paint a relatively clear picture about the availability and accessibility of healthcare. Articles 12(2) of ICESCR and 24(2) of the CRC demand at the very least: (1) the reduction of stillbirth rates and infant mortality and healthy development of the child; (2) improvement of environmental and industrial hygiene; (3) prevention, treatment and control of epidemic, endemic and other diseases; (4) provision of necessary medical assistance and healthcare to all children; (5) the combating of child disease and malnutrition; (6) ensuring appropriate pre-natal and post-natal health care for mothers.

Neither the Covenant nor the CESCRC require that healthcare and its socio-economic necessities be provided free of charge. The CESCRC does, however,

<sup>91</sup> Similarly worded provisions are found also in article 5 CERD; article 12 CEDAW; article 24 CRC; article 10 San Salvador Protocol; article 16 ACHPR; article 11 European Social Charter. See generally Ssenyonjo, above note 68, 313ff.

<sup>92</sup> CESCRC, General Comment 14, paras. 8–9.

<sup>93</sup> *Ibid.*, para. 11.

<sup>94</sup> *Ibid.*, para. 4.

emphasise that they must be available, affordable and offered without discrimination.<sup>95</sup> Affordability should not be construed narrowly. By way of illustration, a person who can purchase medicines and treatment by paying 20 per cent of his monthly salary cannot be said to afford his medicines in the same way as another who must sell his house. Affordability, therefore, must be construed by reference to a person's material capacity to live a dignified life. This means that where people are indigent or unable to pay for medical and other socio-economic necessities, lest they be deprived of a dignified life, then the state must offer these free of charge. This has certainly been the position of the South African and Argentine Constitutional and Supreme courts respectively in their dealings with HIV/AIDS sufferers who could not afford access to essential drugs. Although, as already explained, the South African Constitutional Court chooses to justify government restrictions only if they are reasonable, in the *Treatment Action Campaign* case it could find no reasonable basis for withholding a drug which prevented the transmission of HIV by indigenous mothers to their newborn.<sup>96</sup> Its Argentine counterpart has not demanded reasonableness in its ruling favouring unimpeded access to life-saving medicines, although this is probably implicit in its judgments. Rather, its primary consideration was the direct constitutional stipulation and the internationally recognised rights to life and health.<sup>97</sup>

A significant dimension in the interpretation of the right to health is that of gender. Women are routinely given no voice as regards their sexual reproductive rights and little attention is given to their particular health risks, particularly pre-natal care, child mortality and the effects of domestic violence. It is imperative, therefore, that states be obliged to integrate a gender perspective into their national health plans.<sup>98</sup>

Perhaps more than any other ESC right, the realisation of both strands of the right to health in developing countries is dependent significantly on international cooperation. What is striking in the modern world is that technological advances in medicine and drugs do not translate into a rise in the living standards of the billions of poor. This has given rise to a conflict between the right to health on the one hand and the right of pharmaceutical companies to protect their patented drugs from being manufactured and sold at smaller cost by generic producers. This tension is explained more fully in

<sup>95</sup> Ibid., para. 12.

<sup>96</sup> *South African Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721. This case seems to contradict *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 where the Court ruled that the authorities were right in prioritising the distribution of scarce medical resources and as a result refused dialysis treatment to an elderly patient who later died. Even so, *Soobramoney* should not be read as a denial of affordable healthcare.

<sup>97</sup> *Asociación Benghalensis and Others v. Ministerio de Salud y Acción Social*, Judgment (1 June 2000).

<sup>98</sup> CESCR, General Comment 14, paras. 20–21.

the chapter dealing with globalisation. It suffices therefore here simply to iterate the trend whereby developing nations are now able to produce generic (cheap) drugs in order to protect their indigent populations from the spread of easily treatable or other diseases and infections.



## INTERVIEW 9.1

### **Greek NGO implements the right to health for the socially excluded (Tzanetos Antypas)**

Tzanetos Antypas is Director of Praxis, a Greek NGO active in the creation, application and implementation of programmes related to the provision of humanitarian and medical services, particularly to socially excluded groups.<sup>1</sup>

**According to your analyses, how many people in Greece, both immigrants and Greeks, lack access to public healthcare services and why?**

On the basis of our data, it is evident that the situation is different for the two population groups. As far as third-country nationals are concerned, their legal status determines their access to public healthcare. Even so, it is possible to estimate that one-third of third-country nationals living in Athens and visit our clinic have problems accessing public healthcare services. For people without proper documentation, in particular [i.e. illegal entrants], things are quite hard indeed. They do not have access to any public healthcare service, save for emergencies which are treated with some cost to the patient and are available only during the duration of the emergency itself.

As regards Greek nationals served by our services, in the course of the past year [i.e. 2011] we observed a rather acute increase in the number of patients visiting our clinics, at a rate of 15 per cent, which accounts mainly for pharmaceutical and medical treatment.

**How does your organisation substitute the absence of the state?**

Through the provision of entry level medical services via our clinics in Athens and Thessaloniki, which have been working since 1996 and 1997 respectively, Praxis is able to serve indigent segments of the population that face hurdles in accessing public healthcare facilities. Such populations include the Greek indigent, homeless, uninsured persons, financial immigrants, asylum seekers, refugees and any other socially excluded and vulnerable group such as addicts, Roma, trafficking victims, those released from prison, street children, as well as any person with poor access to healthcare, psycho-social or legal support.

