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Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report of the Secretary-General on the question of the realization in all countries of economic, social and cultural rights

Summary

The present report, prepared pursuant to Human Rights Council resolution 22/5, presents an overview of the scope of and applicable standards relative to the right to access to justice and to an effective remedy for violations of economic, social and cultural rights. It provides a synopsis of the interpretation of this right by United Nations treaty bodies and special procedures mandate holders as an indispensable right for the realization of economic, social and cultural rights, focusing on its essential elements and the specific obligations to which it gives rise, and drawing on examples from regional human rights mechanisms.

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I. Introduction

1. In its resolution 22/5, the Human Rights Council requested the Secretary-General to continue to prepare and submit to the Council an annual report on the question of the realization in all countries of economic, social and cultural rights, with a special focus on access to justice relating to violations of economic, social and cultural rights (para. 18). The legal protection of economic, social and cultural rights has already been considered in previous reports prepared by the United Nations High Commissioner for Human Rights.¹ Since then, a number of developments in the United Nations human rights system have further clarified the issues and obligations that should be taken into account by Member States in ensuring access to justice for violations of economic, social and cultural rights. In the present report, the Secretary-General reviews some of these developments and considers, firstly, the scope of the right to an effective remedy for violations of economic, social and cultural rights, as elaborated by United Nations human rights treaty bodies and special procedures mandate holders. Following this review, he discusses the principal barriers to access to justice that constitute a violation of the right to an effective remedy. The report concludes with an identification of the due process requirements that the United Nations treaty bodies and special procedures mandate holders have proposed for remedial proceedings relating to economic, social and cultural rights violations.

II. The right to a remedy for violations of economic, social and cultural rights

2. The right to a remedy for violations of human rights is fundamental to the very notion of human rights. The Universal Declaration of Human Rights provides in its article 8 that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.² This applies equally to all civil, political, economic, social and cultural rights. However, the International Covenant on Economic, Social and Cultural Rights lacks a specific provision requiring States parties to provide effective remedies in such cases — in contrast with the International Covenant on Civil and Political Rights, which includes such a clause in article 2, paragraph 3. Any lack of clarity has, however, since been largely overcome as a result of the interpretative work of United Nations human rights treaty bodies and the work of the special procedures mandate holders over the last 20 years, a period during which the United Nations human rights system has consistently recognized the right to an effective remedy for violations of economic, social and cultural rights.

3. The Committee on Economic, Social and Cultural Rights has played an important role in this regard. In one of its key general comments setting out the scope of the obligations arising from article 2, paragraph 1, of the Covenant, the Committee noted that “among the measures which might be considered appropriate [to achieve the full realization of the rights of the Covenant], in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be

¹ See, for example, the 2006 report of the United Nations Commissioner for Human Rights to the Economic and Social Council (E/2006/86).

² See also the International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

considered justiciable”.³ Since then, the Committee has consistently affirmed that appropriate means of redress, or remedies, must be available to any aggrieved individual or group,⁴ and that, as a measure to ensure the implementation of the Covenant at the national level, any persons or groups who have experienced violations of their economic, social and cultural rights should have access to effective judicial or other appropriate remedies at both national and international levels.⁵

4. Other treaty bodies have reached similar conclusions. Both the Committee on the Elimination of Discrimination against Women and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have determined that migrant workers, and specifically women migrant workers, must have access to remedies for rights violations that occur in the workplace.⁶ The Committee on the Rights of the Child has urged States parties, among other things, to take all necessary measures to abolish all forms of child labour and to regulate the working environment and conditions for working adolescents so as to ensure that they are fully protected and have access to legal redress mechanisms.⁷

5. Special procedures mandate holders and subsidiary bodies of the Human Rights Council have emphatically affirmed the right to a remedy. The Special Rapporteur on extreme poverty and human rights has called on States to establish effective, affordable and accessible procedures, including non-formal dispute resolution mechanisms, in accordance with human rights standards, to support persons living in poverty seeking justice, taking into account the specific barriers that they face gaining access to justice.⁸ According to the Special Rapporteur on the right to food, justiciability is essential to the realization of the right to food.⁹ Similarly, the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights noted with approval the view of the Committee on Economic, Social and Cultural Rights that the victims of violations of the right to health should have access to effective judicial or other appropriate remedies at both the national and international levels.¹⁰ Other United Nations experts have held that an effective legal remedy ensures that the right will be viewed as an entitlement and not an act of charity,¹¹ corrects for local power imbalances,¹² facilitates accountability,¹³ and allows for the development of specific jurisprudence.¹⁴

³ General comment No. 3 (1990), para. 5.

⁴ General comment No. 9 (1998), para. 2.

⁵ General comment No. 19 (2008), para. 77 (right to social security); general comment No. 18 (2005), para. 48 (right to work); general comment No. 15 (2002), para. 55 (right to water); general comment No. 14 (2000), para. 59 (for right to health); general comment No. 12 (1999), para. 32 (right to adequate food). See also the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, which recommend that States report on the “judicial and other appropriate remedies in place enabling victims to obtain redress in cases where their rights have been violated” (para. 2 (d)).

⁶ Committee on the Elimination of Discrimination against Women (CEDAW), general recommendation No. 26 (2008), para. 26 (c); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), general comment No. 1 (2010), para. 49.

⁷ Committee on the Rights of the Child (CRC), general comment No. 4 (2003), para. 18; CRC, general comment No. 16 (2013), para. 30.

⁸ A/HRC/21/39, para. 68 (a); A/67/278, paras. 51–56 and 60–67.

⁹ See A/HRC/7/5, para. 66.

¹⁰ A/HRC/7/21, para. 30.

¹¹ A/HRC/14/31, para. 80.

¹² *Ibid.*, para. 81.

¹³ See A/HRC/15/31/Add.1, para. 61.

¹⁴ E/CN.4/2002/58, paras. 49 and 51.

