



SOCIETY, RIGHTS AND THE ENVIRONMENT

INTERNATIONAL HUMAN RIGHTS STANDARDS APPLICABLE
TO ACCESS TO INFORMATION, PUBLIC PARTICIPATION
AND ACCESS TO JUSTICE



UNITED NATIONS

ECLAC



**UNITED NATIONS
HUMAN RIGHTS**
OFFICE OF THE HIGH COMMISSIONER

Society, rights and the environment

INTERNATIONAL HUMAN RIGHTS STANDARDS APPLICABLE
TO ACCESS TO INFORMATION, PUBLIC PARTICIPATION
AND ACCESS TO JUSTICE



UNITED NATIONS

ECLAC



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

This document was prepared under the overall supervision of Joseluis Samaniego, Chief of the Sustainable Development and Human Settlements Division of the Economic Commission for Latin America and the Caribbean (ECLAC), and Amerigo Incalcaterra, Regional Representative for South America of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

It was drafted by David Barrio, with support from Carlos de Miguel and Valeria Torres, of ECLAC, and from Humberto Henderson, Krista María Orama and Alejandra Parra, of OHCHR.

This document constitutes an input from ECLAC and OHCHR to the negotiations for the adoption of a regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean, referred to as the "Principle 10 process" (in reference to Principle 10 of the Rio Declaration on Environment and Development), of which ECLAC is the technical secretariat. More information on the process can be found at: <http://www.cepal.org/en/topics/principle-10>.

This document was prepared with financial support from the United Nations Development Account under the project "Addressing critical socio-environmental challenges in Latin America and the Caribbean".

The views expressed in this document, which has been reproduced without formal editing, are those of the authors and do not necessarily reflect the views of the Organization.

Contents

Foreword	11
Chapter I:	
GENERAL CONSIDERATIONS	13
A) OVERVIEW OF THE UNITED NATIONS HUMAN RIGHTS SYSTEM	15
B) THE HUMAN RIGHTS-BASED APPROACH	17
C) THE CORE UNITED NATIONS HUMAN RIGHTS TREATIES IN THE LATIN AMERICAN AND CARIBBEAN REGION	17
D) THE RIGHTS OF ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND JUSTICE AS HUMAN RIGHTS	21
E) IMPLEMENTATION OF ACCESS RIGHTS	22
F) RIGHT OF ACCESS TO INFORMATION	23
G) RIGHT TO PARTICIPATE IN DECISION-MAKING	25
H) RIGHT OF ACCESS TO JUSTICE	27
I) EQUALITY AND NON-DISCRIMINATION	30
J) REFERENCES TO SPECIFIC GROUPS	31
K) HUMAN RIGHTS DEFENDERS	32
Annex I.1	
LINKS TO RELEVANT DOCUMENTS	34
Universal system	34
Inter-American system	37
Chapter II:	
COMPILATION OF INTERNATIONAL STANDARDS	39
A) IMPLEMENTATION OF ACCESS RIGHTS	41
Universal System	41
International Covenant on Civil and Political Rights (1966)	41
Human Rights Committee, General Observation no. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13	42
Inter-American system	45
American Convention on Human Rights (1969)	45

B) RIGHT OF ACCESS TO INFORMATION	45
Universal system	45
Universal Declaration of Human Rights (1948)	45
International Covenant on Civil and Political Rights (1966)	45
Human Rights Committee, General Comment no. 34, Article 19 (freedom of opinion and expression), 2011, CCPR/C/GC/34	46
Committee of Economic, Social and Cultural Rights, General Comment no. 15, The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 2002, E/C.12/2002/11	55
Committee on Economic, Social and Cultural Rights, General Comment no.14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, E/C.12/2000/4	56
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	58
Convention on the Rights of the Child (1989)	58
Committee on the Rights of the Child, General Comment no. 16, State obligations regarding the impact of the business sector on children's rights, 2013, CRC/C/GC/16	59
Committee on the Rights of the Child, General Comment no. 15, The right of the child to the enjoyment of the highest attainable standard of health (article 24), 2013, CRC/C/GC/15	61
Committee on the Rights of the Child, General Comment no. 12, Children's right to be heard 2009, CRC/C/GC/12	61
Committee on the Rights of the Child, General Comment no. 11, Indigenous children and their rights under the Convention, 2009, CRC/C/GC/11	63
Committee on the Rights of the Child, General Comment no. 9, The rights of children with disabilities, 2006, CRC/C/GC/9	63
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	63
Convention on the Rights of Persons with Disabilities (2006)	64
Committee on the Rights of Persons with Disabilities, General comment no. 2, Article 9 (Accessibility), 2014, CRPD/C/GC/2	65
United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)	68
Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/14/23, 20 April 2010	69
Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/68/362, 4 September 2013	70
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013	75
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015	76