<sup>1</sup> Translation from Greek was carried out by the authors. The organisation's website is available at: [www.praxis.gr/](http://www.praxis.gr/).

### What are the principal medical and social needs of the increasing poor population?

Principal needs mainly consist of pharmaceutical drugs for chronic illnesses (given that these increase the cost of living in the long run), as well as the treatment of illnesses caused by poor living conditions. Moreover, dental treatment is in high demand by a large segment of the people treated in our clinics because it is a service that is costly and is not offered free of charge by the National Health System, whether for Greeks or third-country nationals living in Greece.

### What measures would you recommend for the application of the right to health in respect of all those living in Greece, taking into consideration the country's financial situation?

- support and reinforcement of [private non-for-profit] organisations and groups that are active in the provision of healthcare services to vulnerable populations, since such groups and organisations are able to cover the needs of said populations with far lower cost in comparison to public entities;
- support and reinforcement of private initiative in the provision of pharmaceutical products. In other words, there needs to be support for the production of drugs by Greek pharmaceutical companies since this would decrease the cost of healthcare generally in public hospitals, as well as the cost to the patients;
- decentralisation of the health system through the support of regional healthcare institutions (e.g. support for community medical centres) since these will end up receiving the bulk of referrals and incidents that demand entry-level treatment at lower cost in comparison to a centralised institution with similar referrals and incidents;
- promulgation of a law detailing relevant procedures for the legalisation of newly arrived third-country nationals. The legalisation of their residence in Greece will culminate in the payment of national insurance premiums which ultimately will lead to increased earnings for the National Health System.

## 9.9 THE RIGHT TO WATER

Water is a limited natural resource that is essential for the preservation of life, in addition to its utility in cooking food, sanitation and sewerage, personal hygiene and religious rites, among other things. In 2011 it was estimated that

nearly one billion people lacked access to an improved source of drinking water and 2.6 billion did not have access to improved sanitation. This is a far cry from the targets set by the MDGs and the failure is largely down to inadequate funding. Some estimates consider that if we are to halve the number of those without access to water and sanitation by 2015 an annual cost of US\$16.58 billion will be required. Sadly, the total annual amount of international aid earmarked for water and sanitation is substantially less than half the above required mark.<sup>99</sup>

Before examining the particular contours of the right to water it is necessary to emphasise that it is a resource that is freely given (e.g. unlike agriculture, which requires cultivation of seeds). Thus, if it is to be treated as a good, or commodity, the value of water should reflect only the investment necessary to clean, purify and transport it to households. Even so, given that it constitutes an ingredient of life, by denying it to those who cannot afford to pay its additional investment cost, one is necessarily depriving the poor of their right to life. This tension is particularly reflected in those countries that possess limited water resources and those that have privatised their water distribution systems, so that the investor intends to make a profit. It is also useful to point out that domestic water consumption accounts for less than 10 per cent of total use, the rest being consumed by irrigation in agriculture and industry. This does not mean that agriculture should cease, given that it provides food that sustains life, but certain sectors that consume high levels of water, such as cotton, should not be given priority over food crops and domestic use, especially where water is scarce.

The right to water has been affirmed by the CESCR by reference to the right to an adequate standard of living in article 11(1) of ICESCR. While this provision does not specifically mention water, its list of essentials (i.e. food, clothing and housing) is merely indicative through the word 'including'.<sup>100</sup> Given that the right to the highest attainable standard of health requires water for drinking and sanitation,<sup>101</sup> it is equally implicit in this right also. Quite clearly it is also implicit in the right to life, among others, as already stated.<sup>102</sup> In its General Comment 15, dedicated especially to the right to water, the CESCR has elaborated the particular qualities of this entitlement. The right contemplates a degree of adequacy which, according to the CESCR,

<sup>99</sup> SR Report on the Human Right to Safe Drinking Water and Sanitation, UN Doc. A/66/255 (3 August 2011), paras. 9–12.

<sup>100</sup> UNGA resolution 64/292 (28 July 2010) explicitly recognised the right to water as a distinct entitlement.

<sup>101</sup> For the importance of sanitation as a fundamental component of the right to water, see CESCR, General Comment 15, para. 29.

<sup>102</sup> It is also directly recognised as a distinct right in a long list of international instruments, including article 14(2)(h) of CEDAW, article 24(2) of the CRC, article 28(2)(a) of the CRPD and in numerous provisions of IHL.



should not be measured merely according to volumetric quantities.<sup>103</sup> In practice, however, most institutions follow the WHO Guidelines on Domestic Water Quantity, Service Level and Health, which sets fifty litres per person daily as the minimum for basic hygienic and consumption requirements.<sup>104</sup>

The South African Supreme Court in *Mazibuko and Others v. City of Johannesburg* adopted a different approach. One of the issues in the case concerned the installation of a pre-paid meter in an impoverished Soweto neighbourhood that allocated 25 litres per person daily (10 kilolitres monthly per household being free of charge), well below the WHO's Guidelines. In keeping with earlier jurisprudence, the Court refused to determine a minimum core, adding that the City was not under a constitutional obligation to provide any particular amount of free water; rather, it was under a duty to take reasonable measures progressively to realise the achievement of the right. The Court found the policy to be reasonable because it charged excessive use, avoided waste and catered to everyone's needs, including the provision of free water for the indigent.<sup>105</sup>