6. The legal protection of the right to a remedy for violations of economic, social and cultural rights has recently been strengthened by the adoption and recent entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which allows the Committee on Economic, Social and Cultural Rights to consider communications alleging violations of the rights enshrined in the Covenant. The entry into force of the Optional Protocol provides an international remedial mechanism which will reinforce the justiciability of all economic, social and cultural rights.¹⁵ Many United Nations experts, including special procedures mandate holders, have since affirmed their interpretation of the Optional Protocol as a clear expression of the fact that the fulfilment of economic, social and cultural rights is not a matter of charity but one of legal obligation.¹⁶

III. The character of effective domestic remedies

7. The right to an effective remedy for economic, social and cultural rights violations may, in principle, be satisfied either by a judicial remedy or by administrative remedies subject to judicial appeal when appropriate.¹⁷ Several treaty bodies and special procedures mandate holders have also indicated that administrative remedies may be sufficient if subject to judicial review. Although the Committee on Economic, Social and Cultural Rights has stated that either form of remedy may be sufficient, it has emphasized that “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary”, and that an effective judicial remedy is considered an appropriate, and perhaps even necessary, means of realizing economic, social and cultural rights, since other means “could be rendered ineffective if they are not reinforced or complemented by judicial remedies.”¹⁸ Moreover, even when an administrative remedy is permissible, it is typically essential that there be a judicial appeal available for review of the administrative resolution of the issue.¹⁹ To justify the failure to provide any judicial recourse, a State would need to show that such recourse was neither an appropriate means for realizing economic, social and cultural rights nor necessary for that purpose, which, according to the Committee, would be difficult to demonstrate.²⁰

8. As failure to comply with State obligations in the field of economic, social and cultural rights often affects groups of rights holders in a similar situation, allowing for collective or group remedies is, in many cases, indispensable for the realization of the right to an effective remedy. The Committee on Economic, Social and Cultural Rights has repeatedly recognized that groups that have suffered violations of their economic, social and cultural rights must have access to a remedy, whether judicial or administrative.²¹

¹⁵ Optional Protocol, art. 1.

¹⁶ Statement entitled “ ‘Economic, social and cultural rights: legal entitlements rather than charity’ say UN human rights experts”, signed by special procedures mandate holders, 10 December 2008. Available from

www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9216&LangID=E.

¹⁷ Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 9 (1998), para. 9, general comment No. 3 (1990), para. 5, general comment No. 16 (2005), para. 38, and general comment No. 17 (2005), para. 18 (a); E/C.12/NPL/CO/2 (2007), para. 32.

¹⁸ CESCR, general comment No. 9 (1998), paras. 3 and 9.

¹⁹ *Ibid.*, paras. 3 and 9.

²⁰ *Ibid.*, para. 3; CESCR, general comment No. 3 (1990), para. 5.

²¹ CESCR, general comment No. 4 (1991), para. 17 (right to housing); general comment No. 9 (1998), para. 2; general comment No. 19 (2008), para. 77 (right to social security); general comment No. 18 (2005), para. 48 (right to work); general comment No. 15 (2002), para. 55 (right to water); general comment No. 14 (2000), para. 59 (right to health); general comment No. 12 (1999) (right to adequate food), para. 32. See also A/HRC/7/21, para. 30.

Examples of such collective or group remedies drawn from different legal systems include, inter alia, class actions, collective *amparo*, public interest litigation, *actio popularis* and recognizing the standing of national human rights institutions, public defenders or equality bodies to represent groups. The Committee on the Rights of the Child has also stated that it might be mandatory to allow for collective complaints when “large numbers of children” suffer similar economic, social and cultural rights violations.²² The Special Rapporteur on extreme poverty and human rights has indicated that remedial mechanisms must allow for collective complaints,²³ while the Special Rapporteur on the right to education has argued that groups must have a right of action for rights violations²⁴ and that “legal standing should be given the broadest possible interpretation”.²⁵

9. In some circumstances, an appropriate procedure available prior to the actual infringement of an economic, social or cultural right may be an important component of the right to a remedy. The Committee on Economic, Social and Cultural Rights has asserted that, in the case of the rights to social security, housing, and water, State action that could interfere with the enjoyment of the right must be preceded by an opportunity for genuine consultation with those affected, timely and full disclosure of information on the proposed measures, reasonable notice of proposed actions, legal recourse and remedies for those affected, and legal assistance for obtaining legal remedies.²⁶

10. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health effectively concurred in this finding, adding that accountability can be prospective in nature, and requires that “at all times the State must be able to demonstrate and justify how it is discharging its obligations.”²⁷ Potentially affected individuals must have access to information about the measures and be able to challenge their adequacy.²⁸

11. The right to an effective remedy entails that the remedy must be capable of providing adequate reparations for the violation. The Committee on Economic, Social and Cultural Rights has clearly stated that all victims of violations of economic, social and cultural rights should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition.²⁹ Other treaty bodies have made similar findings, such as the Committee on the Rights of the Child, which recognized the need for a broad range of reparations for violations of the rights of the child, and specifically acknowledged such a right for violations of the right to health.³⁰ The Special

²² CRC, general comment No. 16 (2013), para. 68; similarly, CRC, general comment No. 15 (2013), para. 119.

²³ A/HRC/14/31, para. 81.

²⁴ A/HRC/23/35, para. 22.

²⁵ *Ibid.*, para. 82 (j); A/HRC/15/31/Add.1, para. 61.

²⁶ CESCR, general comment No. 19 (2008), para. 78; general comment No. 15 (2002), para. 56 (right to water); and general comment No. 7 (1998), para. 15 (right to housing and forced evictions).

²⁷ A/HRC/20/15, para. 50.

²⁸ *Ibid.*, paras. 50–51.

²⁹ CESCR, general comment No. 19 (2008), para. 77 (right to social security); general comment No. 18 (2005), para. 48 (right to work); general comment No. 15 (2002), para. 55 (right to water); general comment No. 14 (2000), para. 59 (right to health); general comment No. 12 (1999), para. 32. See also CESCR, general comment No. 16 (2005), para. 21 (availability and accessibility of appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes); and general comment No. 20 (2009), para. 40 (discrimination).

