of guarantees set forth in the convention. On the other hand, issuing norms and developing practices which are conducive to effective respect for such guarantees.'

137. As stated before, in this case Nicaragua has not adopted the adequate domestic legal measures to allow delimitation, demarcation, and titling of Indigenous community lands, nor did it process the amparo [alleging a violation of fundamental rights] remedy filed by members of the Awas Tingni Community within a reasonable time.

Article 13 of the European Convention on Human Rights is narrower in scope than Article 25 ACHR. It states that 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' The European Court of Human Rights considers that 'where an individual has an arguable claim to be a victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress' (Eur. Ct. H.R., *Silver and others* v. *United Kingdom*, judgment of 25 March 1983, Series A No. 61, §113; Eur. Ct. H.R., *Leander* v. *Sweden*, judgment of 26 March 1987, Series A No. 116, §77). Since the claim needs to be 'arguable', not every grievance based on the Convention requires access to a remedy in domestic law, however unmeritorious; on the other hand, the requirement of an effective remedy has an autonomous function to fulfil, and it may be violated even if no other substantive right appears violated: the right to an effective remedy must be understood as a right of the individual to have access to a procedure for the determination of the merits of the claim made under the Convention, unless the allegation of violation is totally without any plausible foundation. The right to an effective remedy does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (Eur. Ct. H.R., *James and others* v. *United Kingdom*, judgment of 21 February 1986, Series A No. 98, §85); nor does it require access to a *judicial* remedy, since other remedies may present the required effectiveness, provided the authority before which they are filed has the competence to put an end to the violation and provided it is independent from the author of the measure that is allegedly causing the violation. The Court summarizes its interpretation of the requirement of an effective remedy as follows:

European Court of Human Rights (3rd sect.), *Čonka* v. *Belgium* (Appl. No. 51564/99) judgment of 5 February 2002, para. 75:

Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint'

under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be 'effective' in practice as well as in law. The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

Effective remedies at domestic level should ensure that human rights violations find their solution at that level, without it being necessary to rely on the European machinery of protection: thus, only in exceptional cases – where the national authorities, in particular courts, fail to understand their obligations under the Convention or to act accordingly – should the European Court of Human Rights be called upon to intervene. The provision of effective remedies thus has a crucial function to fulfil in a system that emphasizes subsidiarity, according to which the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities (Eur. Ct. H.R. (GC), *Kudła* v. *Poland* (Appl. No. 30210/96), judgment of 26 October 2000, §152). The need to strengthen effective remedies at national level is thus particularly important in a context in which, as under the ECHR, the international judicial supervisory mechanism is overburdened. The Committee of Ministers of the Council of Europe has therefore sought to build on the case law of the European Court of Human Rights to address the following recommendation to the Council of Europe Member States:

Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th session):

The Committee of Ministers, [r]ecalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties;

Emphasising that, as required by Article 13 of the Convention, member states undertake to ensure that any individual who has an arguable complaint concerning the violation of his rights and freedoms as set forth in the Convention has an effective remedy before a national authority;

Recalling that in addition to the obligation of ascertaining the existence of such effective remedies in the light of the case law of the European Court of Human Rights (hereinafter

referred to as 'the Court'), states have the general obligation to solve the problems underlying violations found;

Emphasising that it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found;

Noting that the nature and the number of applications lodged with the Court and the judgments it delivers show that it is more than ever necessary for the member states to ascertain efficiently and regularly that such remedies do exist in all circumstances, in particular in cases of unreasonable length of judicial proceedings;

Considering that the availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court's workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier;

Emphasising that the improvement of remedies at national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court;

Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ascertain, through constant review, in the light of case law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;
II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;
III. pay particular attention, in respect of aforementioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings ...

Appendix to Recommendation Rec(2004)6
Introduction

1. [It] is states parties who are primarily responsible for ensuring that the rights and freedoms laid down in the Convention are observed and that they must provide the legal instruments needed to prevent violations and, where necessary, to redress them. This necessitates, in particular, the setting-up of effective domestic remedies for all violations of the Convention, in accordance with its Article 13. The case law of the European Court of Human Rights has clarified the scope of this obligation which is incumbent on the states parties to the Convention by indicating notably that:

   - Article 13 guarantees the availability in domestic law of a remedy to secure the rights and freedoms as set forth by the Convention.
   - this article has the effect of requiring a remedy to deal with the substance of any 'arguable claim' under the Convention and to grant appropriate redress. The scope of this obligation

varies depending on the nature of the complaint. However, the remedy required must be 'effective' in law as well as in practice;
- this notably requires that it be able to prevent the execution of measures which are contrary to the Convention and whose effects are potentially irreversible;
- the 'authority' referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy it provides is indeed effective;
- the 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness.

2. In the recent past, the importance of having such remedies with regard to unreasonably long proceedings has been particularly emphasised, as this problem is at the origin of a great number of applications before the Court, though it is not the only problem.
3. The Court is confronted with an ever-increasing number of applications. This situation jeopardises the long-term effectiveness of the system and therefore calls for a strong reaction from contracting parties. It is precisely within this context that the availability of effective domestic remedies becomes particularly important. The improvement of available domestic remedies will most probably have quantitative and qualitative effects on the workload of the Court:

   - on the one hand, the volume of applications to be examined ought to be reduced: fewer applicants would feel compelled to bring the case before the Court if the examination of their complaints before the domestic authorities was sufficiently thorough;
   - on the other hand, the examination of applications by the Court will be facilitated if an examination of the merits of cases has been carried out beforehand by a domestic authority, thanks to the improvement of domestic remedies.

4. This recommendation therefore encourages member states to examine their respective legal systems in the light of the case law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case law, effective remedies as secured by Article 13. The examination may take place regularly or following a judgment by the Court.
5. The governments of member states might, initially, request that experts carry out a study of the effectiveness of existing domestic remedies in specific areas with a view to proposing improvements. National institutions for the promotion and protection of human rights, as well as non-governmental organisations, might also usefully participate in this work. The availability and effectiveness of domestic remedies should be kept under constant review, and in particular should be examined when drafting legislation affecting Convention rights and freedoms. There is an obvious connection between this recommendation and the recommendation on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention.
6. Within the framework of the above, the following considerations might be taken into account.

The Convention as an integral part of the domestic legal order

7. A primary requirement for an effective remedy to exist is that the Convention rights be secured within the national legal system. In this context, it is a welcome development that the Convention has now become an integral part of the domestic legal orders of all states parties.

This development has improved the availability of effective remedies. It is further assisted by the fact that courts and executive authorities increasingly respect the case law of the Court in the application of domestic law, and are conscious of their obligation to abide by judgments of the Court in cases directly concerning their state (see Article 46 of the Convention) …

8. The improvement of domestic remedies also requires that additional action be taken so that, when applying national law, national authorities may take into account the requirements of the Convention … This notably means improving the publication and dissemination of the Court's case law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials …

Specific remedies and general remedy

9. Most domestic remedies for violations of the Convention have been set up with a targeted scope of application. If properly construed and implemented, experience shows that such systems of 'specific remedies' can be very efficient and limit both the number of complaints to the Court and the number of cases requiring a time-consuming examination.
10. Some states have also introduced a general remedy (for example before the Constitutional Court) which can be used to deal with complaints which cannot be dealt with through the specific remedies available. In some member states, this general remedy may also be exercised in parallel with or even before other legal remedies are exhausted … [S]tates which have such a general remedy tend to have fewer cases before the Court.
11. This being said, it is for member states to decide which system is most suited to ensuring the necessary protection of Convention rights, taking into consideration their constitutional traditions and particular circumstances.
12. Whatever the choice, present experience testifies that there are still shortcomings in many member states concerning the availability and/or effectiveness of domestic remedies, and that consequently there is an increasing workload for the Court.

8.1. Questions for discussion: providing effective remedies before national authorities

1. In principle, international law only imposes obligations of result on States, rather than obligations of conduct: it leaves it to each State to designate which measures shall be taken, and by which organ, in order to implement its international obligations. Consistent with this principle, the obligation to provide effective remedies formulated under international human rights treaties is not generally interpreted as imposing on the States parties an obligation to recognize the provisions of those treaties as directly applicable by national courts, i.e. to implement their obligations by 'direct incorporation' of those provisions. Thus for example, the European Court of Human Rights considers that 'Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms *in whatever form they may happen to be secured in the domestic legal order*'; and the Human Rights Committee states in its General Comment No. 31 that 'the enjoyment of the rights recognized

under the Covenant can be effectively assured by the judiciary *in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law'*. Is this a mistake? Should direct incorporation of international human rights be seen as inherent in the right to an effective remedy?

2. The European Court of Human Rights considers that the notion of an effective remedy under Article 13 ECHR requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (Eur. Ct. H.R. (3rd sect.), *Conka* v. *Belgium* (Appl. No. 51564/99), judgment of 5 February 2002, para. 79). In those cases, it may be inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention. In which circumstances should the execution of measures alleged to result in violations of the Convention be considered to produce 'irreversible' consequences? Should this be limited to instances where a foreigner is facing removal from the national territory, or should it apply to a much larger set of situations?

1.2 The question of the justiciability of economic and social rights

The main question regarding the provision of effective remedies concerns the justiciability of economic and social rights (for general studies, see F. Coomans (ed.), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems* (Antwerp-Oxford: Intersentia-Hart, 2006); M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009); F. Matscher (ed.), *The Implementation of Economic and Social Rights: National, International and Comparative Aspects* (Kehl am Rhein: N. P. Engel, 1991); and the contributions of M. Scheinin, 'Economic, Social and Cultural Rights as Legal Rights' and S. Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights. A Textbook*, second edn (Leiden: Martinus Nijhoff, 2001), p. 29 and p. 55 respectively; for a set of materials illustrating the use of economic, social and cultural rights before courts, see B. G. Ramcharan (ed.), *Judicial Protection of Economic, Social and Cultural Rights* (Leiden: Martinus Nijhoff, 2005)).

