

# **Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples**

**Edited by Margot E. Salomon**



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## **Minority Rights Group International**

Minority Rights Group International (MRG) is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations which represent minority and indigenous peoples.

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# Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples

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# Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADB	Asian Development Bank
AU	African Union
CAT	Committee Against Torture
CBD	Convention on Biological Diversity
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFS	Committee on World Food Security
CHR	(UN) Commission on Human Rights
CoE	Council of Europe
CRC	Convention on the Rights of the Child/Committee on the Rights of the Child
DRD	Declaration on the Right to Development
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	(UN) Economic and Social Council
ESC rights	economic, social and cultural rights
EU	European Union
FAO	(UN) Food and Agriculture Organization
FCNM	Framework Convention for the Protection of National Minorities
GA	(UN) General Assembly
HRC	Human Rights Committee
IACtHR	Inter-American Court on Human Rights
IACHR	Inter-American Commission on Human Rights
IADB	Inter-American Development Bank
ICCPR	International Covenant on Civil and Political Rights
ICEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE	Independent Expert
IFI	International financial institution
IGO	inter-governmental organization
ILO	International Labour Organization
IMF	International Monetary Fund

## 2 ABBREVIATIONS

MDGs	Millennium Development Goals
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
NGO	non-governmental organization
OAS	Organization of American States
OHCHR	(UN) Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
PF	(UN) Permanent Forum on Indigenous Issues
SC	(UN) Security Council
SR	Special Rapporteur
Sub-Commission	(UN) Sub-Commission on the Promotion and Protection of Human Rights
TNC	transnational corporation
UDHR	Universal Declaration of Human Rights.
UN	United Nations
UNDM	UN Declaration on Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UNDP	United Nations Development Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UNHCR	UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
WB	World Bank
WCAR	(UN) World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance
WGIP	(UN) Working Group on Indigenous Populations
WGM	(UN) Working Group on Minorities
WTO	World Trade Organization

# Preface

**Paul Hunt – UN Special Rapporteur on the Right to the Highest Attainable Standard of Health**

For many years, economic, social and cultural rights were on the margins of national and international human rights. In the 1990s, this began to change. They began to migrate from the margins towards the human rights mainstream. It is not a coincidence that rights which have a particular preoccupation with the disadvantaged and marginal were themselves marginal for a long time.

The new attention devoted to economic, social and cultural rights has generated many questions. What is the scope – or meaning – of economic, social and cultural rights, such as the rights to health, education, food and shelter? In practical terms, how can they empower the disadvantaged and marginal, such as minorities and indigenous peoples? Will measures that are daily used to promote and protect civil and political rights adequately promote and protect economic, social and cultural rights?

This timely publication addresses some of these important questions. It introduces a number of specific economic, social and cultural rights and explains how they may empower minorities and indigenous peoples. Its analysis, examples and ideas will help to ensure that minorities and indigenous peoples enjoy a central role in the dynamic and growing movement for economic, social and cultural rights. It confirms the well-deserved reputation of Minority Rights Group International (MRG) as an organization that is at the cutting edge of the promotion and protection of human rights. Designed for community organizations, the publication is a practical, user-friendly, advocacy tool in relation to the economic, social and cultural rights of minorities and indigenous peoples.

Of course, many individuals and communities, although unfamiliar with the language of rights, have campaigned for the substance of economic, social and cultural rights for many years. Innumerable campaigns against environmental degradation, indiscriminate logging, the eviction of indigenous peoples from their ancestral lands, the suppression of minority languages, the demolition of slums, domestic violence, corruption and so on, have not used rights language, norms and procedures. Nonetheless, these campaigns have been tackling issues that lie at the heart of economic, social and cultural rights, as well as other human rights.

A major challenge is to make connections between these numerous community-based campaigns and human rights. This publication explains the relevance of economic, social and cultural rights to these campaigns. This does not mean that

all community initiatives must be framed in terms of human rights. But if campaigners understand the economic, social and cultural rights dimensions of their struggle, they can strategically draw upon these rights, when they wish, to reinforce their campaigns.

Economic, social and cultural rights have reached a critical stage in their development. If lofty statements are to be turned into practical policies, programmes and projects, the human rights community has to develop new skills and techniques. The well-established human rights methods – ‘naming and shaming’, letter-writing campaigns, test cases, etc. – are still needed. But the realization of economic, social and cultural rights demands the development of additional skills, techniques and methods of work.

This signals a major contribution that minority and indigenous peoples’ organizations can make to economic, social and cultural rights. Over the years, these organizations have developed sophisticated skills to promote their campaigns, and advocacy and policy initiatives. Those committed to economic, social and cultural rights can learn from this wealth of experience.

In short, while economic, social and cultural rights can empower minorities and indigenous peoples, minorities and indigenous peoples have an indispensable contribution to make to the development of economic, social and cultural rights.

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# Introduction

Margot E. Salomon

In recent years, increased attention has been given to economic, social and cultural (ESC) rights internationally and, to a certain degree, domestically. However not enough has been done to consider fully and systematically the economic, social and cultural rights of minorities and indigenous peoples. This guide aims to bridge that gap. It provides an overview of ESC rights and how they can be applied to minorities and indigenous peoples. Aimed at minority and indigenous activists and those working with them, each chapter has been written by an expert on a different right. The contributors are familiar with a particular region or regions, and bring to the guide their experience using diverse mechanisms to advocate for securing ESC rights.

Each chapter focuses upon a different ESC right and describes the legal standards, the various enforcement mechanisms, and guidelines for successful civil society advocacy. Since many of the examples provided in individual chapters could be applied to various ESC rights, to get the most out of this guide, readers should review the suggestions for action in each chapter and consider how the different strategies discussed could be applied to their specific area of work.

Nearly the world over, minorities and indigenous peoples face discrimination, entrenched exclusion and particular concerns regarding the preservation of their identity. This guide considers the specific content of their economic, social and cultural rights in law: the rights to food, water, housing, health, a healthy environment, education, labour rights and the scope and significance of cultural rights. Rights that are not discussed in dedicated chapters are often referred to in chapters addressing a closely related theme. For example, the right to land and property is discussed in the chapter, 'Housing rights', and the right to social security is addressed in the chapter, 'Labour rights'. The annexes provide practical information and a valuable list of resources, including further guidance on the methods and means of targeting various bodies in advocacy work.

## **Where are ESC rights found and how do they apply to minorities and indigenous peoples?**

Economic, social and cultural rights are found in a range of international human rights instruments including the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>1</sup> the International Convention on the Elimination of

All Forms of Racial Discrimination (ICERD), the International Convention on the Elimination of All Forms of Discrimination Against Women (ICEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), in the International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention (No. 169), and in the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Elimination of Discrimination in Education. Some of these treaties refer explicitly to the rights of minorities and indigenous peoples<sup>2</sup>. Others have read their rights into the provisions of the treaty.<sup>3</sup>

There are also international declarations that address economic, social and cultural rights. Declarations reflect a degree of consensus among the international community and create an expectation that the rights within them will be met, as well as informing the content of the obligations found in binding conventions and covenants. A notable example is the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM). The UNDM extends the language of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) by recognizing that persons belonging to minorities have the positive right to enjoy their own culture, to profess and practise their own religion, and to use their own language<sup>4</sup> and that the state should actively create the conditions that ensure the existence and identity of the minority group.<sup>5</sup> The UNDM is also one among many instruments to articulate the importance of effective participation by minorities in decisions that affect them – a subject that surfaces throughout this guide. The Declaration on the Right to Development (DRD) recognizes that equal attention and urgent consideration should be given to the participatory<sup>6</sup> and non-discriminatory implementation, promotion and protection of civil, political, economic, social and cultural rights,<sup>7</sup> the failure of which presents an obstacle to development.<sup>8</sup> UNESCO has a variety of declarations addressing human rights and the preservation of cultural diversity, and a draft Declaration on the Rights of Indigenous Peoples currently being negotiated at the UN also includes a range of relevant provisions.

At the regional level, various economic, social and cultural rights are guaranteed in both treaties and declarations. These include: the African Charter on Human and Peoples' Rights (ACHPR) and in its Protocol on the Rights of Women in Africa;<sup>9</sup> the Protocol of San Salvador to the American Convention on Human Rights (ACHR), and the American Declaration on the Rights and Duties of Man; the First Protocol to the European Convention on Human Rights (ECHR) that protects *inter alia*, the right to education and possession of property, and the revised European Social Charter. Elsewhere, economic, social and cultural elements of the central rights protected form part of the provisions as found in the European

Charter for Regional or Minority Languages and in the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM).

The scope and application of ESC rights, as they apply to minorities and indigenous peoples, have been elaborated and refined through the General Comments of treaty bodies, the rulings of regional courts and the opinions of regional commissions. They have also been developed through the decisions of national courts in countries that have entrenched many of these rights into domestic law.

Two instrumental elements have been identified as essential for the exercise of ESC rights by minorities and indigenous peoples. These are the need for self-identification and for official state recognition. Self-identification is generally accepted as the primary criterion in the determination of who constitutes a minority or indigenous person.<sup>10</sup> However, while the existence of a minority does not depend upon a decision by the state,<sup>11</sup> there is little doubt that the recognition of minority communities, particularly when provided for in domestic law, is conducive to the fulfilment of their rights. Moreover, domestic laws that recognize only certain groups, thereby facilitating their enjoyment of certain rights, while excluding other groups, may well be discriminatory.<sup>12</sup>

The chapters in this guide offer valuable insight into the specific content of ESC rights when the beneficiaries are minorities or indigenous peoples. They consider recent developments, highlight existing limitations in the content and enforcement of the standards to date, and describe various mechanisms including those of the UN, ILO, World Bank and regional human rights bodies.

### **What can we learn from the interrelatedness and interdependence of human rights?**

Drawing on the interrelatedness and interdependence between ESC rights and civil and political rights can expand the scope for advocacy. For example, bodies that monitor state compliance with the treaties addressing civil and political rights have considered cases with distinct socio-economic components.<sup>13</sup> Throughout this guide, there are many examples of ESC rights activists using standards and monitoring procedures aimed more directly at the protection of civil and political rights. We see in the chapter, 'Housing rights', how the right to property, traditionally a civil liberty, has been used to protect indigenous land rights in the Americas; and how the violation of the right to life has been successfully invoked in the case of forced evictions in India. In the chapter, 'Cultural rights', we are shown that traditional economic activities may form an essential element of the culture of an ethnic community under the ICCPR. This 'integration approach' is also highlighted in the chapter, 'Health rights', in relation to the European Court of Human Rights.<sup>14</sup>

The interdependence of ESC rights, how they relate to one another and how this may inform advocacy choices, is also raised throughout the guide. The chapter, ‘Education rights’, demonstrates the importance of education in maintaining elements integral to the cultural preservation of minority groups such as their history, knowledge and languages. And the chapter, ‘The rights to food and to water’, clearly shows links between securing traditional forms of livelihood and access to food and food security.

### **Are the individual and the collective ESC rights of minorities and indigenous peoples protected?**

It is important that the policies and measures adopted by states to give meaning to their obligations are designed to respond to both the individual and collective nature of minorities and indigenous peoples’ economic, social and cultural rights. For ethnic, religious and linguistic minorities, as for indigenous peoples, the preservation of a distinct identity is critical to their existence and forms the cornerstone of their collective rights. Indeed, giving effect to ESC rights often requires that they be collectively exercised, as is evidenced through the collective use and ownership of traditional lands, and by ensuring cultural and linguistic rights in educational curricula.

Some states have shown a reluctance to recognize collective rights, particularly in negotiations at the international level. This stems largely from an apprehension over granting power to distinct ethnic groups and a concern that this could lead to the break-up of the state. As the chapter, ‘Labour rights’, illustrates, ILO standards have built in the need to address the situations of particular minorities as groups; UN treaty-monitoring bodies have developed the group-oriented component of various provisions found within the human rights treaties they oversee;<sup>15</sup> and the African regional human rights system entrenches collective rights,<sup>16</sup> including in relation to indigenous peoples and ethnic minorities.<sup>17</sup> The Inter-American human rights system recognizes rights vested in collectivities<sup>18</sup> and, constitutions from countries in Latin American provide for the collective rights of ethnic groups, often with specific consideration given to indigenous peoples.<sup>19</sup>

As individuals, persons belonging to minority and indigenous communities are all too often exposed to discrimination based on ethnicity, language or religion, which limits their ability to exercise their individual economic, social and cultural rights. Drawing on the standards in place to secure the various rights of minorities and of indigenous peoples, this guide addresses both aspects of their particular human rights.

## Knowing the key elements of ESC rights

### Minimum obligations

Economic, social and cultural rights have a number of particular characteristics. It is helpful to know what these are in order to advocate for the strengthening of a state's obligations.

Firstly, states can 'progressively realize' economic, social and cultural rights. Under Article 2(1) of the ICESCR a state party is to 'undertake steps individually and through international assistance and co-operation ... to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the ... Covenant'. Significantly, the *steps* towards fulfilling the rights are to be taken within a 'reasonably short time' and should be 'deliberate, concrete and targeted' toward fulfilling ESC rights.<sup>20</sup> Thus, it is not only once a state has reached a certain level of economic development that the obligations provided for under the Covenant are to be undertaken. The duty in question obliges state parties, regardless of their level of national wealth, to move towards the realization of ESC rights.<sup>21</sup> The Committee has further emphasized that, regardless of the reasons for resource constraints, 'vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes'.<sup>22</sup> Resource constraints do not relieve states of their obligations to give immediate effect to their *undertaking* to guarantee the Covenant rights, and include ensuring certain core obligations.<sup>23</sup> Also any process aimed at fulfilling the rights is immediately subject to the application of the principle of non-discrimination.<sup>24</sup> Since there is a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights, under the Covenant 'a State party, in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations'.<sup>25</sup> Despite being subject to progressive realization, the obligation imposed on state parties is to 'move as expeditiously and effectively as possible towards the goal', for all groups without discrimination.<sup>26</sup> While the full realization of all ESC rights generally may not be achievable in a short period of time, measures that deliberately detract from the enjoyment of any of the Covenant rights must meet a very high threshold of justification.<sup>27</sup>

### International cooperation

Under the ICESCR, states are obligated to meet the minimum essential levels of each right, corresponding to minimum core obligations, elaborated in the General Comments of the CESCR. Whether efforts to meet this threshold have been satisfactorily undertaken is assessed according to a number of criteria. These include: whether or not the country with inadequate resources has actively sought

### Questions activists might ask of the state

- Where is the detailed plan of action that you are obligated to adopt in order to ensure the progressive implementation of the rights to food, health, education, housing, water, employment and culture?
- What concrete steps have been taken to ensure the minimum essential levels of each right are met, including for the most marginalized segments of society?
- What measures have been undertaken to ensure that services are culturally appropriate,<sup>28</sup> that public resources are distributed in a non-discriminatory manner, and that particular attention has been paid to ensure that specific programmes – devised with the participation of minorities and indigenous peoples – are in line with the aim of preserving their identities?
- Have social safety nets been put in place to protect members of society from times of economic shock and recession, including those most vulnerable in times of national economic hardship?<sup>29</sup>
- Has the impact of the debt burden and of fiscal adjustment measures been assessed for its differential impact on the enjoyment of economic, social and cultural rights of all people in a country?<sup>30</sup>

Advocates should note that the burden of proof is on the state to demonstrate that it is making measurable progress towards the full realization of the rights.<sup>31</sup>

assistance where required;<sup>32</sup> whether or not the state can demonstrate that all resources – including those available from the international community through international assistance and cooperation<sup>33</sup> – have been used as a matter of priority to meet the minimum obligations;<sup>34</sup> and what the state has done to ensure the enjoyment of the rights, despite possible insufficient resources.<sup>35</sup>

The Committee on the Rights of the Child reminds us that in order for states to demonstrate that they have implemented the ESC rights found in the Convention to the ‘maximum extent of their available resources’, they are to show that they have sought international cooperation, where necessary, in order to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups.<sup>36</sup>

Obligations under the ICESCR are also to be taken into account in all aspects of a state party’s negotiations with international financial institutions, such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organization (WTO) to ensure that ESC rights – particularly of the most vulnerable – are not undermined by policies imposed by these institutions.<sup>37</sup> Obligations of international assistance and cooperation require state parties that are members of

international financial institutions (notably those from the North with the greatest influence) ‘to do all [they] can to ensure that the policies and decisions of those organizations are in conformity with the obligations of state parties to the Covenant’.<sup>38</sup> International cooperation also includes meeting the internationally agreed targets for international development assistance (0.7 per cent of gross national income), which forms the basis of the UN Millennium Development Goals.<sup>39</sup> In sum, obligations that correspond to ESC rights are both of an immediate and progressive nature, and invoke national and international responsibilities.

### **Obligations to respect, protect and fulfil ESC rights**

Human rights obligations are both positive and negative in character and it is widely accepted that they be ‘respected, protected and fulfilled’ by states. These different levels of obligations have been specifically applied to a variety of ESC rights in relation to minorities and indigenous peoples, as the various chapters in this guide will demonstrate. The obligation to ‘respect’ human rights refers to an obligation of abstention by the state and all its organs and agents from doing anything that violates human rights or undermines the realization of those rights. The obligation to ‘protect’ human rights requires that states and their agents take the measures necessary to prevent any individual or entity – including non-state actors such as companies – from violating human rights. The obligation to ‘fulfil’ requires that measures be taken to ensure the realization of human rights.<sup>40</sup>

The corresponding economic, social and cultural rights require measures geared towards both individuals and communities. For minorities and indigenous peoples, these include: the prohibition of forced evictions from their lands;<sup>41</sup> providing assistance so that they are able to realize their right to education;<sup>42</sup> determining whether health facilities are culturally acceptable to minority communities;<sup>43</sup> and ensuring that nomadic and traveller communities have access to adequate water at traditional and designated halting sites.<sup>44</sup>

### **What mechanisms are there to secure these rights?**

This guide points to a range of mechanisms at the international, regional and national levels that are available to advocates seeking to claim their ESC rights. There are helpful tips on preparing ‘shadow reports’ to the UN treaty bodies in the chapter, ‘Health rights’, and it is brought to our attention in the chapter, ‘Labour rights’, that shadow reports can also be submitted to the ILO’s Committee of Experts, while receiving a detailed overview of key ILO mechanisms. Several chapters familiarize readers with the contributions made by UN Special Rapporteurs in relation to the exercise of ESC rights by minority and indigenous communities. Readers are informed of UN bodies with particularly relevant

mandates, such as the Working Group on Minorities or on Indigenous Populations, or the Permanent Forum on Indigenous Issues.

The case study in the chapter, ‘Cultural rights’, provides insight into litigation to protect indigenous ancestral lands under the ICCPR individual complaint mechanism, and the chapter, ‘Housing rights’, describes a broad-based advocacy strategy that included successful use of the European Court of Human Rights to address violations against Kurdish minorities in Turkey. Several chapters remark on the strengths and limitations of the World Bank Inspection Panel, including a case study about a controversial project by China in Tibet (see ‘Housing rights’). Other case studies describe advocacy work undertaken by a coalition of national NGOs and the Basarwa of the Central Kalahari Game Reserve in Botswana to maintain their traditional lifestyle as hunters and gatherers (see ‘The Rights to food and to water’); by the Ainu in Japan for legislative recognition of their indigenous identity (see ‘Cultural rights’); by indigenous women in Peru who have used radio to further a number of their rights (see ‘Health rights’); and in relation to a criminal case in Russia for incitement to racial hatred stemming from the contents of a school textbook (see ‘Education rights’).

Also included are the authors’ strategic insights. We are reminded, for example, that constructive engagement with governments can be an efficient form of advocacy; that collaboration between national and international non-governmental organisations (NGOs) can strengthen initiatives; and that legal action should be part of a broader advocacy campaign.

It is the hope of MRG and all contributors, that you find this guide a useful resource, and that by sharing knowledge, expertise and experience we can further the ESC rights of minorities and indigenous peoples.

## Notes

- 1 At November 2004, a total of 150 states were party to the Covenant.
- 2 For example, CRC Art. 30; ICCPR Art. 27.
- 3 For example, CERD General Recommendation XXIII on the Rights of Indigenous Peoples, UN doc. CERD/C/51/Misc.13/Rev.4, 1997; CERD General Recommendation XXVII on Discrimination against Roma, UN doc. A/55/18, annex V, 2000.
- 4 UNDM Art. 2(1). However, despite the negative formulation of Article 27 which states that ‘persons belonging to ... minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’ the Human Rights Committee recognizes that positive measures are nonetheless required of the state parties to the ICCPR. Human Rights Committee (HRC) General Comment No. 23 on the Rights of Minorities, UN doc. CCPR/C/21/Rev.1/Add.5, 1994, para. 6.1.
- 5 UNDM, Art. 1(1).

- 6 DRD, Arts. 1(1), 2(1), 2(3), 8(2).
- 7 DRD, Art. 6(2).
- 8 DRD, Art. 6(3).
- 9 At October 2004, there were three ratifications, 15 are required for its entry into force.
- 10 ILO Indigenous and Tribal Peoples Convention, (No. 169), Art. 1(2); the African Commission on Human and Peoples' Rights, *Resolution on the Adoption of the Report of the Working Group on Indigenous Populations/Communities*, 34th Ordinary Session, 2003, preambular para. 4.
- 11 HRC General Comment No. 23 on the Rights of Minorities. *op.cit.*, para 5.2.
- 12 CERD Concluding Observations on Botswana, UN doc. A/57/18, 2002, para. 301.
- 13 *Kitok v. Sweden*, HRC Communication No. 197/1985 (1988); *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, HRC Communication No. 167/1984 (1990); *Apirana Mahuika et al v. New Zealand*, HRC Communication No. 547/1993 (2000); *Hajrizi Dzemajl et al. v. Federal Republic of Yugoslavia*, CAT Communication No. 161/2000 (2002).
- 14 Notably though, the need to rely on international procedures constituted to assess civil and political rights in order to secure economic and social rights reflects the absence of a much needed international system for the adjudication of ESC rights. See, Cahn. C., *The Justiciability of ESC Rights at the International Level*, European Roma Rights Centre, presentation to the open ended Working-Group to consider options regarding the elaboration of an optional protocol to ICESCR, 2nd Session, 2005. Available at: [www.errc.org](http://www.errc.org)
- 15 See, for example, *Mahuika v. New Zealand*, *op.cit.*, para. 9.2; CERD General Recommendation XXIII on the Rights of Indigenous Peoples, *op.cit.*
- 16 African Charter on Human and Peoples' Rights, Arts. 20–24.
- 17 *Report of the African Commission's Working Group of Experts on Indigenous Population/Communities*, adopted by resolution at the 35th Ordinary Session, 2004; on reading minority and indigenous rights into the Charter see, Slimane, S., *Recognizing Minorities in Africa*, London, Minority Rights Group International, 2003.
- 18 As stated by the Inter-American Commission on Human Rights, 'perhaps most fundamentally, the Commission and other international authorities have recognized the collective aspect of indigenous rights, in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people.' *The Human Rights Situation of Indigenous People in the Americas*, IACHR, OEA/Ser.L/V/III/108, doc. 62, 2000, 125; *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua*, Judgement, 31 August 2001, IACtHR, Series C No. 79, paras. 149. Notably, greater consideration has been given to the collective rights of indigenous peoples than of minorities.
- 19 For excerpted provisions see, *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource*, Module 6. Available at: [www.1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module6.htm](http://www.1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module6.htm).

## 14 INTRODUCTION

- 20 CESCR General Comment No. 3 on the Nature of States Parties' Obligations, UN doc. E/1991/23, Annex III, 1990, para. 2. Notably, the ACHPR makes no reference to progressive realization.
- 21 See generally, *ibid.*, paras. 9 and 10.
- 22 *Ibid.*, para. 12.
- 23 CESCR General Comment No.15 on the Right to Water, UN doc. E/C.12/2002/11, para. 37. On core obligations see also, *Minister of Health v. Treatment Action Campaign and Others*, CCT 8/02 Judgement, 5 July 2002, Constitutional Court of South Africa, paras. 26-29.
- 24 *Ibid.*, para. 1.
- 25 CESCR General Comment No. 3, *op.cit.*, para. 10; CESCR Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, UN doc. E/C.12/2001/10, paras. 15–18.
- 26 CESCR General Comment No. 3, *op.cit.*, para. 9.
- 27 *Ibid.*
- 28 See for example, CESCR General Comment No. 4 on the Right to Adequate Housing, UN doc. E/1992/23, annex III at 114, 1991, para. 8(g).
- 29 See generally, Alston, P., 'Thematic Hearing before Inter-American Commission on Human Rights', *Strategies and Frameworks for Protecting Economic, Social and Cultural Rights in the Individual Petitions Process*, 3 March 2004. Available at: [www.nyuhr.org](http://www.nyuhr.org) CRC General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child, UN doc. CRC/GC/2003/5, para. 51.
- 30 CESCR General Comment No. 2 on International Technical Assistance Measures, UN doc. E/1990/23, annex III at 86, 1990, para. 9
- 31 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline 4', 20 *Human Rights Quarterly* 3 (1998) 691 at 694–5.
- 32 Notably assistance need not only be financial in nature, see, CESCR General Comment No. 2, *op.cit.*; Draft report of the CESCR to ECOSOC, UN doc. E/C.12/2003/CRP.1, Section V.A, para. 4.
- 33 CESCR General Comment No. 3, *op.cit.*, para. 13.
- 34 *Ibid.*, para. 10.
- 35 *Ibid.*, para. 11.
- 36 CRC General Comment No. 5 on General Measures of Implementation, *op.cit.*, paras. 7-8.
- 37 CESCR Concluding Observations on Morocco, UN doc. E/C.12/1Add.55, 2000, para. 38.
- 38 CESCR Concluding Observations on Belgium, UN doc. E/C.12/1/Add.54, 2000, para. 31; and on Italy UN doc. E/C.12/1/Add.43, 2000, para. 20.
- 39 CRC General Comment No. 5 on General Measures of Implementation, *op.cit.*, para. 61.
- 40 Eide, A., 'Realization of social and economic rights and the minimum threshold approach', 10 *Human Rights Law Journal*, Nos. 1–2, 1989, 35 at 37; 'Maastricht Guidelines, *op.cit.*, 691 at 691; see also, CESCR General Comment No.12 on the Right to

Adequate Food, UN doc. E/C.12/1999/5; General Comment No.14 on the Right to the Highest Attainable Standard of Health, UN doc. E/C.12/2000/4; General Comment No. 15 on the Right to Water, *op.cit.*

- 41 CESCR General Comment No.7 on Forced Evictions and the Right to Adequate Housing, UN doc. E/1998/22, annex IV at 113, 1997, para. 3.
- 42 CESCR General Comment No.13 on the Right to Education, UN doc. E/C.12/1999/10, para. 47, including through the use of special measures, para. 32.
- 43 CESCR General Comment No.14 on the Right to the Highest Attainable Standard of Health, *op.cit.*, paras 27, 37.
- 44 CESCR General Comment No.15 on the Right to Water *op.cit.*, paras. 16, 25, 33.