³⁰ CRC, general comment No. 5 (2003), para. 24 (considering all rights of the child); general comment No. 15 (2013), para. 119 (right to health); and general comment No. 16 (2013), paras. 30–31 (harm caused by third parties); see also CRC/C/MMR/CO/3-4, 2012, paras. 21–22 and 86 (d).

Rapporteurs on the right to health,³¹ on the human right to safe drinking water and sanitation,³² on extreme poverty and human rights,³³ and on toxic waste³⁴ have also stated that the right to a remedy for violations of economic, social and cultural rights requires the provision of reparations in appropriate circumstances. For its part, the African Commission on Human and Peoples' Rights has found that a local remedy which would constitute a bar to proceedings for failure to exhaust local remedies must be available, effective and sufficient.³⁵

12. Restitution requires restoring the circumstances that existed prior to the violation, to the degree that it is possible.³⁶ However, where it is impossible to restore the prior circumstances, compensation must cover the costs that resulted from the rights violation.³⁷ Affording the victims satisfaction for the rights violation involves making a formal commitment to respect the right,³⁸ an effort that is closely linked to providing guarantees of non-repetition. Guarantees of non-repetition may include concrete reforms to law and policy connected to the violation as well as the sanctioning of responsible actors.³⁹ It is important, in effecting reparation, to ensure differential attention to the special needs and vulnerabilities of different categories of victims, such as children, who have distinct capacities and developmental requirements.⁴⁰ Differential attention may require providing services, such as "medical and psychological assistance, legal support and measures of rehabilitation",⁴¹ in response to these special needs.

IV. Legal framework for domestic remedies

13. In order to fulfil the right to a remedy, the general legal framework establishing the national strategy for ensuring the enjoyment of economic, social or cultural rights must provide for remedial mechanisms regarding violations. According to the Committee on Economic, Social and Cultural Rights, framework laws should establish "institutional responsibility for the implementation of the right to health ... and possible recourse procedures."⁴² Other treaty bodies and special procedures mandate holders have emphasized the need to incorporate provisions in national laws concerning remedial procedures. The Committee on Migrant Workers asserted that both monitoring mechanisms and complaints procedures should be incorporated into the national legal framework.⁴³ The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, and the Special

³¹ A/HRC/20/15, para. 58.

³² A/HRC/12/24, para. 64; A/HRC/15/31, para. 60.

³³ A/67/278, para. 8.

³⁴ A/HRC/7/21, para. 30.

³⁵ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03-296/05, para. 99.

³⁶ A/HRC/20/15, para. 57.

³⁷ *Ibid.*, para. 58.

³⁸ *Ibid.*

³⁹ CRC, general comment No. 16 (2013), para. 31.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² CESCR, general comment No. 14 (2000), para. 56. See also CESCR, general comment No. 12 (1999), para. 29 (equivalent statement on the right to food); general comment No. 7 (1997), para. 15 (forced evictions); and general comment No. 4 (1991), para. 17 (the right to housing).

⁴³ See CMW, general comment No. 1 (2010), para. 41.

Rapporteur on the right to education have determined that national law must establish domestic remedies to address alleged violations of those rights.⁴⁴

14. The legal framework establishing domestic remedies should consider allowing the application of international human rights norms in remedial proceedings, as well as any applicable domestic constitutional or legislative provisions that give legal status to international human rights norms.⁴⁵ The Committee on Economic, Social and Cultural Rights has repeatedly asserted that the incorporation in the domestic legal order of international instruments recognizing rights “can significantly enhance the scope and effectiveness of remedial measures and should be encouraged.”⁴⁶ The domestic application of treaty provisions should also involve States taking effective measures to increase awareness of human rights norms among the judiciary, and ensuring that judicial training takes full account of the justiciability of internationally recognized human rights.⁴⁷

15. The United Nations human rights system has recognized the usefulness of the direct incorporation of human rights treaties into domestic legal systems.⁴⁸ In the case of any conflict with domestic legislation, United Nations treaty bodies and special procedures mandate holders have emphasized that precedence should be accorded to human rights instruments.⁴⁹ The issue of incorporation also arises regarding the domestic effect of non-self-executing treaties. The Committee on Economic, Social and Cultural Rights has maintained that States should avoid a priori assumptions that human rights treaties are not self-executing.⁵⁰ In fact, both the Committee on Economic, Social and Cultural and the Special Rapporteur on the right to education have made reference to various treaty norms that courts and other domestic adjudication mechanisms should consider to be self-executing.⁵¹

V. Barriers to access to justice for violations of economic, social and cultural rights

16. For a remedial mechanism to constitute an effective remedy for an economic, social and cultural rights violation, it must be “accessible to everyone without discrimination.”⁵² The Committee on Economic, Social and Cultural Rights has stressed the need for effective access to justice for economic, social and cultural rights violations.⁵³ Similarly, the Committee on Migrant Workers has repeatedly expressed concern that migrant workers

⁴⁴ A/HRC/23/35 para. 22; A/63/275, para. 69.

⁴⁵ A/HRC/17/29 and Corr.1, para. 65. See also E/C.12/CMR/CO/2-3, 2011, para. 7.

⁴⁶ CESCR, general comment No. 19 (2008), para. 79; general comment No. 18 (2005), para. 49; general comment No. 15 (2002), para. 57; general comment No. 14 (2000), para. 60; general comment No. 12 (1999), para. 33.

⁴⁷ E/C.12/KAZ/CO/1, 2010, para. 7.

⁴⁸ CESCR, general comment No. 9 (1998), para. 8: “While the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts.”

⁴⁹ CRC general comment No. 6 (2005), para. 14; A/HRC/23/35, para. 21.

⁵⁰ CESCR, general comment No. 9 (1998), para. 11.

⁵¹ E/C.12/NLD/CO/4-5, 2010, para. 6; A/HRC/23/35, para. 23.

⁵² CESCR, general comment No. 20 (2009), para. 40.