The water must be of a specified quality, in the sense that it must be safe for consumption and as a result should be free from micro-organisms, chemical and other substances.<sup>106</sup> It should moreover be accessible to individual users, both physically and economically.<sup>107</sup> It is not always feasible to bring water into houses in shanty towns or dwellings in remote villages because of the lack of infrastructure. None the less, it is accepted that water should be within reasonable walking distance from dwelling groups, otherwise physical accessibility is essentially denied. The CESCR emphasises that water must be 'affordable for all', not necessarily free for all. This is subject to several reservations. First, there exists a 'special obligation' to provide water and sanitation to those who cannot afford them, including marginalised and vulnerable groups.<sup>108</sup> Secondly, the concept of affordability means that water charges may be set in such a way that higher- and middle-income people subsidise those on lower incomes, so that the latter can enjoy water free of charge or at very little cost.<sup>109</sup> This is the case, for example, with the Chilean Law 18,788

<sup>103</sup> CESCR, General Comment 15, para. 11.

<sup>104</sup> Available at: [www.who.int/water\\_sanitation\\_health/diseases/WSH03.02.pdf](http://www.who.int/water_sanitation_health/diseases/WSH03.02.pdf).

<sup>105</sup> *Mazibuko and Others v. City of Johannesburg* [2009] ZACC 28, paras. 77ff., per O'Regan J.

<sup>106</sup> CESCR, General Comment 15, para. 12(b). Guaranteed also in articles 23 and 42 of the Ecuador Constitution. The Indian Supreme Court in *Subhash Kumar v. State of Bihar and Others* (1991) AIR 420, held that the right to life guaranteed under article 21 of the Constitution encompasses the enjoyment of pollution-free water.

<sup>107</sup> General Comment 15, para. 12(c). <sup>108</sup> *Ibid.*, para. 15.

<sup>109</sup> In fact, the Special Rapporteur on water and sanitation in her 2011 Report, para. 19, stresses that 'obtaining water at no cost may actually harm low-income households by depriving service providers of the revenue needed to expand and maintain the service and risks being unsustainable'.

where the subsidisation of water is assessed on the income of households.<sup>110</sup> States can additionally minimise water prices by the adaptation of low-cost techniques and technologies.<sup>111</sup> Finally, the price of water should not be susceptible to commodity-like fluctuations or the interventions of private water providers<sup>112</sup> and thus must be treated as a public good.

The obligation to provide water of a decent quality and quantity to all people is meaningless if states are not under compulsion to protect the environment where potable water is found. More so, states are responsible for preserving and augmenting their water resources so that they can be available for future generations.<sup>113</sup> The right to water constitutes a fine example of the extraterritorial reaches of certain ESC rights. Although country A does not have an obligation to make available water to the citizens of state B, it is none the less obliged to take all those steps on its territory that do not prejudice the enjoyment of this entitlement by the citizens of B. A likely scenario is the erection of dams or river diversions that preclude downstream consumers from enjoying water. It is for this reason that as a general rule states should not unilaterally act in this manner in the detriment of their neighbours or against 'vital human needs' of civilian populations.<sup>114</sup> In practice, states that share freshwater resources make an effort to enter into bilateral or multilateral agreements that regulate in detail their mutual affairs. This in no way means that conflicts over water are exceptional.

### CASE STUDY 9.3

#### The deprivation of water rights as cruel and inhuman treatment

In *Mosetlhanyane and Others v. Attorney-General (Kalahari Bushmen case)*,<sup>1</sup> the Botswana Court of Appeal was confronted with a claim by a group of Kalahari bushmen who had occupancy rights over an arid land but who were not permitted by the government to extract underground water. In fact, a mining company had originally dug a deep hole in the area, which once abandoned was fitted with a pump and had since then been used by the indigenous group for extracting underground water, which was their only source of water. The government recognised, albeit reluctantly, that although the indigenous

<sup>1</sup> *Mosetlhanyane and Others v. Attorney-General (Kalahari Bushmen case)*, judgment (27 January 2011).

<sup>110</sup> Centre on Housing Rights and Evictions (COHRE), *Legal Resources for the Right to Water and Sanitation* (2008), p. 77.

<sup>111</sup> General Comment 15, para. 27.

<sup>112</sup> *Ibid.*, para. 24.

<sup>113</sup> *Ibid.*, para. 28.

<sup>114</sup> See articles 6(1)(b) and 10(2) of the 1997 UN Convention on the Law of the Non-Navigable Uses of International Watercourses. Irrespective of the status of the convention, the principles of equity and reasonableness upon which these provisions are based have long been considered part of customary international law.

group possessed occupancy rights in the land,<sup>2</sup> which by that time was a wildlife reserve, all underground streams were public property and were not subject to unilateral use, even by the land's super-adjacent occupants. In court it was shown that the lack of water had caused a number of maladies to the bushmen. The Court cited with approval General Comment 15 of the CESCR and held that it was irrational for one to possess occupancy rights but not water rights, especially if no other water is available, in which case the person was effectively denied his right of occupancy. As a result, the bushmen were entitled to water rights and a quantity that was important for their private needs.