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on climate change and human rights, A/HRC/31/52/ 1 February 2016.....	79
Report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, on the right to information and participation, A/HRC/7/21, 18 February 2008	80
Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, on the right of access to information, A/HRC/30/40, 8 July 2015.....	86
Inter-American System	101
American Convention on Human Rights (1969)	101
Inter-American Democratic Charter (2001)	102
Declaration on Principles of Freedom of Expression (2000).....	102
Model Inter-American Law on Access to Information (2010), adopted by AG/RES. 2607 (XL-O/10).....	102
C) RIGHT TO PARTICIPATE IN PUBLIC DECISION-MAKING	112
Universal system	112
Universal Declaration of Human Rights (1948).....	112
International Covenant on Civil and Political Rights (1966)	113
Human Rights Committee, General Comment n° 25, Article 25 (The right to participate in public affairs, voting rights and the right of equal access to public service), 1996, CCPR/C/21/Rev.1/Add.7	113
Committee on Economic, Social and Cultural Rights, General Comment no. 21 on the right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 2010, E/C.12/GC/21/Rev.1.....	114
Committee on Economic, Social and Cultural Rights, General Comment no. 15, The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 2002, E/C.12/2002/11	116
Committee on Economic, Social and Cultural Rights, General Comment no. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, E/C.12/2000/4	118
Committee on Economic, Social and Cultural Rights, General Comment n° 12, The right to adequate food (article 11 in the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5.....	119
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	119
Committee on the Elimination of Racial Discrimination, General Comment no. 34, Racial discrimination against people of African descent, 2011, CERD/C/GC/34	119
Committee on the Elimination of Racial Discrimination, General Comment no. 23, Rights of indigenous peoples, 1997, A/52/18, Annex V.....	120

Convention on the Elimination of All Forms of Discrimination Against Women (1979)	121
Committee on the Elimination of Discrimination Against Women, General Comment no. 34 on the rights of rural women, 2016, CEDAW/C/GC/34.....	121
Committee on the Elimination of Discrimination Against Women, General Comment no. 27, Older women and protection of their human rights, 2010, CEDAW/C/GC/27	123
Committee on the Elimination of Discrimination Against Women, General Comment no. 24, Women and health, 1999, A/54/38/Rev.1, cap. I.....	124
Committee on the Elimination of Discrimination Against Women, General Observation no. 23, Political and public life, 1997, A/52/38	124
Convention on the Rights of the Child (1989).....	130
Committee on the Rights of the Child, General Comment no. 16, State obligations regarding the impact of business on children's rights, 2013, CRC/C/GC/16.....	130
Committee on the Rights of the Child, General Comment no. 15, The right of the child to the highest attainable level of health (article 24), 2013, CRC/C/GC/15	132
Committee on the Rights of the Child, General Comment no. 12, The right of the child to be heard, 2009, CRC/C/GC/12	133
Committee on the Rights of the Child, General Comment no. 11, Indigenous children and their rights under the Convention, 2009, CRC/C/GC/11	140
Committee on the Rights of the Child, General Comment no. 9, The rights of children with disabilities, 2006, CRC/C/GC/9	141
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	142
Convention on the Rights of Persons with Disabilities (2006)	142
Committee on the Rights of Persons with Disabilities, General Comment no. 2, Article 9 (accessibility), 2014, CRPD/C/GC/2.....	143
Committee on the Rights of Persons with Disabilities, General comment no. 1, Article 12 (Equal recognition before the law), 2014, CRPD/C/GC/1	146
International Labour Organisation Indigenous and Tribal Peoples Convention (n° 169) (1989)	147
United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)	148
Declaration on the Right to Development, adopted by the General Assembly, 41/128 (1986).....	148
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013.....	149
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015	151
Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on climate change and human rights, A/HRC/31/52, 1 February 2016	153

Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, The right to participation, A/69/213, 31 July 2014	155
Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, The right to participation of people living in poverty, A/HRC/23/36, 11 March, 2013.....	171
Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, The rights to freedom of peaceful assembly and of association natural resource exploitation, A/HRC/29/25, 28 April 2015.....	183
Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013.....	185
Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas, on the participation of persons with disabilities in public decision-making, A/HRC/31/62, 12 January 2016.....	187
Inter-American System	190
American Declaration of the Rights and Duties of Man (1948).....	190
American Convention on Human Rights (1969)	190
Inter-American Democratic Charter (2001)	190
Social Charter of the Americas (2012).....	190
Inter-American Strategy for the Promotion of Public Participation in Decision-Making of Sustainable Development (2001).....	191
D) RIGHT OF ACCESS TO JUSTICE	192
Universal system	192
Universal Declaration of Human Rights.....	192
International Covenant on Civil and Political Rights (1966)	192
Human Rights Committee, General Comment no. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13	194
Human Rights Committee, General Comment no. 32, Article 14 (Right to equality before courts and tribunals and to a fair trial, 2007, CCPR/C/GC/32.....	195
Committee on Economic, Social and Cultural Rights, General Comment no. 15, The right to water (Article 11 and 12 of the International Covenant of Economic, Social and Cultural Rights), 2002, E/C.12/2002/11.....	208
Committee of Economic, Social and Cultural Rights, General Comment no. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, E/C.12/2000/4	209
Committee of Economic, Social and Cultural Rights, General Comment no. 12, The right to adequate food (Article 11 of the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5.....	210
Committee of Economic, Social and Cultural Rights, General Comment no. 10, The role of national human rights institutions in the protection of economic, social and cultural rights, 1998, E/C.12/1998/25.....	211
Committee of Economic, Social and Cultural Rights, General Comment no. 4, The right to adequate housing (Article 11 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights), 1991, E/1992/23	211

International Convention on the Elimination of All Forms of Racial Discrimination (1965).....	211
Committee on the Elimination of Racial Discrimination, General recommendation No. 34, Racial discrimination against people of African descent, 2011, CERD/C/GC/34.....	212
Committee on the Elimination of Racial Discrimination, General Comment no. 31, On the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005, A/60/18.....	212
Convention on the Elimination of All Forms of Discrimination Against Women (1979)	214
Committee on the Elimination of Discrimination Against Women, General Comment no. 33, Women's access to justice, 2015, CEDAW/C/GC/33.....	214
Committee on the Elimination of Discrimination Against Women, General Comment no. 27, Older Women and protection of their human rights, 2010, CEDAW/C/GC/27.....	229
Committee on the Elimination of Discrimination Against Women, General Comment no. 24, Women and health, 1999, A/54/38/Rev.1, cap. I.....	230
Convention on the Rights of the Child (1989).....	230
Committee on the Rights of the Child, General Comment no. 16, State obligations regarding the impact of the business sector on children's rights, 2013, CRC/C/GC/16	231
Committee on the Rights of the Child, General Comment no. 14, The right of the child to have his or her best interests taken as a primary consideration (article 3, paragraph 1), 2013, CRC/C/GC/14.....	235
Committee on the Rights of the Child, General Comment no. 12, The right of the child to be heard, 2009, CRC/C/GC/12	241
The Committee on the Right's of the Child, General Comment no. 10, Children's rights in juvenile justice, 2007, CRC/C/GC/10.....	243
Committee on the Rights of the Child, General Comment no. 9, The rights of children with disabilities, 2006, CRC/C/GC/9.....	248
Convention on the Rights of Persons with Disabilities (2006)	248
Committee on the Rights of Persons with Disabilities, General Comment no. 2, Article 9 (accessibility), 2014, CRPD/C/GC/2.....	249
Committee on the Rights of Persons with Disabilities, General Comment no. 1, Article 12 (equal recognition before the law), 2014, CRPD/C/GC/1	249
International Labour Organisation Indigenous and Tribal Peoples Convention (n° 169) (1989).....	258
United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)	259
Basic Principles on the Independence of the Judiciary (1985).....	260
Guidelines on the Role of Prosecutors (1990)	261
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147, 16 December 2005.....	264