⁵³ CESCR, general comment No. 17 (2005), para. 18 (b); general comment No. 20 (2009), para. 40; E/C.12/TUR/CO/1, 2011, para. 18 (b).

lack effective access to justice for economic, social and cultural rights violations⁵⁴ and has frequently recommended that States ensure such access.⁵⁵ This section will consider several aspects of access that the United Nations system has dealt with in more detail, including physical accessibility, affordability, legal assistance, access to information, and equality of access.

A. Physical accessibility

17. A fundamental aspect of the right to access remedies for economic, social and cultural rights violations is to ensure physical access to such remedies. The Committee on Economic, Social and Cultural Rights has indicated that, as a basic matter, individuals must be able to physically access the means of seeking remedy for economic, social and cultural rights violations.⁵⁶ United Nations experts, including the Special Rapporteur on the human right to safe drinking water and sanitation⁵⁷ and the Special Rapporteur on extreme poverty and human rights,⁵⁸ as well as the Human Rights Council Advisory Committee,⁵⁹ have repeatedly alluded to physical access to justice. Physical accessibility is of particular concern in the case of persons with disabilities that render it more difficult to physically access police stations, courts, State administrative offices and other infrastructure that may be necessary for mobilizing the law.⁶⁰ It is also important for people living in remote areas, as the distances involved in travelling to the locations of established justice mechanisms can seriously impede their effective access.⁶¹ Finally, women migrant workers may also have difficulties with physical accessibility if employers confine them to their work sites and restrict outside communication.⁶²

B. Affordability

18. Beyond physical accessibility, economic barriers often prevent access to remedies. According to the Committee on Economic, Social and Cultural Rights, remedies for violations of these rights must be affordable for all, with “related administrative and legal costs ... based on the principle of equity”.⁶³ Similarly, the Committee on Migrant Workers expressed concern that certain migrant workers would be unable to seek redress through means free of legal fees,⁶⁴ while the Committee on the Rights of the Child has affirmed that States must eliminate economic barriers to access to justice.⁶⁵ Among United Nations system experts, the Special Rapporteur on extreme poverty and human rights has identified economic accessibility as one of the principal barriers limiting access to justice,⁶⁶ while the

⁵⁴ CMW/C/PRY/CO/1, 2012, para. 24; CMW/C/BOL/CO/2, 2013, paras. 24–25; CMW/C/GTM/CO/1, 2011, para. 20; CMW/C/SLV/CO/1, 2009, para. 25; CMW/C/SYR/CO/1, 2008, para. 25; CMW/C/EGY/CO/1, 2007, para. 22.

⁵⁵ CMW/C/CHL/CO/1, 2011, para. 37; CMW/C/ECU/CO/1, 2007, para. 38.

⁵⁶ CESCR, general comment No. 17 (2005), para. 18 (b) (i) (concerning rights of the author).

⁵⁷ A/HRC/15/31/Add.1, para. 54.

⁵⁸ A/HRC/21/39, paras. 67–68; A/67/278, para. 11.

⁵⁹ A/HRC/22/72, para. 51.

⁶⁰ CESCR, general comment No. 17 (2005), para. 18 (b) (i) (concerning rights of the author); A/67/278, para. 11.

⁶¹ A/67/278, paras. 36–40.

⁶² CEDAW, general recommendation No. 26 (2008), para. 21.

⁶³ CESCR, general comment No. 17 (2005), para. 18 (b) (ii).

⁶⁴ CMW/C/SYR/CO/1, 2008, para. 25.

⁶⁵ CRC, general comment No. 16 (2013), para. 68.

⁶⁶ A/67/278, paras. 51–56.

Special Rapporteur on the human right to safe drinking water and sanitation has emphasized that remedies must be financially accessible to the poor.⁶⁷ To ensure economic accessibility, formal fees should be reduced or eliminated and attention should be paid to other costs that might limit access to justice.⁶⁸

C. Legal assistance

19. Access to adequate legal assistance in pursuing a remedy is essential to the right to a remedy for economic, social and cultural rights violations. As the Committee on Economic, Social and Cultural Rights has stated, “legal assistance for obtaining remedies should be provided within maximum available resources.”⁶⁹ Several concluding observations adopted by treaty bodies emphasize that available legal assistance is crucial following a violation of economic, social and cultural rights.⁷⁰ Other treaty bodies have confirmed the need for access to legal assistance and representation in pursuing remedies for economic, social and cultural rights violations.⁷¹ United Nations experts agree that legal assistance is necessary in the context of economic, social and cultural rights violations to ensure that all have access to justice.⁷² The Committee on Economic, Social and Cultural Rights has added that “national ombudspersons, human rights commissions, and similar national human rights institutions should be permitted to address violations of the right”,⁷³ thus proposing an expansion of the avenues for victims to access legal aid, present complaints and obtain legal redress.⁷⁴

⁶⁷ A/HRC/15/31/Add.1, para. 54.

⁶⁸ A/HRC/23/35, paras. 79–80; A/67/278, para. 96. See also European Court of Human Rights, *Airey v. Ireland*, 9 October 1979, paras. 26–28; Inter-American Court of Human Rights, *Cantos v. Argentina*, 28 November 2002, paras. 54–56 and 60.

⁶⁹ CESCR, general comment No. 19 (2008), para. 77; general comment No. 15 (2002), para. 56; general comment No. 7 (1998), para. 15.

⁷⁰ E/C.12/TKM/CO/1, 2011, para. 17; E/C.12/1995/3, 1995, para. 5; E/C.12/CYP/CO/5, 2009, para. 10; E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, 2006, para. 14; E/C.12/1/Add.19, 1997, para. 9; CEDAW/C/CAN/CO/7, 2008, para. 22.

⁷¹ CEDAW, general recommendation No. 26 (2008), para. 24 (f); CRC, general comment No. 16 (2013), para. 68.