The Court went on to invoke article 7(1) of the Constitution, which protects all persons from inhuman or degrading treatment. It held that the deprivation of water to a population lawfully occupying land which was arid amounted to such treatment and ordered the authorities to restore the applicant's pump.

<sup>2</sup> The group's occupancy rights were recognised a few years prior in *Sesana and Others v. Attorney-General* [2006] 2 BLR 633 (HC).

## 9.10 THE RIGHT TO EDUCATION

Education and its availability raise two practical issues. First, while the provision of quality education is expensive, no meaningful development can be achieved without it. The lack of education is a particular characteristic of those living in extreme or moderate poverty. The US Supreme Court in its landmark case of *Brown v. Board of Education* noted that 'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education'.<sup>115</sup> Secondly, without a quality education most civil and political rights are meaningless. Freedom of expression, assembly, democratic governance and other things can only be realised if the rights-holders are capable of understanding and pursuing their rights. Since the drafting of article 13 of ICESCR on the right to education, a number of controversies have arisen. Chief among these is the spiralling cost of public education, particularly in an era of financial constraint, which has caused many nations to partially privatise elements of their educational system or otherwise introduce direct and indirect user fees. Other controversies include discrimination in the quality of education provided to vulnerable groups, which leads to their social exclusion.

Besides the ICESCR, the right to education is enshrined, among others, in article 17(1) of the ACHPR, articles 3 and 13 of the San Salvador Protocol, article 2 of Protocol I to the ECHR, article 11(3) of the 1999 African Charter

<sup>115</sup> *Brown v. Board of Education of Topeka* 347 US 483, 493 (1954).

on the Rights and Welfare of the Child, article 5(e)(v) of ICERD, article 28 of the CRC and article 8(1) of the Declaration on the Right to Development. Moreover, the preamble to the UNESCO Constitution elevates education to a sacred duty because it leads to the achievement of dignity, understanding of peoples, development and the exchange of ideas and knowledge. All of these instruments to a large degree converge as to the projected aims and objectives of education, which by and large also determine its quality. Thus, education must be directed towards the full development of the human personality, achieving human dignity, enabling persons to effectively participate in a free society and promoting understanding between all groups and nations. In more recent years, two further elements have been recognised by the CESCR as inherent to this process: gender equality and respect for the environment.<sup>116</sup>

Education is distinguished on the basis of three layers, each corresponding to a more advanced level of study, namely primary, secondary and tertiary (or university) education. In between these there are several sub-categories, particularly basic education and technical or vocational education. Article 13(2)(a) of ICESCR expressly stipulates that primary education should be universal, without discrimination, and provided free of charge irrespective of a country's financial situation.<sup>117</sup> This is an immediate, not a progressive duty, despite the fact that public resources in the form of teachers' salaries, school buildings and books are required. Yet even if governments secure all the necessities for free education, a number of marginalised children may still be excluded through indirect costs.<sup>118</sup> For example, physical inaccessibility will naturally hinder children living in remote areas from travelling to school several miles away. The same is true of schools demanding specific uniforms and books, the cost of which burdens those families that cannot afford them. Finally, the universality of primary education means that states must take appropriate measures to compel *all* children to attend primary school, despite the misgivings of their parents, whether because children are considered breadwinners or because of gender discrimination, in addition to cultural practices and beliefs. Although the CESCR has explained that primary education must 'take into account the culture, needs and opportunities

<sup>116</sup> CESCR, General Comment 13, UN Doc. E/C12/1999/10 (8 December 1999), para. 5.

<sup>117</sup> In *SERAC v. Federal Republic of Nigeria and Universal Basic Education Commission*, the Nigerian government argued that because of corruption, funds destined for the realisation of basic and primary education were no longer available. As a result, it was unable to fulfil its pertinent obligations. The ECOWAS Court held that the right to primary education is universal and not subject to any resource limitations and ordered Nigeria to rectify the situation.

<sup>118</sup> Although the ICESCR does not impose an obligation on parties to provide day-care and pre-school access, the Brazilian Federal Supreme Court has inferred such an obligation from the country's constitutional mandate regarding the right to education: case RE 436996/SP, Judgment, 26 October 2005.

of the community',<sup>119</sup> this should not be used as a justificatory guise for social exclusion. Consider a situation where the children of a marginalised ethnic minority within country X are given free education only through their minority language, but not in the dominant language. Although this might seem to satisfy the cultural needs of the minority, it perpetuates the social exclusion of the group's new generation and its continued marginalisation.<sup>120</sup> This is why it is imperative that minority members receive a broad education equal to that of the majority,<sup>121</sup> unless the difference in treatment is based on objective and reasonable justification.<sup>122</sup>

As far as secondary and university education are concerned, article 13 of ICESCR makes some practical distinctions. Unlike primary education, which must be compulsory and universal, secondary education is to be made generally available and accessible to all, but its fee component is subject to progressive, as opposed to immediate, realisation. University education must equally be made accessible to all, but unlike the other two layers there does not exist a general right to higher education. Rather, accessibility is assessed by capacity alone, which is measured by a degree of competition between candidates. Although states are under an obligation to progressively abolish fees in public universities in accordance with article 13(2)(c) of ICESCR, this should not be given a restrictive interpretation. In countries like the UK, which have introduced significant higher education fees, prospective students are not required to pay upfront and are eligible for low-interest, subsidised, loans that also cover their accommodation and maintenance. These loans are repayable only when students start earning an average salary. The fees in this case, unfortunate as they are, link education with a guarantee of employability and should not be viewed as a denial of higher education rights.