(a) Challenges to the justiciability of social and economic rights

1. The justiciability of these rights has traditionally been contested on three distinct grounds. The classical argument, as formulated by Bossuyt and Vierdag, and recently revived by Dennis and Stewart, is that economic and social rights are indeterminate: they are not sufficiently well defined in order to lend themselves to be adjudicated, and the judge would necessarily act arbitrarily – making the law rather than applying it – by seeking to provide meaning to those rights. By adjudicating social and economic rights, jurisdictions would be exceeding their powers under a classical

understanding of separation of powers: courts should leave it to the legislature or to the executive to implement social and economic rights, since they have no legitimacy to make choices of social policy. In addition, since they require resources for their implementation, social and economic rights cannot be immediately applied, but can only be progressively realized; and international assistance and co-operation is required in order to achieve this (see E. W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, 9 (1978), 69, and M. Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *Revue des droits de l'homme*, 8 (1975), 783, and the answer by G. J. H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views' in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Dordrecht: Martinus Nijhoff, 1984), p. 97; although they focus on international procedures rather than on domestic litigation, the arguments of Dennis and Stewart are largely similar: M. J. Dennis and D. P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', *American Journal of International Law*, 98, No. 3 (2004), 462).

2. The argument of legitimacy is sometimes hardly distinguishable from the argument of competence. Courts, it is said, are ill equipped to deal with complex, multipolar issues, and the adjudicatory setting is inappropriate for the resolution of problems of social policy:

Stephen Holmes and Cass R. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes* (New York and London: W. W. Norton, 1999), p. 95:

How can judges, in deciding a single case, take account of annual ceilings on government spending? Unlike a legislature, a court is riveted at any one time to a particular case. Because they cannot survey a broad spectrum of conflicting social needs and then decide how much to allocate to each, judges are institutionally obstructed from considering the potentially serious distributive consequences of their decisions. And they cannot easily decide if the state made an error when concluding, before the fact, that its limited resources were more effectively devoted to cases A, B, and C, rather than to case D.

Holmes and Sunstein do not fully subscribe to the position they describe in this excerpt. They note however that 'Courts that decide on the enforceability of rights claims in specific cases will … reason more intelligently and transparently if they candidly acknowledge the way costs affect the scope, intensity, and consistency of rights enforcement' (at p. 98).

3. A final argument is that the adjudication of social and economic rights would be narrowing the room for the exercice of democratic self-determination. The argument is presented as follows by Michael Walzer:

Michael Walzer, 'Philosophy and Democracy', *Political Theory*, 9 (1981), pp. 391–2:

The judicial enforcement of welfare rights would radically reduce the reach of democratic decision. Henceforth, the judges would decide, and as cases accumulated, they would decide in increasing detail, what the scope and character of the welfare system should be and what sorts of redistribution it required. Such decisions would clearly involve significant judicial control of the state budget and, indirectly at least, of the level of taxation – the very issues over which the democratic revolution was originally fought.

(b) Answers to these challenges

1. One tendency within the doctrine, in order to overcome these objections, has been to set aside as misguided the focus on the 'progressive realization' of economic and social rights, and instead to treat these rights following the 'violations approach', usually adopted in the area of civil and political rights. The 'violations approach' would achieve protection of social and economic rights by focusing on three categories of violations: (1) violations that result from measures adopted by governments that contravene the rights of the International Covenant on Economic, Social and Cultural Rights, or that create conditions inimical to the realization of these rights; (2) patterns of discrimination, taking into account the fact that, in the ICESCR, the requirement of non-discrimination is not subject to progressive realization but constitutes instead an immediate obligation; (3) failure to fulfil minimum core obligations (see A. R. Chapman, '"Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 18(1) (1996), 23–66). This, it is claimed, 'would provide a more feasible and appropriate methodology both for monitors on the ground and for reviewers evaluating the compliance of individual countries with international standards. One major advantage is that the monitoring of violations does not depend on access to extensive and comparable good quality statistical data. Further, the identification of violations in order to end and rectify abuses constitutes a higher priority than promoting progressive realisation for its own sake. The monitoring of human rights is not an academic exercise. It is intended to be a means of ameliorating the human suffering which results from serious violations of international standards' (A. R. Chapman and S. Russell, 'Introduction', in A. R. Chapman and S. Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002), pp. 3–19 at pp. 6–7).

2. Another riposte has been to uncover the premises on which the arguments above are based. For instance, where the requirements of the rights are vague, judges would not necessarily have to usurp the powers normally allocated to legislatures: a 'co-operative model' of the relations between different branches of government could develop, in which judges and other authorities interact in ways that favour a 'constitutional dialogue' as to how human rights should be implemented (C. Scott and J. Nedelsky, 'Constitutional Dialogue' in J. Bakan and D. Schneidermann (eds.), *Social Justice and*

the Constitution: Perspectives on a Social Union for Canada (Ottawa: Carleton University Press, 1992), p. 59). More generally, judges and other branches of government should be seen less as opposing one another – the power attributed to the ones meaning less power left to the others – than as complementing each other. Courts therefore should not have to choose between substituting themselves for the other authorities, or abdicating their responsibility to monitor compliance with economic and social rights: 'The courts can place a burden on the executive and the legislature to justify the reasonableness of their policy choices in the light of the constitutional commitment to economic and social rights. Should they fail to discharge this burden of justification, a court may issue a declaratory order to this effect. This can set the parameters for a constitutionally acceptable decision while still preserving sufficient "space" for the exercise of a choice of means by the legislature' (S. Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights. A Textbook*, second edn (Leiden: Martinus Nijhoff, 2001), p. 55, at p. 60).

Consider also the counter-objection by Fabre to the claim by Walzer about the anti-democratic character of constitutionalizing social rights. This claim, she states:

Cécile Fabre, *Social Rights under the Constitution. Government and the Decent Life* (Oxford Univeristy Press, 2000), p. 146:

rests on two questionable assumptions. First, it assumes that enforcing social rights is always more expensive than enforcing civil rights. But this is not always the case ... Secondly, it assumes that the constitution specifies the duties which are grounded in social rights in such a way as to leave no scope for democratic decision-making. But ... this need not always be the case ... [For instance, the] constitution can simply specify which level of resources individuals should get, and make it very clear that it is up to the democratic majority to decide whether, for example, employers should pay a minimum wages to their employees, or whether the state should top up wages that are below the poverty threshold. It could also state that decent housing should be provided while leaving it to the government to decide whether rents should be controlled, or whether housing benefits should be given to the needy, or both.

In order to respond to the denunciation of the constitutionalization of social rights as anti-democratic, Fabre instead proposes to distinguish, among social rights, between those that indeed, at a conceptual level, may be seen as limiting democratic decision-making – such as, for instance, social rights to adequate minimum income, housing, and health care – and those which are 'democratic' – such as the right to adequate education – insofar as they promote effective political participation.

3. Of course, a third answer could be to emphasize the complementarity between direct justiciability of economic and social rights before courts and the role of the legislator in implementing social and economic rights, thus guiding the courts and clarifying the content of requirements expressed in broad terms in international treaties or in domestic constitutions (see F. Viljoen, 'National Legislation as a Source of Justiciable Socio-Economic

Rights', *Economic and Social Rights Review*, 6, No. 3 (2005), 6–9). Fons Coomans concludes from a comparative study of the application of economic and social rights by courts:

Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context' in F. Coomans (ed.), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems* (Antwerp-Oxford: Intersentia-Hart, 2006), p. 1 at pp. 7–8:

Almost all domestic systems demonstrate that constitutional provisions on economic and social rights are not sufficient for an effective realisation of these rights. There is a need for implementation through secondary and other (delegated) forms of legislation or executive and administrative action. This is also emphasised in Article 2(1) ICESCR. Such legislation and executive measures may also provide for remedies. For example, the South African Social Assistance Act and the Social Security Agency Act create statutory socio-economic rights that are enforceable through the courts. In India, statutes give effect to particular economic and social rights listed in the Directive Principles of State Policy, such as the National Rural Employment Guarantee Act of 2005. In Canada, jurisdictions at state level have adopted anti-discrimination legislation that also prohibits discrimination in education, employment, housing and the provision of goods and services.

8.2. Questions for discussion: doctrinal objections to the adjudication of social and economic rights

1. To what extent do the objections summarized above apply, not only to the adjudication of social and economic rights, but also to civil and political rights, such as freedom of expression and the right to respect for private and family life? Is there any reason for these critiques to be addressed specifically to the former category of rights?
2. To what extent are these objections pre-supposing a specific institutionalization of the adjudicatory function? Would changes in the working methods followed by courts or in their relationship to the other branches of government be sufficient to answer these objections?
3. Is the 'violations approach' to social and economic rights preferable to one seeking to achieve compliance with the obligation to 'progressively realize' the rights of the ICESCR, or does it risk sacrificing certain important dimensions of social and economic rights? In response to the claim that, as they put it, the 'violations approach' presented above 'would weaken the call for eventual full implementation of economic and social rights by concentrating on the most flagrant abuses', A. Chapman and S. Russell note: 'The premise is that by focusing on the negative goal of preventing or halting serious violations of these rights the positive goal of full implementation, realised over time, would be overshadowed. However, the violations approach is not meant to replace the ultimate goal of full implementation of the rights of the [ICESCR], but rather, to provide a simple and effective monitoring method' (A. R. Chapman and S. Russell, 'Introduction' in A. R. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002), pp. 3–19 at pp. 7–8). How convincing is this answer to the critiques addressed at the 'violations approach'?