⁷² A/HRC/19/53, para. 59; A/HRC/23/35, para. 82 (k); A/67/278, paras. 60–67; A/66/265, para. 12; A/HRC/15/31/Add.1, para. 54; A/HRC/19/75, annex, art. 13, para. 2.

⁷³ CESCR, general comment No. 19 (2008), para. 77; general comment No. 15 (2002), para. 55; general comment No. 14 (2000), para. 59; general comment No. 12 (1999), para. 32.

⁷⁴ In the regional sphere, the inter-American human rights system has recognized the State’s obligation to remove any obstacles to accessing justice that result from economic status. Furthermore, the Plenary Assembly of the XIV Ibero-American Judicial Summit adopted the 100 Brasilia Rules on Access to Justice for Vulnerable Groups which provide guidance for ensuring access to justice for persons in vulnerable situations, and have been endorsed by the judiciaries, public defenders and Public Prosecutor’s offices of several Latin American countries. Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have imposed in certain circumstances an obligation to provide free legal services to those in need to prevent a violation of their right to a fair trial and effective judicial protection. The Commission has set out three factors to be assessed in determining the need for free legal counsel in specific cases, namely the resources available to the litigant, the complexity of the issues involved and the significance of the rights at issue. The European Court of Human Rights has also highlighted that the requirement of legal representation before a court should not constitute a barrier to access justice (see European Court of Human Rights, *Airey v. Ireland*, 9 October 1979, paras. 26–28).

D. Access to information

20. States have a general obligation to provide access to the information necessary to pursue remedies, with the goal of ensuring awareness of available remedies and remedial procedures. The Committee on Economic, Social and Cultural Rights has affirmed on multiple occasions that States must provide the information necessary for individuals to seek remedies for economic, social and cultural rights violations.⁷⁵ The Committee on the Rights of the Child has also indicated that children should receive information about available remedies and that special attention should be paid to increasing awareness of these among children and their representatives.⁷⁶ The Committee on Migrant Workers has expressed concern that migrant workers lack sufficient awareness of available remedies,⁷⁷ and has asserted that both States of origin⁷⁸ and destination⁷⁹ have obligations to provide information. Finally, the Committee on the Elimination of Discrimination against Women has noted that lack of knowledge of available remedies can affect the right of access to justice for women migrant workers.⁸⁰ Similar statements have been made by the Special Rapporteur on the human right to safe water and sanitation and the Special Rapporteur on extreme poverty and human rights.⁸¹

21. The information provided on available remedies for rights violations must be understandable to all⁸² and available in local languages, including those of minority and indigenous groups.⁸³ It should include details about existing law and procedures.⁸⁴ This may require that States “make legal materials, such as laws, judgements, trial transcripts and adjudication procedures, available and reasonably accessible.”⁸⁵

E. Equality of access

22. Access to justice for violations of economic, social and cultural rights must be provided for all on the basis of equality without discrimination. The Committee on Economic, Social and Cultural Rights has upheld this principle in a variety of contexts,

⁷⁵ E/C.12/NLD/CO/4-5, 2010, para. 8 (considering economic, social and cultural rights generally). See also CESCR, general comment No. 17 (2005), para. 18 (b) (iii).

⁷⁶ CRC, general comment No. 16 (2013), paras. 66 and 68.

⁷⁷ CMW/C/PRY/CO/1, 2012, para. 24; CMW/C/GTM/CO/1, 2011, para. 20; CMW/C/SLV/CO/1, 2009, para. 25; CMW/C/BOL/CO/1, 2008, paras. 23; CMW/C/SYR/CO/1, 2008, para. 25; CMW/C/EGY/CO/1, 2007, para. 22.

⁷⁸ CMW, general comment No. 1 (2010), paras. 9, 29. See also CEDAW, general recommendation No. 26 (2008), para. 24.

⁷⁹ CMW/C/TJK/CO/1, 2012, para. 24; CMW/C/PRY/CO/1, 2012, para. 25; CMW/C/GTM/CO/1, 2011, para. 21; CMW/C/ALB/CO/1, 2010, para. 22; CMW/C/SLV/CO/1, 2009, para. 26; CMW/C/BOL/CO/1, 2008, para. 24; CMW/C/SYR/CO/1, 2008, para. 26; CMW/C/EGY/CO/1, 2007, para. 22.

⁸⁰ CEDAW, general recommendation No. 26 (2008), para. 21.

⁸¹ A/HRC/15/31/Add.1, para. 54; A/HRC/18/33, para. 41; A/HRC/22/72, para. 51; A/HRC/21/39, para. 44; A/67/268, paras. 17 and 26–27.

⁸² CESCR, general comment No. 17 (2005), para. 18 (b) (iii); CRC, general comment No. 16 (2013), paras. 66 and 68.

⁸³ CESCR, general comment No. 17 (2005), para. 18 (b) (iii); CEDAW, general recommendation No. 26 (2008), para. 21; A/HRC/15/31/Add.1, para. 54.

⁸⁴ CESCR, general comment No. 17 (2005), para. 18 (b) (iii); A/67/278, para. 26.

⁸⁵ A/67/278, para. 26.

stressing the need for remedies in case of discrimination,⁸⁶ and many other treaty bodies have affirmed it, including the Committee on the Elimination of Discrimination against Women,⁸⁷ the Committee on the Rights of the Child,⁸⁸ and the Committee on Migrant Workers.⁸⁹ The Special Rapporteur on adequate housing and the Special Rapporteur on extreme poverty and human rights have stated that remedies for economic, social and cultural rights violations cannot discriminate against certain groups of rights holders, but must be available to all on an equal footing.⁹⁰ Particular attention should be paid to direct or indirect discrimination on the basis of poverty,⁹¹ social marginalization,⁹² age,⁹³ caste,⁹⁴ race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁵

23. Ensuring equal access to justice for economic, social and cultural rights violations requires repealing or modifying any laws that effectively prevent certain groups from accessing remedies. The Committee on the Elimination of Discrimination against Women has emphasized that laws affecting a work permit upon receipt of a complaint may prevent or discourage women migrant workers from accessing remedies,⁹⁶ while the Committee on Migrant Workers has indicated that domestic workers as a group must not be systematically excluded from remedial systems through categorization as non-workers.⁹⁷ However, in some circumstances it might not be sufficient to require that laws and regulations concerning access to legal remedies for economic, social and cultural rights violations do not discriminate. In some cases, such as those of undocumented women migrant workers or homeless people, procedural laws and regulations should include proactive measures to ensure access to justice by such categories of persons.⁹⁸ Affirmative protection will be important when it is likely that a person will suffer discrimination in access to justice based on group membership.