The right to education in the ICESCR derives its philosophical foundations from a combination of socialist and liberal traditions, given that it renders the state the primary provider of education while at the same time entitling parents to direct their children's education in accordance with their religious and other beliefs.<sup>123</sup> This includes the right of parents to enrol their children

<sup>119</sup> CESCR, General Comment 13, para. 9. Culturally sensitive education was endorsed as far back as 1935 by the PCIJ in the case concerning *Minority Schools in Albania*, Advisory Opinion (1935) PCIJ Reports, Ser. A/B no. 64, pp. 3, 17.

<sup>120</sup> The HRCtee in its concluding observations on Georgia pointed out that the lack of Georgian language skills 'could lead to marginalization and under-representation of minorities in different public and private spheres'. UN Doc. CCPR/C/GEO/CO/3 (15 November 2007), para. 17.

<sup>121</sup> Article 4(4), 1992 UN Declaration on Minority Rights.

<sup>122</sup> In *D. H. and Others v. Czech Republic* (2008) 47 EHRR 3, para. 196, the ECtHR held that where a difference in treatment is based on race or ethnicity, 'the notion of objective and reasonable justification must be interpreted as strictly as possible'.

<sup>123</sup> K. D. Beiter, *The Protection of the Right to Education by International Law* (Dordrecht: Martinus Nijhoff, 2005), 24.

in private schools so long as these conform to minimum educational standards laid down or approved by the state.<sup>124</sup> This is part of the wider concept of academic freedom, which on the one hand corresponds to the parents' entitlement to educate their child according to their belief system, while on the other hand, the right of freedom of expression allows higher education institutions to propagate ideas freely.

## 9.11 THE RIGHT TO FOOD

Despite human advances in sciences close to one billion people currently suffer from undernourishment.<sup>125</sup> This number is staggering if one considers that undernourishment exists when caloric intake is below the minimum dietary energy requirements (MDER) and is essentially a synonym for hunger; hence, it is merely poor feeding. This situation is unjustifiable because the global food crisis is not the result of food shortage; rather, it is the result of poor availability and accessibility on account of socio-economic factors. Food crises, also described as famines, began to receive media attention in the late 1970s and were originally viewed from a humanitarian perspective. Essentially, the international community undertook an anti-hunger role through the provision of relief shipments to the destitute. However, from the mid-1990s onwards it became evident that a combination of sharp population increases, climatic change, commodification of agricultural produce, unequal trade liberalisation in the agricultural sector and poor crop management and sustainability had led to soaring food prices beyond the reach of the poor. The problem could no longer be handled through anti-hunger policies, but instead required a holistic approach to the question of food accessibility and availability.

This holistic approach is encapsulated in the right to food, which is articulated in article 11 of the ICESCR.<sup>126</sup> There are two strands to this entitlement. In its generic form the right to food is derived from the right to an adequate standard of living, whereby food must be available 'in a quantity and quality sufficient to satisfy the dietary needs of [all] individuals, free from adverse substances and acceptable within a given culture' while at the same time its availability must be sustainable and should not interfere with the enjoyment of other human rights.<sup>127</sup> Thus, food need not necessarily be dispensed by the

<sup>124</sup> Article 13(3) ICESCR. <sup>125</sup> FAO, *The State of Food Insecurity in the World* (2010), 8.

<sup>126</sup> The right to food is also protected in article 25 UDHR; articles 12 and 14 CEDAW; articles 25 and 27 CRC; articles 12, 15 and 17 of the San Salvador Protocol, albeit the right to food is not directly justiciable in the Protocol. The right to food was also explicitly recognised in principle 3 of the 2009 FAO Declaration of the World Summit on Food Security, FAO Doc. WSFP 2009/2 (16–18 November 2009). See FAO, 'The Right to Food and Access to Justice: Examples at the National, Regional and International Levels' (2009).

<sup>127</sup> CESCR, General Comment 12, paras. 6–8.

state for free but the state is under a concrete obligation to take all means at its disposal to make food affordable and available to all with a view to securing a dignified life.<sup>128</sup> States are certainly able to increase food production by, among other things, subsidising small-scale farming, as well as decreasing the cost of food through the elimination of all taxes and tariffs on basic foods. In addition, as already discussed, they can impose a tax on the wealthy to offset the residual cost of food production in favour of the poor. Equally, apart from its positive obligations, the state should refrain from action that removes existing access to food, particularly mass displacement, introduction of toxic substances into the food chain and other things.<sup>129</sup> In the *Ogoniland* case, for example, the Nigerian government had allowed foreign oil companies to take over the land occupied by the Ogoni, thus leading to widespread land and water contamination and expulsion through terror tactics. All of this resulted, as the ACHPR pointed out, in the violation of the Ogoni's right to food.<sup>130</sup> Strategic litigation concerned with the right to food in the developing world generally challenges the soundness of food and agricultural concessions to foreign investors in situations where local communities rely on those resources for their survival.<sup>131</sup>