# The rights to food and to water

Pooja Ahluwalia

Food and water are fundamental for human life and existence. The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comments 12 and 15, noted this, adding that the right to adequate food and to water is a prerequisite for the realization of other human rights.<sup>1</sup> The UN Special Rapporteur on the Right to Food (currently Jean Zeigler) has expressed his grave concern that the number of undernourished people around the world has increased to 840 million, and that over 2 billion people worldwide suffer from ‘hidden hunger’, or micronutrient deficiencies – in spite of record availability of food per capita in most countries and globally.<sup>2</sup> Further, over a billion persons lack access to basic water supply, while several billion do not have access to adequate sanitation.

The root cause of hunger and malnutrition is an inability to access sufficient food, because of poverty and past and prevailing inequalities, resulting in food insecurity.<sup>3</sup> Minorities and indigenous peoples suffer disproportionately from economic marginalization, social discrimination and political exclusion. Moreover, women belonging to minority or indigenous groups suffer multiple discrimination because of their ethnicity and gender, both from within and outside their communities. Minority groups are consistently below the national average, and thus vulnerable to low life expectancy and high malnutrition.<sup>4</sup> The social, political and economic arrangements (poor economic opportunities, systematic social deprivation, lack of political participation in decision-making or policy formulations) to which minorities and indigenous peoples are often subjected, restrict their capabilities and their access to adequate food and water.

## Standards

### The right to food

The right to food is codified at the international level in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has been refined by the useful work of the CESCR set up to monitor its implementation. In Article 11(1) of the ICESCR, state parties recognize ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food’, while Article 11(2) is concerned with ‘the fundamental right of everyone to be free from hunger’. Similarly, the Universal Declaration of Human Rights (UDHR) Article

25(1) encompasses the concern of 'freedom from want' by recognizing the right to food as a component of an adequate standard of living.

While there is no uniformly accepted definition of the right to food, the Special Rapporteur on the Right to Food applies the following definition:

*'The right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.'*<sup>5</sup>

The purpose of promoting the right to adequate food is to achieve nutritional well-being for all human beings. The right to adequate food is a necessary, but not sufficient component of the right to adequate nutrition. The full realization of the latter depends also on parallel achievements in the fields of health, care for the vulnerable, land/income security and education.<sup>6</sup>

CESCR and the Special Rapporteur on the Right to Food recognize food security as a necessary corollary of the right to food. Important elements linked to food security are, *sustainability* (long-term availability and accessibility)<sup>7</sup> and *adequacy* (cultural and consumer acceptability) of the *availability* of and *access* to food.<sup>8</sup> *Accessibility* encompasses both 'economic accessibility' and 'physical accessibility'.<sup>9</sup> Landless persons and other impoverished segments of the population may require special programmes. Particularly vulnerable are many indigenous groups whose access to their ancestral lands may be threatened. Discrimination in access to food, or the means and entitlements for its procurement, constitute a violation of the Covenant.<sup>10</sup> Food has certain cultural aspects, associated with how a community or people grows, prepares and eats it. These are fundamental aspects of the culture and values of a community and of its identity. *Cultural acceptability* is a core aspect of the right to adequate food.<sup>11</sup> When a community's food-growing capacity is constrained or their ability to secure their traditional food is curtailed, elements of their cultures may also be threatened.

It is worth noting that the International Covenant in Civil and Political Rights (ICCPR) provides for the inherent right to life of every human being (Art. 6) and the Committee has linked this provision to the right to food. In its General Comment No. 6, the HRC observes: 'the protection of this right requires that states adopt [positive] measures to eliminate malnutrition'.<sup>12</sup>

The HRC has adopted guidelines for the implementation of other rights related to indigenous peoples' right to food and means of subsistence, such as the General Comment on the rights of minorities (which can also be applied to persons

belonging to indigenous groups) under Article 27 of the ICCPR, which recognizes the relationship between traditional food systems and cultural diversity.<sup>13</sup> In many indigenous cultures, indigenous peoples fish or hunt for food as a part of a practice, custom or tradition, which is an integral part of their distinctive culture,<sup>14</sup> such as Kihals in Pakistan – fisher peoples whose food and livelihood depends on specific fish and tortoise food production which has been threatened by dam building;<sup>15</sup> and pastoralists of East Africa – for whom ranging of cattle is an integral custom and a source of food and income.<sup>16</sup> The Declaration of Aritl'an, adopted at the first Indigenous Peoples' Global Consultation in 2001, on the right to food and food security, has also articulated the cultural aspect of food, water and means of subsistence.<sup>17</sup>

Many ethnic minorities and indigenous communities living in remote areas rely on foods they can forage from the forests that surround their villages.<sup>18</sup> Ecological deterioration because of migration, development programmes and war, have resulted in dwindling natural resources and the loss of subsistence, leading to malnutrition and food insecurity. The importance of the control of peoples over natural resources appears in many instruments (the ICESCR, ICCPR) and specific reference to the rights of indigenous peoples in relation to natural resources pertaining to their lands is found in the ILO's Indigenous and Tribal Peoples Convention (No. 169).

The Convention on Biological Diversity, under Article 8(j) recognizes the role and knowledge of indigenous and local communities in the preservation of the world's biological resources, elements necessary for the enjoyment of the right to food and subsistence.<sup>19</sup>

Other important provisions for our purposes are contained in the Convention on the Rights of the Child (Arts. 24, 30) and in the International Convention on the Elimination of All Forms of Discrimination Against Women (Art. 12),<sup>20</sup> the Declaration the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities (Arts. 1-3), the Declaration on the Right to Development (Art. 1); and ILO Conventions Nos. 107 and 169 (Arts. 2, 3, 5, 7, 13).

A range of declarations and resolutions<sup>21</sup> have elaborated the standards relating to the right to food: the UN Millennium Declaration, 2000 and Millennium Declaration Goal 1;<sup>22</sup> the Declaration of the World Food Summit: Five Years Later (2002);<sup>23</sup> and the voluntary guidelines to 'support the progressive realization of the right to adequate food in the context of national food security' adopted by the UN Food and Agriculture Committee (FAO) on World Food Security (CFS) in September 2004.<sup>24</sup>

At the regional level, the San Salvador Additional Protocol to the Inter-American Convention on Human Rights explicitly recognizes the right to adequate nutrition. And while the African Charter on Human and Peoples' Rights does not

expressly guarantee the right to food, the decision by the African Commission on Human and People's Rights in the landmark Ogoni case against Nigeria (2002), has recognized the right to food as implicit under Art. 4 (right to life) and Art. 16 (right to health) of the Charter.<sup>25</sup> At the national level, the right to food also appears in a number of constitutions.<sup>26</sup>

### Right to water

The right to water has been recognized in a wide range of international documents.<sup>27</sup> Everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>28</sup> State parties must guarantee that the right to water is enjoyed without discrimination and take steps to remove *de facto* discrimination.<sup>29</sup> State parties should give special attention to individuals and groups who have traditionally faced difficulties in exercising their right to water, including women, children, minority groups, indigenous peoples. In particular, state parties should take steps to ensure that:

*(d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water.*

*(e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites ...*<sup>30</sup>

The CESCR also noted the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food. It observed that particular attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems.<sup>31</sup> The Special Rapporteur on the Right to Food has reiterated that access to safe drinking water is essential, including for irrigation purposes.<sup>32</sup>

At the regional level, the African Charter on the Rights and Welfare of the Child, explicitly provides for safe drinking water under Art. 14. And while the African Charter on Human and Peoples' Rights (ACHPR) does not expressly provide for a right to water, the African Commission in the case of *Free Legal Assistance, et. al. v. Zaire*<sup>33</sup> held that a failure of the government to provide basic services such as safe drinking water is a violation of Art. 16 (right to health). The Recommendation 14 (2001) of the Council of Europe's Committee of Ministers to member states on the European Charter on Water Resources<sup>34</sup> recognizes the right to a sufficient quantity of water to meet basic needs (paras. 5 and 19). At the national level a number of constitutions, as well as national legislation and judicial decisions, recognize the right to water.<sup>35</sup>

## State obligations

Governments are obliged to move as expeditiously as possible towards the full realization of the rights to food and water, including through international assistance and cooperation.<sup>36</sup> While acknowledging that the right to food should be realized progressively, General Comment No.12 points out that as minimum core obligations, every state is obliged to ensure for everyone under its jurisdiction access to the minimum essential food that is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.<sup>37</sup> A state where a significant number of individuals are deprived of essential foodstuffs is, *prima facie*, violating the Covenant.<sup>38</sup> Even where a state faces resource constraints, measures should be taken to ensure that the right to adequate food is fulfilled for vulnerable groups or individuals.<sup>39</sup> With respect to the right to water, General Comment No.15 explains that as minimum core obligations, state parties should ensure the right of access to water and water facilities and services on a non-discriminatory basis for disadvantaged or marginalized groups and adopt relatively low-cost targeted water programmes to protect these groups.<sup>40</sup>

The right to food and right to water, like other human rights, imposes three levels of obligations on state parties – obligations to respect, protect and fulfil. The *obligation to respect* enjoins states to ensure that every individual has permanent access at all times to sufficient and adequate food and safe drinking water, and prohibits any measures that would result in preventing individuals from having access to adequate food.<sup>41</sup> A violation of the obligation to respect occurs, for example, if the government arbitrarily evicts people from their land, especially if the land was their primary means of feeding themselves.<sup>42</sup> Another violation of the obligation to respect the right to food could come as a result of a government removing social security provisions without making sure that marginalized people, such as minorities, have alternative ways to obtain food. A further breach would occur if the government were to carry out large-scale or major development projects without taking into account their impact on the right to food and water of indigenous communities or minorities, and without ensuring effective participation of those communities in decision-making processes.<sup>43</sup>

Similarly, a violation could be seen to have occurred if a government privatizes the public water company and, by failing to monitor adequately and regulate it, permits discriminatory and unaffordable increases in the price of water. Projects involving the privatization of water supplies should provide for continued, assured and affordable access to water by local communities, indigenous peoples, and the most disadvantaged and marginalized groups of society.<sup>44</sup> Finally, states should respect the resources of the individual or community, who should be able to make optimal use of their own knowledge and have the freedom to take action and use resources to satisfy their own needs.<sup>45</sup>

The *obligation to protect* implies that states must ensure that individuals and companies do not deprive people of permanent access to adequate food and safe drinking water. The government must establish bodies to investigate and provide effective remedies if rights are violated.

Violations of the obligation to protect occur if the government does not intervene when a third party – for example, a powerful individual, evicts people from their land. CESCR has observed that the plight of the indigenous population in Chaco, Paraguay — expelled from their traditional land by cattle ranchers or industrial enterprises – as well as the estimated 200,000 landless *mestizo* peasant families, raises concern in this regard.<sup>46</sup> The obligation to protect would not be met if the government failed to take appropriate action when a company diminished or polluted a community's water supply. Thus states must guarantee security of land tenure and other productive resources, and guarantee the traditional rights of indigenous communities regarding their natural resources as against violation by others.

The *obligation to fulfil* requires that governments take positive steps to ensure initially the satisfaction of, at the very least, minimum essential levels of the rights to food and to water.<sup>47</sup> The government must take action to identify vulnerable groups and to adopt and implement a national strategy which has the active participation of minorities and indigenous communities. The strategy should include appropriate decentralization which should be achieved through social programmes, safety nets and international assistance. It should give particular attention to the need to prevent discrimination in access to food or resources for food, as well as water. The strategy should therefore include special legislation to protect the land rights of indigenous peoples and ethnic minorities,<sup>48</sup> and guarantee full and equal access to economic resources, particularly for women.<sup>49</sup> The obligation to fulfil the right to water includes adopting a national water strategy and plan of action to realize this right, ensuring that water services are affordable for all, and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.<sup>50</sup>

### International cooperation

CESCR General Comments 12 and 15 succinctly spell out that state parties should recognize the essential role of international assistance and cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the rights to food and water. States are obliged to respect the rights to food and water of persons living in other states; and they must guarantee that their own policies do not contribute to violations of the right to adequate food in other countries<sup>51</sup> or to safe drinking water.<sup>52</sup> They have the duty to promote and help other states (through international assistance and cooperation) to implement the right to food and water. Notably, international assistance should be provided in a manner that is culturally appropriate.<sup>53</sup>

## Enforcement mechanisms

Under international law, governments are the primary entity responsible for ensuring that people's human rights are met. However, states are encouraged to identify the roles of, and involve, all relevant stakeholders – individuals, families, communities, civil society groups, the private sector and international, regional and UN organizations, NGOs, parliamentarians, academic institutions and foundations – drawing together their know-how and facilitating efficient use of resources.<sup>54</sup> While the most appropriate ways and means of implementing the right to food may vary from one state to another, and thus states have discretion in choosing their approach, CESCR in its General Comment No.12 emphasizes the adoption of a regulatory framework of law, and a national strategy to ensure food and nutrition for all. The formulation and implementation of national strategies require full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and independence of the judiciary.<sup>55</sup>

At the regional level, minority and indigenous peoples' rights in relation to adequate food and water, can be considered under a number of regional instruments, notably the Inter-American Court on Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR) and the ACHPR.<sup>56</sup> A case brought to the Inter-American Commission on behalf of the indigenous Huaorani people living in the Oriente region in Ecuador, alleged that oil exploitation activities by the government's own oil company contaminated the water they used for drinking and cooking, and the earth in which they cultivate their food. Following a report issued by the Center for Economic and Social Rights, the Inter-American Commission conducted a country visit to Ecuador in November 1994, and in its final report stated that oil activities in Ecuador were not sufficiently regulated to protect indigenous peoples.<sup>57</sup>

At the national level, important enforcement mechanisms include the legislature, administrative bodies and the judiciary. National Human Rights Commissions, ombudspersons and civil society organizations can also contribute significantly to monitoring activities.<sup>58</sup> International NGOs can often be effective partners to domestic activists publicizing breaches and intervening in cases of alleged violations. Some notable international organizations and agencies include the NGO Foodfirst International and Action Network (FIAN), the UN Food and Agriculture Organization, the UN World Health Organization (WHO) and the World Food Programme (WFP).

## Guidelines for successful advocacy

Advocacy efforts should adopt a two-pronged approach, addressing policy-makers on the one hand and disenfranchised populations on the other. Publicizing issues

can put pressure on governments; lobbying and legal procedures, as well as activist tactics such as grassroots mobilization and education campaigns can also be effective. Ultimately, the goal should be to engage in a constructive dialogue with all parties to bring about change.

Campaigning and advocacy should aim to generate awareness among minorities and indigenous communities in an effort to ensure they contribute to decision-making processes that affect them. Insisting on a rights-based approach (RBA) can be useful in this regard. The RBA is based on international human rights standards with emphasis on non-discrimination, participation and accountability, while paying particular attention to the different ability of people and groups to exercise their rights depending on whether they are in positions of vulnerability or empowerment.

### Case study – Indigenous peoples in Botswana

The San (Basarwa) are hunters and gatherers who travel in small family bands within defined territories. They hunt antelope, but their daily diet consists more of the fruits, nuts and roots which they seek out in the desert, and water from underground water sources. Hunting is a crucial part of their cultural heritage. When the Central Kalahari Game Reserve (CKGR) was created in 1961 one of its objectives was to protect the food supplies of the existing Bushmen (San) population in the area.

In the 1970s, the government of Botswana attempted to persuade the San to live in permanent settlements within the reserve, where services like water, education and health care could be easily provided. Later, it terminated essential services, to get them to move to settlements outside the reserve. The government justified its relocation policy by claiming that the San deplete the natural resources of the reserve; that providing services to the CKGR is too expensive; or that it is ensuring development and seeking to enhance their living standards.

The former CKGR residents are unable to adapt to the new surroundings; they can no longer use their traditional knowledge and are exposed to changes in their diet and way of life which have led to malnutrition. The water quality is deteriorating, resulting in higher incidence of diarrhoea in children. Because the people have no means of subsistence, there is an increased dependency on the state for food relief and cash-for-work programmes.

The Basarwa and other indigenous peoples have responded by mobilizing, demonstrating and establishing their own advocacy groups (First People of Kalahari – FPK and Working Group for Indigenous Minorities in Southern Africa – WIMSA). They have formed a negotiating team comprising representatives of the San people in CKGR as well as the FPK, WIMSA and the Botswana Centre for Human Rights

(DITSHWANELO) to facilitate on-going dialogue with the government. They have lodged formal complaints in domestic courts. In August 2002, DITSHWANELO presented a shadow report at the 61st session of the Committee on the Elimination of Racial Discrimination (CERD); and many statements have been presented at repeated sessions of the African Commission on Human and Peoples' Rights. They have facilitated human rights training sessions for the Basarwa that they might better know their rights, and some members have also sought international attention through the media.

The High Court case is still pending and the government has not revoked its decision to terminate essential services. However, the multi-pronged approach of the San has resulted in effective mobilization and internationalization of their human rights concerns and has made continued, high-level negotiations possible.

## Notes

- 1 CESCR General Comment No.12 on the Right to Food, UN doc. E/C.12/1999/5, para. 4; General Comment No.15 on the Right to Water, E/C.12/2002/11, para.1.
- 2 *The Right to Food*, Report of the Special Rapporteur, UN doc. E/CN.4/2003/54.
- 3 Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food (World Food Summit Plan of Action, para. 1). Also, see Report of the Special Rapporteur on the Right to Food, UN doc. E/CN.4/2001/53, para. 15.
- 4 *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, report submitted by Eide, A. to Commission on Human Rights, UN doc. E/CN.4/Sub.2/1993/34, pp. 32–5.
- 5 Special Rapporteur's report 2001, *op. cit.*, para. 14.
- 6 Eide, A., *The Right to Adequate Food and to be Free from Hunger, updated study on the right to food*, UN doc. E/CN.4/Sub.2/1999/12, para. 44.
- 7 CESCR General Comment No.12, *op. cit.*, paras 7, 12-13; CESCR General Comment No. 15, *op. cit.*, para. 7.
- 8 CESCR General Comment No.12, *op. cit.*, paras 11-12; Special Rapporteur's report 2003, *op. cit.*, para. 24.
- 9 CESCR General Comment No.12, *op. cit.*, para. 13.
- 10 Eide, A., *The Right to Adequate Food*, *op. cit.*, para. 54.
- 11 CESCR General Comment No.12, *op. cit.*, para. 11
- 12 HRC General Comment No.6, 1982, UN doc. HRI\GEN\1\Rev.7, 2004, para 5,
- 13 The HRC observed that, 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources...That right may include such traditional activities as fishing and hunting', General Comment No.23 (Art. 27), UN doc. CCPR/C/21/Rev.1/Add.5, 1994, para. 7.
- 14 At the national level, an aboriginal right to fish for food, as a part of their custom, has

been upheld in decisions. For example, the Supreme Court of Canada in the following cases: *R v. Adams*, [1996] 3 SCR 101; *R v. Cote*, (1996) DLR (4<sup>th</sup>) 385 (Can SC); and *R v. Nikal*, (1996) 133 DLR (4<sup>th</sup>) 658 (Can SC).

- 15 Gadi, M., Naeem I. and Wasim W., *Unheard Indigenous Voices: the Kihals of Pakistan*, Minority Rights Group International and SUNGI Development Foundation, (2003).
- 16 Markakis, J., *Pastoralism on the Margin*, Minority Rights Group International, (2004).
- 17 *Indigenous Peoples' Consultation on the Right to Food: A Global Consultation*, Atitlán, Sololá, Guatemala, 17–19 April 2002, available at: [www.tebtebba.org/tebtebba\\_files/susdev/susdev/atitlan.html](http://www.tebtebba.org/tebtebba_files/susdev/susdev/atitlan.html). The Declaration's preamble underscores that: 'the denial of the right to food for indigenous peoples not only denies us our physical survival, but also denies us our social organization, our cultures, traditions, languages, spirituality, sovereignty, and total identity; it is denial of our collective indigenous existence.'
- 18 See for example, Ohenjo, N., *Kenya's Castaways: The Ogiek and National Development Processes*, Minority Rights Group International and Centre for Minority Rights Development, 2003.
- 19 Recently, the CBD Ad Hoc Open-ended Intersessional Working Group on Article 8(j) and related provisions, adopted the draft Akwé: *Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments proposed to take place on, or which are likely to impact on, Sacred Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*. See Multi-stakeholder Dialogue Segment of the Second Preparatory Session, Note by the Secretary-General, Add. 3: Dialogue paper by indigenous peoples, 28 January–8 February 2002, UN doc. E/CN.17/2002/PC.2/6/Add.3, paras 42–8.
- 20 Note also, Art.2 of the Convention on Prevention and Punishment of the Crime of Genocide, 1948; and Art.20 and 23 of Convention relating to the Status of Refugees, 1951; and Art.54 of the Additional Protocol to the Geneva Conventions of 1949, relating to the Protection of Victims of International and Non-International Armed Conflicts, 1977 (Protocol II).
- 21 For a detailed list of international declarations and resolutions on the right to food, see *Extracts from International and Regional Instruments and Declarations, and Other Authoritative Texts Addressing the Right to Food*, FAO Legislative Study, Legal Office FAO, Rome, 1999. Available at: [www.fao.org/legal/Right to Food/legst68.pdf](http://www.fao.org/legal/Right%20to%20Food/legst68.pdf).
- 22 The UN Millennium Declaration, UN doc. A/Res/55/2. The heads of states and governments pledged to 'eradicate extreme poverty and hunger' as one of the eight Millennium Development Goals, para. 19 of the Millennium Declaration.
- 23 World Food Summit, FAO Headquarters, Rome, 10–13 June 2002. Available at: [www.fao.org/DOCREP/MEETING/004/Y6948E.HTM](http://www.fao.org/DOCREP/MEETING/004/Y6948E.HTM)
- 24 FAO Newsroom, 'Committee on world food security adopts right to food guidelines', available at: [www.fao.org](http://www.fao.org). The guidelines, although not legally binding, provide national governments with a roadmap and a practical guide for incorporating the right to food

into national law, and for creating an international environment conducive to its implementation.

- 25 *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96, 30th Ordinary Session, October 2001). The African Commission ruled that: 'The African Charter and international law require and bind Nigeria to protect and improve existing food resources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food productions and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food resources. It should not allow private parties to destroy or contaminate food sources, and prevent people's effort to feed themselves.' (para. 65). See also Special Rapporteur's report submitted to General Assembly, UN doc. A/58/330, 2003, para. 38.
- 26 See 'The right to food in national constitutions', in *The Right to Food in Theory and Practice*, FAO Rome, 1998, pp. 42–3 (English only). Available at: [www.fao.org/docrep/w9990e/w9990e12.htm](http://www.fao.org/docrep/w9990e/w9990e12.htm).
- 27 For a comprehensive list see CESCR General Comment No.15, para. 4, n. 5. See also the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, *op.cit.*
- 28 CESCR General Comment No.15, paras 2, 4.
- 29 *Ibid.*, para. 14.
- 30 *Ibid.*, para. 16.
- 31 *Ibid.*, para 7.
- 32 Special Rapporteur on the Right to Food, Report 2003, *op. cit.*, para. 35.
- 33 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, Communications 25/89, 47/90, 56/91 and 100/93, (18th Ordinary Session, October 1995), available at [www1.umn.edu/humanrts/africa/comcases/25-89\\_47-90\\_56-91\\_100-93.html](http://www1.umn.edu/humanrts/africa/comcases/25-89_47-90_56-91_100-93.html)
- 34 Available at: [www. http://cm.coe.int/stat/E/Public/2001/adopted\\_texts/recommendations/2001r14.htm](http://cm.coe.int/stat/E/Public/2001/adopted_texts/recommendations/2001r14.htm)
- 35 For a detailed list of international and national standards and legislation as well as judicial decisions on the right to water, see *Legal Resources for Right to Water: International and National Standards*, Centre On Housing Rights and Evictions (COHRE), January 2004, available at: [www.cohre.org/downloads/water\\_res\\_8.pdf](http://www.cohre.org/downloads/water_res_8.pdf)
- 36 ICESCR, Art. 2.
- 37 CESCR General Comment No.12, para. 14; also General Comment 3, *op. cit.*, para. 10. In *Tribunal fédéral suisse, références: ATF 121 I 367, 371, 373 V. = JT 1996 389*, the Swiss Federal Tribunal, the highest court in Switzerland, recognized the right to minimum basic conditions, including 'the guarantee of all basic human needs, such as food, clothing, and housing'. This case suggests that in Switzerland the right to food is a right recognized as inherent in everyone as a human being. The case is referred to in *The*

- Right to Food*, Report of Special Rapporteur on the Right to Food, UN doc. E/CN.4/2002, para. 58.
- 38 The Right to Food, Report of the High Commissioner for Human Rights, UN doc. E/CN.4/1998/21, para. 17.
- 39 CESCR General Comment No.12, *op. cit.*, para. 28.
- 40 CESCR General Comment No.15, *op. cit.*, para. 37.
- 41 CESCR General Comment No.15, para. 15; also see Special Rapporteur's report 2001, *op. cit.*, para. 27.
- 42 The CESCR urged the Cameroon government to take measure to protect the right of the Baka Pygmies to an adequate standard of living, CESCR, UN doc. E/2000/22, 1999, para. 56.
- 43 For example on the repercussion of a dam on the Epupa community of Namibia, see, *Human Rights and Indigenous Issues*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, UN doc. E/CN.4/2003/90, para 28, and on the Adivasis of India, paras. 15-18.
- 44 Concluding Observation on Nepal, CESCR, UN doc. E/2002/22, para. 83.
- 45 Eide, A., *Right to Adequate Food.*, *op. cit.*, para. 52.
- 46 Concluding Observation on Paraguay, CESCR, UN doc. E/1997/22, para. 22.
- 47 CESCR General Comment No.15, *op. cit.*, para. 37.
- 48 *Voluntary Guidelines on the Right to Food*, guideline 8b provides: 'States should take measures to promote and protect the security of land tenure, especially with respect to women, poor and disadvantaged segments of society, through legislation.... Special consideration should be given to the situation of indigenous communities.'
- 49 CESCR General Comment No.12, *op. cit.*, para. 26.
- 50 CESCR General Comment No.15, *op. cit.*, paras 26-7.
- 51 CESCR General Comment No.12, *op. cit.*, para. 36.
- 52 CESCR General Comment No.15, *op. cit.*, para. 31.
- 53 CESCR General Comment No.15, *op. cit.*, para. 34.
- 54 *Voluntary Guidelines on the Right to Food*, *op.cit.*, guideline 6: Stakeholders.
- 55 CESCR General Comment No.12, *op. cit.*, para. 23.
- 56 *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (Ogoni case), *op. cit.*
- 57 Report on the Situation of Human Rights in Ecuador, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, doc. 10 rev.1, 24 April 1997.
- 58 *Voluntary Guidelines on the Right to Food*, *op. cit.*, guideline 18.