(c) The justiciability of economic, social and cultural rights: conceptual guidance

The documents below can be seen as answers to the challenges described in (a). They are presented in chronological order. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights were elaborated by a group of international law experts in 1986 only months after the Committee on Economic, Social and Cultural Rights was established by Resolution 17/1985 of the Economic and Social Council. The set of principles these experts adopted relate, in particular, to the justiciability of the rights of the Covenant. In 1990, the Committee on Economic, Social and Cultural Rights adopted its General Comment No. 3, on the nature of States parties' obligations under Article 2, para. 1, of the Covenant. This provision states: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' The General Comment is an attempt to clarify that this clause does not deprive the obligations stipulated under the Covenant from any immediate effect. Finally, in 1998 the Committee on Economic, Social and Cultural Rights adopted its General Comment No. 9 on the domestic application of the Covenant, where it describes, in particular, the importance of judicial remedies in implementing the Covenant, and bridges the gap between the ICCPR and the ICESCR.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986):

3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

4. The International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice …

7. States parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time …

10. States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies …

13. All organs monitoring the Covenant should pay special attention to the principles of non-discrimination and equality before the law when assessing States parties' compliance with the Covenant.

14. Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

15. Trends in international economic relations should be taken into account in assessing the efforts of the international community to achieve the Covenant's objectives.

Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States Parties' Obligations* (Art. 2, para. 1, of the Covenant) (1990):

5. Among the measures which might be considered appropriate [to satisfy the obligation to take steps to implement the International Covenant on Economic, Social and Cultural Rights, as stated in article 2(1) by 'all appropriate means, including particularly the adoption of legislative measures'], in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, 'shall have an effective remedy' (art. 2(3)(a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered 'appropriate' for the purposes of article 2(1) include, but are not limited to, administrative, financial, educational and social measures …

9. The principal obligation of result reflected in article 2 (1) is to take steps 'with a view to achieving progressively the full realization of the rights recognized' in the Covenant. The term

'progressive realization' is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, 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 under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints [on this, see chapter 5, section 4.]

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes ...

Committee on Economic, Social and Cultural Rights, General Comment No. 9, *The Domestic Application of the Covenant* (E/1999/22) (1998):

A. The duty to give effect to the Covenant in the domestic legal order

1. In its general comment No. 3 (1990) on the nature of States parties' obligations (article 2, paragraph 1, of the Covenant) the Committee addressed issues relating to the nature and scope of States parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so 'by all appropriate means', the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

2. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties, is that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' The International Covenant on Economic, Social and Cultural Rights contains no direct counterpart to article 2, paragraph 3(b), of the International Covenant on Civil and Political Rights, which obligates States parties to, *inter alia*, 'develop the possibilities of judicial remedy'. Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

B. The status of the Covenant in the domestic legal order

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see paragraph 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

C. The role of legal remedies

Legal or judicial remedies? 9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token,

there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Justiciability 10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in general comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a)(i); 8; 10, paragraph 3; 13, paragraph 2(a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Self-executing 11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered 'non-self-executing' were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any *a priori* assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

D. The treatment of the Covenant in domestic courts

12. In the Committee's guidelines for States' reports, States are requested to provide information as to whether the provisions of the Covenant 'can be invoked before, and directly enforced by,

the Courts, other tribunals or administrative authorities' (see E/1991/23, annex IV, chapter A, paragraph 1(d)(iv)). Some States have provided such information, but greater importance should be attached to this element in future reports. In particular, the Committee requests that States parties provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant.

13. On the basis of available information, it is clear that State practice is mixed. The Committee notes that some courts have applied the provisions of the Covenant either directly or as interpretative standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights

1.3 Social and economic rights before national courts

Probably the best answers to the objections to the justiciability of social and economic rights are those provided by courts, which through a variety of techniques manage to rely on provisions guaranteeing such rights in domestic constitutions or in international treaties, and to identify the implications in the concrete cases they are presented with. The following decisions illustrate how national courts have given effect to social and economic rights such as the right to housing, the right to education, or the right to food, on the basis of constitutional provisions framed in terms similar or identical to those of international instruments.

Constitutional Court of South Africa, Case CCT 11/00, *Government of the Republic of South Africa and others* v. *Grootboom and others*, 2000 (11) B.C.L.R. 1169, judgment of 4 October 2000 (leading judgment of Yacoob J.):

[As explained in the judgment of Yacoob J., in which the other justices of the Constitutional Court concurred, 'the group of people with whom [the Constitutional Court was] concerned

in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.' The applicants, who included children, were squatters. They had moved into informal homes on a vacant private land earmarked for formal low-cost housing because the living conditions in Wallacedene, their original place of abode, were intolerable. As explained in the judgment: 'A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister's family in a shack about twenty metres square.' The owner then obtained a court order to evict them from the private land. In the course of the eviction, their building structures and materials were demolished and totally destroyed. To camp on a sports field in the surrounding area was the only available option to the applicants. These circumstances prompted them to approach the Cape of Good Hope High Court for redress, asking that Government provide them with adequate basic shelter or housing until they secured permanent accommodation, or basic nutrition, shelter, healthcare and social services to the respondents who are children. They based their claim on section 26 of the Constitution which provides that everyone has the right of access to adequate housing (section 26(2) provides that the State 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'); and on section 28(1)(c) of the Constitution which provides that children have the right to shelter. Section 7(2) of the Constitution requires the State 'to respect, protect, promote and fulfil the rights in the Bill of Rights'. The applicants were granted relief on the basis of the right of children to shelter stated in section 28(1)(c), which, however, also benefited the childrens' parents since 'an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or her parent': the judgment provisionally concluded that 'tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum'. The Government appealed against this judgment to the Constitutional Court.]

[The interpretation of section 26 of the Constitution]

[21] Like all the other rights in Chapter 2 of the Constitution (which contains the Bill of Rights), section 26 must be construed in its context. The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state to promote access to adequate housing and has three key elements. The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right. These elements are discussed later. The third subsection provides protection against arbitrary evictions.

[22] Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.

[23] Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be

no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

[24] The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

[25] Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality. The context in which the Bill of Rights is to be interpreted was described by Chaskalson P in [*Soobramoney v. Minister of Health (Kwazulu-Natal*) (CCT 32/97) [1997] ZACC 17]:

'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'

[The impact of international law]

[Section 39 of the Constitution provides that: '(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.' Relying extensively on the materials submitted by the *amici curiae*, the Court examines in paras. 27–33 how the right to adequate housing has been interpreted by the Committee on Economic, Social and Cultural Rights, and whether this should influence the reading of section 26 of the Constitution, which guarantees the right to housing. This part of the analysis concludes by noting the difficulty of identifying what constitutes the 'minimum core content' of the right of access to adequate housing in the context of the Constitution, especially since the needs of different groups may vary.]

[34] [S]ection 26 [provides]:

(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right of everyone including children. Although the subsection does

not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs.

[35] The right delineated in section 26(1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

[36] In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

[37] The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

[38] Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to 'take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) 'within available resources'.

Reasonable legislative and other measures

[39] What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government … The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

[40] Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.

[41] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

[42] The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

[43] In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

[44] Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Progressive realisation of the right

[45] The extent and content of the obligation consist in what must be achieved, that is, 'the progressive realisation of this right'. It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular. The committee has helpfully analysed this requirement in the context of housing as follows: 'Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'

Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of 'progressive realisation' in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.

Within available resources
[46] The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources ... There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

[Paras. 47–53 of the judgment then examine the national Housing Act, which provides a framework which establishes the responsibilities and functions of each sphere of government with regard to housing, and other measures aimed at housing development. It concludes in this respect that the programme adopted by the public authorities 'is aimed at achieving the progressive realisation of the right of access to adequate housing'. It then continues:]

[54] A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. Allocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systematic response to a pressing social need. It takes account of the housing shortage in South Africa by seeking to build a large number of homes for those in need of better housing. The programme applies throughout South Africa and although there have been difficulties of implementation in some areas, the evidence suggests that the state is actively seeking to combat these difficulties.

[55] Legislative measures have been taken at both the national and provincial levels. As we have seen, at the national level the Housing Act sets out the general principles applicable to housing development, defines the functions of the three spheres of government and addresses the financing of housing development. It thus provides a legislative framework within which the delivery of houses is to take place nationally. At the provincial level there is the Western Cape Housing Development Act, 1999. This statute also sets out the general principles applicable to housing development; the role of the provincial government; the role of local government; and other matters relating to housing development. Thus, like the Housing Act, this statute provides a legislative framework within which housing development at provincial level will take place. All of the measures described form part of the nationwide housing programme.

[56] This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed. This case is concerned with the situation in the Cape Metro and the municipality and the circumstances that prevailed there are therefore presented.

[The judgment then describes the efforts made in Cape Metro to develop housing, and concludes this review by noting that the crucial element is whether enough is done for families in desperate need: 'the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by [section 26 of the Constitution]'.]

[65] The absence of this component may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme. That is one of the main reasons why the Cape Metro land programme was adopted.

[66] The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26. The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.

[67] This case is concerned with the Cape Metro and the municipality. The former has realised that this need has not been fulfilled and has put in place its land programme in an effort to fulfil it. This programme, on the face of it, meets the obligation which the state has towards people in the position of the respondents in the Cape Metro. Indeed, the amicus accepted that this programme 'would cater precisely for the needs of people such as the respondents, and, in an appropriate and sustainable manner'. However, as with legislative measures, the existence of the programme is a starting point only. What remains is the implementation of the programme by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address.

[68] Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.

[69] In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state

fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier.

[Section 28(1)(c) and the right to shelter]

[Examining then the meaning of section 28(1)(c) of the Constitution, the judgment notes that the High Court granted relief on the basis of the right of children to shelter. However, this produces an 'anomalous result', since:]

[71] People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.