The other component of the right to food is the right to be free from hunger, stipulated in paragraph 2 of article 11 of ICESCR. Although this provision largely describes the measures required of states unilaterally and collectively, the right to be free from hunger has been viewed by the CESCR as a minimum core obligation as follows:

Every state is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.<sup>132</sup>

The right to be free from hunger best addresses the plight and food needs of peoples and populations. First, it requires states to plan ahead by, for example, improving methods of production or introducing appropriate food conservation on the basis of scientific knowledge.<sup>133</sup> Its second dimension entails the urgent distribution of food to those who are destitute and in circumstances where food is inaccessible. Such situations are typical not only

<sup>128</sup> Special Rapporteur on the Right to Food, Report on the Right to Food, UN Doc. E/CN4/2001/53 (7 February 2001), para. 14.

<sup>129</sup> Special Rapporteur on the Right to Food, Report on the Right to Food, UN Doc. E/CN4/2006/44 (16 March 2006), para. 22.

<sup>130</sup> *SERAC and Center for Economic and Social Rights v. Nigeria*, Case no. ACHPR/COMM/AO44/1, *AJIL* 96 (2002), 937, paras. 65–66.

<sup>131</sup> See, for example, *Jagannath v. Union of India and Others*, 1997 SCC (2) 87, where the Indian Supreme Court upheld the traditional fishing rights of a coastal community whose access to food (fish) was curtailed by the issuance of limited fishing licences to private investors.

<sup>132</sup> CESCR, General Comment 12, para. 14.

<sup>133</sup> Article 11(2)(a) ICESCR.



in the aftermath of an earthquake, tsunami or other natural disaster, but also where people have been displaced or are habitually excluded from enjoying food. This latter category is usually forgotten by governments on account of their low socio-economic status – coupled with a complete lack of basic education – which means that whatever their personal circumstances they possess little, or no, voting power.

The *Rajasthan Hunger* case<sup>134</sup> is instructive of a particular dimension of this approach. As an introduction to the case it should be pointed out that India and China account for 40 per cent of the world's undernourished population.<sup>135</sup> In terms of actual numbers, 200 million Indians fall within this category and it is not surprising that in their majority they comprise Dalits, women, poor tribal communities, children and other vulnerable populations living on the fringes of society. It is estimated that up to 2 million children die every year in India as a direct or indirect result of undernourishment.<sup>136</sup> By 2001 a growing number of hunger-related deaths were unfolding in Rajasthan, despite the existence of sufficient food supplies in nearby government storage. In fact, the food was left to rot and was reportedly in the process of being eaten by rodents. The underlying government indifference and poor management was found by the Indian Supreme Court to violate the constitutionally recognised right to life (article 21) as read against the directive principle on nutrition contained in article 47 of the Constitution. The government not only refused to implement the Indian Famine Code, which permitted the release of grain stocks in situations of famine, but further argued that it did not have sufficient resources as a result of the crisis. The Court naturally dismissed all these arguments and went on to issue several directives to the authorities demanding that they identify beneficiaries and make food accessible to them.<sup>137</sup>

A similar result was reached by the Colombian Constitutional Court in the *Abel Antonio Jaramillo* case.<sup>138</sup> There, thousands of internally displaced persons were left without any assistance by the Colombian authorities, including access to food. The Court held that the exposure of these people to conditions of food deprivation, among other things, was a violation of their right to food, the minimum requirements of which the state was under an obligation to provide to all in need. It went on to request the authorities to formulate an adequate plan to assist the victims. In similar fashion, the Supreme Court of

<sup>134</sup> *People's Union for Civil Liberties v. Union of India and Others*, Writ Petition (Civil) no. 196/2001. See also *Kishen Pattanayak and Another v. State of Orissa*, AIR 1989 SC 677, where the right to food as a corollary to the right to life was first expounded.

<sup>135</sup> FAO, Report on Food Insecurity, 10.

<sup>136</sup> Special Rapporteur, Right to Food Report 2006, para. 7.

<sup>137</sup> See FAO, Report on the Right to Food, 26, 56–7.

<sup>138</sup> *Abel Antonio Jaramillo and Others v. La Red de Solidaridad Social and Others*, T-025/2004, *ibid.*, 25.

Nepal in a judgment issued in April 2011 examined the plight of several districts facing acute food shortages with an estimated undernourished population of 300,000. While reaffirming the constitutional right to food, it held that the state must take every available measure to protect its citizens from food scarcity caused by natural disaster.<sup>139</sup>

The right to food should be examined by reference to two important international efforts to boost global food supplies and prevent hunger. These consist of the 1996 Rome Declaration on World Food Security, reviewed thereafter through a series of World Food Summits (WFS) organised by FAO and the UN's MDGs. Both initiatives set out to halve the number of undernourished people by 2015, but it is highly unlikely that this will be achieved, particularly following the sharp increase in food prices between 2006 and 2008. Some countries have criticised the absence of any mention of the root causes of global food insecurity from FAO summits and declarations, particularly the impact of agricultural subsidies on poor farmers, the conversion of grains and cereals into fuel, the consequences of financial speculation on food prices and the imposition of conditionalities on developing nations. Indeed, developed nations are disinclined to discuss such issues in the context of food security alone and prefer to incorporate them in the agenda of the WTO.