# Housing rights

Iain Byrne

The struggle for minorities and indigenous peoples to protect and secure their own economic and social resources has entered the public consciousness more in relation to housing and land than perhaps any other issue. From the landmark case of *Mabo*<sup>1</sup> in the Australian High Court, confirming aboriginal title in the early 1990s; to that of *Grootboom*<sup>2</sup> before the South African Constitutional Court in 2000 brought by a squatter community demanding access to basic shelter; to the decision of the Inter-American Court in *Awas Tingini Indigenous Community of Mayagna v. The State of Nicaragua*<sup>3</sup> in 2001, concerning the failure to consult indigenous people before granting logging concessions on their lands: the story of minority and indigenous groups securing their economic and social rights has often been one of successful housing and land rights advocacy.

Moreover, nowhere does the principle that states and other entities must respect peoples' own economic and social resources ring more true than in relation to housing and land. Clearly, both rights, as well as being inextricably linked (since often there can be no access to housing without access to land), play a key role in guaranteeing non-discriminatory enjoyment to a range of other rights – not just economic and social, but also civil and political, and consequently to the principles of indivisibility and universality.<sup>4</sup>

For many people, land rights define the way and the means by which they live and practise their culture. The focus of this chapter is the elaboration and protection of minorities' and indigenous peoples' right to housing including, related land rights.

## Standards

Housing rights standards are found in all of the major international instruments with economic and social rights provisions, including those with special applicability for minorities. Most tend to be brief statements (e.g. ICESCR Art. 11(1), ICEDAW Art. 14(2)(h)). These provisions have been augmented by numerous resolutions passed by the UN General Assembly and by the Commission and Sub-Commission on Human Rights. One of the most significant is the Draft Declaration on the Rights of Indigenous Peoples which states that they shall have a right to determine, plan and implement all housing and other social and economic

programmes affecting them; and also to enjoy autonomy in matters relating to their own internal and local affairs, including housing.

Such protection at the international level is generally not found in respect of regional treaties,<sup>5</sup> with the exception of Article 31 of the revised European Social Charter. However, given that it has been successfully argued that the rights to a home and private and family life and to property (as protected by Article 8, and Article 1 of Protocol 1, respectively, of the ECHR) effectively encompasses a right to housing, (albeit in relation to negative violations such as forced evictions and house demolition - see case study) the case can also be made that similar protection should be offered under the corresponding provisions of the ACHR.<sup>6</sup>

At the domestic level, the right to housing is contained in over 50 constitutions,<sup>7</sup> of which perhaps the best known (at least in the common law system) are those of South Africa and India. Examples of successful challenges brought under the former include *Alexkor v. The Richtersveld Community & Ors*,<sup>8</sup> where the South African Constitutional Court found that an indigenous community had been unlawfully dispossessed of their land and mineral rights due to racially discriminatory policies. Also *Modderklip*<sup>9</sup> in the Supreme Court of Appeal concerned the failure of the state to meet its constitutional obligations to secure the housing and land rights of squatters faced with eviction. In the case of India, the Supreme Court has demonstrated a long standing commitment to economic, social and cultural rights, largely through a creative interpretation of the right to life as underpinning such rights. The protection of slum dwellers from forced eviction in *Olga Tellis v. Bombay Municipal Corporation*<sup>10</sup> is one of the most well known decisions.<sup>11</sup>

The commitment at the international level to housing rights is evidenced by the fact that they were the subject of the two earliest substantive General Comments by the CESCR,<sup>12</sup> together with the establishment of one of the first UN Special Rapporteur economic and social rights mandates. In addition, the UN housing rights agency, Habitat, organized two major international conferences in Vancouver in 1976 and Istanbul in 1996, as well as devising a Global Shelter Strategy with the aim of securing basic shelter for all by the year 2000. The Strategy has clearly failed to realize its ambitious goal, but it is to be hoped that Target 11 of the Millennium Development Goals – to have achieved a significant improvement in the lives of at least 100 million slum dwellers by 2020 – will enjoy more success.

In practice, the right to housing means there is a basic obligation on the state and its agents:

- (1) to respect people's own housing and land resources by, for example, not carrying out or condoning forced or arbitrary evictions
- (2) to promote housing and land rights through appropriate legislation and policies
- (3) to protect against violations by other non-state actors, e.g. landlords, property developers and multinationals

(4) to *fulfil* rights through public expenditure and regulation, including the provision of public housing, social security payments and services and infrastructure.

Beyond these individual state duties there is the general obligation of all countries to provide international assistance and cooperation to secure realization of the right.<sup>13</sup> Since at least the Vienna Conference and Declaration on Human Rights in 1993, it has now been accepted that the obligation to provide international assistance and cooperation also implies a concrete right to development.<sup>14</sup>

The core components of the right to housing are: legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. Thus the right to housing means more than basic shelter; it means the right to live in peace, security and dignity.<sup>15</sup> These factors have particular resonance for minority and indigenous groups.

In contrast to housing, land rights are not explicitly mentioned in any major human rights instrument. However, the Human Rights Committee (HRC) has expressly stated that the general minority rights provision of Article 27 of the ICCPR should encompass the use of land resources,<sup>16</sup> particularly in relation to indigenous people.<sup>17</sup> This has resulted in some litigation,<sup>18</sup> whilst CERD has provided similar recognition.<sup>19</sup> Among the few provisions to expressly refer to land rights are Articles 14–19 of the ILO's Indigenous and Tribal Peoples Convention (No. 169). This recognizes the particular affinity between indigenous peoples and the land, and requires states to establish adequate procedures within their national legal systems to resolve land claims, together with compensation in the case of forced removal. The general issue of providing suitable restitution for loss of housing and land when people are forced to flee through conflict or as a result of persecution remains a major challenge for many minority groups and indigenous people.<sup>20</sup> Property rights are found in many of the international and regional instruments (although not the two Covenants), reflecting their historic status as a core aspect of civil liberties,<sup>21</sup> and can therefore also be used to ground claims.

The UN has estimated that there are over 100 million persons homeless worldwide, many of whom have been forcibly evicted, and over one billion inadequately housed. The CESCR has concluded: 'It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing.'<sup>22</sup>

## Enforcement mechanisms

The mechanisms available to those seeking to protect housing and land rights vary. The UN Special Rapporteur on Housing is empowered to carry out country visits;

respond to information received on allegations concerning the situation of housing rights in particular countries (communications); develop dialogues with both states and civil society; and submit annual reports to the UN Commission on Human Rights on thematic issues (see Annex II). Since 2000, the post has been held by Miloon Kothari, a housing rights activist from India, who has experience working with minority and indigenous groups. In his second annual report to the CHR in 2002, he presented a framework for state action urging states to enact a series of measures designed to improve the housing rights of minorities, including enacting and strengthening legislation, guaranteeing access to judicial remedies for violations, undertaking affirmative action and institutionalising ethical housing, land-use and planning practices.<sup>23</sup> Kothari has looked at the issue of forced evictions and how it can disproportionately affect minority groups such as the Roma, contrary to the CERD General Recommendation XXVII.<sup>24</sup> In all of the country visits undertaken to date by the Special Rapporteur - the Occupied Palestinian Territories, Romania, Mexico, Peru and Afghanistan - he has highlighted the plight of minorities and made suitable recommendations. For example, in Romania he recommended that particular attention should be given to the needs of minority and other vulnerable groups (in particular the Roma) and for their integration into national housing sector policies.<sup>25</sup> In Mexico, much of the report was focused on the situation of indigenous people, particularly in the Chiapas region, and how forced displacement has impacted negatively – not only on their land and housing rights – but also their ability to work and enjoy their own culture.<sup>26</sup> Similar concerns were highlighted in the case of Peru, particularly in regard to potentially disastrous consequences of a mining project in the Tambogrande region.<sup>27</sup> In Afghanistan, the Special Rapporteur noted that ethnic, religious and linguistic minorities were among those at particular risk of having their homes seized after occupation having heard testimonies from Sikhs and Hindus of how their properties had been occupied by powerful military commanders in Kabul.<sup>28</sup>

In his 2004 report to the CHR, Kothari looked at the issue of forced evictions and how it can disproportionately affect minority groups.<sup>29</sup> Clearly minorities and indigenous peoples are high on the Special Rapporteur's agenda and complaints and/or requests for visits should receive a favourable response (see Annex II).

The Special Rapporteur on Indigenous Peoples, currently Rodolfo Stavenhagen, is mandated to gather and request information on violations against indigenous peoples and to make recommendations to remedy them. He has carried out thematic studies, including one on the impact of development projects on indigenous peoples<sup>30</sup> and their right to participate in the decision-making process. On occasions, both Special Rapporteurs have sent joint communications in response to urgent appeals<sup>31</sup> where the housing rights of indigenous peoples have been violated.

In addition, the Special Rapporteur on Indigenous Peoples continues to be preoccupied with land issues, as shown in his 2004 report to the CHR concerning the Inughuit people in Greenland. Their land was seized in 1953 to make way for a US air force base.<sup>32</sup> and the anxieties of the Sami people in Finland regarding the impact of a proposed land-management bill on their traditional rights to land and resources was also evidenced.<sup>33</sup>

The ECHR can hand down binding judgments offering the prospect of real redress for victims. While its case law on discrimination against minorities remains generally underdeveloped,<sup>34</sup> its creative interpretation of traditional civil rights provisions has allowed some limited economic and social rights protection, particularly in the case of housing and land rights. The procedure has recently been streamlined, but applicants must still surmount a number of hurdles before their claims are considered admissible, including the need to exhaust domestic remedies and to ensure that the claim is not ‘manifestly ill-founded’.<sup>35</sup>

Quasi-legal mechanisms, such as those of the World Bank Inspection Panel, may have more accessible procedures but often lack the independence of a court of law and the ability to provide effective remedies for victims. However, their decisions will usually carry great moral weight and can be used to great effect to campaign both domestically and internationally for changes in the policy and the law. Litigation should always be seen not just as an end in itself, but as part of a broader advocacy strategy.

## Guidelines for successful advocacy

The success of human rights advocacy – whether focused on litigation or part of a broader strategy that encompasses media work and lobbying – will frequently be the story of partnerships: working to gather information on the ground and present it to the wider community.

As both case studies below demonstrate, partnerships can take a variety of forms and involve a range of actors. In the case of the Kurds bringing cases before the European Court of Human Rights, it involved an international organization acting as an intermediary between the victims and grassroots lawyers and activists and legal experts based at a university Human Rights Centre. Everybody had a vital role to play: the grassroots lawyers working with the victims on the ground to gather evidence, the international NGO assembling the case-file and briefing the legal experts who, in turn, argued the case before the Court. The interaction also provided important lessons on the need to be rigorous in the collecting of corroborative evidence in order, not just to prove that the alleged violations took place, but that they were part of a much wider pattern of abuse. Successful advocacy can also be a matter of seizing opportunities and using them to your advantage. In the case

of Turkey, the external pressure resulting from the accession process to the European Union and to conform to human rights standards, provided a platform for Kurds and other oppressed groups in Turkey to lobby for internal reform.

Ultimately, successful advocacy is about making choices based upon informed research and creative thinking. There are many mechanisms ranging from international treaty and non-treaty bodies and experts, to internal inspection regimes of international institutions, to regional tribunals and domestic courts. Litigation can be a long and costly process with often, in the case of UN mechanisms, no binding decision and remedy at the end, even after a finding of a violation. However, for many parts of the world such as Asia and the Pacific, the UN system provides the only possible avenue after all domestic remedies have been exhausted.<sup>36</sup>

Moreover, using such mechanisms strengthens their credibility and at least provides an effective means of ‘naming and shaming’. What is required is familiarity with the appropriate rules of procedure and mandates of each body and expert.

#### Case study 1 – Using the ECHR to protect Kurdish housing and land rights

Prior to the 1990s, the ECHR had not addressed large-scale systematic abuses. This changed with the establishment of the Kurdish Human Rights Project (KHRP) in the UK in 1992 by exiled activists and lawyers based in London and at the Human Rights Centre of the University of Essex. Working in partnership with local lawyers and human rights groups in the region, the KHRP’s strategy was to use international and regional human rights mechanisms to hold states to account for their treatment of the Kurdish minorities. Turkey provided the best opportunity for securing redress since it was a member of the Council of Europe and had ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, the treatment of the Kurds in south-east Turkey amounted to gross and systematic abuse.<sup>37</sup> Kurds were denied political or cultural autonomy, and were the victims of a brutal military campaign waged by the Turkish military against the Kurdistan Workers’ Party (PKK) separatist group, resulting in extra-judicial killings, torture, rape, and the burning and destruction of villages and farms.

The KHRP gathered evidence via local contacts, such as the Turkish Human Rights Association, and field visits carried out by its legal staff. Establishing the facts of what had happened was a major challenge, given that the area was under a permanent state of emergency, and given the tradition of oral testimony among the people. The ability of the ECHR to conduct its own investigations greatly assisted with establishing the authenticity of violations. A major breakthrough was the case of *Akdivar*,<sup>38</sup> which concerned the destruction of nine houses and forced evacuation of a village following a raid by the security forces. The latter claimed that the PKK had

set the homes on fire. However, the Commission accepted that the applicants' homes had been burnt, and that the weight of the evidence pointed to the security forces having carried out the destruction. The Court found breaches of the right to home and family life under Article 8 and to property under Protocol 1 Article 1. However, it did not uphold a claim under the non-discrimination provision of Article 14 that the destruction was ethnically motivated. The Court held that the victims should be compensated for their loss of homes and the cost of alternative accommodation, and for the loss of income from the forced abandonment of their land. Other cases followed, such as *Mentes* and *Selcuk*,<sup>39</sup> reinforcing the Kurds' claim that the activity was part of a systematic operation to control and subjugate the population.

To date, over 500 applicants have been assisted in bringing complaints against Turkey. With over 90 per cent of cases establishing a violation, they have shone a light on some of the worst human rights abuses ever carried out by a member state of the Council of Europe. As well as providing effective forms of redress for individual victims (i.e. monetary compensation), the cases helped to keep the situation of the Kurdish people in the public consciousness in Western Europe and undoubtedly contributed towards the tough stance taken by the EU towards Turkey in relation to admission negotiations. The result has been some improvement in the human rights situation of the Kurdish minority. These cases also demonstrate how a traditional civil and political rights mechanism can be used by minorities to secure fundamental economic and social entitlements. Another benefit of the litigation work has been to increase the capacities and skills of local lawyers and NGOs to bring cases themselves, thereby empowering Kurds to claim their own rights.

### Case study 2 – Holding the World Bank to account in Tibet

The impact of the World Bank on the rights of minorities and indigenous people has been profound. While many of its projects have contributed towards combating poverty and improving living standards in the developing world, there have been numerous examples when it has had a negative impact on marginalized people's rights.<sup>40</sup> In 1993, the World Bank established an Inspection Panel of independent experts to investigate projects and make recommendations. The Panel is generally seen as a positive initiative that provides some accountability for the World Bank and monitors the level of effective participation in Bank-funded projects of affected groups. The Inspection Panel however lacks the true independence of a court or ombudsperson and remains very much subject to the Bank's will. The Board of the Bank chaired by the President appoints the Panel members. The Board must approve any request for a Panel inspection and is not obliged to accept its

recommendations, which do not have the force of law. Moreover, the Panel is not concerned with the breach of human rights standards per se, but merely with compliance with the Bank's own policies and procedures (although of course the former can and do inform the latter in a limited way, as in the case of the Operational Directive issued with respect to indigenous people).<sup>41</sup>

The most high-profile case dealt with by the Panel to date has been the Qinghai component of the China Western Poverty Reduction Project. This involved the resettlement of over 57,000 poor farmers, mainly Han and Hui Chinese, who practised high-altitude rain-fed agriculture in Haidong (Tib.: Tsoshar) Prefecture in Dulan (Tib.: Tulan) County, in Haixi (Tib.: Tsonub) Tibetan and Mongolian Autonomous Prefecture.

The resettlement was accompanied by the construction of a dam and irrigation channels, and conversion of fragile, arid lands used as pasture by indigenous nomads into areas for intensive agricultural production. The population transfer would increase the Chinese population in the area, making Tibetans and Mongolians an even more marginalized minority. Tibetans and a number of international environmental and human rights NGOs, led by the US-based Information Campaign for Tibet, called on the Bank to withdraw its support from the Project, stating that it would have a disastrous effect on the local environment and the housing, land and cultural rights of the indigenous population.

The Board took the unprecedented step of recommending that all Bank work on the project should cease until the Panel had carried out its investigation. The Panel found a lack of sufficient planning and consultation both, in relation to the impact on the area left behind by the settlers and the area they were being moved to. It concluded that the Project failed to consider the appropriateness of implanting large-scale irrigated agriculture on traditional forms of land use. It found the Environmental Assessment to be 'uninformative' and 'silent' on the layout of the new towns and villages, their infrastructure and facilities, together with waste management. In sum, it found the Project to be inconsistent with the Bank's policy towards indigenous people. The Board decided to cease its funding of the Project. For some Bank staff, the decision was the wrong one.<sup>42</sup>

Moreover, the victory might be seen as meaningless given that China announced that it would continue funding the Project anyway. However, it demonstrated that the Panel was not only prepared to listen to the weak, but also to take action on their behalf, and important lessons were learnt about the conduct of future projects.

Many observers pointed out that the case only received so much attention because it had been brought by a US-based NGO working on a country that was already the subject of a high-profile campaign. However, the majority of Panel requests have been brought directly by organizations based in the South.<sup>43</sup> What is needed are the organizational skills and capacities to collect sufficient evidence to present a case, and to ensure that the findings are made available to local and international media in order to maximize impact.

## Notes

- 1 *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1.
- 2 *Grootboom & Ors v. Government of the Republic of South Africa* (2000), (11) BCLR 1169 (CC). It was the first case to confirm the justiciability of economic and social rights in the new Constitution.
- 3 Available at: [www.utulsa.edu/law/classes/rice/INTERAMER\\_CT\\_HUMAN\\_RTS\\_Mayagna.htm](http://www.utulsa.edu/law/classes/rice/INTERAMER_CT_HUMAN_RTS_Mayagna.htm) 30 September 2004. See also Anaya, S.J., 'The Maya Petition to the Inter-American Commission on Human Rights: Indigenous land and resource rights and the conflict over logging and oil in southern Belize', in Merali, I. and Oosterveld, V. (eds), *Giving Meaning to Economic, Social and Cultural Rights*, Philadelphia, University of Pennsylvania Press, 2001, pp. 180–211.
- 4 See *Report of the Special Rapporteur on Adequate Housing*, UN doc. E/CN.4/2002/59, para. 38.
- 5 Neither the Additional San Salvador Protocol to the ACHR nor the ACHPR contain any express provision. However, the Inter-American Court of Human Rights has read the right to land into the ACHR when it declared in *Awás Tingini* (see note 3) that the Nicaraguan government violated the indigenous community's property rights, and the right to judicial protection under Articles 21 and 25 of the Convention, when it demarcated land belonging to the community, since the property rights arose through the traditional occupancy and use of the lands by the community. Similarly, the African Commission on Human and Peoples' Rights has read the right to housing into the Charter by deriving it from the rights to property (Art. 14), health (Art. 16) and family (Art. 18) in *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (Communication no. 155/96, 30th Ordinary Session, October 2001) concerning the violation of the rights of the Ogoni people by a consortium of oil producers; see also the Working Group on the Rights of Indigenous Populations/Communities in Africa, *Report on Indigenous Populations/Communities*, November 2003, available at: [www.iwgia.org/sw2073.asp](http://www.iwgia.org/sw2073.asp)
- 6 See Article 11(2) protecting against arbitrary interference with private life, family and home and Article 21 protecting the right to property.
- 7 See Leckie, S., *Housing as a Need, Housing as Right: International Human Rights Law and the Right to Adequate Housing*, London, Human Settlements Programme, International Institute for Environment and Development, 1992, pp. 80–6.
- 8 *Alexkor Ltd v. The Richtersveld Community and Ors* (2004) 5 SA 460. The court ruled that the customary rights of the community had survived the transition to common law and subsequent legislation.
- 9 *President of the Republic of South Africa & Ors v Modderklip Boerdery (Pty) Ltd*, SCA 213/03, 2004.
- 10 *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545
- 11 See for example *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11

- SCC 123. For a further survey of the Indian jurisprudence see Muralidhar, S., 'Justiciability of ESC Rights – the Indian Experience' in *Circle of Rights*, 2000, pp. 435-444.
- 12 See General Comment No.4, The Right to Adequate Housing UN doc. E/1992/23, 1991, and General Comment No.7, Forced Evictions UN doc. E/1998/22, annex IV, 1997.
- 13 See CESCR Committee General Comment No.4, *op. cit.*, paras 10 and 13.
- 14 See Rosas, A., 'The right to development', in A. Eide et al., *Economic, Social and Cultural Rights: A Textbook*, The Hague, Martinus Nijhoff, 2000, pp. 119–30; see also, Salomon, M.E. and Sengupta, A., *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, London, Minority Rights Group International, 2003.
- 15 CESCR Committee General Comment No.4, *op. cit.*, para 7
- 16 See HRC General Comment No.23, The Rights of Minorities, para. 7, UN doc. CCPR/C/21/Rev.1/Add.5, 1994.
- 17 See Concluding Comments on Sweden, UN doc. CCPR/C/79/Add.58, 1995; Brazil UN doc. CCPR/C/79/Add.66, 1996; and Mexico UN doc. CCPR/C/79/Add.32, 1994.
- 18 See for example *Lansman v. Finland* (511/92) and (671/95).
- 19 See CERD General Recommendation No.XXIII on The Rights of Indigenous Peoples, para. 5. and the Concluding Observations on Suriname, UN doc. CERD/C/64/CO/9 paras 11–15, 22, 2004, concerning the lack of legal recognition of indigenous people's land rights.
- 20 See Leckie, S., *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons*, New York, Transnational Publishers, 2003.
- 21 See UDHR Article 17; Protocol 1 of the ECHR Article 1; IACHR Article 21; ACHPR Articles 14 and 21; ICERD Article 5(d)(vi); ICEDAW Articles 15(2) and 16(1)(h); Convention Relating to the Status of Refugees Articles 13, 18–19, 29–30; International Convention on the Rights of All Migrant Workers and their Families Article 15. For a detailed elaboration of the right see Krause, C., 'The right to property' in Eide et al., *op. cit.*, pp. 191–209.
- 22 CESCR General Comment No.4, *op. cit.*, para. 4.
- 23 For the complete list see UN doc. E/CN.4/2002/59 para 46
- 24 Paragraph 31 of General Recommendation XXVII on Discrimination Against Roma states that States should 'act firmly against any discriminatory practices affecting Roma, mainly by local authorities and private owners, with regard to taking up residence and access to housing; to act firmly against local measures denying residence to and unlawful expulsion of Roma, and to refrain from placing Roma in camps outside populated areas that are isolated and without access to health care and other facilities.'
- 25 UN doc. E/CN.4/2003/5/Add. 2 para 18.
- 26 UN doc. E/CN.4/2003/5/Add. 3.
- 27 UN doc. E/CN.4/2004/48/Add.1 p. 20.
- 28 UN doc. E/CN.4/2004/48/Add.2 para 59.
- 29 See *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN doc. E/CN.4/2004/48, 2004, paras 64–5.

- 30 In his 2003 report to the CHR the Special Rapporteur highlighted the cost of such projects in terms of the loss of traditional territories and land, forced eviction and environmental destruction in countries such as Chile, Colombia, Costa Rica, India and the Philippines.
- 31 Such collaboration is not confined to the Special Rapporteur on Housing. During 2003/4 the Special Rapporteur on Indigenous Peoples sent 25 joint communications involving nine other thematic mechanisms (see Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, UN doc. E/CN.4/2004/80/ Add.1, 2004, p. 20, Table 2).
- 32 *Ibid.*, para. 102–7.
- 33 *Ibid.*, para. 108–18.
- 34 This is largely due to the requirement that a claim solely on non-discrimination grounds under Article 14 of the ECHR cannot be made, but must be lodged in conjunction with one claiming a breach of a substantive article, e.g. right to property or private and family life.
- 35 Increasing numbers of cases have been found manifestly ill-founded, suggesting that the Court might be using this as an administrative device to limit the number of claims it considers.
- 36 That is, assuming that countries have accepted the right of petition to the HRC or CEDAW, which many have yet to do.
- 37 See, for example, McDowall, D., *The Kurds*, London, Minority Rights Group International, 1991, and Amnesty International, *Turkey: The Duty to Supervise, Investigate and Prosecute*, London, 1999.
- 38 *Akdivar v. Turkey* 23 EHRR 143, 1996.
- 39 *Mentes v. Turkey* 26 EHRR 595, 1997; *Selcuk v. Turkey* 26 EHRR 478, 1998.
- 40 See for example Clark, D., *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, Rowman & Littlefield, 2003, and Sadasivam, B., 'The impact of structural adjustment on women: a governance and human rights agenda', *Human Rights Quarterly*, vol. 19, 1997, pp. 630–65.
- 41 Paragraph 15(a) refers to the need to give 'particular attention...to the rights of indigenous peoples to use and develop the lands that they occupy.'
- 42 See Bottelier, P., 'Was World Bank support for the Qinghai Anti-poverty project in China ill-considered?', *Harvard Asia Quarterly*, winter, 2001.
- 43 For a list of the Panel's Requests to date, visit: [www.wbIn0018.worldbank.org/ipn/ipnweb.nsf/WRequest?openview&count=500000](http://www.wbIn0018.worldbank.org/ipn/ipnweb.nsf/WRequest?openview&count=500000) (accessed 30 September 2004).