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by the General Assembly, 40/34, 29 November 1985	268
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013	270
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015	271
Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on climate change and human rights, A/HRC/31/52, 1 February 2016	275
Report of the Special Rapporteur on the independence of judges and lawyers, Access to justice, Leandro Despouy, A/HRC/8/4, 13 May 2008	276
Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Free legal assistance, A/HRC/23/43, 15 March 2013	281
Inter-American System	283
American Declaration on the Duties of Man (1948)	283
American Convention on Human Rights (1969)	283
Inter-American Democratic Charter (2001)	284
E) CROSS-CUTTING THEMES	284
a) Equality and non-discrimination	284
Universal system	284
United Nations Declaration of Human Rights (1948)	284
International Covenant on Civil and Political Rights (1966)	285
Human Rights Committee, General Comment no. 28, The equality of rights between men and women, 2000, HRI/GEN/1/Rev.9 (Vol. I)	285
Human Rights Committee, General Comment no. 18, Non-discrimination, 1989, HRI/GEN/1/Rev.1	286
International Covenant on Economic, Social and Cultural Rights (1966)	287
Committee on Economic, Social and Cultural Rights, General Comment no. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009, E/C.12/GC/20	287
Committee of Economic, Social and Cultural Rights, General Comment no. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), 2005, E/C.12/2005/4	294
International Convention on the Elimination of All Forms of Discrimination (1965)	299
Convention on the Elimination of All Forms of Discrimination Against Women (1979)	299
Convention on the Rights of the Child (1989)	300
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	300

Convention on the Rights of Persons with Disabilities (2006)	301
United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)	301
Inter-American System	302
American Convention on Human Rights (1969)	302
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988)	302
Inter-American Democratic Charter (2001)	302
Inter-American Convention Against All Forms of Discrimination and Intolerance (2013)	302
b) Persons and specific groups (human rights and environment)	303
Universal system	303
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013	303
Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015	305
c) Human rights defenders	307
Universal system	307
Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the General Assembly, 53/144, 1999	307
Guidelines against Intimidation or Reprisals ("San José Guidelines"), 2015, HRI/MC/2015/6	311
Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, on the situation of environmental human rights defenders, A/71/281, 3 August 2016	315
Report of the Special Rapporteur on the situation of human rights defender, Michel Forst, A/70/217, 30 July 2015	316
Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, On elements of a safe and enabling environment for human rights defenders, A/HRC/25/55, 23 December 2013	323
Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, On the relationship between large-scale development projects and the activities of human rights defenders, A/68/262, 5 August 2013	331
Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, On the specific risks and challenges faced by selected groups of defenders, including journalists and media workers, defenders working on land and environmental issues and youth and student defenders, A/HRC/19/55, 21 December 2011	345

Foreword

The profound global changes and challenges that stem from economic, social and environmental imbalances have demonstrated, more than ever, the centrality of human rights to sustainable development. Development will not be sustainable or inclusive unless human rights are at its core. States' commitments under international human rights law and those related to a new style of development are mutually reinforcing and aspire to the same objectives: increase human well-being and safeguard the dignity of people. They build on equality and universality. They set common principles, standards and values, aim at achieving global public goods and address collective concerns, especially considering the most vulnerable sectors of society.

The 2012 United Nations Conference on Sustainable Development (Rio+20) reaffirmed the importance of respecting, protecting and promoting all human rights to achieve fair and democratic societies. The recently adopted 2030 Agenda for Sustainable Development goes further in its emphasis on the interconnection between human rights and sustainable development, and its strong drive for universality, participation and inclusion. Its primary theme —“No one left behind”— is an affirmation of the fact that everyone should enjoy all rights. Placing equality at the centre of any development that is sustainable, the 2030 Agenda has unprecedented transformative potential —the potential to eradicate extreme poverty, break down inequalities, and ease our world towards more equitable, sustainable and people— and planet-centred societies. This development agenda is a human rights agenda.

This powerful interconnection of human rights, equality and sustainable development is also at the core of the mandate, priorities and proposals of the two institutions which take part in this publication: the Economic Commission for Latin America and the Caribbean (ECLAC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

One of the Economic Commission's central concerns has precisely been the establishment of a model for sustainable development in the medium and long terms, whereby the horizon is equality, progressive structural change is the path, and policymaking, the instrument. In the proposals contained in the documents of its last four sessions —*Time for Equality*, *Structural Change for Equality*, *Compacts for Equality*, and *Horizons 2030*— ECLAC placed the need for public policies based on full entitlement to rights at the centre of the regional debate. Such policies should contribute to greater social inclusion and equality on the basis of partnerships and compacts, and a renewed equation between the State, the private sector and society.