[Evaluation of the conduct of the appellants towards the respondents]

[80] The final section of this judgment is concerned with whether the respondents are entitled to some relief in the form of temporary housing because of their special circumstances and because of the appellants' conduct towards them. This matter was raised in argument, and although not fully aired on the papers, it is appropriate to consider it. At first blush, the respondents' position was so acute and untenable when the High Court heard the case that simple humanity called for some form of immediate and urgent relief. They had left Wallacedene because of their intolerable circumstances, had been evicted in a way that left a great deal to be desired and, as a result, lived in desperate sub-human conditions on the Wallacedene soccer field or in the Wallacedene community hall. But we must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country.

[81] Although the conditions in which the respondents lived in Wallacedene were admittedly intolerable and although it is difficult to level any criticism against them for leaving the Wallacedene shack settlement, it is a painful reality that their circumstances were no worse than those of thousands of other people, including young children, who remained at Wallacedene. It cannot be said, on the evidence before us, that the respondents moved out of the Wallacedene settlement and occupied the land earmarked for low-cost housing development as a deliberate strategy to gain preference in the allocation of housing resources over thousands of other people who remained in intolerable conditions and who were also in urgent need of housing relief. It must be borne in mind however, that the effect of any order that constitutes a special dispensation for the respondents on account of their extraordinary circumstances is to accord that preference.

[82] All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.

[83] But section 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen …

[85] Consideration is now given to whether the state action (or inaction) in relation to the respondents met the required constitutional standard. It is a central feature of this judgment that the housing shortage in the area of the Cape Metro in general and Oostenberg in particular had reached crisis proportions. Wallacedene was obviously bursting and it was probable that people in desperation were going to find it difficult to resist the temptation to move out of the shack settlement onto unoccupied land in an effort to improve their position. This is what the respondents apparently did.

[86] Whether the conduct of Mrs Grootboom and the other respondents constituted a land invasion was disputed on the papers. There was no suggestion however that the respondents' circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred. If there had been such a plan the appellants might well have acted differently.

[87] The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.

[88] There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejectment of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place. The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation …

[92] This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.

Summary and conclusion

[93] This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

[94] I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[95] Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

[96] In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

[97] The Human Rights Commission is an amicus in this case. Section 184(1)(c) of the Constitution places a duty on the Commission to 'monitor and assess the observance of human rights in the Republic'. Subsections (2)(a) and (b) give the Commission the power: '(a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human right have been violated.'

Counsel for the Commission indicated during argument that the Commission had the duty and was prepared to monitor and report on the compliance by the state of its section 26 obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment ...

The Order

[99] The following order is made:

1. The appeal is allowed in part.
2. The order of the Cape of Good Hope High Court is set aside and the following is substituted for it:

It is declared that:

(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
(c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations …

Supreme Court of Israel (sitting as the High Court of Justice), *Yated – Non-Profit Organization for Parents of Children with Down Syndrome, and 54 Parents* v. *Ministry of Education* (HCJ 2599/00), judgment of 14 August 2002 by Justice D. Dorner (leading judgment):

This petition raises the following questions: Are children with special needs only entitled to free special education in a special education institution? Or is the State also under an obligation to provide free special education to children with special needs who have been integrated into the regular education system?

The Statutory Provisions
1. Section 4 of the Special Education Law, 1988 provides that '[t]he State is responsible to provide special education under this law'. Sections 3 and 7 of the statute regulate the placement of children with special needs in educational institutions …

Facts, Procedure, and Claims
2. Yated, a registered non-profit organization, together with 54 parents of children with Downs syndrome, asks that we order the State to provide free special education to children who, though having special educational needs, have been found suitable for integration in regular educational institutions. Petitioners claim that the authorities are required by the Special Education Law to finance special education in any educational institution where a child is placed. They claim that the approach expressed in section 7(b) of the law [according to which the Placement Committee determining the eligibility of a child with special needs for special education and his placement in a special education institution should, in determining the placement of a child with special needs, prefer placement in a recognized educational institution which is not a special education institution] requires the Placement Committee to prefer the placement of children with special needs in a regular educational institution. Furthermore, pursuant to the policy of the Ministry of Education, children with special needs should, wherever possible, be placed in the regular educational system and also be given additional educational assistance. Petitioners explained

that the Ministry of Education, though it encourages such integration, does not provide financial aid. As such, the financial burden falls on the parents. As such, parents who are unable to bear these expenses are forced to transfer their children to special education institutions, despite the fact that these children have been found suitable for integration into the regular educational system …

This was the background for petitioners' claim that the policy of the Ministry of Education violates the right to education – a fundamental right. They further alleged that this policy infringes the fundamental right to equality. This is because it discriminates between parents whose children's special education needs are paid by the Ministry of Education and between parents who are forced to bear these costs independently. Furthermore, they claim, the policy also discriminates between those children integrated into regular classes – as their parents can bear the expenses involved – and those children placed in special education institution solely due to their parents' inability to bear those expenses.

3. In its response, the State did not dispute the pedagogical advantages of integrating children with special needs into regular educational institutions, and that the policy of the Ministry of Education was to encourage such integration. As part of this policy, since 1996 the Ministry of Education has even implemented programs for children with special needs who have been integrated into the regular education system. The Minister of Education appointed a public committee in 2000, which noted the importance of giving preference to integration within the regular education system, as provided by the Special Education Law. The Committee also noted the inadequacy of the resources allocated towards such integration. Internal ministerial committees were appointed to implement the recommendations of the public committee. These determined that the regular education system should be granted monies for additional integration hours and personnel trained in special education. They further determined that those special education students studying within the regular education system should receive the services provided by the law, as available resources allow.

The State claims that, subject to budgetary pressures, significant resources are allocated towards integration. Even so, the State contended that the clear import of section 3 of the law is that the right to free special education, which is conferred by section 4 of the law, can only be realized in an institution for special education or in a special education class within a regular institution. The actual extent of assistance granted to children with special needs in the regular education system is subject to the discretion of the Placement committee. The State claimed, however, that the Placement Committee is not authorized to provide assistance for all 'special education', as per the broad definition of that term in the law. They further argued that, pursuant to section 7(b) of the law, the State is under no statutory obligation to provide such assistance. This is because the decisions of the Placement Committee are only recommendations; their realization is contingent upon the resources actually available to the State.

The Right to Education

4. The right to education has long been recognized as a basic human right. The right is anchored in the Universal Declaration of Human Rights of 1948. Article 26 of this Declaration provides that every person has the right to education and that education must be free, at least in the elementary and fundamental stages. The International Covenant on Economic, Social and Cultural Rights of 1966 was also ratified by Israel in 1991. This declared in article 13 that education should be directed to the full development of the human personality, and that it

should strengthen the respect for human rights and fundamental freedoms. It also determined that elementary education should be compulsory and freely available … The right to education is also anchored in articles 28 and 29 of the Convention on the Rights of the Child, 1989 …

The right to education is also anchored in numerous constitutions, such as the Belgian Constitution (article 24), the South African Constitution (article 29), the Constitution of Spain (article 27), and the Irish Constitution (article 42). The German Constitution and the constitutions of most of the states of the United States establish the government's responsibility to provide education for its citizens …

6. Shortly after its establishment, with the enactment of the Compulsory Education Law, 1949, the State of Israel delineated the scope of its obligation to ensure the rights of its citizenry to education. This law sets out an arrangement for compulsory education for every boy and girl until the age of 15, as well as the State's responsibility to ensure the provision of such education. More recently, the right of children to education in Israel was anchored in the Rights of the Student Law, 2000. The purpose of this law is to determine the principles for the rights of the student in the spirit of human dignity and the principles of the United Nations Convention on the Rights of the Child.

Case law, too, recognized the right to education as a fundamental right. Justice Theodor Or made the following comments regarding the importance of this right: 'One cannot exaggerate the importance of education as a social tool. This is one of the most important functions fulfilled by the government and the State. Education is critical for the survival of a dynamic and free democratic society. It constitutes a necessary foundation for every individual's self-fulfillment. It is essential for the success and flourishing of every individual. It is crucial to the survival of society, in which people improve their individual well-being and thus contribute to the well-being of the entire community' (HCJ 7715, 1554/95 *Shoharei Gilat* v. *Minister of Education and Culture*, at 24).

The right to free education is also an expression of the principle of equality. It enables every child to realize their innate talent and potential, to integrate into society and to progress therein, irrespective of their parents' socio-economic status …

Discrimination in the exercise of the right to education, if occasioned on the basis of group affiliation, may indeed be regarded as degradation that violates the right to human dignity … By contrast, unequal treatment occasioned by political, administrative, or budgetary reasons is not degrading, and does not, therefore, violate human dignity. For our purposes, discrimination against children with special needs, though rooted in their group affiliation, is motivated by budgetary considerations. As such, the question of whether such discrimination violates human dignity is not unequivocal and I see no need to answer it. Petitioners did not claim that the law should be annulled because it violates the right to human dignity. Their claim was rather that the law should be interpreted and applied in light of the right to education. Indeed, the basic right to education, as established by statute, our case law, and international law, is of independent validity, and has no necessary connection to the right to human dignity prescribed by the Basic Law: Human Dignity and Liberty …

The Right to Special Education

7. The right to special education is a derivative of the right to education. Children with special needs are not able to exercise their right to education unless they receive special education that addresses their needs. Accordingly, the signatory States to the Convention on the Rights

of the Child recognized the right of children who are physically or mentally disabled to enjoy full and decent lives in conditions that ensure dignity, promote self-reliance and facilitate their active participation in communal life. See section 23 of the Convention. In order to ensure the protection of these rights, the Convention provides:

Party States recognize the right of the disabled child to special care. Party States shall encourage and ensure the extension, subject to available resources, to the suitable child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

Children with special needs are entitled to an education suitable for their needs; this right is recognized in most of the countries around the world … Many States have also recognized the importance of integrating people with special needs generally and children in particular into regular frameworks, and have created statutory arrangements for such integration. Thus, the [United States] Disabilities Education Act provides, in section 1412(a), that preference shall be given to placing children with special needs in the regular education system: '[States must establish procedures to ensure] to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily' (see also *Oberti* v. *Board of Education*, 1204 F. Supp. 995 (2d Cir. 1993); *Daniel R.R.* v. *State Board of Education*, 874 F. Supp. 2d 1036, 1049 (5th Cir.1989)).