A significant achievement of the 2002 WFS was the subsequent endorsement in 2004 of a set of voluntary guidelines on the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security.<sup>140</sup> The importance of the guidelines lies in the fact that they were endorsed by all WFS not only as a matter of policy but also as a matter of pledged target. Increasingly, they are also relied on by governments and the courts. The aforementioned Nepalese Supreme Court judgment seems to have been influenced by several sections of the guidelines.



## QUESTIONS

- 1 If a state has inadequate water resources, is it justified in rationing water to its people even slightly below the minimum threshold stipulated by the WHO?
- 2 Free-market economists argue that states should not intervene in the running and operation of markets because this does not allow them to reach their full potential which in turn would create numerous benefits for societies. Critically discuss, with reference to the global surge in food prices which exposes three-quarters of the world's population to acute food deprivation although there is enough food for everyone.

<sup>139</sup> Reported by [www.fao.org/righttofood/news47\\_en.htm](http://www.fao.org/righttofood/news47_en.htm).

<sup>140</sup> Available at: [www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm](http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm).

- 3 **There is an inherent tension between the values protected under intellectual property law (i.e. the property rights of the inventor) and the right of the sick and suffering to life-saving medicines in accordance with the right to health. Discuss.**
  - 4 **Why is it important that benchmarks be agreed to by the target state and adapted to its particular circumstances?**
  - 5 **When dealing with private actors that dispense in substance those ESC rights guaranteed by the state (e.g. water and sewerage, private social security and healthcare) are the remedies available under human rights law more effective for the victims? It may be argued that if victims were assimilated to consumers clearly enjoying the pertinent ESC rights they could turn against the providers of services on the basis of both contract and tort. In this manner they could enforce their rights directly against the 'violators'. Discuss.**
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### 9.11.1 Links between loss of the right to work, debt crisis and mental illness

The right to work, enshrined among other instruments in article 6 of ICESCR, cannot realistically be construed in such a way as to oblige states to secure employment to all their citizens. This would require a shift from capital-led economies to publicly dominated ones. Resource constraints aside, there are other ways to realise this entitlement, which is a fundamental precondition for a dignified life. According to the CESCR, states are obliged to counter unemployment by setting up employment policies that stimulate economic growth and development and raise living standards.<sup>141</sup> Moreover, in order to facilitate access to work they must provide appropriate vocational and technical training and establish their national economies in a manner that tends toward meaningful job creation. Significantly, the CESCR emphasises that:

States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by states parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalized individuals and groups.<sup>142</sup>

<sup>141</sup> CESCR General Comment 18 (right to work), UN Doc. E/C12/GC/18 (6 February 2006), paras. 26–7. See also J. Sarkin and M. Koenig, 'Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy', *HRQ* 33 (2011), 1.

<sup>142</sup> *Ibid.*, para. 30.

This observation by the CESCR stems from the practice of the IMF of disregarding the right to meaningful employment and the associated benefits in its design of structural adjustment programmes for indebted nations (although without exception, in all its official reports and lending conditions the IMF emphasises quite the opposite). Among its lending conditions to Greece – between 2010 and 2012 – the IMF demanded the dismissal of one-third of the country's civil servants, the reduction of as much as 50 per cent of the remainder's salaries,<sup>143</sup> below-living-standards salaries for the bulk of private sector workers and the introduction of fees for basic and advanced healthcare. At the same time, and while the economy was shrinking, the IMF and its partners, both public and private, demanded the imposition of the highest possible taxes on all goods and services, the ultimate aim being to repay the country's debts irrespective of the suffering of the low-income and poor classes. This obviously had a detrimental effect on job creation and unemployment rose to almost 20 per cent in January 2012 – which does not take into consideration the prospective public sector dismissal demands and those not officially registered as unemployed – compared to less than 5 per cent in Austria during the same time. For a country with traditionally strong family connections, Greeks were shocked to learn that homelessness had risen by 20 per cent each year since the start of the recession,<sup>144</sup> whereas poverty levels had risen by 25 per cent during the same period.

No doubt, the IMF, EU member states and multilateral lending institutions are aware not only that their structural adjustment programme (SAP) for Greece stifles growth and thus hampers job creation, but that unemployment is clinically associated with high ratios of psychiatric disorders, quadrupling the odds of drug dependence, trebling the odds of phobias and functional psychosis and doubling the odds of depression-related episodes.<sup>145</sup> Stuckler *et al.* undertook an empirical study of twenty-six European nations for the period between 1970 and 2006 in order to assess the impact of financial volatility on death rates and the way in which governments could limit negative impacts. They found that for every percentile increase in unemployment there was an associated 0.8 per cent increase in suicides for those below sixty-five years, as well as a 0.8 per cent increase in homicides. Unemployment increases above

<sup>143</sup> Although the IMF's suggested cuts represent a decrease of 8–10 per cent in salaries and pensions, the real loss to income is closer to 40–50 per cent, if one considers elimination of salary-related benefits, introduction of fees for health and other services and sharp increases in taxes on income, property and others.