24. The obligation to ensure equality of access to justice requires that States eliminate inequality or discrimination in fulfilling the various components of the right of access to justice. For instance, the Committee on the Elimination of Discrimination against Women has determined that the obligation to provide legal assistance and legal aid must be fulfilled equally for women migrant workers who have suffered violations under labour and employment laws.⁹⁹ According to the Committee on the Rights of the Child: “States may have to provide special assistance to children who face obstacles to accessing justice, for example, because of language or disability or because they are very young.”¹⁰⁰ In this sense, the various aspects concerning access to justice — such as the rights to physical access,

⁸⁶ CESCR, general comment No. 16 (2005), para. 21; general comment No. 17 (2005), paras. 19, 39; general comment No. 20 (2009), para. 40; E/C.12/IND/CO/5, 2008, para. 53; E/C.12/1/Add.82, 2002, para. 36.

⁸⁷ CEDAW, general recommendation No. 26 (2008), para. 26 (b).

⁸⁸ CRC, general comment No. 16 (2013), para. 68.

⁸⁹ CMW, general comment No. 1 (2010), para. 49.

⁹⁰ A/HRC/19/53, para. 59; A/67/278, paras. 9–10.

⁹¹ CESCR, general comment No. 16 (2005), para. 21; see also A/67/278, para. 10.

⁹² CESCR, general comment No. 16 (2005), para. 21; general comment No. 17 (2005), para. 39.

⁹³ See CRC, general comment No. 16 (2013), para. 66.

⁹⁴ See E/C.12/IND/CO/5, 2008, para. 53.

⁹⁵ CESCR, general comment No. 17 (2005), para. 19.

⁹⁶ CEDAW, general recommendation No. 26 (2008), para. 26 (c). See also CMW, general comment No. 1 (2010), paras. 20 and 49.

⁹⁷ CMW, general comment No. 1 (2010), paras. 18–19.

⁹⁸ See CEDAW, general recommendation No. 26 (2008), para. 26 (b) and (c); A/HRC/7/16, para. 99 (b).

⁹⁹ CEDAW, general recommendation No. 26 (2008), para. 26 (c).

¹⁰⁰ CRC, general comment No. 16 (2013), para. 68.

affordability and access to information — must be fulfilled equally and without discrimination. Special emphasis has been placed on ensuring that administrative and judicial mechanisms respect the right to equality for those who historically have been discriminated against in remedial proceedings. This includes having a victim-sensitive and human rights-based approach in managing the proceedings and in resolving the matter. In that respect, the Committee on the Rights of the Child has underscored that, for matters affecting children, the legal reasoning of all judicial and administrative judgements and decisions should be based on the principle of the best interests of the child. The Committee and other experts have also stressed that the design and implementation of adjudication mechanisms must ensure that children are afforded an opportunity to be heard and that due weight should be given to those views in accordance with the age and maturity of the child.

VI. Right to due process for remedies relating to economic, social and cultural rights

25. The duty to realize economic, social and cultural rights imposes an obligation on States to establish “appropriate venues of redress” such as courts or administrative mechanisms.¹⁰¹ For the realization of such rights, the Committee on Economic, Social and Cultural Rights has indicated that States parties should institute policies and strategies at the national level that ensure the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudspersons and other national human rights institutions, courts and tribunals.¹⁰² Remedies can be an adequate venue of redress if they are accessible,¹⁰³ affordable,¹⁰⁴ timely or prompt,¹⁰⁵ effective,¹⁰⁶ legitimate,¹⁰⁷ predictable,¹⁰⁸ compatible with rights,¹⁰⁹ and transparent.¹¹⁰ They also must be equitable,¹¹¹ requiring that they provide means to include the “poorest and most disadvantaged and marginalized”.¹¹²

26. Administrative and other remedial mechanisms cannot replace a right to judicial remedy when it is necessary to realize economic, social and cultural rights. As the Committee on Economic, Social and Cultural Rights has determined, “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”¹¹³ In such cases, States have a duty to guarantee victims seeking remedies for alleged violations of economic, social and cultural rights proper access to the judicial system.¹¹⁴ Courts and tribunals must adjudicate complaints promptly, expeditiously,

¹⁰¹ CESCR, general comment No. 16 (2005), para. 21.

¹⁰² *Ibid.*, para. 38; CESCR, general comment No. 20 (2009), para. 40.

¹⁰³ CESCR, general comment No. 9 (1998), para. 9; general comment No. 16 (2005), para. 21; A/HRC/7/11, para. 51 (d).

¹⁰⁴ CESCR, general comment No. 9 (1998), para. 9; A/HRC/15/31/Add.1, para. 54; A/HRC/21/42, para. 77.

¹⁰⁵ A/HRC/15/31/Add.1, para. 54; CRC, general comment No. 16 (2013), para. 30; CMW/C/GTM/CO/1, 2011, para. 21.

¹⁰⁶ CESCR, general comment No. 20 (2009), para. 40; general comment No. 16 (2005), para. 38; E/C.12/NPL/CO/2, 2007, para. 32.

¹⁰⁷ CESCR, general comment No. 9 (1998), para. 9; A/HRC/15/31 para. 58.

¹⁰⁸ A/HRC/15/31, para. 58.

¹⁰⁹ *Ibid.*

¹¹⁰ A/HRC/7/11, para. 51; A/HRC/15/31 para. 58.

¹¹¹ A/67/278, para. 8.