In a similar vein, section 6(a)(2) of the Equal Rights For People With Disabilities Law of 1998 provides that 'the exercise of right and the grant of services to a person with disabilities shall be carried out … within the framework of the services granted and intended for the general public, after making such adjustments as may be required under the circumstances …' We ourselves ruled that the integration of the handicapped in the regular fabric of community life is intended to protect the dignity and the liberty of such persons, by ensuring equality and participation in society. HCJ 7081/93 *Botzer* v. *Municipal Council of Maccabim-Reut*, at 19. This is the background for the interpretation of the Special Education Law.

Interpretation of the Law

8. As stated above, the questions raised by this petition are: Is the right to special education conferred by the Special Education Law limited to special education provided in separate institutions for special education (as argued by the State)? Alternatively, does this right extend also to special education provided to children studying in the regular education system (as argued by petitioners)?

Our presumption is that statutes are interpreted in a manner commensurate with the basic values of the legal system. As such, our interpretations must accord with the principle of equality … Similarly, statutory interpretation must harmonize with the right to education, including the right to special education.

Another rule of interpretation is the presumption that the norms adopted by the State should be in accord with the norms of international law by which the State is bound. According to this presumption, all rules will, wherever possible, be interpreted in a manner consistent with the norms of international law …

These interpretive presumptions may be rebutted only when the language of the statute, or its particular purpose as specified in the law, cannot be reconciled with the general values of the legal system or with the international norm …

9. For our purposes, the Special Education Law is intended to provide special education free of charge to any child with special needs, in order to ensure that he fulfills his potential and that he integrates into society. See also the Explanatory Notes to the Special Education Law Bill, 1988. The notes point out that special education is intended to aid integration into society and ensure the full development of the innate potential – physical, intellectual, and emotional – of each student. This purpose conforms with and gives expression to the right to education, the principle of equality, and the international conventions ratified by the State of Israel.

Section 7 of the law, which discusses special education in a regular educational institution, does not specifically provide that such education must be funded by the State, as it provides in section 3 regarding special education in separate institutions and classes. However, in view of the rights to education and to equality, the principles of international law, as well as the purpose of the law as described above, the necessary conclusion is that the funding duty of the State also applies to the assistance required for a child with special needs integrated into a regular educational institution.

Until now, the State has been guided by a discriminatory interpretation, which leads to an unreasonable result. The Special Education Law prescribes two paths for the provision of special education. The first path is within the separate framework of special education. The second path is within the regular educational framework. In the latter path, children receive assistance as determined by the Placement Committee in accordance with their needs. It is implausible that the Knesset would have arbitrarily decided to limit the State's duty to provide free special education to only one of these statutory frameworks. This is especially true in light of the undisputed fact that the regular framework has substantial advantages.

Furthermore, it is unacceptable that parents of children with special needs should waive their children's right to integration within the framework of regular education solely due to financial difficulties. This would undermine the very heart of substantive equality. The aspiration for such equality is manifest in the goal to provide equal opportunities for every child in Israel. When children with special needs are sent to frameworks for special education rather than the regular education framework – solely due to financial reasons – these children are deprived of this equal opportunity. Such discrimination is unacceptable.

10. The State's claim – that the duty of assistance under section 7 of the law is narrower than the duty set out by the definition of special education – is unacceptable. The provision regarding the recommendation for separate assistance is the natural result of placing a child with special needs in a regular educational framework. In such a case, it is the Placement Committee's duty to determine the type of assistance the child requires. This determination is classified as a 'recommendation', not because the State is released from its duty to provide the assistance, but rather because flexibility is required in implementing the recommendation. This implementation must consider the evolving needs of the particular child.

The Remedy

11. A purposive interpretation of the law requires that the state implement it in accord with the principle of equality. Discharge of this duty requires an equal budgetary allocation for all the

frameworks providing special education. In this context, a distinction must be made between the current budget and future budgets, beginning with the next fiscal year.

As for the future: it is clear that it is incumbent upon the Ministry of Education, with the assistance of the Ministry of Finance, to allocate its budget in a manner that implements the law as interpreted by this judgment … And as for the present year: the appropriate remedy when human rights are violated is to compel the authorities to undo this breach immediately, even if this involves amending the budget structure …

This is the rule, but in the present case it would be inappropriate for us to issue a rigid order, one that applies to the current fiscal year. For we fear that, as a result of the current dire economic straits in which the State finds itself, a renewed budgetary allocation would adversely affect those children with special needs currently being educated in special education institutions. In many cases the situation of these children is more acute than that of those in regular educational institutions, and it is not appropriate that the realization of the rights of the latter be at the expense of the former. Even now, however, the State should, wherever possible and at least partially, attempt to provide funding for the education of children with special needs in the regular educational institutions.

I therefore propose that the petition be accepted in the sense that it will be declared that the State has not discharged its statutory duty to provide free special education for children placed in regular educational institutions; that it must quickly adopt the measures necessary for it to come into compliance with the statutory requirements; and that it must comply with these requirements no later than the preparatory stages of the budget for the coming fiscal year, all subject to the restrictions of section 7(e) of the law.

Supreme Court of India, *People's Union for Civil Liberties and another* v. *Union of India & others*, in the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 196 of 2001, judgment of 2 May 2003:

[The People's Union for Civil Liberties (PUCL) claimed that starvation deaths had occurred in the state of Rajasthan, despite excess grain being kept for official times of famine, and various schemes throughout India for food distribution were also not functioning. It petitioned the Court for enforcement of both the food schemes and the Famine Code, a code permitting the release of grain stocks in times of famine. They grounded their arguments on the right to food, deriving it from the right to life. Various interim orders were made by the Court over two years, but with meagre implementation by the national and State Governments. In 2003, the court issued a judgment which found the right to life was imperiled due to the failure of the schemes to reach the poor. The Court noted the paradox of food being available in granaries while the poor were starving and it refused to hear arguments concerning the non-availability of resources given the severity of the situation. The court ordered that: (1) the Famine Code be implemented for three months; (2) grain allocation for the food for work scheme be doubled and financial support for schemes be increased; (3) ration shop licensees must stay open and provide the grain to families below the poverty line at the set price; (4) publicity be given to the rights of families below the poverty line to grain; (5) all individuals without means of support (older persons, widows,

disabled adults) are to be granted an Antyodaya Anna Yozana ration card for free grain; (6) and State Governments should progressively implement the mid-day meal scheme in schools. The following excerpts include the departure point used by the Court and its direction as regards (1) the effective implementation of the Famine Code.]

This Court in various orders passed in the last two years has expressed its deep concern and it has been observed, in one of the orders, that what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to malnutrition, starvation and other related problems. The anxiety of the Court is to see that the poor and destitute and the weaker sections of society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government – whether Central or the State. Mere schemes without any implementation are of no use. What is important is that the food must reach the hungry.

Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families? Reference can also be made to Article 47 which, *inter alia*, provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health among its primary duties.

In the light of the aforesaid, we are of the view that for the time being for the months of May, June and July 2003, it is necessary to issue certain directions so that some temporary relief is available to those, who deserve it the most.

Our attention has been drawn to the Famine Code … That Famine Code, we are informed, is the one formulated by State of Rajasthan and similar Codes have been formulated by other States … Under the circumstances, we direct the implementation of the Famine Code for the period May, June and July 2003, as and when and where the situation may call for it, subject to the condition that if in subsequent schemes the relief is to be provided and preventive measures to be undertaken, during famine and drought, are better than the one stipulated by the Famine Code, the same may be implemented instead of the Famine Code.

Box 8.1. The adjudication of economic and social rights by the European Committee on Social Rights

Although this chapter examines the role of domestic courts in the implementation of international human rights law, and particularly their role in protecting economic and social rights, inspiration may also be sought from the practice of certain international judicial or quasi-judicial bodies that have been confronted with similar problems. For instance, the European Committee on Social Rights established under the European Social Charter (on the role of the Committee in the context of collective complaints, see further box 11.1.) relied on the non-discrimination clause in order to affirm the justiciable nature of social rights, although recognizing that these

are in principle subject to progressive realization. This, as we have seen (chapter 7, section 3.3., b)), was exemplified by the decision on the merits of collective Complaint No. 13/2002 (*Autisme-Europe* v. *France*), where the European Committee of Social Rights concluded that France had violated the provisions of the Revised European Social Charter on the right of persons with disabilities to integration and on the right to education, whether alone or combined with the non-discrimination requirement, because it had failed to raise significantly the proportion of children with autism being educated in either general or specialist schools in comparison to other children.

The Committee cited the judgment of the European Court of Human Rights in *Thlimmenos* v. *Greece*, Appl. No. 34369/97, judgment of 6 April 2000) to the effect that the principle of non-discrimination 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'. Indirect discrimination, the Committee noted, 'may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all' (para. 52). While acknowledging that the realization of certain rights having important budgetary implications could require an effort in time, the ECSR considered that this could not justify a failure of the State to adopt clear timeframes for the realization of the rights at stake and to monitor progress. It was clearly inspired by the approach of the Committee on Economic, Social and Cultural Rights with respect to the obligations of the Covenant on Economic, Social and Cultural Rights which are to be progressively realized (see General Comment No. 5, *Persons with Disabilities*, adopted at the eleventh session of the Committee (1994) (UN Doc. E/1995/22), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (UN Doc. HRI/GEN/1/Rev.7, 12 May 2004), p. 26: 'since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, insofar as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability').