Similarly, OHCHR is committed to helping to build a world in which all civil, political, economic, social and cultural rights are protected, universally and indivisibly, including the right to development. Human rights offer States a path towards greater stability, not less. They build systems of governance that are inclusive and just; economies that are grounded in fair access to resources and opportunities; societies that are resilient and based on respect for human dignity and equality; and an impartial rule of law. Poverty, inequality and exclusion arise because people have been made powerless —because of grinding, long-term deficits in democratic governance, essential freedoms and social dialogue. The 17 Sustainable Development Goals acknowledge these fundamental truths. They embrace the full range of civil, cultural, economic, political and social rights, as well as the right to development. And they do so as rights —not policy choices, but rights.

Both our institutions consider that the human rights-based approach is key to achieving sustainable development. This means acknowledging the equal rights of every individual, without discrimination. It means ensuring that the most vulnerable people, the poor and marginalized, have a voice and are included in all public policies. It means ensuring that the equal rights of women, and other historically discriminated

groups, are protected and promoted. It means making officials and authorities at all levels truly accountable for protecting, respecting and fulfilling human rights, including in the economic sphere.

It also means fully acknowledging that to be sustainable, development must be grounded on the people's freedom to participate in the key decisions that frame society. Under international human rights law, States must respect the public freedoms which are indispensable to enable civil society to develop and operate, including the freedoms of opinion and expression, peaceful assembly and association and the right to participate in public affairs. These are some of the most powerful investments that societies can make, to ensure prosperity, stability and peace.

The six key elements to create and maintain a safe and enabling environment for civil society are: a robust legal framework that is compliant with international standards, including safeguards for public freedoms and effective access to justice; an inclusive and enabling political environment; access to information; avenues for participation by civil society in decision-making processes; minimum economic and social rights guarantees; and long-term support and resources for civil society. By creating such conditions, and acknowledging that they must be extended to all members of the public—including critical voices—Governments, the international community and other stakeholders can foster a climate of trust and cooperation, at the local, national, regional and global levels. As the 2030 Agenda moves into implementation, we need to ensure that the ambitious commitments of States are not inadvertently lost in their translation to the regional and national levels.

Providing a unique bridge between the global and national frameworks, the regional dimension constitutes an imperative in the implementation, follow-up and review of the new United Nations sustainable development agenda. Latin American and Caribbean countries have expressed their will to advance regionally towards sustainable development by creating the Forum of the Countries of Latin America and the Caribbean on Sustainable Development under the auspices of ECLAC. Additionally, to further environmental democracy in the region, contribute to the implementation of the Sustainable Development Goals and build upon international human rights standards related to the environment, at Rio+20 Latin America and the Caribbean initiated a negotiation process on a regional agreement on access to information, public participation and access to justice in environmental matters.

In this publication, ECLAC and OHCHR provide a compilation and systematization of international human rights standards applicable to access to information, public participation and access to justice. This collection contains the criteria set by international norms and shows how they have been developed and interpreted by international and regional human rights mechanisms.

Through this joint effort, we invite countries in the region to strengthen the promotion, protection and guarantee of access rights, to incorporate these rights into their strategies, policies and programmes, and to render them an imperative conceptual framework for achieving sustainable development through equality and the universality of rights.



Alicia Bárcena

Executive Secretary
Economic Commission for Latin America
and the Caribbean (ECLAC)



Zeid Ra'ad Al Hussein

United Nations High Commissioner
for Human Rights (OHCHR)

The left side of the page features four vertical stripes of varying widths and shades of teal and green, creating a modern, layered background effect.

Chapter I: General considerations

A) Overview of the United Nations human rights system

With the adoption of the Charter of the United Nations in 1945, human rights took centre stage in public international law and their protection became one of the most basic requirements in contemporary international society. The Charter of the United Nations proclaimed that one of the purposes of the Organization is to promote and encourage respect for human rights and for fundamental freedoms for all and recognized the interdependence of human rights, peace, security and development. These principles were later enshrined in the 1948 Universal Declaration of Human Rights, the first international instrument to codify a complete catalogue of human rights. Despite not being a legally binding treaty, the Declaration embodies a shared and generally accepted legal conviction, it was the first internationally agreed definition of human rights and it laid the foundations for the construction of the current United Nations human rights treaty system.