¹¹² CESCR, general comment No. 16 (2005), para. 21.

¹¹³ CESCR, general comment No. 9 (1998), para. 9. See also A/HRC/15/31/Add.1, para. 55.

¹¹⁴ E/C.12/1994/5, 1994, para. 21; E/C.12/1/Add.90, 2003, para. 6; CMW/C/MEX/CO/2, 2011, para. 25.

effectively, impartially and independently.¹¹⁵ Judicial remedies regarding economic, social and cultural rights violations must, *inter alia*, be accessible, affordable, and equitable. The remainder of this section will discuss the characteristics that both administrative and judicial mechanisms must have in order to fulfil the right to due process for victims of economic, social and cultural rights violations, in the terms set forth by United Nations treaty bodies and experts.

A. Competence, independence, transparency and accountability

27. As recalled by the Committee on Economic, Social and Cultural Rights, remedial proceedings for economic, social and cultural rights violations require competent and independent administrative and judicial bodies.¹¹⁶ One way to assure the competence of those in charge of adjudicating complaints is by providing training on international legal standards regarding economic, social and cultural rights. The Committee on Migrant Workers and other treaty bodies has emphasized the importance of providing training on the human rights treaties to the officials involved in the protection of rights, “particularly public prosecutors, judges, magistrates and personnel involved in the administration of justice.”¹¹⁷ States have also been requested to ensure that the training is provided on a permanent and continuous basis.¹¹⁸

28. Adjudication mechanisms, whether judicial or administrative, must also be independent. The Special Rapporteur on the right to education has noted that the very purpose of adjudicating alleged violations of that right is “to have a credible, independent body monitoring the legal compliance of State actors in the field of education.”¹¹⁹ Independence of adjudicatory bodies cannot be limited to formal legal or constitutional requirements but also must include guarantees to ensure the *de facto* independence of officials, judges and magistrates.¹²⁰ Various special rapporteurs have stated that independence requires proper financing, as well as adequate human resources allocations to and institutional structure of the adjudicative bodies.¹²¹

29. Finally, courts and other remedial mechanisms for economic, social and cultural rights violations must be transparent and accountable. The Committee on Economic, Social and Cultural Rights has emphasized that, because the realization of rights requires good governance, the courts and administrative bodies responsible for providing remedies for rights violations must be both transparent and accountable.¹²² In this regard, both United Nations treaty bodies and experts have emphasized the State duty to combat corruption among officials responding to economic, social and cultural rights violations.¹²³ The Committee on Migrant Workers has underscored that States must take a proactive role in eliminating corruption, including by investigating and sanctioning those involved.¹²⁴

¹¹⁵ CESCR, general comment No. 20, para. 40, and general comment No. 15 (2002), para. 49.

¹¹⁶ CESCR, general comment No. 17 (2005), paras. 18 (c) and 51.

¹¹⁷ CMW/C/MEX/CO/2, 2011, para. 22. See also CMW/C/DZA/CO/1, 2010, para. 15 (a); CMW/C/ECU/CO/1, 2007, para. 9; E/C.12/IND/CO/5, 2008, para. 53.

¹¹⁸ CMW/C/MEX/CO/2, 2011, para. 22.

¹¹⁹ A/HRC/23/35 para. 82 (e).

¹²⁰ E/C.12/1/Add.20, 1997, para. 15.

¹²¹ A/67/278, paras. 41–42; A/HRC/15/31/Add.1, para. 53.

¹²² CESCR, general comment No. 15 (2002), para. 49.

¹²³ E/C.12/KHM/CO/1, 2009, para. 14; CMW/C/MEX/CO/2, 2011, para. 27.

¹²⁴ CMW/C/MEX/CO/2, 2011, para. 28.

B. Expeditious proceedings

30. States should ensure that remedies for economic, social and cultural rights violations are able to provide an answer in a prompt and timely fashion.¹²⁵ As the fulfilment of economic, social and cultural rights is often linked to the livelihood of rights holders, remedies require special diligence, celerity and expeditious decisions in order to be effective.¹²⁶ United Nations treaty bodies and experts have made extensive reference to this requirement, stating that remedial proceedings must be timely, prompt and expeditious.¹²⁷ Although there is no legal stipulation as to the appropriate length of any given administrative proceeding or judicial process, the Committee on Economic, Social and Cultural Rights made clear that proceedings should not result in “unwarranted delays” in the preliminary stages of proceedings or in arriving at a final decision.¹²⁸ The reasonableness and adequacy of the length of the decision must take into account the specific nature of the controversy and the specific needs of claimants, especially of those whose are most in need of an expeditious response, such as children or migrant workers facing deportation.¹²⁹

31. Specific issues arise in the context of migrant workers who might return to their States of origin, voluntarily or otherwise, prior to the resolution of remedial proceedings for economic, social and cultural rights violations.¹³⁰ The Committee on Migrant Workers has emphasized that States should design remedial proceedings so that victims are not barred by the length of proceedings from filing and pursuing a complaint regarding violations of their rights.¹³¹ As alluded to in paragraph 23 above, the Committee on the Elimination of Discrimination against Women has indicated that the right to access justice may be affected when, upon complaint, a migrant worker loses a work permit, making it financially difficult “to remain in the country for the duration of the trial, if any.”¹³² In the case of migrants returned to their country of origin, States may consider entering into bilateral agreements that permit these migrants to have access to justice in the country of employment.¹³³

C. Reasonably simple and inexpensive proceedings

32. Administrative and judicial remedies must be designed based on a principle of equity and affordability. As a consequence, the Committee on Economic, Social and Cultural Rights has determined that remedies must not be “unreasonably costly”.¹³⁴ If any

¹²⁵ CESCR, general comment No. 17 (2005), para. 18 (c) and general comment No. 20 (2009), para. 40 (discrimination); CRC, general comment No. 16 (2013), para. 30.