The *Autisme-Europe* v. *France* decision illustrates how the requirement of non-discrimination may provide the direction for the realization of socio-economic rights by identifying the categories which, because of their particular vulnerability, deserve special attention. While that decision concerned the right to education, other decisions concerned, for instance, the right to housing: in *ERRC* v. *Bulgaria*, the Committee confirmed its view that, while 'States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter' (para. 35), 'the measures taken must meet the following three criteria: (i) a reasonable timeframe, (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources' (*ERRC* v. *Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006, para. 37). In that case, Bulgaria was found to have violated the Charter because 'notwithstanding the clear political will ... to improve the housing situation of Roma families, [the programmes adopted to improve the housing conditions of the Roma segment of the population] have not yet yelded (*sic*) the expected results' (para. 38).

8.3. Questions for discussion: implementing social and economic rights through domestic courts

1. How would you describe the relationship between the Constitutional Court and the other branches of government in the South African case of *Grootboom*? Is the Court usurping the competences of the legislative or the executive branches of government?
2. In the case of *Yated* concerning the implementation of the Special Education Law in Israel, Justice Dorner expresses his 'fear that … a renewed budgetary allocation [for the current fiscal year] would adversely affect those children with special needs currently being educated in special education institutions'. This recognizes what Fuller and Hart have called the problem of 'polycentricity', which is sometimes seen as an obstacle to the adjudication of claims related to rights that require significant resources (see L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review*, 92 (1978), 353; and previously 'Adjudication and the Rule of Law', *Proceedings of the American Society of International Law*, 54, 1 (1960); the notion of 'polycentricity', as a characteristic of problems which should not be solved by adjudication, is borrowed from M. Polanyi, *The Logic of Liberty. Reflections and Rejoinders* (London: Routledge and Kegan Paul, 1951), p. 170 *et seq.*; see also, in a perspective similar to Fuller's, H. Hart, 'The Supreme Court, 1958 Term – Foreword: The Time Chart of Justices', *Harvard Law Review*, 73 (1959), 84 (1959); and for a discussion, see J. W. F. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjucation', *Cambridge Law Journal*, 53 (1994), 367). Where an individual complaint presents the judge with a problem the solution of which will have a ripple effect elsewhere and perhaps only worsen the situation of many others, how can the judge take this collective dimension into account? Would the alternative be between either denying the complaint or transforming him/herself into a social engineer, ordering and perhaps supervising large-scale changes to ensure that the remedy will meet the true dimensions of the problem the judge is confronted with? What is Justice Doner's solution to that problem? Is this solution appropriate?
3. In the course of its various orders concerning the implementation of the right to food in India, the Indian Supreme Court established its own independent monitoring mechanism to track both hunger and the Government's performance across the country. It appointed independent Commissioners for that purpose to provide the Court with reports on the implementation of its orders. For instance, in their fifth report, the Commissioners note in the introduction: 'At the outset, we would like to place on record, the complete lack of seriousness shown by many state governments to the implementation of schemes under review. On more than one occasion as the report will show, many states have not implemented Supreme Court's directions on one pretext or the other, and repeated orders from the Court have been blatantly ignored with no proper justification. It is our strong recommendation that the Honorable Court may take note of these violations, especially by the States of Uttar Pradesh, Bihar, Jharkand, Madhya Pradesh and Delhi, and pass appropriate orders for time-bound implementation of its orders' (*Right to Food* (India: Human Rights Law Network, 2008), p. 158; for a description of the role of the Supreme Court of India, see also C. Gonsalves, 'From International to Domestic Law: the Case of the Indian Supreme Court in Response to ESC Rights and the Right to Food' in

W. B. Eide and U. Kracht (eds.), *Food and Human Rights in Development*, vol. II, *Evolving Issues and Emerging Applications* (Antwerp-Oxford: Intersentia-Hart, 2007), p. 215). The reports of the Commissioners are an extraordinary collection of the failures of different levels of government to implement adequately the various schemes that are adopted in order to combat hunger and extreme poverty. Note that, in the *Grootboom* case, the Human Rights Commission was appointed to supervise compliance with the judgment of the Constitutional Court. Does this demonstrate that classical separation of powers may be inappropriate to deal with the need to ensure accountability for the progressive realization of economic and social rights? Should such 'fourth branches' be generalized?

4. How valid are the analogies between the protection of economic and social rights by international bodies, of a judicial or quasi-judicial nature, and their protection by domestic courts? For instance, may the approach chosen by the European Committee of Social Rights in *Autism-Europe* v. *France*, referred to in box 8.1. above, serve as a source of inspiration for domestic courts, or are the institutional settings too different for such a comparison to be justified?
5. In the light of the decisions above concerning the right to housing, the right to education for children with disabilities, or the right to food, do the critiques directed towards the adjudication of social and economic rights appear justified?

2 NON-JUDICIAL MECHANISMS

For the reasons briefly explained above, the provision of *ex post* remedies, however important, should not be considered sufficient for the effective protection of human rights. Preventive mechanisms should complement the role of courts or other authorities providing remedies to victims of violations (see, generally, T. Van Boven, 'Prevention of Human Rights Violations' in A. Eide and J. Helgesen (eds.), *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address. Essays in Honour of Torkel Opsahl* (Oslo: Norwegian University Press, 1991), p. 183). This section discusses three such mechanisms, or tools. These may be seen as elements of a governance model best suited to ensure respect for, and protection and fulfilment of, human rights: they are human rights impact assessments; the establishment of national human rights institutions; and the mainstreaming of human rights.

These tools go clearly beyond the 'judicial-normative' model that sees human rights as norms to be enforced by judicial mechanisms (on the need to move beyond such an approach, see P. Alston and J. H. H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: the European Union and Human Rights' in P. Alston, with M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999), p. 3). While the adoption of human rights action plans can be seen as another such governance tool, and while indicators are instruments that can be used both in the adoption and implementation of action plans and in impact assessments, both action plans and indicators have been discussed above (see chapter 5, sections 2.2. and 3, respectively), and they

are not further elaborated upon here (for a study, as 'non-judicial preventive tools', of national human rights institutions, human rights indicators, human rights impact assessments, and human rights action plans, see G. de Beco, *Non-judicial Mechanisms for the Implementation of Human Rights in European States* (Brussels: Bruylant, 2009)).

2.1 The role of preventive mechanisms in general

The Committee on the Rights of the Child has provided useful guidance about the kind of measures which could be adopted in order to complement a remedial, *post hoc* approach to human rights violations, by a preventive, *ex ante* approach:

Committee on the Rights of the Child, General Comment No. 5 (2003), *General Measures of Implementation of the Convention on the Rights of the Child* (Arts. 4, 42 and 44, para. 6) (CRC/GC/2003/5, 27 November 2003), paras. 18 and 27–59, and 65:

[Review of legislation *ex ante* and *ex post*]
The Committee believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. Its experience in examining not only initial but now second and third periodic reports under the Convention suggests that the review process at the national level has, in most cases, been started, but needs to be more rigorous. The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation. And while it is important that this review process should be built into the machinery of all relevant government departments, it is also advantageous to have independent review by, for example, parliamentary committees and hearings, national human rights institutions, NGOs, academics, affected children and young people and others.

[Monitoring implementation – the need for child impact assessment and evaluation]
Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3(1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy.

Self-monitoring and evaluation is an obligation for Governments. But the Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions …

The Committee commends certain States which have adopted legislation requiring the preparation and presentation to parliament and/or the public of formal impact analysis statements. Every State should consider how it can ensure compliance with article 3(1) and do so in a way which further promotes the visible integration of children in policy-making and sensitivity to their rights.

[Making children visible in budgets]

In its reporting guidelines and in the consideration of States parties' reports, the Committee has paid much attention to the identification and analysis of resources for children in national and other budgets (General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted under Article 44, Paragraph 1(b), of the Convention on the Rights of the Child, CRC/C/58, 20 November 1996, para. 20). No State can tell whether it is fulfilling children's economic, social and cultural rights 'to the maximum extent of ... available resources', as it is required to do under article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly. Some States have claimed it is not possible to analyse national budgets in this way. But others have done it and publish annual 'children's budgets'. The Committee needs to know what steps are taken at all levels of Government to ensure that economic and social planning and decision-making and budgetary decisions are made with the best interests of children as a primary consideration and that children, including in particular marginalized and disadvantaged groups of children, are protected from the adverse effects of economic policies or financial downturns.

Emphasizing that economic policies are never neutral in their effect on children's rights, the Committee has been deeply concerned by the often negative effects on children of structural adjustment programmes and transition to a market economy. The implementation duties of article 4 and other provisions of the Convention demand rigorous monitoring of the effects of such changes and adjustment of policies to protect children's economic, social and cultural rights.

[Training and capacity-building]

The Committee emphasizes States' obligation to develop training and capacity-building for all those involved in the implementation process – government officials, parliamentarians and members of the judiciary – and for all those working with and for children. These include, for example, community and religious leaders, teachers, social workers and other professionals, including those working with children in institutions and places of detention, the police and armed forces, including peacekeeping forces, those working in the media and many others. Training needs to be systematic and ongoing – initial training and re-training. The purpose of training is to emphasize the status of the child as a holder of human rights, to increase knowledge and understanding of the Convention and to encourage active respect for all its provisions. The Committee expects to see the Convention reflected in professional training curricula, codes of conduct and educational curricula at all levels. Understanding and knowledge of human rights must, of course, be promoted among children themselves, through the school curriculum and in other ways ...

The Committee's guidelines for periodic reports mention many aspects of training, including specialist training, which are essential if all children are to enjoy their rights. The Convention highlights the importance of the family in its preamble and in many articles. It is particularly important that the promotion of children's rights should be integrated into preparation for parenthood and parenting education.