# Health rights

Alicia Ely Yamin

Health is so fundamental to human existence and fulfilment that it is both a precondition to and a by-product of the enjoyment of all other rights. The health of minorities and indigenous peoples depends on the rights to education, work, housing and food, but also on the enjoyment of civil and political rights. But health is also a right in itself under international law, which is critically important for indigenous peoples and minorities.

Health is perhaps the most radical of all rights, because it questions more than any other the boundaries of what is ‘natural’. When health is understood to be a human right, patterns of ill-health among minorities and indigenous peoples cannot be explained away as matters of fate, cultural practices or individual behaviour. The state bears responsibility for promoting and protecting the health of disadvantaged populations, including minorities and indigenous peoples. Also, the early mortality and greater morbidity faced by so many minorities and indigenous peoples becomes a matter of pressing social justice for which the state and other actors must be held accountable.

## Standards

The core provision regarding the right to health is found in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which announces four steps states should take in fulfilling the highest attainable standard of health. These were updated and elaborated on in Committee on Economic, Social and Cultural Rights General Comment No.14. The right to health, as for all human rights, is to be realized without discrimination and with particular consideration for marginalized and vulnerable groups, including minorities and indigenous peoples.

Both health and the right to be free from discrimination with respect to health are set out in a broad array of international treaties.<sup>1</sup> Article 24 of the Convention on the Rights of the Child (CRC) adopts a similar definitional approach to that of the ICESCR with respect to children. As women often face double discrimination as members of minority or indigenous groups (who often live in rural areas), ICEDAW is especially important and speaks to the obligation of state parties to eliminate discrimination against women in the field of health care, as well as mentioning pregnancy-related protections and eliminating disparities between rural

and urban women in conditions affecting health. ICERD calls on state parties to guarantee the right of everyone, *inter alia*, to public health and medical care.<sup>2</sup> Article 25 of the ILO's Indigenous and Tribal Peoples Convention (No. 169) specifically addresses the rights of indigenous peoples to health.

At the regional level, a number of treaties also set out the right to health.<sup>3</sup> A review of these treaties, together with interpretive documents, makes it clear that the right to health includes: (1) health care and healthy conditions – including environmental and living conditions and (2) effective participation in decisions affecting people's well-being.<sup>4</sup>

In relation to indigenous peoples, ILO Convention No. 169 stresses that health services should be community-based, and planned and administered in cooperation with the peoples concerned, taking into account their traditional preventive care healing practices and medicines. Paul Hunt, the Special Rapporteur on the Right to Health has specifically called for governments and other actors to ensure participation in the formulation, implementation and monitoring of health policies and programmes.<sup>5</sup> While not yet adopted, the Draft Declaration on Indigenous Peoples Article 31 explicitly connects health to self-determination. Participation of indigenous peoples in decisions affecting their own health entails greater respect for the use of traditional medicines and healing practices on the part of formal health systems, training of indigenous health workers, the use of indigenous languages in transmitting health information, and creating accountability to indigenous communities for policy and programmes that affect their health, including displacement of communities from their land.<sup>6</sup>

There is also a separate right to a healthy environment, which was first recognized in the 1972 Stockholm Declaration. The UN Working Group on Indigenous Populations has highlighted the importance of a healthy environment to indigenous peoples. In the Inter-American System, the Protocol of San Salvador distinguishes between the right to health and the separate right to a healthy environment. Article 24 of the African Charter on Human and Peoples' Rights also provides for a separate right to a healthy environment. In the Ogoni case, the African Commission found a violation of Article 24 of the ACHPR, among other provisions.<sup>7</sup> The CESCR's General Comment No.15 on The Right to Water, protects a critically important element of the right to a healthy environment for indigenous peoples and minorities.<sup>8</sup>

At the domestic level, the right to health is recognized in over 70 national constitutions and in federal legislation in many countries around the world. Even in those countries that have not incorporated the full dimensions of ICESCR Article 12 into their domestic legislation, the right of minorities and indigenous peoples to be free from discrimination in access to health care is widely protected. Many constitutions provide directive principles to the effect that the state has

obligations to protect public health and the environment, as well as provisions for indigenous peoples to control their lands and environment.

### Obligations of states and other actors

Under international law, state parties to a variety of different treaties assume three dimensions of obligations.

First, the obligation to *respect* requires governments to refrain from directly contravening the provisions set out under the respective treaty. The obligation to respect would include, for example, the obligation to eliminate institutional discrimination against minorities within the health care system. The prohibition of discrimination does not mean that difference should not be acknowledged, or that special measures may not be taken to redress past inequities faced by minorities or indigenous peoples, but rather that differential treatment must be based on objective criteria reasonably intended to remedy injustice within a society.<sup>9</sup>

Second, the obligation to *protect* requires the government to protect the enjoyment of the right from interference by third parties, for example, appropriate regulation of mining companies that are operating on indigenous lands.

Third, the obligation to *fulfil* requires that governments satisfy at least a minimum core of the right to health and that they progressively realize the other programmatic aspects of the right over time. Violations of the obligation to fulfil occur when a state fails to satisfy a 'minimum core obligation to ensure the satisfaction of, at the very least, *minimum essential levels* of each of the rights'.<sup>10</sup> When a failure to meet any of the minimum obligations set out in paragraphs 43 or 44 of General Comment No.14 is identified, the burden of proof shifts to the state party to demonstrate that it has done everything possible to meet its basic obligations.<sup>11</sup>

National courts and regional bodies have also addressed the question of what minimum standards governments can be required to meet. States have an obligation not to adopt retrogressive measures. For example, if a state has a programme to provide anti-retroviral drugs, backsliding due to budget crunches or political expediency is impermissible.<sup>12</sup> Also, the obligation to implement the right to health must be done on a non-discriminatory basis<sup>13</sup> and there should be some evidence of efforts to control or regulate the conduct of third parties that are interfering with the right to health.<sup>14</sup> Finally, all states can develop a national public health plan, with measurable targets and deadlines, which is open for public debate and evaluation.<sup>15</sup> Such a plan should be directed at remedying past inequities and should pay particular attention to vulnerable and marginalized groups.<sup>16</sup>

With respect to health-care facilities, goods and services, the CESCR has established that there are four interrelated aspects of state obligations.

First, the underlying determinants of health (safe, potable drinking water; adequate sanitation facilities; hospitals, clinics, etc.; trained medical and professional personnel) have to be available in sufficient quantity within the state party.

Second, health facilities, goods and services have to be accessible to everyone. The CESCR clarifies that accessibility has four overlapping dimensions, which are particularly important for minorities and indigenous peoples:

- (a) health facilities, goods and services must be accessible to all in law and in fact
- (b) health facilities, goods and services must be within safe physical reach for all sections of the population and medical services and underlying determinants of health, such as water and sanitation, must be within safe physical reach, including in rural areas
- (c) economic accessibility requires that health facilities, goods and services must be affordable for all – poorer households should not be disproportionately burdened with health expenses as compared to richer households
- (d) accessibility includes the right to seek, receive and impart information and ideas concerning health issues – often indigenous peoples and minorities do not have access to health information in their own languages.

Third, the CESCR states that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate. Cultural acceptability requires respect for traditional medicines and practices, which have not been shown to be harmful to human health.<sup>17</sup>

Fourth, health facilities, goods and services must be scientifically and medically appropriate and of good quality.

Activists should bear in mind that the realization (or lack thereof) of the right to health for minorities and indigenous peoples is particularly dependent on the actions and decisions of other actors beyond the state:

- (1) *third-party states*, which provide bilateral aid, hold sovereign debt, exercise influence over corporations and wield power over international institutions;
- (2) *international institutions* (the World Bank, IMF and WTO), which set the terms of loans and press for reforms to comply with trade and intellectual property agreements or policies regarding privatization of services;
- (3) *transnational corporations* (TNCs), which often have assets and budgets that dwarf those of the countries they are investing in, and which call for reforms of tax, labour and environmental laws that affect health in order to enhance their profitability.

The CESCR explicitly states in General Comment No.14 that state parties and other actors should provide assistance and cooperation to enable developing countries to fulfil their core and other obligations. The CESCR also specifically states that: 'priority in the provision of international medical aid, distribution and

management of resources ... should be given to the most vulnerable or marginalized groups of the population'.<sup>18</sup>

There is now an increasing number of commitments by wealthy countries to provide aid for development and health-related assistance in the South. The most important of these is probably that stemming from the Millennium Declaration and the Millennium Development Goals (MDGs).<sup>19</sup> The Special Rapporteur on the Right to Health has noted that four of the MDGs are directly health-related and two others are closely linked to health.<sup>20</sup> He further argues that bringing to bear a human rights' lens with respect to the MDGs helps to ensure their benefits reach the disadvantaged and vulnerable, such as minorities and indigenous peoples.

With respect to international financial institutions (IFIs), the CESCR has stated that they should pay more attention to the protection of the right to health in their policies and programmes. In its General Comment No.2, it stated that in any structural adjustment programme or other loan programme IFIs have an obligation to ensure that:

- (1) the right to health is protected in policies promoting or enabling the privatization of services
- (2) the human rights implications (especially for minorities and disadvantaged populations) of such policies have been addressed through a broad process of consultation
- (3) necessary checks and balances have been put in place to protect the interests of the most vulnerable members of society, including minorities and indigenous peoples.

The multiple layers of discrimination and exclusion faced by indigenous peoples and minorities shape many important social determinants of health, and not merely degrading or unacceptable encounters during treatment. These incidents are only surface manifestations of the institutional and structural forms of discrimination and exclusion that permeate popular culture, development policies, educational institutions, and the employment and housing markets, and affect the well-being of minorities and indigenous peoples throughout the course of their lives. Often physical remoteness of services and a lack of culturally appropriate health practices and health information combine with discrimination and other forms of socio-economic marginalization and exploitation to impact on indigenous peoples' lives. It is not only the availability, accessibility, acceptability and quality of health facilities, goods and services that is affected, but also the environmental health and even the identity of minorities and indigenous peoples. Realizing the right to health – including access to health care and to the basic preconditions of health – is fundamental to permit indigenous peoples and minorities to dignified lives and to participate as full members of their societies.

## Enforcement mechanisms

Some committees, such as CERD, allow for urgent action petitions in emergency situations involving environmental or other health issues. Shadow reports to treaty bodies can also be an important form of advocacy but should not simply repeat general health data or denounce the government. Key questions to address include: what are the most urgent health-related issues facing their (minority or indigenous) population? Is there systematic discrimination against their population within the health system? What are the actual results of government's policies and other laws aimed at promoting the right to health for minorities or indigenous peoples? What are some of the concrete obstacles faced in achieving the right to health for minorities or indigenous peoples (e.g. in terms of availability, accessibility, acceptability, quality)?<sup>21</sup> Focusing on a very few issues and providing evidence (ideally budgetary and statistical, in addition to testimonial), as well as making reference to past reports by the government, will be important in conveying the message to the committee.

Indigenous peoples and minorities can work with the Special Rapporteur on the Right to Health, the Special Rapporteur on Indigenous Peoples (currently Rudolfo Stavenhagen) and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (currently Doudou Diene), as well as potentially with other Special Rapporteurs, in various ways to promote enforcement of their health rights. For example, they can request that a Special Rapporteur makes a country visit to examine issues of particular concern to their population. (Note however that Special Rapporteurs are very limited in the site visits they can make per year). Groups can also notify the Special Rapporteurs of cases involving situations of serious violations of their health rights or systemic discrimination resulting in such violations. Unlike the criterion for submitting a communication, there is no condition of exhaustion of domestic remedies before contacting a Special Rapporteur. Note that the two themes which the Special Rapporteur on the Right to Health has chosen to focus his mandate on are: (1) poverty and the right to health. (2) stigma and discrimination and the right to health, both of which can disproportionately affect minorities and indigenous peoples.<sup>22</sup>

With regard to the World Bank Inspection Panel, most of the cases brought to the Panel involve environmental claims that relate to the right to health and a healthy environment. In some cases, claims brought and the reports issued by the Inspection Panel have caused the Bank to withdraw support for the project.<sup>23</sup> In other cases, indigenous peoples and minorities have successfully challenged their exclusion from compensation plans provided by the Bank.<sup>24</sup>

When domestic remedies are exhausted or inapplicable, advocates may consider bringing petitions to regional human rights institutions. Although there are a

variety of strategies through which to approach establishing the enforceability of the right to health, there is clear precedent for two approaches in particular.

First, the ‘indirect approach’ uses procedural rights which are generally enforceable.<sup>25</sup> That is, once a state has taken steps to implement health rights, courts are obligated to ensure that it is done in a non-discriminatory manner, which affords judicial protections.<sup>26</sup> Freedom from discrimination (equal protection) will be key to many cases relating to health and a healthy environment.<sup>27</sup> Similarly, the rights to due process and/or judicial protection become relevant in most cases.

Second, the ‘integration approach’ entails building health into judicially-protected civil rights.<sup>28</sup> The ECHR has adopted this integration approach and it has been explicitly advocated by a former Inter-American Court judge.<sup>29</sup> The rights to life and physical integrity have figured prominently as civil rights connected with the right to health.<sup>30</sup>

Regional human rights institutions, such as the African Commission and the Inter-American Commission on Human Rights, can also be asked to undertake site visits to examine situations of alleged violations of the right to health or a healthy environment. Also, these bodies can issue precautionary measures in situations that present imminent danger of irreparable harm, and requesting such precautionary measures does not require the prior exhaustion of domestic remedies.

Although only a trickle compared with the potential demand, there is a discernable trend toward the enforcement of programmatic aspects of the right to health by judiciaries in a number of countries.<sup>31</sup> This has largely been driven by the advent of effective anti-retroviral medications (ARVs) for HIV/AIDS.<sup>32</sup> Other cases have involved securing treatment for different conditions, and obliging the government to develop a national plan.<sup>33</sup>

Indigenous peoples and minorities may choose to avail themselves of foreign courts in order to hold transnational corporations (TNCs) accountable for violations of health-related rights. Such litigation has generally been brought in the United States where many TNCs are headquartered, and where there are a number of other incentives for public interest law firms to take on such cases.<sup>34</sup> Costs and jurisdictional hurdles remain significant obstacles to undertaking this strategy, however, lawsuits have been brought for bodily and property damages stemming from environmental pollution that has had health effects.<sup>35</sup>

## **Guidelines for successful advocacy**

### **Raise awareness about health rights**

Advocacy on the right to health refers not only to securing remedies in legal cases, but also to creating a consciousness of health issues (including reproductive and sexual health) as matters of fundamental rights. Members of indigenous and

minority groups cannot claim and defend their health rights until they know them and understand the conditions that would enable them to enjoy these rights. Raising consciousness requires that individuals from traditionally oppressed or marginalized groups come to perceive themselves as rights-holders.

### **Statistical information**

Monitoring the right to health will usually call for the use of statistical information and in some cases budgetary data. Statistics can be used to show patterns of disparities, which are critical in demonstrating discrimination against minorities or indigenous peoples. Budget analysis can be used to determine whether the policies the government proclaims are actually appropriately funded. By comparing funding for insured people (those with social security) versus uninsured people (those dependent on the Ministry of Health), disparities and discrimination may also be revealed.<sup>36</sup>

It is crucial to look for disaggregated data, or to call for the disaggregation of data along racial and ethnic, as well as other lines, as part of advocacy. Budgets should also have line items for health programmes for vulnerable populations such as certain minority groups. It is important to select statistically valid indicators and not to misuse them. Each indicator or statistic used should be directly related to holding a duty-bearer to account for progress on a specific norm.<sup>37</sup>

### **Alliances with health professionals**

Realizing the right to health in any context will require revising services and relationships with providers and therefore requires the active participation of health professionals. Although health professionals can reflect the prejudices of the overall society toward minorities and indigenous peoples, they can also be critical allies on the inside of the health system. The education and training of health professionals, together with campaigns to build bridges between the communities served and the formal health system, can be important targets of advocacy.

### **The media**

Often the issue is not just documenting information about abuses of health rights but getting the message out. Local, national and even international media can be very helpful in raising awareness of health-related rights, as well as disseminating information about abuses of the health rights of indigenous peoples and minorities. Journalists should be notified when indigenous or minority groups plan to file a case and should be called upon to be present when a shadow report is presented to a UN body. However, different forms of media can also be used as educational and consciousness-raising tools, as well as for more directly pressuring the government for accountability. (See case study at end of chapter.)

## Local capacity and participation

The rhetoric of ‘participation’ is often used by international finance institutions and governments. Minorities and indigenous peoples can take advantage of stated commitments to gain a seat at the table, demand consultation and have genuine input into policy decisions and programmes affecting their health and well-being. In order to participate effectively and influence local, national and international decision-making, community members require the necessary information and support. Building local capacity around health and a healthy environment as rights issues are fundamental to making lasting gains.

## Governmental allies

Sometimes it is more productive to provide or obtain technical support for the government than to denounce actions or inaction. Different actors within the government can prove to be valuable allies. Elected representatives, as well as sympathetic ministers or officials at the local level, can play key roles in obtaining funding for regulatory and oversight agencies, securing information and investigating facts, as well as influencing other important actors.

## Non-state actors

Often governments have neither the political will nor the resources to protect the rights to health and a healthy environment. Further, trade agreements, loan conditions, and intellectual property regimes can significantly limit their capacity to adopt protective measures. Although it is more difficult to hold IFIs and TNCs legally accountable for human rights violations, it can be equally effective to hold them politically and ethically accountable, in order to secure a change of policy or conduct.<sup>38</sup>

## Campaigns and legal action

Domestic litigation and international petitions can establish the principle of enforceability and provide remedies in specific cases. They can also draw media attention, affect public perceptions, mobilize communities and put pressure on the government and private actors. It is sometimes more fruitful to draw attention to health rights through an illustrative case. Conversely, to be effective, legal strategies should always be situated in larger campaigns that include public outreach and education, and political organizing.

### Case study – Broadcasting health issues<sup>39</sup>

In the Loreto department (province) of Peru, MINGA offers a radio programme to the dispersed and extremely isolated indigenous people who live along the tributaries of the Amazon River. The programme, *Bienvenida Salud!* (Welcome Health!) does not just transmit information to passive listeners; it creates a communications network among the people in these remote communities, thereby multiplying their possibilities for asserting pressure on the state.

The mostly female listeners of *Bienvenida Salud!* write to the programme with questions about health (especially reproductive and sexual health) and with issues that have arisen in their lives, such as domestic violence. The programme provides information and reads some letters aloud (maintaining confidentiality). However, it also takes issues presented and transforms them into episodes of a soap opera, where 'answers' are not provided, but different perspectives are aired and humour allows people to identify with and enjoy the show. Both through writing their experiences down and through hearing themselves portrayed as protagonists on the radio, listeners effectively create their own messages and understandings of their health rights.

Many of the thousands of letters that the programme receives contain complaints about rights' violations by the state, including lack of health posts or health personnel. When these situations are exposed and denounced over the radio, people across these small and dispersed communities recognize they face similar problems and can join together to exercise greater pressure on the state. Letters also recount success stories (e.g. bridges that were repaired, health posts that were built, initiatives for reforestation and community control of natural resources), which promote a sense of effective agency.

As the absence of indigenous languages in the public sphere is a form of exclusion and discrimination, it is important that the MINGA programme creates a space to exercise the right to express oneself in one's native language. Before *Bienvenida Salud!* certain indigenous languages, such as Urarina, had never been heard on the radio in Loreto. *Bienvenida Salud!* promotes a more democratic approach to the medium of radio – including fostering participation by indigenous women and other marginalized people who rarely have access to a public forum – as a way of securing health rights and promoting a more democratic society.

### Notes

- 1 See Toebees, B., *The Right to Health as a Human Right in International Law*, Antwerp, Intersentia, 1999; Eide, A., Krause, C., Rosas, A. (eds), *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff, 1995, pp. 125–43, 309–23.
- 2 ICERD, Art. 5(e)(iv).

- 3 Among the more widely used are: the European Social Charter, and the Revised Charter (Art. 11); the African Charter on Human and Peoples' Rights (Art. 16), the American Declaration on the Rights and Duties of Man (Art. 11), the Additional Protocol to the American Convention on Human Rights In the Area of Economic, Social and Cultural Matters (Protocol of San Salvador, Art. 10), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention "Belém do Pará").
- 4 CESCR General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN doc. E/C.12/2000/4, para. 11.
- 5 Hunt, P., Report of the Special Rapporteur on the Right to Health *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN doc. A/59/27 Sept. 2004 (advance edited version), para. 58.
- 6 Hunt, *op. cit.*, para 58.
- 7 *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96, 30th Ordinary Session, October 2001) paras 51–5.
- 8 CESCR General Comment No. 15, on The Right to Water, UN doc. E/C.12/2002/11, para. 16.
- 9 For 'special measures,' see, e.g., ICERD, Article 2.
- 10 See CESCR General Comment No. 3, The Nature of States Parties' Obligations, UN doc. E/1991/23, Annex III, 1990, para. 10.
- 11 *Ibid.*, para. 10; see also 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', para. 9, reprinted in *Human Rights Quarterly*, vol. 20, no. 2, 1998, p. 694.
- 12 E.g. *Cortez et al. v. Instituto Venezolano de Seguros Sociales*, Supreme Court of Venezuela, Constitutional Chamber, 2001. Available at; [www.tsj.gov.ve/decisiones/scon/Mayo/881-080502-00-0995.htm](http://www.tsj.gov.ve/decisiones/scon/Mayo/881-080502-00-0995.htm) (some prescribed ARV triple cocktail drugs removed and not provided consistently); *Jofre Mendoza et al. v. Ministerio de Salud*, Constitutional Tribunal of Ecuador, Third Court, Decision No. 0749-2003-RA (2004) (one prescribed ARV triple cocktail drug not given to patient).
- 13 ICESCR Art. 2.
- 14 E.g. Ogoni case, *op. cit.*
- 15 E.g. *Minister of Health v. Treatment Action Campaign*, CCT 8/02, July 2002, Constitutional Court of South Africa. (Government programme to prevent mother-to-child transmission of HIV/AIDS ordered expanded from 18 pilot sites.)
- 16 CESCR General Comment No. 14, *op. cit.*, para. 52.
- 17 Traditional practices that have been shown to be harmful, such as female genital cutting, should be abolished in keeping with international human rights law (ICEDAW, Arts. 5 and 12).
- 18 CESCR General Comment No. 14, *op. cit.*, para. 65.
- 19 See [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals)
- 20 Hunt, *op. cit.*, para. 11. The following goals are directly related to health: reduction of child mortality (goal 4); improvement of maternal health (goal 5); combating HIV/AIDS, malaria and other diseases (goal 6); and ensuring environmental sustainability (goal 7).

- Goal 1 (eradication of extreme poverty and hunger) and goal 8 (developing a global partnership for development) are closely related to health.
- 21 For information on shadow reports, see Tanaka, A and Nagamine, Y., *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs*, London, MRG and IMADR, 2001; Asher, J., *The Right to Health: A Resource Manual for NGOs*, London, Commonwealth Medical Trust/American Association for the Advancement of Science/ HURIDOCS, 2004, pp. 127–41. See also: International Human Rights Internship Program, *Circle of Rights – Economic, Social and Cultural Rights Activism*, Washington, DC, 2000.
  - 22 See Asher, *op. cit.*, p. 140; *Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health*, on the CHR Res. 2002/31.
  - 23 Moog Rodriguez, M. G. , 'The Planaflo Inspection Panel Claim: Opportunities and Challenges for Civil Society in Rondonia, Brazil', in Clark, D., Fox, J. and Treakle, K. (eds.) *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, Rowman & Littlefield, Inc., 2003, pp. 45-68.
  - 24 Huq Dulu, M. 'The Experience of the Jamuna Bridge', in *Ibid.*, pp. 93-114.
  - 25 See Melish, T. *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual for Presenting Claims*. New Haven, CT, Orville Schell Center for International Human Rights/Yale University, 2002, p. 194.
  - 26 See e.g. ACHR, Arts. 1, 24.
  - 27 See *Purohit and Moore v. The Gambia*. African Commission on Human and Peoples' Rights. Communication 241/01 (33rd Sessions, 2003) [right to health of mentally disabled persons].
  - 28 See e.g., Melish, *op. cit.*, p. 233.
  - 29 See Inter-American Court of Human Rights Separate Vote of Judge Rodolfo E. Piza Escalante, *Proposed Amendments to the Naturalization provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 1984, OAS TS Ser A No. 4 (1984), para. 6.
  - 30 The right to life was specifically addressed in the ACHPR Ogoni Case, *op. cit.*; Bodily Integrity concerns were raised in Inter-American Commission Report No. 66/00. Case 12.191 *Maria Mamérita Mestanza Chávez*. (October. 3, 2000). Available at: [www.cidh.oas.org](http://www.cidh.oas.org). See also *MM v. Peru* (unpublished case resolved through amicable resolution process signed Mar. 6, 2000) [discussion available at [www.crr.org/esp\\_pub\\_art\\_ias.html](http://www.crr.org/esp_pub_art_ias.html)].
  - 31 Note that the domestic effect of international treaties varies. See Toebes, *op. cit.*, pp. 191-93.
  - 32 E.g. *Lopez v. Instituto Venezolano de Seguros Sociales*, 487-060401 Supreme Court of Venezuela, Constitutional Chamber (1997), available at: [www.tsj.gov.ve/decisiones/scon/Abril/487-060401-001343.htm](http://www.tsj.gov.ve/decisiones/scon/Abril/487-060401-001343.htm); *Alvarez v. Caja Costarricense de Seguro Social*, Exp. 5778-V-97, No. 5934-97, Sala Constitucional de la Corte Suprema de Justicia de Costa Rica.
  - 33 See, generally, *Alejandro Moreno Alvarez v. Estada Colombiano*, SU.819/99 Corte Constitucional de Colombia (1999). Available at: [//bib.minjusticia.gov.co/jurisprudencia/](http://bib.minjusticia.gov.co/jurisprudencia/)

CorteConstitucional/1999/Tutela/su819-99.htm [autologous bone marrow transplant which required treatment abroad]; *Campodonico de Beviacqua, Ana Carina et al c/Ministerio de Salud y Acción social—Secretaría de Programas de Salud y Banco de Drogas Neoplasicas*. Protection Writ. Supreme Court of Argentina. Ley 16.986, (2002) cited in ‘Centro de Estudios Legales y Sociales, Derechos Humanos en Argentina’ (2002). Chapter IX. “La Salud bajo la ley del mercado.” Available at: [www.cels.org.ar/Site\\_cels/publicaciones](http://www.cels.org.ar/Site_cels/publicaciones) [cancer treatment]; and *Causa No. 31 “Viceconte, Mariela Cecilia c/Estado Nacional—Ministerio de Salud y Acción Social”—s/Amparo Ley 16.986*. Cámara Nacional en lo Contencioso-Administrativo Federal, Sala IX Jun. 2, 1998. [manufacture of orphan vaccine for Argentine hemorrhagic fever].