¹²⁶ CESCR, general comment No. 9 (1998), para. 9 and general comment No. 17 (2005), para. 18 (c); CRC, general comment No. 16 (2013), para. 31. See also European Court of Human Rights, applying the guarantee of reasonable length of judicial procedures to economic and social rights: *Deumeland v. Germany*, 29 May 1986; *Obermeier v. Austria*, 28 June 1990; *Vocaturo v. Italy*, 24 May 1991; *Lestini v. Italy*, 26 February 1992; *Ruotolo v. Italy*, 27 February 1992; *X v. France*, 31 March 1992; *Salesi v. Italy*, 26 February 1993; *Schouten and Meldrum v. the Netherlands*, 9 December 1994; *Mosca v. Italy*, 2 February 2000; *Mennitto v. Italy*, 5 October 2000; *Delgado v. France*, 14 November 2000.

¹²⁷ CESCR, general comment No. 9 (1998), para. 9; CMW/C/GTM/CO/1, 2011, para. 21; CRC, general comment No. 16 (2013), para. 30; A/HRC/15/31/Add.1, para. 54.

¹²⁸ CESCR, general comment No. 17 (2005), para. 52.

¹²⁹ CMW/C/GTM/CO/1, 2011, para. 21; CRC, general comment No. 16 (2013), para. 30.

¹³⁰ CMW, general comment No. 1 (2010), para. 17.

¹³¹ *Ibid.*, paras. 49–50.

¹³² CEDAW, general recommendation No. 26 (2008), para. 21.

¹³³ CMW, general comment No. 1 (2010), para. 50.

¹³⁴ CESCR, general comment No. 17 (2005), para. 52.

fee or other direct or indirect cost is introduced, it should be guided by a principle of equity.¹³⁵ Moreover, the Committee has highlighted the State's obligation to provide legal recourse that is not "unreasonably complicated".¹³⁶ The right to reasonably simple proceedings especially benefits those who have been historically discriminated against or those who are in particular circumstances of vulnerability. In that sense, United Nations experts have called upon States to avoid proceedings that are complex, overly legalistic or employ legal jargon or use languages that make it difficult for disadvantaged people to understand the proceedings and its consequences and interfere with their ability to demand the fulfilment of their rights.¹³⁷

D. Fair opportunity to prove the violation

33. Remedial proceedings must ensure that the victim of an economic, social or cultural rights violation has a fair opportunity to prove his or her claim. In considering the principle of equality of arms, United Nations experts have signaled the importance of not presuming conditions of equality between the parties in a dispute when practice and experience have shown otherwise. The Committee on Economic, Social and Cultural Rights has stressed the need to include measures to balance inequalities between parties, including provision for shifting the burden of proof. The Committee has stated, in that regard, that "where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively."¹³⁸

E. Reasoned decision on the merits

34. To make administrative and judicial remedial mechanisms effective, the final decision must include the reasons on which it is based and indicate any applicable reparations. For the Committee on Economic, Social and Cultural Rights, effectively addressing economic, social and cultural rights violations entails the opportunity of arriving at a final decision on the merits of the case.¹³⁹ This resolution should include a reasoned basis for the decision, that is, an explanation of the decision on the merits of the legal claim on which the complaint is founded. Another crucial aspect of the content of the decision, when a breach of a right has been found, is the determination of the reparations that are to be provided and effectively implemented. As previously indicated, the right to an effective remedy requires that the remedy must be capable of providing adequate reparations for the rights violation.¹⁴⁰

F. Effective enforcement of the decision

35. Finally, States have also an obligation to take steps in order to ensure that decisions will be enforced or implemented. The purpose of any remedial proceeding is to give effect

¹³⁵ Ibid., para. 18 (b) (ii).

¹³⁶ Ibid., para. 52.

¹³⁷ See, for example, A/67/278, paras. 70–72 and 75–78.

¹³⁸ CESCR, general comment No. 20 (2009), para. 40. See also E/C.12/HUN/CO/3, 2008, para. 8; E/C.12/1/Add.86, 2003, para. 10.

¹³⁹ E/C.12/PHL/CO/4, 2008, para. 12; E/C.12/KHM/CO/1, 2009, para. 12.

¹⁴⁰ CESCR, general comment No. 19 (2008), para. 77; general comment No. 18 (2005), para. 48; general comment No. 15 (2002), para. 55; general comment No. 14 (2000), para. 59; general comment No. 12 (1999), para. 32.

to the economic, social and cultural rights contained in various human rights instruments. Therefore, follow-up and enforcement mechanisms must be established and be available and accessible in practice. As a way to promote enforcement, United Nations special rapporteurs have recommended implementing diverse measures, including sanctions, against those who interfere with the implementation of rights enshrined in the instruments.¹⁴¹ Additionally, as enforcement should be considered as an integral part of the proceedings,¹⁴² this right must be understood in conjunction with the requirement of a “prompt decision” when examining the length of a trial or proceeding.

VII. Conclusion

36. **The right to effective access to justice for economic, social and cultural rights violations is well established in the United Nations human rights protection system. The system has both recognized the right and established extensive guidance on how States should ensure its realization. In this sense, the system reflects a broader trend among international human rights protection mechanisms requiring that States create adequate remedial mechanisms for economic, social and cultural rights violations. Failure to provide effective remedial mechanisms that can lead to reparations for economic, social and cultural rights violations can itself amount to a breach of human rights obligations.**

¹⁴¹ CMW/C/MEX/CO/2, 2011, para. 28; CEDAW, general recommendation No. 24 (1999), para. 15.

¹⁴² Regional human rights systems have considered that lack of implementation of judicial decisions in the area of economic, social and cultural rights constitutes a violation of due process rights. See, for example, European Court of Human Rights, *Burdov v. Russia*, 7 May 2002; *Makarova and others v. Russia*, 24 February 2005; *Plotnikov and Poznakhirina v. Russia*, 24 February 2005; *Sharenok v. Ukraine*, 22 February 2005; Inter-American Court of Human Rights, “5 pensioners” v. *Peru*, 28 February 2003; *Acevedo Jaramillo and others v. Peru*, 7 February 2006.