There should be periodic evaluation of the effectiveness of training, reviewing not only knowledge of the Convention and its provisions but also the extent to which it has contributed to developing attitudes and practice which actively promote enjoyment by children of their rights.

[Independent human rights institutions]

In its general comment No. 2 (2002) entitled 'The role of independent national human rights institutions in the protection and promotion of the rights of the child', the Committee notes that it 'considers the establishment of such bodies to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children's rights'. Independent human rights institutions are complementary to effective government structures for children; the essential element is independence: 'The role of national human rights institutions is to monitor independently the State's compliance and progress towards implementation and to do all it can to ensure full respect for children's rights. While this may require the institution to develop projects to enhance the promotion and protection of children's rights, it should not lead to the Government delegating its monitoring obligations to the national institution. It is essential that institutions remain entirely free to set their own agenda and determine their own activities' (HRI/GEN/1/Rev. 6, para. 25, p. 295).

One of the reasons why preventive mechanisms should be developed, in addition to remedial mechanisms, is because of the considerable burden imposed on courts by the flow of individual applications of victims of violations. This was also the concern which led the Committee of Ministers of the Council of Europe to formulate the following recommendation:

Committee of Ministers of the Council of Europe, Recommendation Rec(2004)5 of the Committee of Ministers to Member States on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th session):

The Committee of Ministers, [r]ecalling that, according to Article 46, paragraph 1, of the Convention, the high contracting parties undertake to abide by the final judgments of the European Court of Human Rights (hereinafter referred to as 'the Court') in any case to which they are parties;

Considering however, that further efforts should be made by member states to give full effect to the Convention, in particular through a continuous adaptation of national standards in accordance with those of the Convention, in the light of the case law of the Court;

Convinced that verifying the compatibility of draft laws, existing laws and administrative practice with the Convention is necessary to contribute towards preventing human rights violations and limiting the number of applications to the Court;

Stressing the importance of consulting different competent and independent bodies, including national institutions for the promotion and protection of human rights and non-governmental organisations;

Taking into account the diversity of practices in member states as regards the verification of compatibility;

Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case law of the Court;
II. ensure that there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars;
III. ensure the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention;

Instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

Appendix to Recommendation Rec(2004)5
Introduction 1. ... [T]he number of applications submitted to the European Court of Human Rights (hereinafter referred to as 'the Court') is increasing steadily, giving rise to considerable delays in the processing of cases.

2. ... [I]t should not be forgotten that it is the parties to the Convention, which, in accordance with the principle of subsidiarity, remain the prime guarantors of the rights laid down in the Convention. According to Article 1 of the Convention, 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' It is thus at national level that the most effective and direct protection of the rights and freedoms guaranteed in the Convention should be ensured. This requirement concerns all state authorities, in particular the courts, the administration and the legislature.

3. The prerequisite for the Convention to protect human rights in Europe effectively is that states give effect to the Convention in their legal order, in the light of the case law of the Court. This implies, notably, that they should ensure that laws and administrative practice conform to it.

4. This recommendation encourages states to set up mechanisms allowing for the verification of compatibility with the Convention of both draft laws and existing legislation, as well as administrative practice. Examples of good practice are set out below. The implementation of the recommendation should thus contribute to the prevention of human rights violations in member states, and consequently help to contain the influx of cases reaching the Court.

Verification of the compatibility of draft laws 5. It is recommended that member states establish systematic verification of the compatibility with the Convention of draft laws, especially those which may affect the rights and freedoms protected by it. It is a crucial point: by adopting a law verified as being in conformity with the Convention, the state reduces the risk that a violation of the Convention has its origin in that law and that the Court will find such a violation. Moreover, the state thus imposes on its administration a framework in line with the Convention for the actions it undertakes *vis-à-vis* everyone within its jurisdiction.

6. Council of Europe assistance in carrying out this verification may be envisaged in certain cases. Such assistance is already available, particularly in respect of draft laws on freedom of religion, conscientious objection, freedom of information, freedom of association, etc. It is none the less for each state to decide whether or not to take into account the conclusions reached within this framework.

Verification of the compatibility of laws in force 7. Verification of compatibility should also be carried out, where appropriate, with respect to laws in force. The evolving case law of the Court may indeed have repercussions for a law which was initially compatible with the Convention or which had not been the subject of a compatibility check prior to adoption.

8. Such verification proves particularly important in respect of laws touching upon areas where experience shows that there is a particular risk of human rights violations, such as police activities, criminal proceedings, conditions of detention, rights of aliens, etc.

Verification of the compatibility of administrative practice 9. This recommendation also covers, wherever necessary, the compatibility of administrative regulations with the Convention, and therefore aims to ensure that human rights are respected in daily practice. It is indeed essential that bodies, notably those with powers enabling them to restrict the exercise of human rights, have all the necessary resources to ensure that their activity is compatible with the Convention.

10. It has to be made clear that the recommendation also covers administrative practice which is not attached to the text of a regulation. It is of utmost importance that states ensure verification of their compatibility with the Convention.

Procedures allowing follow-up of the verification undertaken 11. In order for verification to have practical effects and not merely lead to the statement that the provision concerned is incompatible with the Convention, it is vital that member states ensure follow-up to this kind of verification.

12. The recommendation emphasises the need for member states to act to achieve the objectives it sets down. Thus, after verification, member states should, when necessary, promptly take the steps required to modify their laws and administrative practice in order to make them compatible with the Convention. In order to do so, and where this proves necessary, they should improve or set up appropriate revision mechanisms which should systematically and promptly be used when a national provision is found to be incompatible. However, it should be pointed out that often it is enough to proceed to changes in case law and practice in order to ensure this compatibility. In certain member states compatibility may be ensured through the non-application of the offending legislative measures.

13. This capacity for adaptation should be facilitated and encouraged, particularly through the rapid and efficient dissemination of the judgments of the Court to all the authorities concerned with the violation in question, and appropriate training of the decision makers ...

14. When a court finds that it does not have the power to ensure the necessary adaptation because of the wording of the law at stake, certain states provide for an accelerated legislative procedure.

15. Within the framework of the above, the following possibilities could be considered.

Examples of good practice ... *I. Publication, translation and dissemination of, and training in, the human rights protection system*

17. As a preliminary remark, one should recall that effective verification first demands appropriate publication and dissemination at national level of the Convention and the relevant case law of the Court, in particular through electronic means and in the language(s) of the country concerned, and the development of university education and professional training programmes in human rights.

II. Verification of draft laws 18. Systematic supervision of draft laws is generally carried out both at the executive and at the parliamentary level, and independent bodies are also consulted.

By the executive
19. In general, verification of conformity with the Convention and its protocols starts within the ministry which initiated the draft law. In addition, in some member states, special responsibility is entrusted to certain ministries or departments, for example, the Chancellery, the Ministry of Justice and/or the Ministry of Foreign Affairs, to verify such conformity. Some member states entrust the agent of the government to the Court in Strasbourg, among other functions, with seeking to ensure that national laws are compatible with the provisions of the Convention. The agent is therefore empowered, on this basis, to submit proposals for the amendment of existing laws or of any new legislation which is envisaged.

20. The national law of numerous member states provides that when a draft text is forwarded to parliament, it should be accompanied by an extensive explanatory memorandum, which must also indicate and set out possible questions under the constitution and/or the Convention. In some member states, it should be accompanied by a formal statement of compatibility with the Convention. In one member state, the minister responsible for the draft text has to certify that, in his or her view, the provisions of the bill are compatible with the Convention, or to state that he or she is not in a position to make such a statement, but that he or she nevertheless wishes parliament to proceed with the bill.

By the parliament
21. In addition to verification by the executive, examination is also undertaken by the legal services of the parliament and/or its different parliamentary committees.

Other consultations
22. Other consultations to ensure compatibility with human rights standards can be envisaged at various stages of the legislative process. In some cases, consultation is optional. In others, notably if the draft law is likely to affect fundamental rights, consultation of a specific institution, for example the Conseil d'Etat in some member states, is compulsory as established by law. If the government has not consulted as required, the text will be tainted by procedural irregularity. If, after having consulted, it decides not to follow the opinion received, it accepts responsibility for the political and legal consequences that may result from such a decision.

23. Optional or compulsory consultation of non-judicial bodies competent in the field of human rights is also often foreseen. In particular these may be independent national institutions for the promotion and protection of human rights, the ombudspersons, or local or international non-governmental organisations, institutes or centres for human rights, or the Bar, etc.

24. Council of Europe experts or bodies, notably the European Commission for Democracy through Law ('the Venice Commission'), may be asked to give an opinion on the compatibility with the Convention of draft laws relating to human rights. This request for an opinion does not replace an internal examination of compatibility with the Convention.

III. Verification of existing laws and administrative practice 25. While member states cannot be asked to verify systematically all their existing laws, regulations and administrative practice, it may be necessary to engage in such an exercise, for example as a result of national experience in applying a law or regulation or following a new judgment by the Court against another

member state. In the case of a judgment that concerns it directly, by virtue of Article 46 [of the European Convention on Human Rights], the state is under obligation to take the measures necessary to abide by it.

By the executive
26. In some member states, the ministry that initiates legislation is also responsible for verifying existing regulations and practices, which implies knowledge of the latest developments in the case law of the Court. In other member states, governmental agencies draw the attention of independent bodies, and particularly courts, to certain developments in the case law. This aspect highlights the importance of initial education and continuous training with regard to the Convention system. The competent organs of the state have to ensure that those responsible in local and central authorities take into account the Convention and the case law of the Court in order to avoid violations.

By the parliament
27. Requests for verification of compatibility may be made within the framework of parliamentary debates.

By judicial institutions
28. Verification may also take place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court).