- 34 Civil procedure rules and contingency fee recoveries providing two such incentives. ‘Civil procedure rules’ are those rules which govern the bringing of civil lawsuits. ‘Contingency fee recoveries’ allow minorities and indigenous groups to bring a case without incurring up-front out-of-pocket expenses for the attorney, who charges upon a theoretical recovery in the event of winning the case.
- 35 E.g., lawsuits were brought against Union Carbide for the Bhopal disaster in India and against Texaco for oil contamination in the Ecuadoran Amazon; both were eventually dismissed. However, the lawsuit against Texaco is currently ongoing in Ecuador. Ellsworth, B. “Court Goes to Oil Fields in Ecuador pollution Suit,” *NY Times*, 27 August 2004, p. W1.
- 36 For more on the use of disaggregated statistical information and indicators, see Hunt, *op. cit.*, paras 59–84.
- 37 That is, there should be a close correspondence between the indicator and a specific aspect of the right to health under international law. For more on this, see Hunt, *op. cit.*, para. 68.
- 38 Internal codes of conduct and voluntary industry guidelines with respect to environmental and social issues, including health, may provide additional opportunities for securing accountability. See generally [www.business-humanrights.org](http://www.business-humanrights.org).
- 39 The author is very grateful to MingaPeru for information provided in this case study.



# Education rights

Duncan Wilson

Realization of the right to education can have a multiplier effect on the ability to realize other human rights.<sup>1</sup> Where education rights are respected, protected and fulfilled, the possibilities for self-realization of, for example, the rights to health,<sup>2</sup> work<sup>3</sup> and freedom of expression<sup>4</sup> will be significantly increased. Yet education is not intrinsically good. In multicultural societies, education can be either divisive or cohesive<sup>5</sup> as was recently shown during the 1990s by the central role education played in the instigation of genocide in Rwanda,<sup>6</sup> and in the conflict in the former Yugoslav Republic of Macedonia.<sup>7</sup>

Which of these ends education serves, depends on the extent of respect for minority and indigenous rights within education. As explained in this chapter, the scope of education rights extends beyond equal access to include the contents and means of delivery of education. The levels of governmental obligation being explained in human rights terms as availability, accessibility, acceptability and adaptability – ‘the 4-A scheme’.<sup>8</sup>

Since the inclusion of the right to education in the Universal Declaration of Human Rights (UDHR) in 1948 (Art. 26), it has been incorporated in binding international treaties including the ICERD (Art. 5(e)(v); ICESCR (Arts. 13 and 14); the ICEDAW (Art. 10); the CRC (28 and 29); and regional treaties in Africa,<sup>9</sup> the Americas<sup>10</sup> and Europe.<sup>11</sup> Education rights are also an important element of international law protecting minority and indigenous peoples’ rights and are found in a range of specific instruments.<sup>12</sup>

The right to education is to be fully realized progressively (moving as expeditiously as possible)<sup>13</sup> according to the maximum of the available resources.<sup>14</sup> Such available resources include those from the international community, which is obliged to offer assistance where able.<sup>15</sup> There is a presumption that any steps a government takes which have the effect of moving further away from full realization of the right to education are incompatible with its obligations,<sup>16</sup> and this would include fulfilling the right to education for minorities and indigenous peoples.

## Standards

### Minimum core obligations

The right to education, like other ESC rights, includes minimum core governmental obligations. These obligations include:

- ensuring the right of access to public educational institutions and programmes on a non-discriminatory basis
- ensuring that education conforms to the objectives set out in ICESCR Article 13(1)
- providing primary education for all
- adopting and implementing a national educational strategy which includes provision for secondary, higher and fundamental education
- ensuring free choice of education without interference from the state or third parties, subject to conformity with minimum educational standards.<sup>17</sup>

### Free and compulsory primary education – availability

Thus, the minimum core obligations include the duty to ensure that primary education is free and compulsory.<sup>18</sup> Where this has not been achieved, the state must develop plans and a reasonable time-frame.<sup>19</sup> The (former) UN Special Rapporteur on the Right to Education, Katerina Tomasevski, in her 2004 report found that even primary education is still not free in 91 countries.<sup>20</sup> ‘Free of charge’ means that fees should not be charged; indirect charges may also be incompatible with this obligation.<sup>21</sup>

States also have an obligation to take concrete steps towards achieving free secondary and higher education.<sup>22</sup> The Special Rapporteur has reported that this standard is under threat, as education is increasingly traded as a service.<sup>23</sup>

Ensuring that primary education is free and compulsory also has a significant gender aspect, as this obligation on the state removes delicate decision-making on the education of children from the private to the public sphere. It is for the state to take measures to encourage attendance.<sup>24</sup>

### Non-discrimination – accessibility

Minimum obligations include the obligation to ensure that access to education is non-discriminatory. A widespread form of direct discrimination in access to education is against non-citizens. This can have disastrous effects on the education of refugees, children of asylum seekers, and children of migrant workers.

International law is very clear on this point. The CRC extends protection to all children, making no distinction between citizens and non-citizens.<sup>25</sup> More specifically, both the Refugee Convention, and the Migrant Workers Convention state that children of refugees and children of migrant workers should have equal access to education.<sup>26</sup> Likewise, the Inter-American Commission on Human Rights has upheld the right of all to education, irrespective of citizenship.<sup>27</sup>

Human rights law requires not only that discrimination be prohibited, but that it be actively eliminated.<sup>28</sup> This requires a focus on direct obstacles to access and the disaggregation of enrolment and other data according to all internationally

prohibited grounds of discrimination. Eliminating such discrimination requires fulfilling the governmental obligation to encourage attendance,<sup>29</sup> notably by adapting education to ensure that it is in the best interests of all children,<sup>30</sup> including through promoting the culture, language and religion of minority and indigenous children.<sup>31</sup> To achieve this requires that representatives of minorities and indigenous peoples be present in participatory processes of designing, re-designing or re-thinking educational systems.<sup>32</sup>

Ensuring non-discrimination, and the promotion of equality through education leads to questioning segregation. The UNESCO Convention Against Discrimination in Education prohibits ‘establishing or maintaining separate educational systems or institutions for persons or groups of persons’, with some exceptions, notably for religious or linguistic reasons.<sup>33</sup> However, a common recommendation of bodies charged with monitoring state practice in realizing human rights obligations is to pursue integrated education.<sup>34</sup>

### Freedom of education – acceptability

An important element of the right to education is the guarantee of pluralism in education,<sup>35</sup> encapsulated in the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions,<sup>36</sup> and to establish schools outside the public education system (subject to state regulation to ensure that they reach minimum quality assurance standards).<sup>37</sup> The denial of these rights – including to minorities and indigenous peoples – is considered by UN bodies as a human rights violation. This right has been successfully defended before both regional<sup>38</sup> and national human rights bodies.<sup>39</sup>

In general, states do not have obligations to fund private schools equally with public schools.<sup>40</sup> Bodies monitoring state practice do occasionally require funding of private minority schools where these fill a gap in provision.<sup>41</sup> However, states are required to adopt special measures to pursue *de facto* equality.<sup>42</sup> The right to education can act as a multiplier: where it is realized, opportunities for realizing a range of rights are enhanced.<sup>43</sup> Special measures in education to this end should always be based on reasonable and objective criteria<sup>44</sup> (such as redressing historical marginalization), and should cease once the objective has been attained.<sup>45</sup> So, for example, special measures for education of the Roman Catholic minority in Canada, was no longer justified over one hundred years after adopted, as there was nothing to suggest that the Roman Catholic community remained in a disadvantaged position vis-à-vis other religious groups.<sup>46</sup>

### Rights-based contents of education – adaptability

Education should promote understanding among all ‘ethnic’ groups, as well as national, racial and religious groups,<sup>47</sup> and should be culturally appropriate in both

its form and substance, including curricula and teaching methods.<sup>48</sup> This aim has been developed in terms of minority and indigenous rights in the UNDM<sup>49</sup> (not a legally binding document) and in ILO's Indigenous and Tribal Peoples Convention (No. 169) (legally binding, but only for those states, mostly in Latin America and Scandinavia, which have ratified it). The ILO Convention, for example, requires that all sections of the national community, particularly those in most direct contact with indigenous peoples, should receive education to eliminate prejudices, and that text books should provide a fair, accurate and informative portrayal of their societies and cultures.<sup>50</sup> As the Committee on the Rights of the Child has outlined, this calls for a, 'balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference'.<sup>51</sup>

In furthering these aims, states should ensure that education materials, teacher recruitment and training,<sup>52</sup> and curricular development all promote intercultural education,<sup>53</sup> and adopt measures to combat abuses of education. As such, human rights bodies have called on Bahrain to include human rights education in the general curriculum to, '[develop] ... respect for human rights, tolerance, and ... religious and ethnic minorities';<sup>54</sup> [and] called on the Turkish authorities in Northern Cyprus to refrain from censoring Greek language textbooks;<sup>55</sup> and accepted the dismissal of a teacher in Canada for promoting anti-Semitism in the classroom.<sup>56</sup>

### A thorny issue – linguistic rights in education

Instruments aimed at the promotion and protection of the rights of minorities and indigenous peoples, as for general human rights instruments, are most hesitant on the right to first-language education. The only legally binding instrument specifically devoted to minority rights, the FCNM, recognizes, 'that every person belonging to a national minority has the right to learn his or her minority language'.<sup>57</sup> The right *to learn* a language is quite different from the right to learn *through* that language, and the provision continues to lay out a series of qualifications to the right to be 'taught the minority language *or* [to receive] instruction in this language'.<sup>58</sup> The ILO Convention outlines teaching indigenous children to read and write their mother tongue as an objective, rather than a right.<sup>59</sup>

Where learning the official language is essential to give children the opportunity later to integrate fully, have equal opportunities to advance to higher and further education and to seek employment, it is essential that they be given adequate opportunities for learning that language.<sup>60</sup> However, sound research indicates children learn best when they first learn through the medium of their first language. UNESCO, the lead UN agency on education, promotes bilingual education, not only because it gives the opportunity for multilingualism, but also because it permits children from minority and indigenous groups to learn alongside those of majority groups (latterly, if not initially).<sup>61</sup>

The UN Special Rapporteur on the Situation of Indigenous Peoples, Rudolfo Stavenhagen, points to some progress, as well as noting problems where bilingual and intercultural programmes have had inadequate resources and have not been complemented by sufficient or well-trained teachers. Success has been most profound where there is monitoring by civil society organizations.<sup>62</sup>

## Enforcement mechanisms

A key means of promoting minority rights in education is at the national level. This may include the national human rights institution.<sup>63</sup> Such institutions may consider individual complaints on the basis of the constitution, undertake investigation of apparent human rights abuses, and take class actions to judicially review government policies.

Where there is a need to seek international redress, there is the possibility to bring individual complaints under certain human rights treaties. At the regional level these include: the African Commission (and soon Court) on Human and Peoples' Rights; the Inter-American Commission and Court on Human Rights, (it is worth noting that the right to education is one of only two rights which permit individual communications under the San Salvador Protocol); the European Court on Human Rights; and the European Committee on Social Rights (which receives only collective complaints).

Today, one of the key international debates surrounding ESC rights is the extent to which they are 'justiciable,' that is whether they can be claimed, enforced and guaranteed in a similar way to civil and political rights. The justiciability of the right to education should be in no doubt. This extends to all elements of governmental obligations. Indeed constitutional and other courts have considered the acceptability of educational content in many states, including India, Japan, the Russian Federation and Venezuela, on grounds related to religious intolerance, historical misrepresentation and the promotion of militarism, and potential violence against the marginalized or vulnerable.<sup>64</sup> Getting involved in the work being done by many NGOs to establish a complaints mechanism under the ICESCR could be an important way to work towards strengthening the implementation of the right to education. UN treaty bodies which already receive individual complaints on aspects of the right to education are the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD).<sup>65</sup>

There is also the possibility to submit alternative or shadow reports, and engage in the review process under all relevant UN treaties, ICESCR, ICERD, and the CRC being of particular importance when it comes to the right to education.

## Guidelines for successful advocacy

Successful advocacy strategies depend on a range of factors. The previous section noted several possible enforcement mechanisms, but to that national or regional *political* bodies could be added. The European institutions, for example, have in recent years proved particularly fruitful for minority rights advocacy in the context of enlargement negotiations of the European Union.<sup>66</sup>

The two case studies presented in this chapter display a variety of tactics, which brought some degree of success in each instance. The case study from Croatia shows how individual members of a minority community, working in partnership with regional minority rights NGOs and an international human rights organization succeeded in raising concerns at the local, regional and international levels. Through litigation, and apparent diplomatic pressure from regional (political) monitoring mechanisms, as well as international human rights monitoring by a UN treaty body, the government adopted a plan to further the integration of minority children in education, the implementation of which all constituencies continue to monitor. It is not yet clear how the implementation of this plan will affect the individual case subject to litigation.

The second case study, from the Russian Federation, shows that minority rights in education can also be effectively defended by exposing prejudicial representation of minority cultures – in this case, minority religions. The strategy of the All-Russia Federation of Human Rights, in bringing a criminal case for incitement to racial hatred, seems to have significantly raised the profile of their claim and succeeded in effecting change in a relatively short period of time.

### Case study 1 – Segregation of Roma in Croatian primary schools

The government of Croatia estimates that there are around 9,000 Roma in the population, 8,000 of whom live in Medjmurje County.<sup>67</sup> Up to one-third of Roma children do not attend any educational institution.<sup>68</sup> Of those who are in the education system, 60 per cent in primary schools are reportedly in segregated classes,<sup>69</sup> of lower quality,<sup>70</sup> following a curriculum designed for children with developmental disorders.<sup>71</sup> This segregation is repeatedly justified on the basis of their lower proficiency in the Croatian language. It has also been reported, however, that justifications include 'hygiene', and an inability to interact with children of other ethnicities.<sup>72</sup> The institutionalization of this practice often results from protests of parents of non-Roma children who do not want their children to learn alongside Roma.<sup>73</sup> Research indicates that the impact of this segregation itself is that a majority of Roma children grow up without any interaction with non-Roma, feel excluded and face abuse at school.<sup>74</sup> UN and regional human rights monitors have 'expressed concern'.<sup>75</sup>

In his 2000 report, the Croatian Ombudsman noted the disturbing frequency of segregation, its roots in racial prejudice and its implications for further marginalization. Protests by the Deputy Ombudsman at governmental inaction to remedy this situation reportedly led to official calls for her removal.<sup>76</sup>

In April 2002, parents of 57 Roma children, assisted by the European Roma Rights Centre (ERRC)<sup>77</sup> filed a lawsuit in the municipal court claiming segregation in education on the basis of ethnicity. County officials responded by claiming that 200–300 lawsuits would soon be brought against Roma parents who refused to send their children to school.<sup>78</sup> Two levels of courts determined that the lack of Croatian language competence of the children, rather than their racial or ethnic origin, was the reason for their segregation. Despite alleged intimidation,<sup>79</sup> in December 2002, the families of 15 Roma children appealed to the Constitutional Court of Croatia, alleging that the segregation of Roma children violated constitutional rights to freedom from discrimination and the right to education. The case is still pending.

In May 2003, the complainants, supported by two minority rights NGOs, lodged a pre-application letter with the European Court of Human Rights pending appeal to the Croatian Constitutional Court in May 2003.

In this context, and in the face of the increasing attention the issue was gaining in the European institutions,<sup>80</sup> the Croatian government recently adopted a National Programme for Roma, including promoting pre-school education of Roma children. Amnesty International has however expressed concern at reports that this programme will be insufficiently funded.<sup>81</sup> The UN Committee on the Rights of the Child recommended that Croatia, ‘ensure the implementation of the National Programme for Roma, providing it with adequate human and financial resources and with periodic evaluation of its progress’.<sup>82</sup>

### Case study 2 – Disputed textbook in Russia

In June 2002, a Moscow-based NGO, the All-Russian Movement for Human Rights (MHR), filed a complaint with the Prosecutor General’s Office to undertake a criminal investigation into a textbook, *The Fundamentals of Orthodox Culture*. MHR alleged that the textbook, which was approved and recommended by the Coordination Council for interaction between the Education Ministry and the Russian Orthodox Church for use in public schools, incited ethnic hatred. The Prosecutor General’s Office forwarded the complaint to the Ostankino prosecutor’s office. A district prosecutor decided on 4 September 2002 not to launch a criminal investigation. The complainants reacted by appealing the refusal by the district prosecutor to the Meshchansky District Court.

Ten thousand copies of the textbook had been published for use in schools.<sup>83</sup> The complainants pointed to examples in the text that they alleged incited ethnic hatred: the book says that the Jews forced Pontius Pilate to crucify Jesus because 'they thought only about power over other peoples and earthly wealth', and asks students to consider why the Jews crucified Christ and cannot accept the kingdom of heaven. The book allegedly also attacks other religions, refers to non-Orthodox Russians as 'guests' and accuses them of 'not always behaving nobly in the traditionally Orthodox state'.<sup>84</sup>

In December 2002, the Meshchansky District Court ruled that the prosecutor's refusal to open a criminal investigation was illegal. However, the prosecutors again refused to launch an investigation, and the court upheld that second refusal on 24 March 2003. In May 2003, a Moscow city court struck down this decision and ordered that it be reconsidered.<sup>86</sup>

Both sides of this debate argued on the basis of human rights principles. Representatives of the Orthodox religion and the Coordination Council argued that:

*'If an Orthodox child thinks that only his faith is true, the Jewish child will consider that for his people only his faith is true ... the school should give each of them the right to an education in the spirit of those convictions that his family shares, and this right is recognized by international legislation'.<sup>87</sup>*

MHR argued that 'schools [should] teach children respect for both their own faith and the faith of their neighbours',<sup>88</sup> and that the textbook could incite anti-Semitism.<sup>89</sup> Although in theory the teaching of this text was to be voluntary, it was reportedly introduced as a compulsory text for all children in some regions.<sup>90</sup>

The MHR strategy of bringing a criminal case for incitement to racial hatred, rather than following an administrative procedure or an advocacy campaign, was intended to ensure that the issue attracted a lot of attention.<sup>91</sup> The aim was to ensure 'that an expert analysis be conducted' of the textbook.<sup>92</sup> The result was reportedly an out-of-court offer to remove the offending paragraphs from the textbook, and a political commitment to ensure that a second edition, called *Fundamentals of World Religions*, would include chapters commissioned by the various faiths.<sup>93</sup> The final outcome remains to be seen, although some districts will indeed use the text book on a voluntary course.<sup>94</sup>

## Notes

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- 13 CESCR General Comment No. 3, UN doc. E/1991/23, annex III, para 9, 1990.
- 14 See ICESCR Art. 2(1); CRC, Article 4; San Salvador Protocol, Article 1.
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- 16 *Ibid.*, para. 9.
- 17 CESCR General Comment No.13, *op.cit.*, para. 57.
- 18 ICESCR, Art. 13 (2)(a), CRC, Article 28 (1)(a).
- 19 ICESCR, Art. 14 and CESCR General Comment No.11, on Plans of Action for Primary Education, UN doc. E/CN.12/1999/4.
- 20 'Annual Report of the Special Rapporteur on the Right to Education', UN doc. E/CN.4/2004/45, para. 27.
- 21 CESCR General Comment No.11, *op.cit.*, para. 7.
- 22 CESCR General Comment No.13, *op.cit.*, para. 14.
- 23 'Annual Report of the Special Rapporteur on the Right to Education', UN doc.

E/CN.4/2002/60.

- 24 CRC, Article 28 (1) (e) states, 'take measures to encourage regular attendance at schools and the reduction of drop-out rates'.
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- 47 ICESCR, Art. 13(1), General Comment No. 13, para. 4.
- 48 *Ibid.*, para. 6.
- 49 UNDM, Art. 4 (4).
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- 52 CERD, Concluding Observations on Croatia, UN doc. A/57/18 (2002) 24; the former Yugoslav Republic of Macedonia, UN doc. A/52/18 (1997) 67; CRC Committee, Concluding Observations on Greece, UN doc. CRC/C/114 (2002), 25; Guatemala, UN doc. CRC/C/108 (2001) 47.
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# Labour rights

Lee Swepston

Minorities and indigenous peoples<sup>1</sup> are entitled to the same economic, social and cultural rights as all other people, but in practice they have a great deal of difficulty gaining access to those rights. In the world of work, there may be direct or indirect discrimination by potential employers, they may have reduced access to the education and the training necessary to become qualified, and they may encounter other specific difficulties when they do find jobs.

## Standards

### Basic workers' rights

There are two main sources of workers' rights in international law – the general protections offered under United Nations instruments, and the more specific and detailed rights found in the standards adopted by the International Labour Organization (ILO).

### The UN system

The UDHR contains a number of provisions on workers' rights that apply to minorities and other parts of the population alike. Certain parts of the UDHR concentrate directly on labour matters: Articles 2 (prohibition of slavery or servitude), 22 (right to social security), 23 (right to work, to freedom from discrimination at work, to just and favourable remuneration and to trade unions) and 24 (right to rest and leisure).

The UDHR is not a convention that countries can ratify, thereby undertaking binding and specific obligations. Several of the UN conventions do have provisions on work-related rights that can be the subject of binding obligations. The one most applicable to work is the ICESCR. Articles related to rights at work, include Art. 6 (the right to work); Art. 7 (the right of everyone to just and favourable conditions of work, including remuneration, safe and healthy working conditions, equal opportunity for promotion in employment, and rest, leisure and limitation of working hours); Art. 8 (freedom of association and the right to establish and join trade unions); Art. 9 (right to social security); and Art. 10 (rights related to the family, including working mothers and prevention of exploitation of children). Art. 13, protects the right to education, and includes technical and vocational training.

The ICCPR includes a provision on trade union rights (Art. 22). In Article 8 it prohibits slavery, the slave trade, and all forms of forced and compulsory labour. A provision of particular importance to minorities and indigenous peoples is Article 27, which protects the rights of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The ICERD Article 5 obliges ratifying countries to guarantee the right to equality before the law with regard to the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration.

Other UN instruments such as the ICEDAW, should not be forgotten. It is increasingly accepted that discrimination multiplies if one is, for instance, both indigenous and a woman. All the general human rights instruments of the UN are applicable to work-related situations, and to discrimination.

### The ILO system

The ILO's mission is to promote opportunities of men and women to obtain decent and productive work.<sup>2</sup> The ILO promotes fundamental rights and principles at work and their application, and pays particular attention to groups that are socially or economically disadvantaged in relation to the society in which they live. The protection of ethnic minorities in the world of work, and of indigenous and tribal peoples, is of central concern.

ILO standards emphasize the need to ensure equality of all. This approach is built on the basis of the rights and dignity of the individual.<sup>3</sup> However, ILO standards also take into account the necessity to promote and protect minority rights by addressing the situation of such groups as a whole and aim to give those affected a voice in this process. ILO standards on non-discrimination and equality, migrant workers and indigenous and tribal peoples play a major role in protecting minorities, but the fundamental human rights Conventions of the ILO concerning forced labour, freedom of association and collective bargaining, and child labour are also relevant.

In 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work as a promotional instrument. It requires all members, even if they have not ratified the Conventions to respect, promote and realize the fundamental rights that are the subject of those Conventions, including:

- (a) freedom of association and the effective recognition of the right to collective bargaining
- (b) the elimination of all forms of forced or compulsory labour
- (c) the effective abolition of child labour
- (d) the elimination of discrimination in respect of employment and occupation.<sup>7</sup>

A system of annual global reports has been established to report on worldwide trends and tendencies for each of the four rights.

### **ILO standards and minority groups**

Non-discrimination and equality are the first principles of the ILO with regard to minorities and other disadvantaged groups. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and its accompanying Recommendation No. 111 are the main ILO instruments as regards discrimination in the world of work. The grounds of discrimination prohibited by Convention No. 111 include race, colour, sex, religion and national extraction, all of which are relevant to the protection of minorities. Article 1 defines discrimination as ‘any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity and treatment in employment and occupation’, including access to vocational training, access to employment and to particular occupations, as well as terms and conditions of employment. Recommendation No. 111 expands the list of areas in which equality should be ensured, including access to vocational guidance and placement services, advancement, security of tenure and equal remuneration for work of equal value.

Several elements of the definition of discrimination contained in Article 1 of the Convention are important to the effective protection of minority workers.<sup>4</sup> Convention No. 111 applies to any distinction, exclusion or preference, both those that are the result of legislation and those that arise in practice. Convention No. 111 also covers indirect discrimination as a result of measures or practices that result in inequality of opportunity or treatment.<sup>5</sup> The Committee of Experts (the ILO’s main supervisory body) has, for instance, asked governments to eliminate dress codes that it considered discriminatory against members of religious minorities.

Under Convention No. 111 the state must promote the development of the basic conditions that enable all to benefit from equal opportunities to obtain training and employment. The Convention allows for special measures in respect of underprivileged groups, including affirmative action in favour of ethnic minorities.<sup>6</sup> The protection from discrimination in the Convention applies to all workers, including those who are not citizens of the country in which they live.

The Committee of Experts, when examining periodic reports by governments on ratified Conventions, has addressed a wide range of issues related to the protection of minority workers. In many cases, the Committee has followed a particular minority situation over years, requesting the government concerned to provide information on measures taken to ensure compliance with the Convention and on their impact on the situation of minorities. Based on its findings, it can ask the particular government to take corrective action. The Committee has also pointed

to higher unemployment rates of ethnic minorities, including minority women, and their disproportional lack of training and educational opportunities and their overrepresentation in low-paid jobs.