The Universal Declaration brought together and defined a broad set of rights without distinction and highlighted their interrelation and interdependence; subsequently, the two Covenants adopted in 1966 established two main categories of human rights: (i) civil and political rights; and (ii) economic, social and cultural rights. The International Covenant on Civil and Political Rights defined such rights as the right to life, the prohibition of torture, the right to personal freedom and security, the right to freedom of expression, access to information and the rights to participation, freedom of association and access to justice, while the International Covenant on Economic, Social and Cultural Rights focused on the human rights related to topics such as labour, social security, health and education.

Regardless of the differences in their scope, the two Covenants —and the other human rights treaties— must be analysed together in order to fully understand the obligations assumed by the States parties. The 1993 Vienna Declaration and Programme of Action states that “human rights are universal, indivisible, and interdependent and interrelated”.¹ Indeed, no right can be enjoyed in isolation, and is dependent upon the realization of the other rights. Furthermore, the treaties share fundamental principles such as equality and non-discrimination, the special care and protection of the most vulnerable groups and the ultimate objective of placing human beings as active and informed participants in public life and the decisions that affect them.

The two Covenants, together with the Universal Declaration, constitute the cornerstone of a series of core human rights treaties (see table I.1), each with its own committee or treaty body. The committees are the treaty oversight bodies and are composed of independent experts charged with important tasks such as issuing authorized interpretations of the treaties (“general comments”), reviewing periodic reports submitted by States and examining individual complaints.²

¹ See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, para. 5 [online] http://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_English.pdf.

² See [online] <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> and <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>.

Table I.1

Core treaties of the United Nations human rights system

Treaty	Optional Protocol(s)	Treaty Body/Bodies
International Covenant on Civil and Political Rights (1966)	Optional Protocol to the International Covenant on Civil and Political Rights (1966) Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)	Human Rights Committee
International Covenant on Economic, Social and Cultural Rights (1966)	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)	Committee on Economic, Social and Cultural Rights
International Convention on the Elimination of All Forms of Racial Discrimination (1965)		Committee on the Elimination of Racial Discrimination
Convention on the Elimination of All Forms of Discrimination against Women (1979)	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)	Committee on the Elimination of Discrimination against Women
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	Committee against Torture Subcommittee on Prevention of Torture
Convention on the Rights of the Child (1989)	Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000) Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011)	Committee on the Rights of the Child
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)		Committee on Migrant Workers
Convention on the Rights of Persons with Disabilities (2006)	Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	Committee on the Rights of Persons with Disabilities
International Convention for the Protection of All Persons from Enforced Disappearance (2006)		Committee on Enforced Disappearances

Source: Office the United Nations High Commissioner for Human Rights (OHCHR).

In addition to the United Nations treaty system (conventional mechanisms), there are other non-conventional mechanisms that have been created by the United Nations General Assembly or its dependent bodies. The Human Rights Council is the main intergovernmental body of the United Nations responsible for human rights, and two key mechanisms have been created under its purview: the universal periodic review and the special procedures. Under the universal periodic review, the human rights situation in each United Nations Member State is periodically reviewed by the other Member States and compliance with human rights obligations is analysed. The review is based on an interactive dialogue and cooperation and concludes with the adoption of an outcome report with recommendations.³ For their part, the special procedures are independent experts (generally special rapporteurs or working groups) appointed by the Human Rights Council to examine, advise and publicly report on the human rights situation in a specific country or on a specific matter, for example, independence of judges and lawyers, freedom of expression, human rights defenders, toxic waste, extreme poverty, environment or disability.⁴

³ See [online] <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

⁴ See [online] <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

B) The human rights-based approach

The human rights-based approach is a conceptual framework based on the promotion and protection of international human rights standards. It aims to analyse the obligations and inequalities that lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that hinder development progress. It consistently and systematically incorporates the main human rights principles and standards into plans, policies and programmes; focuses on rights, not on needs; favours processes and results; and is centred on the most vulnerable groups. Moreover, it strengthens the participation of all stakeholders, fosters local empowerment and reinforces accountability.⁵

The realization of rights must be the ultimate goal of public action and international human rights standards should steer or guide that action to address the themes and problems of development. The process of crafting a policy must be underpinned by human rights and any action taken should seek to strengthen the capacities of all stakeholders.