By independent non-judicial institutions
29. In addition to their other roles when seized by the government or the parliament, independent non-judicial institutions, and particularly national institutions for the promotion and protection of human rights, as well as ombudspersons, play an important role in the verification of how laws are applied and, notably, the Convention which is part of national law. In some countries, these institutions may also, under certain conditions, consider individual complaints and initiate enquiries on their own initiative. They strive to ensure that deficiencies in existing legislation are corrected, and may for this purpose send formal communications to the parliament or the government.

2.2 Human rights impact assessments

Human rights impact assessments are among the tools that could improve the prevention of human rights violations (see G. de Beco, 'Human Rights Impact Assessments', *Netherlands Quarterly of Human Rights*, 27, No. 2 (2009), 139; T. Landman, 'Human Rights Impact Assessments' in *Studying Human Rights* (London: Routledge, 2006)). They differ from, and go beyond, compatibility assessments that merely examine whether a particular policy or regulatory measure is, *on its face*, compliant with the human rights obligations of the State concerned. Such compatibility exercises are regularly performed, for instance, before parliamentary committees, by the legal services of ministerial departments, or by courts, as described in the Annex to the Recommendation Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, addressed by the Committee of Ministers of the Council of Europe to

the Member States of the organization, and presented above (section 2.1.). In contrast, impact assessments seek to assess compatibility not only on the basis of a conceptual analysis, but also through a sociological examination of the impacts, both intended and unintended, that a measure could have on the enjoyment of human rights or on the ability of the State to protect and fulfil human rights. While impact assessments have been common for a number of years to measure the economic, environmental, or social impacts of specific measures, human rights impact assessments differ in significant respects from these more classical impact assessments:

Paul Hunt and Gillian MacNaughton, *Impact Assessments, Poverty and Human Rights: a Case Study Using the Right to the Highest Attainable Standard of Health* (UNESCO, 2006), pp. 12–15:

Human rights impact assessment offers added value for several inter-related reasons. First, human rights impact assessment is based on a framework of international legal obligations to which governments have agreed. Second, human rights impact assessment provides an opportunity to make government policy-making more coherent across departments as the framework applies to all divisions of the government. Third, human rights impact assessment will result in more effective policies because the policies will be more coherent, they will be backed up by legal obligations and they will be adopted through human-rights respecting processes.

1. Legal Obligations

International human rights legal obligations arise when a State voluntarily endorses a human rights treaty … To comply with its international human rights obligations, a State must ensure, before it adopts any proposed law, policy, program or project, that it is consistent with its human rights, as well as other, legal obligations … In response to reports submitted by States, the [United Nations human rights] treaty bodies have also urged individual States to perform impact assessments. For example, the Committee on the Rights of the Child urged the Government of the Netherlands 'to develop ways to establish a systematic assessment of the impact of budgetary allocations and macroeconomic policies on the implementation of children's rights and to collect and disseminate information in this regard'. Similarly, the Committee on Economic, Social and Cultural Rights, has recommended to States that human rights impact assessments 'be made an integral part of every proposed piece of legislation or policy initiative on a basis analogous to environmental impact assessments or statements'.

Thus, human rights impact assessments are highly recommended, perhaps even legally required, for States to comply with the international human rights obligations that they have undertaken. Further, the human rights legal framework for impact assessments adds legitimacy to demands for policy changes that are based on these assessments. The legal obligations also bring both monitoring and accountability to bear on policy-making. Policy-makers will be subject to scrutiny by human rights institutions, including the international treaty bodies, and people can hold their governments accountable for the adverse human rights impacts of policies, programs and projects.

In sum, the international legal obligations underlying the human rights framework for impact assessments gives States a strong incentive to do the impact assessments, a legitimate rationale for modifying proposals based on the assessments and a system to hold policy-makers to account for the impact of their decisions on human rights.

2. Coherence

The human rights framework for impact assessment also offers States the opportunity to enhance coherence in policy-making processes. Governmental departments are often disconnected and do not necessarily know what other departments are doing or have agreed to do. Thus, for example, one department may adopt a policy or program that adversely affects the people that another policy or program in another department is designed to help. However, a State's national and international human rights obligations apply to all divisions of the government, and thus human rights must be consistently and coherently applied across all national policy-making processes. In this manner, the human rights framework can bring coherence to policy making, helping to ensure that the same factors are considered in policy-making in all departments of the government.

3. Effectiveness

The underlying legal obligations and the increased coherence offered by a human rights framework for impact assessment will both contribute to rigorous policy-making as well as to adoption of policies, programs and projects that are more effective in improving the well-being of people, especially those who are marginalized. The human rights approach also brings a number of factors to the assessment process that generally will improve effectiveness in policy making such as disaggregation, participation, transparency and accountability.

For example, a human rights approach to impact assessment requires assessing the decision-making process to determine whether it encourages the people who are likely to be affected by the policy, program or project to participate in a meaningful manner. It asks: does the government consult the people likely to be affected in determining the likely consequences of a proposal, in generating ideas for modifications and alternatives to a proposal, in weighing priorities and in making final trade-offs and decisions? Participation by the people affected is more likely to result in a decision that will be better for them, a decision that they will accept and a decision that they can own. In this way, the human rights requirement of participation will enhance effectiveness of the policy, program or project.

Similarly, the human rights approach to impact assessment requires consideration of the distributional impact of reforms on the well-being of various groups, especially people living in poverty and other marginalized groups. Disaggregated information allows for the impact analysis to identify mitigating measures or alternatives that may not have been evident without this information and that will result in a more effective policy, especially in terms of its impact on the most vulnerable people.

Overall, the human rights framework for impact assessment adds value because human rights (1) are based on legal obligations to which governments have agreed to abide, (2) apply to all parts of the government encouraging coherence to policy-making and ensuring that policies reinforce each other; (3) require participation in policy making by the people affected, enhancing legitimacy and ownership of policy choices; (4) enhance effectiveness through factors such as disaggregation, participation and transparency; and (5) demand mechanisms through which policy makers can be held accountable.

2.3 The role of national human rights institutions

In the Vienna Declaration and Programme of Action of 25 June 1993, the World Conference on Human Rights reaffirmed 'the important and constructive role played

by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights'. It also encouraged 'the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level' (Vienna Declaration and Programme of Action of 25 June 1993, UN Doc. A/CONF.157/23, at para. 36). The establishment of national human rights institutions (NHRI) has further been encouraged by recommendations adopted at regional level – such as the Recommendation No. R(97)14 of the Committee of Ministers of the Council of Europe on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997 – or at universal level – such as the General Recommendation adopted by the Committee on the Elimination of Racial Discrimination on this issue (General Recommendation XVII (1993), Establishment of national institutions to facilitate implementation of the Convention), or similar general comments by the Committee on Economic, Social and Cultural Rights (General Comment No. 10 of the Committee on Economic, Social and Cultural Rights of 14 December 1998, *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (E/C.12/1998/25)) or by the Committee on the Rights of the Child (General Comment No. 2 (2002), *The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, HRI/GEN/1/Rev.9 (vol. II), p. 391).

A national human rights institution is an officially established and State-funded national entity independent from the government, mandated to promote and protect international human rights standards at domestic level. Different models of human rights institutions co-exist, ranging from bodies with a large membership including a wide range of civil society organizations, often referred to as the 'Committee' model (such as the French Commission nationale consultative des droits de l'homme, established in 1947 as the first NHRI in the world), to much smaller expert bodies, such as the 'Commission' model of Australia, which usually have a very broad mandate ranging from investigation of human rights violations to education and public relations, and participation in judicial procedures. Other models include single-member *Defensores del Pueblo* in Latin America or ombudsman institutions in European Nordic countries, which usually act on the basis of complaints and have far-reaching investigation and information rights; or the 'Danish model' of an institute mostly focusing on human rights education, research and documentation (on national human rights institutions, see M. Kjaerum, 'National Human Rights Institutions Implementing Human Rights' in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* (Leiden: Martinus Nijhoff, 2003), p. 631; R. Murray, *The Role of National Human Rights Institutions at the International and Regional Levels* (Oxford: Hart Publishing, 2007); R. Murray, 'National Human Rights Institutions. Criteria and Factors for Assessing their Effectiveness', *Netherlands Quarterly of Human Rights*, 25, No. 2 (2007), 189; A.-E. Pohjolainen, *The Evolution of National Human*

Rights Institutions: the Role of the United Nations (Copenhagen: The Danish Institute for Human Rights, 2006)).

Yet, despite this diversity, a number of key principles apply to all NHRIs. They are defined as the 'Paris Principles', since – although endorsed by the UN General Assembly in 1993, following their approval by the Commission on Human Rights (Commission on Human Rights Resolution 1992/54 of 3 March 1992) – they were initially approved at a meeting convened in Paris in 1991 by the Commission nationale consultative des droits de l'homme in co-operation with the UN. The minimum standards established by the Paris Principles are applied by the International Co-ordinating Committee (ICC) that relies on the Principles to determine accreditation status of NHRIs. The ICC distinguishes between status A-institutions (in compliance with each of the Paris Principles and recognized full voting rights as members), status B (not in compliance with each of the Principles or insufficient information provided, and thus recognized only as observer status), and C (non-compliant with the Paris Principles and thus without status). By mid-2008, the ICC had accredited sixty-two entities.

Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly Resolution 48/134 of 20 December 1993:

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, *inter alia*, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
  (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
  (ii) Any situation of violation of human rights which it decides to take up;
  (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
(e) To cooperate with the United Nations and any other orgnization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;
(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
(b) Trends in philosophical or religious thought;
(c) Universities and qualified experts;
(d) Parliament;
(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,
(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;
(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);
(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

The Paris Principles provide that national human rights institutions shall have the power to adopt opinions on draft bills (para. 3(a)(i)). The extent to which human rights