The Committee regularly requests states to collect and make available statistical information on the participation of minorities in education and the labour market; the Committee views the availability of knowledge about the situation of minority groups as a crucial element concerning the application of the Convention. For example, the government of Brazil was requested to provide indicators and statistical data on the impact of its equal opportunity policy on the distribution of the indigenous, black and *mestizo* population in the various sectors of economic activity and at different occupational levels. The ILO then put some programmes into effect to assist the government achieving its equal opportunity objectives.

The Committee of Experts has stressed that the elimination of discrimination in employment and occupation on all grounds is critical to sustainable development. It tends to examine discrimination against minorities in the world of work, not as an isolated phenomenon, but as an aspect of the broader social, cultural and economic context. For example, based on a trade union complaint of 1989, the Committee of Experts addressed the attempts to suppress the cultural identity of the Turkish minority in Bulgaria, particularly the compulsory change of names and the prohibition of using the Turkish language.

### **ILO standards and indigenous peoples**

Indigenous peoples are usually – but not always – minorities. All the comments about protection of the rights of minorities apply also to indigenous peoples. In addition, the rights spelt out below for indigenous and tribal peoples may be valid goals also for other ethnic and religious minorities, especially if they are quite separate from the dominant population.

There is only one international convention<sup>7</sup> that covers all aspects of this subject: the ILO's Indigenous and Tribal Peoples Convention, (No. 169), which promotes respect for the cultures and institutions of indigenous peoples and presumes their right to existence within national societies, to establish their own institutions and to determine their own path of development. Under the Convention, governments have to consult with the peoples concerned with regard to measures that may directly affect them. Indigenous and tribal peoples have the right to participate in decision-making processes regarding policies and programmes that concern them.<sup>8</sup>

Convention No. 169 is not primarily a workers' rights convention, except insofar as most indigenous peoples are workers. It does promote the inclusion of members of these peoples in vocational guidance and training, as well as education, that is adapted to their needs and will help them continue and adapt their

traditional economic activities. Its land rights provisions are designed to ensure that they can retain their traditional lands and natural resources. This is meant to help preserve their traditional ways of life and economic patterns. Both these sets of provisions thus contribute to improving the situation of indigenous and tribal peoples with regard to work – but work that is often outside the formal economy.

When indigenous peoples come into contact with the formal economy, they are very often subject to racial discrimination and they may have the additional disadvantage of different languages, and less access to education and training. Article 20 of Convention No. 169 therefore requires ratifying states to ‘adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples’. These include enhanced protection from discrimination in the workplace, ensuring that they understand the rights they have under national law, and protecting them against unsafe working conditions and sexual harassment. Special provision is made to ensure that they benefit from labour inspection services to protect these rights.

### **Migrant workers**

Many migrant workers are members of indigenous and other ethnic minorities. The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has supplemented earlier ILO standards on the subject. Under the ILO’s Migration for Employment Convention (Revised), 1949 (No. 97), state parties have the obligation to apply to immigrants lawfully in their territory, treatment no less favourable than that which they apply to their own nationals (Art. 6). The Convention provides for equality of opportunity and treatment in respect of employment and occupation and associated rights. State parties to the ILO’s Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) undertake to respect the basic human rights of all migrant workers. Article 12 provides that state parties should assist migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin.

### **Other basic workers’ rights: forced labour**

Minority and indigenous groups are more vulnerable than other parts of the population to forced labour practices. Slavery is prohibited in the League of Nations’ Slavery Convention of 1926, and the UN’s 1953 Supplementary Convention on the Abolition of Slavery – though neither of them has a supervisory mechanism. Forced labour and slavery are also prohibited in the ICCPR (Art. 8).

In the ILO, these practices are prohibited by the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105).

The supervisory system of the ILO often finds that those most subject to forced labour are ethnic minorities and indigenous and tribal peoples. Article 1(e) of Convention No. 105 places on state parties the explicit obligation to suppress and not to make use of any form of forced or compulsory labour. The Global Report 2001 on stopping forced labour under the follow-up to the 1998 Declaration, pointed out that the coincidence of traditional forms of slavery with ethnic divisions suggests a linkage between eliminating forced labour and eliminating discrimination in societies.<sup>9</sup> Reports of forced labour on agricultural plantations in West Africa have included indications that children from particular ethnic groups are particularly affected. In the case of Myanmar, the burden of forced labour appears to be particularly great for non-Burmese ethnic groups and for the Muslim minority.<sup>10</sup>

### Child labour

Child labour affects minority groups and indigenous peoples to a greater extent than the majority of the population. In northern Europe, child labourers are likely to be of African or Turkish origin; in Canada, they tend to be of Asian decent; and in Brazil, from indigenous groups.<sup>11</sup> Child labour practices perpetuate poverty and inequality along ethnic lines by denying children from vulnerable groups the opportunity to acquire the capabilities needed in productive life. This link has been reaffirmed recently in the Durban Declaration and Programme of Action.<sup>12</sup>

The UN Convention on the Rights of the Child contains a prohibition of economic exploitation of all children (Art. 32). The ILO Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182), provide for the elimination of child labour in respect to *all* persons. Recommendation No. 146, paragraph 2(c), provides that policies for the elimination of child labour should include the development and progressive extension of social security and family welfare measures. Paragraph 3 of Recommendation No. 146 calls for particular attention to the needs of migrant children. Article 7(d) of Convention No. 182 requires effective measures to identify and reach out to children at special risk. Article 6 of Convention No. 182 provides that programmes of action to eliminate child labour shall be designed and implemented, taking into consideration the views of concerned groups. Recommendation No. 190, paragraph 2, recommends that such programmes of action should be designed and implemented in consultation with concerned groups. They should also aim at identifying and working with communities where children are at special risk and at informing and mobilizing concerned groups. It appears that organizations of minorities and/or those representing their interests would qualify as 'concerned groups' and that 'communities' includes indigenous or tribal communities or other minority communities.<sup>13</sup>

## Freedom of association and collective bargaining

The right to freedom of association and collective bargaining is one important tool to ensure the participation of minority workers and migrant workers in employment-relevant decision-making. Article 2 of the ILO's Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) is designed to protect the right of workers and employees, 'without distinction whatsoever', to establish and join organizations of their own choosing. The notion of 'without distinction whatsoever' is meant to prohibit discrimination,<sup>14</sup> not only for workers in the private sector of the economy but also for civil servants and public service employees in general.<sup>15</sup> The Committee of Experts stated in its 1994 general survey that the right of all workers to join and establish organizations implies that anyone legally residing in the territory of a given state benefits from trade union rights provided by Convention No. 87. It also considered that restrictions in this respect may prevent migrant workers from playing an active role in the defence of their interests.<sup>16</sup>

The ILO has drawn attention to specific bans on non-nationals from joining or forming unions, or prohibitions or excessive restrictions on holding office within an occupational organization.<sup>17</sup> Legislation should be made flexible so as to permit foreign workers access to trade union posts after a reasonable period of residency in the host country.<sup>18</sup> It should also allow foreign workers who are not nationals of the host country to serve on joint enterprise committees after a reasonable period of residence.

Despite the fact that ILO standards on freedom of association and collective bargaining are addressed to states, social partners bear a certain responsibility as well to ensure that they are open to minority workers and their concerns. The 1952 ILO Conference resolution concerning the independence of the trade union movement states that a condition for such independence is that trade unions be constituted as to membership without regard to race, national origin or political affiliation and pursue their objectives on the basis of solidarity and economic interests of all workers.<sup>19</sup>

## Enforcement mechanisms

### The ILO

Unlike the UN enforcement mechanisms described at various points throughout this guide, in the ILO, all Conventions are supervised under the same procedures. Supervision of the application of ratified Conventions takes place mainly through the examination of government reports by the ILO Committee of Experts on the Application of Conventions and Recommendations. Reports on the fundamental human rights Conventions are examined every two years,

and others at five-year intervals. Workers' and employers' organizations can make observations on the application of Conventions, which are brought to the attention of the Committee of Experts, which uses the information to supplement periodic reports of governments.<sup>20</sup> Workers' and employers' associations can also file representations (a form of complaint) against a state under Art. 24 of the ILO Constitution. If declared receivable, these are examined by a committee set up by the Governing Body to determine whether a violation has occurred. The Governing Body normally requests the government concerned and the Committee of Experts to follow up on its decisions within the regular reporting mechanism.

The ILO has received several representations under Art. 24 of the ILO Constitution by trade unions alleging violations of Convention No. 169, which demonstrates the practical relevance of this Convention for the protection of indigenous and tribal peoples and other minorities. The problems raised in these representations tend to indicate a lack of effective involvement of these peoples in decisions taken at the national level that affect them, particularly in relation to land rights and development issues. The ILO supervisory bodies have urged governments to take measures to involve indigenous and tribal peoples in decision-making processes by way of proper consultation, including in the design and implementation of policies and programmes relating to them.

### **Guidelines for successful advocacy**

There are many ways in which indigenous and minority representatives and advocates can promote their interests in international organizations, but it is necessary to learn the procedures and the possibilities of each one.

At the national level, non-governmental organizations can make known inside the country the rights contained in international standards and the decisions made by international bodies on how their own country is performing. Comments by the ILO Committee of Experts or the UN treaty bodies often contain a tremendous amount of information, which can be a powerful lobbying tool.

International treaties are often incorporated into national law, according to the national constitution. If the ICCPR and ICESCR are formally part of the legal structure of a country, or if ILO Convention No. 169 becomes national law because of ratification, this means they can be invoked in court even where national laws have not yet incorporated their provisions. The way of taking account of international standards is not the same in every country. Training courses for lawyers, judges and advocates are sometimes organized by the UN, the ILO, and NGOs. UN and ILO training materials are available through their websites or local offices.

International organizations carry out a great deal of development assistance – training minority and indigenous groups in their rights and helping them to achieve economic development – and often engage national organizations to help them. They can fund projects, and work in partnership with national research or development organizations.

The standards provide the international rights foundation for protecting minorities and indigenous peoples. However, they require solid and concentrated action by national and local authorities, and their implementation will not be effective unless the groups themselves organize for their own protection and demand action of national authorities. They can increase their visibility by appealing to the international community, but will have also to increase their political impact and influence in the countries where they live.

### **Complaints**

The UN allows NGOs to bring complaints to their bodies, attend their meetings, and make statements. The ‘1503’ procedure of the CHR allows individuals and NGOs to bring complaints of patterns of human rights abuse. The local office of the UN and the UN website can advise on how to do this. Publicizing the fact that a complaint has been submitted in the national media will increase impact.

In the ILO system, only a trade union or an employers’ organization can make a formal complaint. Other NGOs can form alliances with workers’ organizations to bring matters to the ILO’s attention, or contact the local affiliate of one of the international trade union bodies, such as the International Confederation of Free Trade Unions, or contact that organization direct in Brussels.<sup>21</sup>

### **Submitting information**

The UN allows a wide range of NGOs to submit information either to so-called ‘charter-based bodies’ (e.g. Special Rapporteurs) or to the treaty bodies established to supervise the different treaties.

The Permanent Forum on Indigenous Issues, created in the UN in 2001, has a special mandate to coordinate the work of the international system on indigenous issues.<sup>22</sup> Information can also be submitted to the Working Group on Indigenous Populations, a working group of the UN Sub-Commission on Protection and Promotion of Human Rights, through the Office of the High Commission for Human Rights. Finally, as has been noted throughout this guide, information can be submitted to the Special Rapporteurs, including the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.

Information on other minorities may be submitted to the Special Rapporteur on Contemporary Forms of Racism, the UN Working Group on Persons of African Descent, or the UN Working Group on Minorities.

Organizations can supply information directly to the ILO secretariat. The Committee of Experts and the Conference Committee have emphasized the value of such comments, if they contain verifiable information such as laws, regulations or other official documents.

There is a suggestion (not a requirement) that governments consult with indigenous and tribal peoples' traditional organizations in preparing their reports on Convention No. 169. Some governments, such as Norway, have done so, and some indigenous organizations have sent shadow reports to the Committee of Experts.

## Towards better minority protection

Ensuring equality in respect of access to education and training, access to employment, and terms and conditions of employment is fundamental in promoting and protecting the human rights at work of members of indigenous and minority groups. Inequality has serious consequences for minority workers and their families, which can lead to social exclusion and marginalization, and even to conflict. This is confirmed by the ILO's experience and is increasingly being recognized by the international community.<sup>23</sup>

The principles of non-discrimination and equality, as contained in relevant ILO instruments, are effective tools in protecting minorities because they require substantive rather than formal equality, and provide for the prohibition of indirect as well as direct discrimination. ILO standards address the situations of minorities as a group, striking a balance between the need for individual and collective protection. Active participation of social partners is envisaged by ILO instruments and the possibility of workers' and employers' organizations to submit observations and complaints of a collective nature, allows the ILO to take up discriminatory situations as a whole, which is crucial for tackling structural discrimination. However, the ILO can also request states to take compensatory measures in respect of individuals who have suffered discrimination. The Committee of Experts has also made it clear that Convention No. 111 requires governments to provide for accessible procedures and institutions to remedy individual cases of discrimination.

There is a continuing need for better implementation. ILO research indicates that hidden discrimination against ethnic minorities in employment and occupation is widespread.<sup>24</sup> It is crucial that measures are undertaken to identify and remedy indirect, structural and hidden discrimination against minority groups. Targeted measures to increase the opportunities of minorities in education and training, as well as employment, are essential. A condition for the establishment of policy and programmes based on the rights of minorities and their real needs is the availability of reliable data and research. Equality training for 'gatekeepers' in the labour market institutions has been identified as key for employment equality.

Increased efforts are also required to develop participatory approaches to minority protection in employment. Special attention should be paid to multiple discrimination against minority women. Discrimination against minorities is often linked to racism, xenophobia and related intolerance, so the ILO promotes training and awareness-raising for greater tolerance and respect within societies.

### Case study – Teaching Romanian and minority languages

In addition to the Committee of Experts which is charged with regular supervision of ILO Standards, the bodies set up under the ILO's special procedures have also frequently dealt with situations of specific minorities. A landmark case concerning Romania led to the adoption, in 1991, of a report of the Commission of Inquiry set up under Article 26 of the ILO Constitution to examine the observance of Convention No. 111. The report contains important indications concerning the applicability of Convention No. 111 to the situation of minorities and the obligations of state parties in this context. The Commission of Inquiry found that the government should dismantle all instruments of the policy of assimilation and discrimination, and that it should adopt a language policy that would meet the cultural and economic needs of minorities, including through an appropriate balance in the teaching of Romanian and minority languages so that all citizens master the Romanian language, while enabling minorities to engage in trades and professions using their own language. The Commission also decided that the situation of the Roma should be improved by means of an integrated programme drawn up in collaboration with their representatives, covering education, employment, housing, and other elements necessary to their progress. The Committee of Experts continues to follow Romania's progress in improving the situation of Roma in the labour market.

### Notes

- 1 The ILO uses the term 'indigenous and tribal' instead of 'indigenous' alone as the UN does. This indicates that the issue being addressed is not chronological priority in a given area – who got there first – but rather a particular form of social organization.
- 2 ILO, *Decent Work*, Report of the Director-General to the 87th session of the International Labour Conference, 1999.
- 3 Declaration of Philadelphia, Article II.a – added to the ILO Constitution in 1946.
- 4 For more details on these features of Convention No. 111 see ILO, 'Equality in Employment and Occupation', General Survey by the Committee of Experts, 75th session of the International Labour Conference, 1988.
- 5 An example of indirect discrimination would be a requirement that all police wear

- helmets, imposed without discriminatory intent. This would have the effect of discriminating against Sikh policemen, who must wear turbans and thus cannot wear helmets.
- 6 See Hodges, J. and Raskin, C. (eds), *Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities*, Geneva, ILO, 1997.
  - 7 An earlier convention adopted by the ILO on behalf of the UN system covered the subject until the adoption of Convention No. 169: the Indigenous and Tribal Populations Convention, 1957 (No. 107) was closed to further ratifications when Convention No. 169 came into force in 1991. Convention No. 107 remains in force for several countries that have not ratified the newer convention.
  - 8 As of October 2004, the following 17 states have ratified ILO 169: Mexico, Norway, Brazil, Costa Rica, Colombia, Denmark, Ecuador, Fiji, Guatemala, The Netherlands, Dominica, Peru, Bolivia, Honduras, Venezuela, Argentina and Paraguay.
  - 9 ILO, *Stopping Forced Labour*, global report under the follow-up to the ILO Declaration on Fundamental Rights and Principles at Work, 2001, paras 49, 57–62, 135.
  - 10 *Ibid.*
  - 11 ILO, *A Future without Child Labour*, global report under the follow-up to the ILO Declaration on Fundamental Rights and Principles at Work, 2002, para. 162.
  - 12 ‘Report of World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance’, Durban, 31 August–8 September 2001. Declaration and Programme of Action, A/CONF/189.12, esp. para. 74.
  - 13 See ILO records of proceedings, International Labour Conference, 87th session, 1999, report of the Committee on Child Labour, para. 143.
  - 14 Hodges-Aeberhard, J., ‘The right to organise in Article 2 of the Convention No. 87. What is meant by workers “without distinction whatsoever”?’, *International Labour Review*, vol. 128, No. 2, 1989, p. 177.
  - 15 ‘Digest of Decisions and Principles of the Freedom of Association Committee’, ILO, 4th edn, Geneva, 1996, para. 205. See also Gravel, E., Duplessis, I. and Gernigon, B., *The Committee on the Freedom of Association: Its Impact over 50 Years*, Geneva, 2001, p. 32.
  - 16 ‘Freedom of Association and Collective Bargaining’, general survey by the Committee of Experts, ILO, 81st session, 1994, para. 63.
  - 17 ILO, *Your Voice at Work*, global report under the follow-up to the ILO Declaration on Fundamental Rights and Principles at Work, 2000, para. 78. See also ILO, ‘Freedom of Association and Collective Bargaining’, *op. cit.*, paras 61–63.
  - 18 ILO, ‘Digest of Decisions’, *op. cit.*, paras 368, 382.
  - 19 ILO, ‘Freedom of Association’, *op. cit.*, App. II, para. 4.
  - 20 The Committee of Experts has also been using information on minority matters from reports of other international bodies, such as reports of the special procedures (eg.: Special Rapporteurs) or the Council of Europe.
  - 21 Visit [www.icftu.org](http://www.icftu.org).
  - 22 Visit [www.un.org/esa/socdev/unpfii](http://www.un.org/esa/socdev/unpfii).

- 23 Vienna Declaration and Programme of Action, UN doc. A/conf.157/24, 1993; Durban Declaration and Programme of Action, *op.cit.*, para. 48.
- 24 Zegers de Beijl, R. (ed.), *Documenting Discrimination against Migrant Workers in the Labour Market: A Comparative Study of Four European Countries*, 2000; ILO, *Ethnic Minorities in Central and Eastern Europe – Guidelines and Recommendations Promoting their Employment*, ILO-CEET Report No. 19, 1997, p. 8.



# Cultural rights

Fergus MacKay

Culture manifests itself in many forms and is embedded in the daily practices and knowledge of minorities and indigenous peoples. It includes the duties and obligations that are necessary for social life to continue and is fundamental to the collective identity and the distinctiveness of the group. Because of this relationship between culture and collective and individual identity, social cohesion and daily life, cultural rights are particularly important guarantees for indigenous peoples and minorities. They cumulatively protect the survival and continued development of indigenous and minority collectivities. Indeed, acts and omissions detrimental to indigenous peoples' 'ethnic identity and against development of their traditions, their language, their economies, and their culture' – have been deemed to violate human rights 'essential to the right to life of peoples'.<sup>1</sup>

## Standards

As culture encompasses a wide range of beliefs, values and practices that are intrinsic to most aspects of life, the right to culture has a broad scope. Among others, subsistence rights, rights to lands and resources, burial rites and family rights have all been determined to fall under the right to culture. Additionally, cultural rights are interconnected with and are relevant to the implementation of a range of other rights. Implementation of the right to education, health and housing, among others, requires that services be culturally appropriate and take into account traditional practices and values.<sup>2</sup> Both the HRC and the CESCR also have begun to examine the (highly important) interrelationship between cultural rights and the right to self-determination (Article 1 of the Covenants).<sup>3</sup>

Article 15(1) of the ICESCR guarantees the right of all persons to 'take part in cultural life' and to benefit from the 'moral and material interests of any scientific, literary or artistic production' authored by them, which raises the possibility of protection of traditional knowledge and intellectual and cultural heritage rights under the Covenant, as well as in domestic laws implementing the Covenant.<sup>4</sup> Article 15(2) provides that states must take steps to achieve the full realization of the right to culture. Other international instruments, both binding and non-binding, also recognize the cultural rights of minorities and indigenous peoples. Article 27 of the ICCPR, for instance, protects persons belonging to minorities (and indigenous

peoples) in community with other members of their group from denial of their right to enjoy their culture, as does Art. 30 of the CRC, further elaborated in the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. CRC Art. 30 and ICCPR Art. 27 reflect a general norm of international law protecting indigenous peoples and minorities from 'denials' of their right to enjoy their cultures and therefore are binding on states irrespective of whether they have ratified the treaties.<sup>5</sup>

As discrimination is often an underlying cause for violation of cultural rights, ICERD is also highly relevant.<sup>6</sup> ICERD explicitly recognizes cultural rights, both alone and in conjunction with a series of other rights (right to property and inheritance, for instance). It also protects the rights of groups in addition to individuals. A number of UNESCO Declarations also recognize cultural rights and their relationship to the prohibition of discrimination (e.g. the 1978 Declaration on Race and Race Prejudice and the 2001 Declaration on Cultural Diversity). Finally, ILO's Indigenous and Tribal Peoples Convention (No. 169) contains numerous articles that explicitly and implicitly protect cultural rights.

At the regional level, cultural rights are guaranteed directly and indirectly in all of the instruments of the Inter-American system; the African Charter on Human and Peoples' Rights guarantees cultural rights both to individuals and collectively to peoples; and cultural rights are also protected under the European Convention on Human Rights (indirectly), the 2000 Charter of Fundamental Rights of the European Union (Art. 22; by implication) and, although in relatively weak terms, the European Framework Convention for the Protection of National Minorities (FCNM). While the FCNM's provisions may be considered weak, the Convention's Advisory Committee has nonetheless interpreted its provisions expansively.

UN and regional human rights bodies have developed substantial jurisprudence on cultural rights in the case of minorities and indigenous peoples.<sup>7</sup> The HRC's jurisprudence is the most detailed, setting out the content and contours of the rights of minorities and indigenous peoples under Article 27.<sup>8</sup> Substantively, this includes, among others: the rights of persons to engage in economic and social activities which are part of their culture; protection from forcible relocation; land and resource rights; guarantees against severe environmental degradation; and protection of sites of religious or cultural significance.<sup>9</sup> CERD has called on states to 'recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the state's cultural identity and to promote its preservation; [and to] [e]nsure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs...'.<sup>10</sup> The Committee on the Rights of the Child has concluded that states are obligated to guarantee the rights of children under the Convention 'including those rights related to minority populations and indigenous peoples',<sup>11</sup> and, in 2003, it elaborated on the rights of

indigenous children in a specific recommendation.<sup>12</sup> The CESCR has provided some guidance in its Concluding Observations and elsewhere as to how the Covenant applies to indigenous peoples and minorities. It has recognized the importance of cultural rights for individual and collective identity, the relationship between cultural rights and a variety of other rights, such as land and resource rights, and appears to support the proposition that Article 15 can also protect collective rights in addition to individual rights.<sup>13</sup>

The Inter-American Commission on Human Rights (IACtHR) and the Inter-American Court of Human Rights (IACHR) have paid a great deal of attention to the cultural rights of minorities and indigenous peoples, and especially the interdependency of cultural rights and territorial rights. The Court has also assessed cultural rights in relation to definitions of family, territorial rights and burial customs, and has generally highlighted the importance of taking into account the customs of the indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights (ACHR), including for the purposes of reparations.<sup>14</sup>

Turning to the European system, under the ECHR, in *G and E v. Norway*, a case involving indigenous peoples (Sami), the European Commission recognized that under Article 8 (which protects the right to respect for family and private life), 'a minority group ... [is] in principle, entitled to claim the right to respect for the particular lifestyle it may lead ...'.<sup>15</sup> The Advisory Committee on the FCNM has found that land rights are of 'central relevance to the protection of the culture and identity' of indigenous peoples,<sup>16</sup> and traditional economic and social activities require protection as does the environmental quality of indigenous territories in relation to cultural rights.<sup>17</sup> With regard to minorities, it has repeatedly stressed cultural rights and their relationship to other rights such as education and language, and related participation rights.<sup>18</sup>

Additional standards are being developed that further elaborate cultural rights, particularly in the case of indigenous peoples. Both the UN and the Organization of American States (OAS) are presently in the process of approving declarations on the rights of indigenous peoples that include numerous guarantees for cultural rights. The African Commission on Human and Peoples' Rights recently concluded a study on indigenous peoples in Africa, which placed much emphasis on cultural rights.<sup>19</sup> Human rights standards aimed at the private sector, particularly transnational corporations (TNCs), include guarantees for the cultural rights of minorities and indigenous peoples.<sup>20</sup> Obligations to respect these rights are incumbent on both the TNCs themselves, although this area of law is still developing, and upon states, which are required to exercise due diligence to ensure that TNCs respect rights and are held accountable for violations.<sup>21</sup>

International development agencies and international financial institutions have also recognized that cultural rights require protection in the projects they fund,

particularly with regard to indigenous peoples. The United Nations Development Programme (UNDP) has the most detailed and rights-based policy statement.<sup>22</sup> The policies of the World Bank<sup>23</sup> and Asian Development Bank<sup>24</sup> also contain some degree of protection. The Inter-American Development Bank is presently drafting a policy on indigenous peoples that recognizes a range of cultural rights.<sup>25</sup> These organizations have not adopted specific policies applying to minorities, although both the World Bank and Inter-American Development Bank have applied policy guarantees related to indigenous peoples, to Afro-American communities in Latin America and the Caribbean. The UNDP is presently drafting a policy on minorities that will apply to its projects.