The human rights-based approach identifies the right-holders and the rights to which they are entitled, as well as the entities responsible for protecting those rights, or duty-bearers, and their obligations. It also aims to strengthen the capacity of the right-holders to claim their rights and of the duty-bearers to fulfil their obligations.

This conceptual framework has some central components. First, a human rights-based approach implies the implementation of rights of excluded and marginalized people and of those whose rights are at greater risk of being infringed. Furthermore, a holistic approach should be adopted that takes into consideration the environment of those persons (family, community, civil society, authorities) and the social, political and legal framework in order to determine the requirements and responsibilities and to provide a multidimensional response. The specific results of any plan, policy and programme should be grounded in universal human rights instruments and other internationally agreed standards and be based on participatory processes. Transparency and accountability help determine the rights that need to be addressed and the capacities required to do so.

In addition, the human rights-based approach is based on oversight and supporting compliance with the commitments made by the State. Lastly, sustained results should be sought through capacity-building, improving social cohesion and institutionalizing democratic processes.

C) The core United Nations human rights treaties in the Latin American and Caribbean region

The Latin American and Caribbean region has been at the forefront in taking ownership of the concept of human rights. It was the first region in the world to express multilaterally its concern for human rights (at the Chapultepec Conference in 1945 it charged the Executive Council of the then Pan-American Union to draft a Declaration of International Rights and Duties of Man, which later became the American Declaration of the Rights and Duties of Man) and has since then prominently incorporated human rights into its legal framework, State policies and structures.

Today, the countries of the region have established their firm commitment to the international human rights system. As shown in table I.2, the States of the region have a high ratification index in terms of

⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation*, Geneva, 2006 [online] <http://www.ohchr.org/Documents/Publications/FAQen.pdf>.

the core international human rights treaties at the universal level, and some of the region's countries, such as Argentina, Belize, the Bolivarian Republic of Venezuela, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Peru, the Plurinational State of Bolivia, Saint Vincent and the Grenadines and Uruguay have ratified all the United Nations treaties considered in this document. Ratification rates in the Inter-American human rights system are also noteworthy, as can be seen in table I.3.

The ratification of an international human rights treaty implies the permanent commitment of the entire State structure to the rights enshrined in that instrument. By taking that legal step, States parties undertake to adapt their domestic legal system to the international standard, and act in accordance with such provisions. It is especially revealing that a significant number of countries grant constitutional status to human rights treaties, either expressly in their Constitutions or in case law, for example Argentina,⁶ Brazil,⁷ Costa Rica,⁸ the Dominican Republic,⁹ Ecuador,¹⁰ Mexico,¹¹ Paraguay¹² and Peru.¹³ Other countries of the region go even further by recognizing the supraconstitutional status of human rights treaties, such as the Plurinational State of Bolivia,¹⁴ Colombia,¹⁵ Guatemala¹⁶ and Honduras.¹⁷

⁶ See article 75.22 of the Argentine National Constitution: "Treaties [...] have a higher status than laws".

⁷ See article 5, para. 3, of the Political Constitution of the Federative Republic of Brazil: "International human rights treaties and conventions that are approved by each chamber of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members, shall be equivalent to constitutional amendments." See also "Recurso Extraordinário (RE) 466.343/SP" [online] <http://www.stf.jus.br/imprensa/pdf/re466343.pdf>.

⁸ See article 7 of the Political Constitution of the Republic of Costa Rica: "Public treaties, international conventions and concordats, duly approved by the Legislative Assembly, will have higher status than laws from the moment of their enactment or such date as they may specify".

⁹ See article 74 of the Constitution of the Dominican Republic: "[...] Treaties, covenants and conventions on human rights signed and ratified by the Dominican State have constitutional status and are directly and immediately applicable by the courts and other bodies of the State".

¹⁰ See article 424 of the Constitution of Ecuador: "[...] The Constitution and international human rights treaties ratified by the State that recognize rights that are more favourable than those contained in the Constitution shall prevail over any other legal standard or act of a public authority". See also article 425: "The hierarchy for the application of standards shall be as follows: the Constitution; international treaties and conventions [...]".