<sup>144</sup> P. Beaumont, 'Greek Rise in Homelessness Creates a New Poor', *The Guardian* (3 August 2011).

<sup>145</sup> V. Murali and F. Oyeboode, 'Poverty, Social Inequality and Mental Health', *Advances in Psychiatric Treatment* 10 (2004), 216, 218–19; K. Paul and K. Moser, 'Unemployment Impairs Mental Health: Meta-analyses', *Journal of Vocational Behaviour* 74 (2009), 264, who demonstrate that the unemployed display a higher degree of psychiatric disorders than those in employment (34 against 16 per cent).

3 per cent were moreover correlated to higher suicide rates (above 4 per cent) as well as greater alcohol-related deaths. Encouragingly, they discovered that rising unemployment rates had no impact on suicides in countries where governments augmented public spending on active labour market programmes intended to sustain and create new jobs by at least US\$190 annually per person.<sup>146</sup>

In a 1987 report, UNICEF had cautioned the World Bank institutions that SAPs had a negative impact on health and education, including job losses as a result of excessive cuts in public spending.<sup>147</sup> Although SAPs have in theory been replaced by new programmes requiring an impact assessment on the poor, they fail to provide social safety nets, as the case of Greece aptly demonstrates.

Following the global financial crisis of 2008 the WHO conducted a number of studies on the relationship between debt, unemployment and mental health. While acknowledging the scientific results linking unemployment, especially among men, to increased levels of mental illness and alcoholism, the reports sought ways to mitigate the effects of the debt crisis. Data shows that governments can alleviate the effects of financial crises on the unemployed through active labour market programmes that assist people to remain, or return, to employment, the enhancement of family support measures, restrictions on alcohol availability, debt relief and access to mental health-related services.<sup>148</sup> These findings are supported by specific case studies. During steep economic recessions in Finland and Sweden leading to high unemployment, the augmentation of social benefits and services resulted in a drop in suicide rates.<sup>149</sup> In the USA, on the other hand, there was a concrete link between an increase in suicide rates and a reduction in social welfare spending.<sup>150</sup>

This practical application aims to demonstrate that economic and social rights are interdependent, centred around the notion of a dignified life. The idea that a nation will be delivered from chaos and disaster unless it reduces public spending in all fields of social welfare has by now proved to be just a myth. A decrease in social welfare projects, including education, health and employment programmes, will not only cost more in the long run but will deprive a nation of a good part of its human capital as a result of generalised

<sup>146</sup> D. Stuckler *et al.*, 'The Public Health Effect of Economic Crises and Alternative Policy Responses in Europe: an Empirical Analysis', *Lancet* 374 (2009), 315.

<sup>147</sup> R. Jolly, 'Adjustment with a Human Face: a UNICEF Record and Perspective on the 1980s', *World Development* 19 (1991), 1807.

<sup>148</sup> WHO, *Impact of Economic Crises on Mental Health* (2011), 8.

<sup>149</sup> *Ibid.*, 8–9.

<sup>150</sup> S. L. Zimmerman, 'States' Spending for Public Welfare and Their Suicide Rates, 1960 to 1995: What is the Problem?' *Journal of Nervous and Mental Disorders* 190 (2002), 349.

ill health, lack of innovation and decrease in wealth creation.<sup>151</sup> This does not of course mean that states should not make savings, even in sectors such as health; rather, it is the nature of the cuts and their effect on middle- and low-income populations that is important. Canada, for example, introduced significant cost containment reforms to its publicly funded health sectors in the 1990s. It did so by setting budget caps whereby the federal government adjusted funding to each province on the basis of per capita growth and inflation. Hospital budgets and medical salaries were also capped because all hospitals and physicians were publicly financed. The federal government moreover introduced price controls on pharmaceutical products by freezing their prices. Even so, the Canadian government increased public health expenditures rapidly as a share of GDP in times of recession.<sup>152</sup> As a result, Canada continued to enjoy one of the highest publicly funded universal health-care systems in the world. States should view the improvement of social services as an investment in their human capital and must not cave in to demands from multilateral financial institutions to demolish those services under the simplistic guise of debt reduction.

## FURTHER READING

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<sup>151</sup> The Russian Federation, for example, at the time of writing spends 5.3 per cent of its GDP on health, well below the OECD average of 7–10 per cent. The World Bank has estimated that this has, and will continue to have, an adverse impact on labour supply because job holders with non-communicable diseases are more likely to retire early or lose their jobs and draw on state pensions. The effect is greatest among the poor. Empirical analyses moreover demonstrate that poor health affects the number of productive working hours. Men and women in good health earn about 30 and 18 per cent respectively more compared to their ill counterparts. World Bank, *Public Spending in Russia for Healthcare: Issues and Options*, (2008), 11–12.

<sup>152</sup> IMF, *Macro-fiscal Implications of Health Care Reform in Advanced and Emerging Economies: Case Studies* (December 2010), available at [www.imf.org/external/np/pp/eng/2010/122810a.pdf](http://www.imf.org/external/np/pp/eng/2010/122810a.pdf), 4–6.

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