As a general principle, the right to culture entails both negative and positive obligations. Negative in the sense of the obligation to respect cultural rights they shall not be denied; and positive insofar as states are required to provide resources and take other measures to guarantee and protect the exercise of cultural rights.<sup>26</sup> There are also limits imposed on cultural rights by other human rights. The HRC has stated that ‘none of the rights protected under Art. 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant’.<sup>27</sup> Under ICEDAW (Art. 5), as well as other conventions, states are obligated to modify or prohibit traditional or cultural practices harmful to women.<sup>28</sup> Much of the international jurisprudence on cultural rights counts the extent to which indigenous peoples and minorities were consulted and participated in decision-making as an important criterion in assessing the existence and extent of violations.<sup>29</sup> In the case of indigenous peoples, the requirement of free, prior and informed consent is increasingly employed as the appropriate standard of participation.<sup>30</sup>

## Enforcement mechanisms

The UN is presently discussing an optional protocol to the ICESCR that, in its present form, will permit individuals and groups to file complaints concerning perceived violations of the rights guaranteed therein, potentially including violations of the right to self-determination.<sup>31</sup> Discussions and negotiations are ongoing and it is likely be several years before this mechanism is adopted and opened for states to the Covenant to ratify.

The World Bank established an enforcement mechanism known as the Inspection Panel in 1993 to receive complaints concerning compliance with its policies.<sup>32</sup> Similar mechanisms have also been established by the Inter-American and Asian Development Banks.<sup>33</sup> The Inspection Panel’s Operating Procedures permit two or more individuals who allege harm caused by violations of Bank policies to submit claims if they have been unable to resolve the matter with Bank

staff and the project funds have not yet been substantially disbursed.<sup>34</sup> As a consequence of the last condition, the Panel may not evaluate Bank projects that are closed. After a claim has been received, the Panel assesses its eligibility, conducts a preliminary evaluation and makes recommendations to the Board of the World Bank as to whether a full investigation is required. If the Board approves, a full investigation is conducted, the Panel presents its findings, Bank management proposes a plan to remedy violations and, finally, the Board announces an action plan to resolve the policy violations. The Panel's recommendations however are advisory only and it cannot order compensation or issue interim relief. In practice, the effectiveness of the Panel as a remedy for violations of Bank policies (and the cultural rights implicit therein) has been extremely limited: processing of claims has been unduly complicated and drawn out, often highly politicized, and the Bank's Board has not agreed to full investigations in many cases.<sup>35</sup> For more information, see the case study on *Holding the World Bank to account in Tibet* in the chapter on 'Housing Rights'.

### Guidelines for successful advocacy

Advocacy on cultural rights may take many forms across the local, national and international levels. One of the most important is concerted action by indigenous peoples and minorities to reassert control over the means by which culture is transmitted at the local level, particularly in the education system. Early childhood education programmes, such as the Māori language nest system (*Te Kohanga Reo*) employed in Aotearoa New Zealand,<sup>36</sup> developed and controlled by indigenous peoples and minorities, are critical components of asserting cultural rights; in this case through exercising them and institutionalizing them in the education system.

At the national level, given the interconnections between cultural rights and other rights, recognition of the right to culture often paves the way for addressing other rights, such as land and resource rights and protection of cultural and intellectual heritage. In Guyana, for instance, sustained advocacy by indigenous peoples succeeded in obtaining constitutional recognition for the rights of indigenous peoples to protection and preservation of their cultural heritage, ways of life and languages. This provision is in turn now being used to challenge state activities in relation to unwanted encroachments on traditional lands, the failure to adopt bilingual and intercultural education programmes, definitions of indigenous peoples and communities that fail to account for traditional rules pertaining to membership, and environmental pollution. Cultural rights can also be asserted in relation to projects financed by international financial or development institutions to seek modifications to project design. In this sense, it is important to be proactive in asserting these rights, especially at early stages of project design. It is

equally important to be proactive in articulating models or indicators of culturally appropriate development and by insisting that external projects are sensitive to these models and that development agencies also support indigenous peoples' and minorities' own self-development initiatives.

At the international level, as part of economic, social and cultural rights in general, cultural rights, as a separate category of rights, are somewhat neglected. There is a need for cases and reports that highlight the right to culture as a stand-alone right, as well as the relationship between cultural rights and other rights: education, food and housing, for instance. Interlinkages between the right to culture and non-human rights instruments are also important to stress. The Convention on Biological Diversity offers such an opportunity insofar as it obligates state parties to address rights to traditional knowledge (Art. 8j) and to promote and protect customary use of biological resources in accordance with traditional practices (Art. 10c).

### Case study 1 – Nibutani dam

At the domestic level, recognition of cultural rights is largely dependent on recognition as an indigenous people or a minority, and some governments persist in unjustifiably denying such recognition. Until 1997 this was the case in Japan where the government refused to recognize the existence of indigenous peoples and defined the Ainu people as a minority entitled only to individual rights under the Constitution. The Ainu had long challenged this denial of their identity and a series of assimilationist laws and policies, including bans on their traditional lifestyle and use of language. They established a number of organizations, the Ainu Association of Hokaido (AAH) being the largest, to protect their cultural identity and rights and drafted a model law to show how their rights should be protected. One of the activities of the AAH was supporting Ainu who had attempted to challenge expropriation of their lands in the courts for construction of the Nibutani dam. Although not successful on all counts, they succeeded in obtaining judicial recognition of the Ainu as an indigenous people with attendant collective cultural rights.<sup>37</sup> In reaching its decision, the court made reference to ILO Convention No. 169 and Article 27 of the ICCPR, and concluded that when the state seeks to implement projects such as the Nibutani dam, which may 'produce effects on the culture of indigenous minority groups, the government has a special duty to give adequate consideration to such cultures with a view to avoiding unjust encroachment on their rights'.<sup>38</sup> As a consequence of the court's decision and earlier Ainu efforts promoting a draft law, the Japanese parliament adopted the Act Regarding the Promotion of Ainu Culture and the Dissemination and Education of

Knowledge Concerning Ainu Traditions on 8 May 1997. This law repeals earlier laws aimed at assimilating Ainu, refers to the Ainu as a people, and guarantees the promotion and teaching of Ainu culture.

### Case study 2 Ancestral burial ground or hotel?

Often violations of cultural rights are perpetrated by private actors such as corporations. As noted above, private actors have obligations to respect cultural rights and states have an obligation to protect against abuses committed by private persons. In *Hopu and Bessert v. France*, a case decided by the HRC in 1997, members of an indigenous Tahitian community asserted violations of, among others, the rights to culture, family and privacy in connection with construction of a hotel on their ancestral lands that also entailed destruction of an ancestral burial ground. They were dispossessed of the land in question by the courts in 1961 when it was awarded to a corporation. The land was subsequently leased and then sub-leased to two other companies in 1990, one of which began to clear the land for construction. Community members occupied the land in protest in 1992, maintaining that the land and the lagoon bordering it represented 'an important place in their history, their culture and their life'<sup>39</sup> and included a pre-European burial site. After attempts to address the issue in domestic courts failed, recourse was sought in the HRC. Because France had registered a reservation to Article 27, the HRC declined to examine a violation of that article, but instead found violations of privacy and family rights. In so finding, the HRC stated that 'cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.'<sup>40</sup> The HRC reached this conclusion even though the authors were unable to prove a direct kinship link to the persons interred in the burial ground. Additionally, and importantly, many of the members of the HRC believed that this issue should have been addressed under Article 27, indicating that the HRC will be willing to address cases such as this in the future as violations of cultural rights.

### Notes

- 1 Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in the Republic of Guatemala* (1986), p.114.
- 2 Among others, see, CESCR General Comment No.14, on The Right to the Highest Attainable Standard of Health, UN doc. E/C.12/2000/4, para. 27; General Comment No.13, on The Right to Education (Art. 13), CESCR UN doc. E/C.12/1999/10, para. 15.

- 3 HRC Concluding Observations on Canada, UN doc. CCPR/C/79/Add.105, 1999, para. 8; Mexico, UN doc. CCPR/C/79/Add.109, 1999, para. 19; Norway, UN doc. CCPR/C/79/Add.112, 1999, paras 10, 17; Australia, CCPR/CO/69/Aus, 2000, para. 9; CESCR General Comment No.15, on The Right to Water (ICESCR Arts 11, 12), UN doc. E/C.12/2002/11, at para. 7; CESCR Concluding Observations on the Russian Federation, UN doc. E/C.12/1/Add.94, 2003, paras 11, 39. See also, *Apirana Mahuika et al v. New Zealand*. (Communication No 547/1993) CCPR/C/70/D/547/1993, (2000) para. 9.2.
- 4 The CESCR held a Day of Discussion on 27 November 2000, during which members stated that traditional knowledge and intellectual and cultural heritage, both as individual and collective rights, could be addressed in relation to Article 15(1)(c). See CESCR, Report on the 22nd, 23rd and 24th Sessions, UN doc. E/C.12/2000/21, paras 578–635.
- 5 HRC General Comment No.24, on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant UN doc. HRI/GEN/1/REV7, 2004. (1994), para. 8. See also Anaya, S.J., 'Indigenous rights norms in contemporary international law', 8 *Arizona Journal of Intellectual and Comparative Law* 1, 15 (1991) and Prott, L.V., 'Cultural rights as peoples' rights in international law', in J. Crawford (ed.), *The Rights of Peoples*, Oxford, Clarendon Press, 1988, p. 93.
- 6 See CERD Concluding Observations on Botswana, UN doc. A/57/18, 2002; Suriname. UN doc. CERD/C/64/CO/9/Rev.2; CERD General Recommendation No. XXIII on the Rights of Indigenous Peoples, UN doc. CERD/C/51/Misc.13/Rev.4, 1997.
- 7 With regard to indigenous peoples' rights, this jurisprudence is summarized (in English, Spanish and French) in 'A Guide to Indigenous Peoples' Rights Under ICERD: A Briefing on Indigenous Peoples' Rights and the UN Human Rights Committee'; 'A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System'; and 'A Guide to Indigenous Peoples' Rights' in the ILO. All are available at: [www.forestpeoples.org](http://www.forestpeoples.org)
- 8 *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Report of the HRC, 45 UN GAOR Supp. (No. 43), UN doc. A/45/40, vol. 2, 1990, 1. See also *Kitok v. Sweden*, Report of the HRC, 43 UN GAOR Supp. (No. 40) UN doc. A/43/40; *Lovelace v. Canada* (No. 24/1977), Report of the HRC, 36 UN GAOR Supp. (No. 40) 166, UN doc. A/36/40, 1981. *I. Lansman et al. v. Finland* (Communication No. 511/1992); *Apirana Mahuika et al v. New Zealand*, Communication No. 547/1993, UN doc. CCPR/C/70/D/547/1993, 2000; *J. Lansman et al. v. Finland*, Communication No. 671/1995, UN doc. CCPR/C/58/D/671/1995; and HRC General Comment No.23 on the Rights of Minorities, UN doc. CCPR/C/21/Rev.1/Add.5, 1994. Although not decided under Article 27, see also *Hopu v. France*, Communication No. 549/1993: France. 29/12/97, UN doc. CCPR/C/60/D/549/1993/Rev.1, 1997.
- 9 Among others, see HRC Concluding Observations on Chile, UN doc. CCPR/C/79/Add.104, 1999, para. 22; HRC Concluding Observations on Australia UN doc. CCPR/CO/69/AUS, 2000, paras. 10 and 11; and *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, *op. cit.*

- 10 CERD General Recommendation XXIII on the Rights of Indigenous Peoples, *op cit*, para. 4.
- 11 CRC Concluding Observations on Burundi, UN doc. CRC/C/15/Add.133 at para. 78, 1998.
- 12 Day of General Discussion on the Rights of Indigenous Children, Recommendations, CRC, 34th session, 2003.
- 13 Among others, CESCR Concluding Observations on Panama, UN doc. E/C.12/1/Add.64, 2001, para. 12; Colombia, UN doc. E/C.12/Add. 1/74, 2001, para. 12; Ecuador, UN doc. E/C.12/1/Add.100, 2004, para. 58.
- 14 *Bamaca Velasquez Case*, Judgment of 22 February 2002, Series C, No. 91, para. 81; *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Series C, No. 79, para. 149; *Plan de Sánchez Massacre Case*, Judgment of 29 April 2004, Series C, No. 105, para. 51; and *Aloboetoe et al. Case*, Judgement of 10 September, 1993, Inter-American Court of Human Rights, Reparations, Series C, No.15 para. 62.
- 15 *G and E v. Norway*, Applications Nos 9278/81 and 9415/81 (1983) 35 ECHR Decisions and Reports 30, at 35.
- 16 Advisory Committee on the FCNM, Opinion on Norway, ACFC/INF/OP/I(2003)003, at 2.
- 17 Advisory Committee on the FCNM, Opinion on Russian Federation, ACFC/INF/OP/I(2003)005, paras 49–51.
- 18 See, Advisory Committee on the FCNM, Opinion on Russian Federation, *op. cit.*; Switzerland, ACFC/INF/OP/I(2003)007, para. 33; Spain, ACFC/INF/OP/I(2004)004; and Poland: ACFC/INF/OP/I(2004)005, paras 41–7.
- 19 Report of the African Commission's Working Group of Experts on Indigenous Population/Communities, adopted by resolution at the 35th Ordinary Session, 2004.
- 20 Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN doc. E/CN.4/Sub.2/2003/38/Rev.2. See also Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy, Mining Companies and Human Rights, Geneva, 5–7 December 2001, E/CN.4/Sub.2/AC.4/2002/3, 3, 2002.
- 21 HRC General Comment No. 23, *op.cit.*, para. 6.1. See also Addo, M. (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague, Kluwer Law International, 1999; Macklem, P., 'Indigenous rights and multinational corporations at international law', 24 *Hastings International and Comparative Law Review*, 475 (2001).
- 22 UNDP and Indigenous Peoples: A Policy of Engagement (2001).
- 23 Operational Directive 4.20 on Indigenous Peoples, 1991. See also Draft Operational Policy 4.10 Indigenous Peoples, 17 May 2004, Revised Consultation Draft. Available at: [www.bicusa.org](http://www.bicusa.org)
- 24 Asian Development Bank, *The Bank's Policy on Indigenous Peoples*, April 1998.
- 25 Inter-American Development Bank, *Profile on an Operational Policy for Indigenous Peoples*, 13 February 2004. Available at [www.iadb.org/sds/doc/ind-GN2296E.pdf](http://www.iadb.org/sds/doc/ind-GN2296E.pdf). See also Inter-American Development Bank, IDB Resource Book on Participation, Annex, 'Strategies and Procedures on Socio-cultural Issues as Related to the Environment', 1990.

- 26 Among others, HRC General Comment No. 23, *op. cit.*, para. 6.1–6.2.
- 27 *Ibid.*, para. 8.
- 28 See also CESCR Concluding Observations on Senegal, UN doc. E/C.12/1/Add.62, 2001, para. 39.
- 29 Among others, HRC Concluding Observations on Chile, UN doc. CCPR/C/79/Add.104, 1999, para. 22; *I. Lansman et al. v. Finland* (Communication no. 511/1992), UN doc. CCPR/C/52/D/511/1992; and *J. Lansman et al. v. Finland* (Communication no. 671/1995), UN doc. CCPR/C/58/D/671/1995. See also Advisory Committee on the FCNM, Opinion on Armenia, ACFC/INF/OP/I(2003)001, para. 78.
- 30 CERD Concluding Observations on Suriname, *op. cit.*; CERD General Recommendation XXIII, *op. cit.*; CESCR Concluding Observations on Ecuador, *op. cit.*; Russian Federation, *op. cit.* See also MacKay, F., 'Indigenous peoples' right to free, prior and informed consent and the World Bank's Extractive Industries Review', IV(2) Sustainable Development Law and Policy 43 (2004); and *Preliminary Working Paper on the Principle of Free, Prior and Informed Consent of Indigenous Peoples in Relation to Development Affecting their Lands and Natural Resources* submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation, UN doc. E/CN.4/Sub.2/AC.4/2004/4.
- 31 Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. Note by the Secretary-General. UN doc. E/CN.4/1997/105, 1996, paras. 24–8. See, also, Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, UN doc. E/CN.4/2004/44.
- 32 A helpful explanation of the Inspection Panel and its procedures is found in the Center for International Environmental Law's 'Citizen's Guide to the World Bank Inspection Panel', available in French, Spanish, English and Portuguese at: [www.ciel.org/lfi/IFIs\\_Inspection\\_Panel.html](http://www.ciel.org/lfi/IFIs_Inspection_Panel.html)
- 33 The IADB's Independent Investigation Mechanism came into effect in August 1994 (see, [www.iadb.org/poli/investig.htm](http://www.iadb.org/poli/investig.htm)). The Asian Development Bank's mechanism became effective in October 1996 and comprises a standing committee of the Bank's Board of Directors, which makes recommendations to the full board as to whether a full investigation is required; if so, a full investigation is conducted by a panel of experts drawn from a roster. This process is substantially less independent than the World Bank and IADB mechanisms.
- 34 The operating procedures and other documents pertaining to the Inspection Panel are available at: [//wbln0018.worldbank.org/ipn/ipnweb.nsf](http://wbln0018.worldbank.org/ipn/ipnweb.nsf)
- 35 See, Udall, L., *The World Bank Inspection Panel: A Three Year Review*, Bank Information Center: Washington DC, 1997 and; Alfredsson, G. & Ring, R. (eds), *The Inspection Panel of the World Bank. A Different Complaints Procedure*. Leiden, Martinus Nijhoff, 2000.
- 36 See [www.schoolnet.ca/aboriginal/fnesc/part07-1-e.html](http://www.schoolnet.ca/aboriginal/fnesc/part07-1-e.html)
- 37 *Kayano et al. v. Hokkaido Expropriation Committee*, Judgment of the Sapporo District Court, Civil Division No. 3, (issued 27 March 1997). 1598 Hanrei Jih\_ 33; 938 Hanrei Times

75, 38, *International Legal Materials* 394 (1999). Full text available at: [www.hawaii.edu/law/facpubs/nibutani.pdf](http://www.hawaii.edu/law/facpubs/nibutani.pdf).

38 *Ibid.*, p. 90.

39 *Hopu and Bessert v. France*, *op. cit.*, para. 2.3.

40 *Ibid.*, para. 10.3.



# Conclusion

Margot E. Salomon

Inequality in the distribution of wealth and power between and within countries is both persistent and extreme. Those already marginalized – the poor, living without access to basic nutrition, potable water, adequate education, land, equitable conditions of work, and/or the ability to participate effectively in decision-making processes – are also the least likely to benefit from positive developments within their countries. In most parts of the world, minority groups and indigenous peoples are among the poorest, falling below the national average on all human development indicators.<sup>1</sup> This exclusion – whether a result of structural or direct discrimination – is both a cause and consequence of denying minorities and indigenous peoples their economic, social and cultural rights. There is, however, an additional component of critical importance. Failure to allow minorities and indigenous peoples to progressively realize their economic, social and cultural rights also undermines their ability to preserve their identities, distinct traditions, languages and ways of life. Threats to their cultural identity, coupled with growing economic and social inequalities, can also be a cause of conflict. This underscores the need to appreciate fully the importance of having minorities and indigenous peoples as the beneficiaries of ESC rights. This guide has attempted to provide a synthesis of key elements and outlets that might assist in this critical endeavour.

There are many actors – governments, international organizations, companies – whose actions and decisions impact on the ability of minorities and indigenous peoples to exercise their ESC rights. Under international law, the first responsibility lies with states to enact measures and policies that give meaning to these rights including the establishment of regulatory mechanisms that will prevent other actors (such as corporations) from violating them.

A breach of ESC rights, including those affecting disadvantaged and marginalized groups, occurs if states are unwilling to comply with their obligations, including through the use of the maximum available resources to realize these rights.<sup>2</sup> If the state is unable to meet its obligations, it has an obligation to seek international assistance and cooperation<sup>3</sup> and, those in a position to assist,<sup>4</sup> have an obligation to countenance the request. States and others actors, such as the World Bank, International Monetary Fund and World Trade Organization, which greatly influence the decisions taken by individual states in a range of areas, have a duty not to undermine the ability of these states to meet any of their human rights obliga-

tions, be they national, regional or international,<sup>5</sup> and not to undermine the ability of individuals to meet their own economic, social and cultural needs. And while the Committee on Economic, Social and Cultural Rights (CESCR) has remarked that states have a margin of discretion in assessing which measures are most suitable given particular circumstances,<sup>6</sup> minimum core obligations must be given immediate effect<sup>7</sup> and all measures must be implemented in a non-discriminatory manner.

Although the vast majority of UN member states are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and are thereby bound by its provisions, other states are not void of responsibilities in this area. Basic economic, social and cultural rights constitute part of the minimum standards of human rights, and according to CESCR are guaranteed under customary international law thus binding *all* states.<sup>8</sup> Some states may have ratified regional instruments that entrench economic, social and cultural rights and the scope of those provisions will be informed by standards articulated at the international level, most notably by CESCR. There is also a range of declarations that have been adopted by the international community that reiterate the significance of economic, social and cultural rights and reflect a universal commitment as to their core values.<sup>9</sup>

## Looking to the future

In addition to myriad initiatives being undertaken at the domestic level, there are a number of important initiatives under way at the international and regional levels that have the potential to strengthen economic, social and cultural rights. As has been touched on in this guide, in 2003 a UN working group was convened to examine various modalities related to the drafting of an Optional Protocol for the consideration of communications in relation to the ICESCR.<sup>10</sup> Within this working group CESCR, many NGOs, the Special Rapporteurs and states are discussing and debating legal (and political) issues concerning the creation of a complaints mechanism that would adjudicate on alleged violations of the rights enshrined in the Covenant. As national courts are increasingly creating a foundation of jurisprudence that refines the contours of the domestic justiciability of economic, social and cultural rights,<sup>11</sup> a complementary international mechanism providing a case-by-case elaboration of Covenant standards could contribute meaningfully to strengthening the content and enforcement of ESC rights globally, including in relation to the exercise of ESC rights by minorities and indigenous peoples.<sup>12</sup> Also of interest is the fact that CESCR is currently preparing General Comments that will provide authoritative elaborations of state parties' obligations in relation to the right to work and cultural rights.

At the regional level, we have seen the entry into force, in 2004, of the Protocol to the ACHPR on the Establishment of the African Court on Human and Peoples'

Rights which, once functioning, will be empowered to adjudicate over the rights enshrined in the African Charter.<sup>13</sup> Later in the same year, the African Commission adopted a resolution on economic, social and cultural rights in Africa suggesting we can anticipate increased focus on these rights in the future work of the Commission.<sup>14</sup>

## Giving effect to ESC rights at home

The nature of international and regional human rights' obligations requires that states give effect to these rights. This includes recognizing the rights at the national level by ensuring that they can be invoked before domestic courts and tribunals. It also means that administrative and other authorities take account of the rights in all their decision-making processes. Giving effect to ESC rights requires that remedies are available to aggrieved individuals or groups and that systems are in place to ensure governmental accountability.<sup>15</sup>

The allocation of resources must be decided taking due account of intra-state regional disparities and the particular needs of marginalized and economically disadvantaged groups. These must include minorities, indigenous peoples and women members of those communities, determined through the use of data disaggregated on multiple grounds such as age, ethnicity<sup>16</sup> and gender.<sup>17</sup> Collecting data that allows for informed policy and expenditure can also play a critical role in diffusing any potential tensions or resentment between minorities or indigenous peoples and other poor and marginalized people in the allocation of resources.

The increasingly detailed guidance offered by the elaboration of human rights standards and the subsequent implementation of positive obligations aimed at securing the rights of minorities and indigenous peoples has much to offer in terms of conflict prevention and sustainable development. Just as the economic development of the state must be considered in light of its obligations to respect the cultural rights of minorities,<sup>18</sup> so must all actions at the national and international levels be consistent with the entrenched rights of minorities and indigenous peoples. By facilitating an awareness and understanding of ESC rights, mechanisms for their enforcement, and favoured methods of advocacy, it is hoped this guide provides a step in that direction.

## Notes

- 1 See for example, Stavenhagen, R., *Report of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN doc. A/59/258, 2004, para. 32; and, Lennox, C., *Minority Rights and Development: Overcoming Exclusion, Discrimination and Poverty*, London, Minority Rights Group International, 2002, as submitted to the UN Working Group on Minorities, UN doc. E/CN.4/Sub.2/AC.5/2002/WP.6.

- 2 CESCR General Comment No.14 on the Right to the Highest Attainable Standard of Health, UN doc. E/C.12/2000/4, para. 47.
- 3 CESCR General Comment No.12 on the Right to Adequate Food, UN doc. E/C.12/1999/5, para. 17; CESCR General Comment No. 5 on Persons with Disabilities, UN doc E/1995/22 at 19, para. 13; CESCR General Comment No.11 on Plans of Action for Primary Education, UN doc. E/C.12/1999/4, para. 11.
- 4 CESCR General Comment No. 3 on the Nature of States Parties' Obligations, UN doc. E/1991/23, Annex III, 1990, para. 14.
- 5 CESCR General Comment No. 15 on the Right to Water, UN doc. E/C.12/2002/11, para. 60: '... The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see General Comment No. 2, 1990), so that the enjoyment of the right to water is promoted. When examining the reports of States parties and their ability to meet the obligations to realize the right to water, the Committee will consider the effects of the assistance provided by all other actors ... .'; see also, CRC General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child, UN doc. CRC/GC/2003/5, para. 64; and, CESCR Concluding Observations on Ecuador, UN doc E/C.12/1/Add.100, 2004, paras. 9, 56: 'The Committee takes note that the structural adjustment policies in the State party have negatively affected the enjoyment of economic, social and cultural rights by the population, particularly the disadvantaged and marginalized groups of society. It especially notes the high percentage of the annual national budget (around 40 per cent) allocated to foreign debt servicing that seriously limits the resources available for the achievement of effective enjoyment of economic, social and cultural rights ... The Committee strongly recommends that the State party's obligations under the Covenant should be taken into account in all aspects of its negotiations with the international financial institutions and other regional trade agreements to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined'; and, CESCR Concluding Observations on Senegal UN doc. E/C.12/1/Add.62, 2001, para. 60: 'The Committee strongly recommends that Senegal's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, such as the International Monetary Fund and the World Bank, to ensure that the economic, social and cultural rights of Senegalese and, in particular, of the most vulnerable groups of society, are duly protected'.
- 6 CESCR General Comment No.12 on the Right to Adequate Food, *op.cit.*, para. 21; CESCR General Comment No.14 on the Right to Health, *op.cit.*, para. 53.
- 7 CESCR General Comment No.15 on the Right to Water, *op.cit.*, para. 37.
- 8 CESCR Concluding Observations on Israel, UN doc. E/C.12/1/Add.90, 2003, para. 31.
- 9 Similarly, Alston noted recently that a plausible claim can be made that at least some of

the Millennium Development Goals enjoy the status of customary international law and are thus binding on all governments. Alston, P. *A Human Rights Perspective on the Millennium Development Goals*, paper prepared as part as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development. The work of the Task Force is available at: [www.unmillenniumproject.org](http://www.unmillenniumproject.org).

- 10 The current mandate is 'to consider options regarding the elaboration of an optional protocol and not actually to begin drafting'. CHR Res. 2003/18, para. 13, see also, the *Report of the open-ended Working-Group to consider options regarding the elaboration of an optional protocol to ICESCR*, UN doc. E/CN.4/2004/44.
- 11 See further, Report of the Expert's Roundtable Concerning Issues Central to the Proposed Optional Protocol to the ICESCR, International Commission of Jurists, Sept. 2002. Available at: [www.icj.org](http://www.icj.org)
- 12 For useful information on the benefits of, *inter alia*, a complaints mechanism under ICESCR see, The Coalition for an Optional Protocol to ICESCR, *Advocacy Kit*, 2004. Available at: [www.nwjc.org.au/avcwl/lists/info/op-icescr.html](http://www.nwjc.org.au/avcwl/lists/info/op-icescr.html).
- 13 For information and recent developments related to the establishment of the African Court see [www.interights.org](http://www.interights.org)
- 14 ACHPR resolution on Economic, Social and Cultural Rights in Africa, adopted at the 36th Ordinary Session, 2004; see also the Workshop Statement on Economic, Social and Cultural Rights in Africa, Sept. 2004 ([www.interights.org](http://www.interights.org)) which informed the Commission's resolution.
- 15 See generally, CESCR General Comment No. 9 on the Domestic Application of the Covenant, UN doc. E/C.12/1998/24. See further, CESCR Concluding Observations on Kuwait, UN doc. E/C.12/1/Add.98, 2004, para. 27; CESCR Concluding Observations on Ecuador, 2004, op.cit., para. 59; CESCR Concluding Observations on Moldova, UN doc. E/C.12/1/Add.91, 2003, para. 30; CESCR Concluding Observations on Trinidad and Tobago, UN doc. E/C.12/1/Add.80, 2002, paras. 9, 32.
- 16 CRC Concluding Observations on Brazil, UN doc. CRC/C/15/Add.241, 2004, paras. 20, 21, 23 where reference is made in particular to children of African descent and indigenous children.
- 17 See Beijing +5 Outcome document, UN doc. A/S-23/10/Rev.1 (SUPPL. NO. 3 para. 93(d)). '... Governments, regional and international organizations, including the United Nations system, and international financial institutions and other actors ... Undertake appropriate data collection and research on indigenous women, with their full participation, in order to foster accessible, culturally and linguistically appropriate policies, programmes and services'. ; see also Banda, F. and Chinkin, C., *Gender, Minorities and Indigenous Peoples*, London, Minority Rights Group International, 2004.
- 18 The HRC noted in *Ilmari Lansmann v. Finland*: 'A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by

reference to the obligations it has undertaken in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27...'. HRC Communication No. 511/1992, 1994 para. 9.4.

## Annex I: Useful contacts

### United Nations

UN Office of the High Commissioner  
for Human Rights  
8–14 Avenue de la Paix  
CH-1211 Geneva 10  
Switzerland  
Tel: +41 22 917 9000  
Fax: +41 22 917 9016  
Website: [www.unhchr.ch](http://www.unhchr.ch)

*When submitting information to all UN human rights mechanisms, clearly state the name of the mechanism on your correspondence.*

*For petitions to the treaty bodies (except CEDAW):*  
OHCHR address as above  
Fax: +41 22 917 9022  
Email: [tb-petitions@ohchr.org](mailto:tb-petitions@ohchr.org)

*For all communication with CEDAW:*  
CEDAW c/o Division for the Advancement of Women, Department of Economic and Social Affairs  
United Nations Secretariat  
2 United Nations Plaza, DC-2/12th Floor  
New York, NY 10017  
USA  
Fax: +1 212 963 3463  
Email: [daw@un.org](mailto:daw@un.org)

*For communications under the 1503 Procedure: Commission/Sub-Commission Team (1503 Procedure):*  
OHCHR address as above  
Fax: +41 22 917 9011  
Email: [1503@ohchr.org](mailto:1503@ohchr.org)

*For communications to special procedures:*  
OHCHR address as above  
Fax: +41 22 917 90 06  
Email: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

*General enquiries:*  
NGO Liaison Office  
Palais des Nations Room 153  
CH-1211 Geneva 10  
Switzerland  
Tel: +41 22 917 2127  
Fax: +41 22 917 0583  
Email: [ungeneva.ngoliason@unog.ch](mailto:ungeneva.ngoliason@unog.ch)

*To order UN publications:*  
United Nations Publications  
2 United Nations Plaza  
Room DC2-0853, Dept 1004  
New York, NY 10017  
USA  
Tel: +1 212 963 8302 or +1 800 253 9646  
Fax: +1 212 963 3489  
Email: [Publications@un.org](mailto:Publications@un.org)  
or  
Sales Office and Bookshop  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland  
Tel: +41 22 917 2614 (orders)  
Fax: +41 22 917 0084  
or  
United Nations Bookshop  
Concourse Level, 46th Street  
and 1st Avenue  
New York, NY 10017  
USA  
Tel: +1 212 963 7680 or +1 800 553 3210  
Fax: +1 212 963 4910  
Email: [bookshop@un.org](mailto:bookshop@un.org)

*To apply for NGO consultative status:*

**NGO Section - Department of Economic and Social Affairs (DESA)**

United Nations, Room DC1-1480  
New York, NY 10017  
USA

Tel: +1 212 963 8652

Fax: +1 212 963 9248

Email: [desangosection@un.org](mailto:desangosection@un.org)

*Note: NGOs do not need to have consultative status in order to attend all UN meetings, to make submissions to the Special Rapporteurs or to the treaty bodies, or to attend the public sessions of the treaty bodies.*

*General assistance/information service for NGOs with regard to CERD:*

**Anti-Racism Information Service (ARIS)**

14 avenue Tremblay  
CH-1209 Geneva  
Switzerland

Tel: +41 22 740 3530

Fax: +41 22 740 3565

Email: [aris@antiracism-info.org](mailto:aris@antiracism-info.org)

Website: [www.antiracism-info.org](http://www.antiracism-info.org)

*General assistance/information service for NGOs in regard to the CRC:*

**NGO Group on the Convention on the Rights of the Child**

c/o Defence for Children International  
PO Box 88, 1 rue de Varembe  
CH-1211 Geneva 20  
Switzerland

Tel: +41 22 740 47 30

Fax: +41 22 740 1145

Email: [ngo-crc@tiscalinet.ch](mailto:ngo-crc@tiscalinet.ch)

*General assistance/information service for NGOs regarding any UN human rights bodies:*

**International Service for Human Rights**

PO Box 16, 1 rue de Varembe  
CH-1211 Geneva 20 CIC  
Switzerland

Tel: +41 22 733 5123

Fax: +41 22 733 0826

Website: [www.ishr.ch](http://www.ishr.ch)

**International Labour Organization  
Equality and Employment Branch  
Standards Department  
ILO**

CH-1211 Geneva 22  
Switzerland

Tel: +41 22 799 7115

Fax: +41 22 799 6344

Email: [egalite@ilo.org](mailto:egalite@ilo.org)

Website: [www.ilo.org](http://www.ilo.org)

**World Bank**

*For petitions to the World Bank*

*Inspection Panel:*

Executive Secretary  
The Inspection Panel

1818 H Street NW  
Washington, DC, 20433  
USA

Fax: +1 202 522 0916

*or c/o the appropriate World  
Bank Country Office*

Website: [www.worldbank.org](http://www.worldbank.org)

the Inspection Panel:

<http://wbln0018.worldbank.org/ipn/ipnweb.nsf>

**Asian Development Bank**

*Petitions should be sent to:*

Secretary, Compliance Review Panel  
Asian Development Bank  
6 ADB Avenue

Mandaluyong City  
1550 Metro Manila  
Philippines

Tel: +632 632 4149

Fax: +632 636 2088

Email: [crp@adb.org](mailto:crp@adb.org)

Website: [www.adb.org](http://www.adb.org)

*Petitions can also be sent to any ADB  
office, which will forward the request  
to the Compliance Review Panel.*

**Inter-American Development Bank**

*Petitions can be sent to any of the Bank's  
operational departments, relevant country  
offices or the Office of External Relations:*

Tel: +1 202 623 1397

Fax: +1 202 623 1403

Email: [pic@iadb.org](mailto:pic@iadb.org)

*Once the process has started, petitions are overseen by a coordinator:*

**Coordinator, Independent Investigation Mechanism**

**Inter-American Development Bank**

1300 New York Avenue  
Washington, DC, 20577  
USA

Tel: +1 202 623 3952

Fax: +1 202 312 4057

Email: [investigation@iadb.org](mailto:investigation@iadb.org)

Website: [www.iadb.org](http://www.iadb.org)

**African Commission on Human and Peoples Rights**

Kairaba Avenue

PO Box 673

Banjul

The Gambia

Tel: +220 392 962

Fax: +220 390 764

Email: [achpr@achpr.org](mailto:achpr@achpr.org)

Website: [www.achpr.org](http://www.achpr.org)

**European Court of Human Rights**

Council of Europe

F-67075 Strasbourg-Cedex

Tel: 33 (0)3 88 41 20 18

Fax: 33 (0)3 88 41 27 30

Email: [webmaster@echr.coe.int](mailto:webmaster@echr.coe.int)

Website: [www.coe.int](http://www.coe.int) provides the

application form of the court in 29

European languages and explanatory note.

**Inter-American Commission on Human Rights**

1889 F Street NW

Washington, DC, 20006

USA

Tel: +1 202 458-6002

Fax: +1 202 458-3992

Email: [cidhoea@oas.org](mailto:cidhoea@oas.org)

Website: [www.cidh.oas.org/DefaultE.htm](http://www.cidh.oas.org/DefaultE.htm)

**Secretariat of the Council of Europe Framework Convention for the Protection of National Minorities**

Council of Europe

Directorate General of Human Rights – DG II

Secretariat of the Framework Convention

for the Protection of National Minorities and of the DH-MIN

F-67075 Strasbourg Cedex

Tel: +33 (0) 3 88 41 29 63

Fax: +33 (0) 3 90 21 49 18

Email: [minorities.fcnm@coe.int](mailto:minorities.fcnm@coe.int)

Website: [www.coe.int/T/E/human\\_rights/minorities/](http://www.coe.int/T/E/human_rights/minorities/)

*A selection of international NGOs working on ESC Rights:*

**Center for Economic and Social Rights**

162 Montague Street,

2nd floor, Brooklyn,

New York 11201

USA

Tel: +1 718 237 9145

Fax: +1 718 237 9141

Email: [rights@cesr.org](mailto:rights@cesr.org)

Website: [www.cesr.org](http://www.cesr.org)

**Centre for Housing Rights and Evictions**

83 rue de Montbrillant

1202 Geneva

Switzerland

Tel: + 41 22 734 1028

Fax: + 41 22 733 8336

Email: [cohre@cohre.org](mailto:cohre@cohre.org)

Website: [www.cohre.org](http://www.cohre.org)

**Food First Information and Action Network**

Willy-Brandt-Platz 5

69115 Heidelberg

Germany

Tel: + 49 6221 65300 30

Fax: + 49 6221 830 545

Email: [fian@fian.org](mailto:fian@fian.org)

Website: [www.fian.org](http://www.fian.org)

**Forest Peoples Programme**

1c Fosseyway Business Park  
Stratford Road  
Moreton-in-Marsh, GL56 9NQ  
Tel: + 44 (0) 1608 652893  
Fax: + 44 (0) 1608 652878  
Email: [info@forestpeoples.org](mailto:info@forestpeoples.org)  
Website: <http://forestpeoples.gn.apc.org>

**Interights**

Lancaster House  
33 Islington High Street  
London N1 9LH  
Tel: + 44 (0) 207 7278 3230  
Fax: + 44 (0) 207 7278 4334  
Email: [ir@interights.org](mailto:ir@interights.org)  
Website: [www.interights.org](http://www.interights.org)

**International Commission of Jurists**

P.O. Box 216  
1219, Châtelaine / Geneva  
Switzerland  
Phone: +41 22 979 3800  
Fax: +41 22 979 3801  
Email: [info@icj.org](mailto:info@icj.org)  
Website: [www.icj.org](http://www.icj.org)

**International Network for Economic,  
Social and Cultural Rights (ESCR-Net)**

211 East 43rd Street, Room #906  
New York 10017  
USA  
Tel: +1 (212) 681 1236  
Fax: +1 (212) 681 1241  
Email: [info@escr-net.org](mailto:info@escr-net.org)  
Website: [www.escr-net.org](http://www.escr-net.org)

**3d – Trade – Human Rights  
– Equitable Economy**

15 rue des Savoises  
GE1205 Geneva  
Switzerland  
Tel: +41 22 320 2121  
Fax: +41 22 320 6948  
Email: [info@3dthree.org](mailto:info@3dthree.org)  
Website: [www.3dthree.org](http://www.3dthree.org)

## Annex II: Special Procedures of the UN Commission on Human Rights\*

### Thematic procedures

Mandate	Name and country of origin of current mandate holder	Included in mandate
Special Rapporteur on the sale of children, child prostitution and child pornography	Mr Juan Miguel Petit (Uruguay)	Communications* Country visits
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	Mr Paul Hunt (New Zealand)	Communications Country visits
Special Rapporteur on the right to education	Mr Vernor Munoz Villalobos (Costa Rica)	Country visits
Special Rapporteur on extrajudicial, summary or arbitrary executions	Mr Philip Alston (Australia)	Communications* Country visits
Special Rapporteur on the right to food	Mr Jean Ziegler (Switzerland)	Communications Country visits
Special Representative of the Secretary-General on the situation of human rights defenders	Ms Hina Jilani (Pakistan)	Communications* Country visits
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living	Mr Miloon Kothari (India)	Country visits Communications (with other mandates)
Special Rapporteur on the human rights and fundamental freedoms of indigenous people	Mr Rodolfo Stavenhagen (Mexico)	Communications Country visits
Independent Expert to update the set of principles for the protection and the promotion of human rights through action to combat impunity	Ms Diane Orentlicher (USA)	
Special Rapporteur on the independence of judges and lawyers	Mr Leandro Despouy (Argentina)	Communications Country visits
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	Mr Ambeyi Ligabo (Kenya)	Communications* Country visits
Special Rapporteur on freedom of religion or belief	Ms Asma Jahangir (Pakistan)	Communications Country visits

\* at November 2004

Mandate	Name and country of origin of current mandate holder	Included in mandate
Representative of the Secretary-General on internally displaced persons	Mr Walter Kalin (Switzerland)	Communications Country visits
Special Rapporteur on use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Ms Shaista Shameen (Fiji)	Country visits
Special Rapporteur on the human rights of migrants	Ms Gabriela Rodriguez Pizarro (Costa Rica)	Communications Country visits
Independent Expert on human rights and extreme poverty	Mr Arjun Sengupta (India)	Country visits
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	Mr Doudou Diene (Senegal)	Communications Country visits
Independent Expert on structural adjustment policies and foreign debt	Mr Bernards Andrew Nyamwaya Mudho (Kenya)	Country visits
Independent Expert to assist the High Commissioner in the fulfilment of the mandate entitled 'Protection of human rights and fundamental freedoms while countering terrorism'	Mr Robert K. Goldman (USA)	
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	Mr Manfred Nowak (Austria)	Communications* Country visits
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	Mr Okechukwu Ibeanu (Nigeria)	Communications Country visits
Special Rapporteur on violence against women, its causes and consequences	Ms Yakin Erturk (Turkey)	Communications* Country visits
Special Rapporteur on trafficking in persons, especially in women and children	Ms Ellen Johnson Sirleaf (Liberia)	Communications

\* has issued guidelines for submission of communications

### Countries with a special rapporteur/special representative/independent expert

Afghanistan, Belarus, Burundi, Cambodia, Chad, Cuba, Democratic People's Republic of Korea, Democratic Republic of Congo, Haiti, Liberia, Myanmar, Palestinian territories occupied since 1967, Somalia, Sudan, Uzbekistan

## Working groups

Working Group	Included in mandate
Working Group on a Draft Declaration on the Rights of Indigenous Peoples	
Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	
Working Group on Arbitrary Detention	Communications* Country visits
Working Group on Enforced or Involuntary Disappearances	Communications*
Working Group on the Right to Development	
Working Group on Situations	Communications (1503 procedure)
Working Group on People of African Descent	
Working Group on the Effective Implementation of the Durban Declaration and Programme of Action	

\* has issued guidelines for submission of communications

See further: [www.ohchr.org/english/bodies/chr/special/index.htm](http://www.ohchr.org/english/bodies/chr/special/index.htm)

# Annex III: Model communication/complaint under UN human rights treaties

Name of treaty: .....  
Date: .....

## I. Information on the complainant:

Name: .....  
First name(s): .....  
Nationality: .....  
Date and place of birth: .....  
Address for correspondence on this complaint:  
.....  
.....  
.....

*Submitting the communication:*  
on the author’s own behalf: .....  
on behalf of another person: .....

*If the complaint is being submitted on behalf of another person, please provide the following personal details of that other person:*

Name: .....  
First name(s): .....  
Nationality: .....  
Date and place of birth: .....  
Address or current whereabouts:  
.....  
.....  
.....

If you are acting with the knowledge and consent of that person, please provide that person’s authorization for you to bring this complaint:

.....

*or*

If you are not so authorized, please explain the nature of your relationship with that person:

.....

and detail why you consider it appropriate to bring this complaint on his or her behalf:

.....

**II. State concerned/Articles violated**

Name of the state that is either a party to the Optional Protocol or has made the relevant Declaration:

.....

Articles of the Covenant or Convention alleged to have been violated:

.....

**III. Exhaustion of domestic remedies/Application to other international procedures**

Steps taken by or on behalf of the alleged victims to obtain redress within the state concerned for the alleged violation – detail which procedures have been pursued, including recourse to the courts and other public authorities, which claims you have made, at which times, and with which outcomes:

.....

If you have not exhausted these remedies on the basis that their application would be unduly prolonged, that they would not be effective, that they are not available to you, or for any other reason, please explain your reasons in detail:

.....

Have you submitted the same matter for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and Peoples’ Rights)?

.....

If so, detail which procedure(s) have been, or are being, pursued, which claims you have made, at which times, and with which outcomes:

.....

#### IV. Facts of the complaint

Detail, in chronological order, the facts and circumstances of the alleged violations. Include all matters which may be relevant to the assessment and consideration of your particular case. Please explain how you consider that the facts and circumstances described violate your rights:

.....

Author's signature:

.....

*(The blanks under the various sections of this model communication simply indicate where your responses are required. You should take as much space as you need to set out your responses.)*

#### V. Checklist of supporting documentation (copies, not originals, to be enclosed with your complaint):

- Written authorization to act (if you are bringing the complaint on behalf of another person and are not otherwise justifying the absence of specific authorization)
- Decisions of domestic courts and authorities on your claim (a copy of the relevant national legislation is also helpful)
- Complaints to and decisions by any other procedure of international investigation or settlement
- Any documentation or other corroborating evidence you possess that substantiates your description in Part IV of the facts of your claim and/or your argument that the facts described amount to a violation of your rights.

If you do not enclose this information and it needs to be sought specifically from you, or if accompanying documentation is not provided in the working languages of the secretariat, the consideration of your complaint may be delayed.

Source: Human Rights Fact Sheet No. 7: Complaint Procedures, UN:  
[www.unhchr.ch](http://www.unhchr.ch)

## Annex IV: Shadow report guidelines

Do not underestimate the resources required to produce a shadow report (both financial and human). Plan well in advance. It is better to submit information on certain provisions of the treaty rather than miss the committee's deadline for submission or submit it too late to be of any use because you are trying to address everything.

*Cover page* – include the name of the country the shadow report addresses, the committee session that it has been prepared for and the NGO(s) that prepared it.

*Contents* – a table of contents will ensure the committee members are clear about the issues raised in your report and can find specific information easily.

*Introduction* – provide brief information on the NGO(s) that prepared the report, including their mandate(s) and any information that will enhance credibility in the eyes of the committee members.

*Main section* – comprehensive shadow reports usually follow the structure of the state report and deal with each article of the convention in sequence. Shadow reports can be submitted without reference to the state report where the report is not made available. If you decide not to follow this format you can present the issues thematically but should ensure that the arguments presented are closely related to the articles of the convention. The committee's General Comments/Recommendations can provide useful information on how the committee interprets the treaty articles. Under each article (or theme), outline the issue, focusing on any gaps or inconsistencies in the state report and remember to check whether your government has made any reservations to the treaty. Link your findings with previous Concluding Observations of the committee on the country in question, highlighting whether or not they have been implemented, and seek to address the queries provided in the committee's List of Issues where possible (not all treaty bodies provide Lists of Issues nor are they necessarily adopted in due time to include in shadow reports). You may include questions that you would like the committee members to take up with the state. However, be careful of the tone you use, committee members will decide which questions to ask, so a demanding tone may be counter-productive.

*Conclusion* – this should briefly summarize the main issues addressed in the shadow report and can include recommendations for the government. The committee may take up some of these recommendations to include in its Concluding Observations.

*Sources* – it is vital to refer to reliable sources in order to illustrate arguments. Specific cases of violations of which your organization is aware can be useful as long as sufficient information is provided that will enable your allegations to be crosschecked with the source. Never make allegations without firm evidence. Avoid general references such as ‘reliable sources said ...’; in shadow reports you need to specify who those ‘reliable sources’ are. Committees may not routinely give the state information submitted to it by NGOs; however, you should be aware that despite requests for confidentiality, the state party may end up seeing the shadow report. Therefore care should be taken to ensure it is written in a way that will not endanger sources.

A variety of information can be used to support your arguments. This includes:

- official government documents
- court cases
- UN documents (eg: from other Treaty-bodies or Special Rapporteurs)
- UN agency documents (for example, ILO, UNICEF, UNHCR, etc)
- work of national human rights institutions
- decisions of regional bodies (for example, African Commission, Council of Europe, Inter-American Commission)
- academic research
- cases reported in newspapers (ensure the newspaper sources are reliable).

For all forms of information, and particularly for statistical data, clearly state where, when, how and by whom it was collected or produced.

*Language* – NGO shadow reports will be circulated in the language in which they are received. Most committee members have English as a working language so it is advisable to produce your report in English. However, if you can translate the report into other UN languages, this will be highly appreciated by committee members who do not use English.

*Length* – committee members receive huge amounts of information. A concise document setting out crucial issues will be better received than a longer, detailed

report. A former committee secretary suggested shadow reports should be no more than 20 pages.

**Adapted from:**

Alfredsson, G. and Ferrer. E., London, updated and revised by Ramsay, K., *Minority Rights: A Guide to United Nations Procedures and Institutions*, Minority Rights Group International and the Raoul Wallenberg Institute, 2004.

**See further:**

Tanaka, A. with Nagamine, Y., *The International Convention on the Elimination of All Forms of Racial Discrimination: A Training Manual for NGOs*, London, Minority Rights Group International and Geneva, the International Movement Against All Forms of Discrimination and Racism, 2000.

## Annex V: Complaints to international financial institutions

### Suggested format for a petition to the World Bank Inspection Panel

To: Executive Secretary  
 The Inspection Panel  
 1818 H Street  
 NW, Washington  
 DC 20433  
 USA  
 Fax no. +1 202 522 0916  
 or c/o the appropriate World Bank country office

1. We [*insert names*] live and/or represent others who live in the area known as [*insert name of area*]. Our addresses are attached.
2. We have suffered, or are likely to suffer, harm as a result of the World Bank's failures or omissions in the [*insert name and/or brief description of the project or programme*] located in [*insert location/country*].
3. [*Describe the damage or harm you are suffering or are likely to suffer from the project or programme*]
4. [*List (if known) the World Bank's operational policies you believe have not been observed*]
5. We have complained to World Bank staff on the following occasions [*list dates*] by [*explain how the complaint was made*]. We have received no response, [**or**] we have received a response and we are not satisfied that the explanations and answers solve our problems for the following reasons:
6. We request the Inspection Panel recommend to the World Bank's Executive Directors that an investigation of these matters be carried out.

Signatures:

Date:

Contact address, telephone number, fax number and email address:

List of attachments

We [*do/do not*] authorize you to disclose our identities

**Source:**

World Bank; [www.worldbank.org](http://www.worldbank.org)

**Also available:**

- Information on the Inspection Panel's operating procedures available in English, French, Spanish and Portuguese
- A list of requests for inspection and related information
- For summaries of Inspection Panel claims see the Center for International Environmental Law at [www.ciel.org/Ifi/ifibs.html](http://www.ciel.org/Ifi/ifibs.html)
- Information about the *Inter-American Development Bank's* independent investigation procedures is available in English, French, Spanish and Portuguese at [www.iadb.org](http://www.iadb.org)
- Information on the *Asian Development Bank's* accountability mechanism is available at [www.compliance.adb.org](http://www.compliance.adb.org)



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## **Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples**

In recent years, increased attention has been given to economic, social and cultural (ESC) rights internationally and, to a certain degree, domestically. However not enough has been done to consider fully and systematically the economic, social and cultural rights of minorities and indigenous peoples. This guide aims to bridge this gap. It provides an overview of ESC rights and how these can be applied to minorities and indigenous peoples.

Aimed at minority and indigenous activists and those working with them, each chapter has been written by an expert on a particular right, who provides practical information and advice about the best ways to advocate for securing ESC rights. The chapters cover the rights to food and water, housing, health, education, labour and culture and describe the legal standards, enforcement mechanisms, and guidelines for successful civil society advocacy.

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