¹¹ See article 1 of the Political Constitution of the United Mexican States: "[...] Provisions on human rights will be interpreted in accordance with this Constitution and with the relevant international treaties in order to provide individuals with the broadest possible protection at all times". See also article 133: "This Constitution, the laws of the Congress of the Union that emanate therefrom and all treaties that are made in accordance therewith, which have been or shall be concluded by the President of the Republic, with the approval of the Senate, shall be the Supreme Law of the whole Union. The judges of each state shall be bound by said Constitution, laws and treaties, without regard to any contradictory provisions contained in the constitutions or laws of states".

¹² See article 137 of the Constitution of the Republic of Paraguay: "The Constitution is the supreme law of the Republic. The Constitution, international treaties, conventions and agreements that have been adopted and ratified, the laws enacted by Congress and other related legal provisions of lesser rank constitute the national corpus of positive law, in the order of precedence in which they appear above".

¹³ See Constitutional Court of Peru, "Sentencia del Tribunal Constitucional. EXP. N.º 03343-2007-PA/TC, Lima, Jaime Hans Bustamante Johnson", 19 February 2009, para. 31 [online] <http://www.tc.gob.pe/jurisprudencia/2009/03343-2007-AA.html>.

¹⁴ See article 13.IV of the Political Constitution of the Plurinational State of Bolivia: "International treaties and conventions ratified by the Plurinational Legislative Assembly that recognize human rights and prohibit their limitation in states of emergency shall prevail under national law. The rights and duties enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Bolivia".

¹⁵ See article 93 of the Political Constitution of Colombia: "International treaties and conventions ratified by Congress that recognize human rights and prohibit their limitation in states of emergency shall prevail under national law. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international human rights treaties ratified by Colombia".

¹⁶ See article 46 of the Political Constitution of Guatemala: "The general principle is established that, in matters of human rights, treaties and conventions accepted and ratified by Guatemala prevail over domestic law".

¹⁷ See article 18 of the Political Constitution of the Republic of Honduras: "In case of conflict between a treaty or convention and the law, the former shall prevail".

Table I.2Latin America and the Caribbean: ratification of selected United Nations human rights treaties, 8 November 2016^a

	Antigua and Barbuda	Argentina	Bahamas	Barbados	Belize	Bolivia (Plurinational State of)	Brazil	Chile	Colombia	Costa Rica	Cuba	Dominica	Dominican Republic	Ecuador	El Salvador	Grenada	Guatemala	Guyana	Haiti	Honduras	Jamaica	Mexico	Nicaragua	Panama	Paraguay	Peru	Saint Kitts and Nevis	Saint Lucia	Saint Vincent and the Grenadines	Suriname	Trinidad and Tobago	Uruguay	Venezuela (Bolivarian Republic of)
International Covenant on Civil and Political Rights, 1966	1986	2008	1973	1996	1982	1992	1972	1969	1968	2008	1993	1978	1969	1979	1991	1992	1977	1991	1997	1975	1981	1980	1977	1992	1978		2011	1981	1976	1978	1970	1978	
International Covenant on Economic, Social and Cultural Rights, 1966	1986	2008	1973	2015	1982	1992	1972	1969	1968	2008	1993	1978	1969	1979	1991	1988	1977	2013	1981	1975	1981	1980	1977	1992	1978		1981	1976	1978	1970	1978		
International Convention on the Elimination of All Forms of Racial Discrimination, 1965	1988	1968	1975	1972	2001	1970	1968	1971	1981	1967	1972		1983	1966	1979	2013	1983	1977	1972	2002	1971	1975	1978	1967	2003	1971	2006	1990	1981	1984	1973	1968	1967
Convention on the Elimination of All Forms of Discrimination against Women, 1979	1989	1985	1993	1980	1990	1990	1984	1989	1982	1986	1980	1980	1982	1981	1981	1990	1982	1980	1981	1983	1984	1981	1981	1987	1982	1985	1982	1981	1993	1990	1981	1983	
Convention on the Rights of the Child, 1989	1993	1990	1991	1990	1990	1990	1990	1991	1990	1991	1991	1991	1990	1990	1990	1990	1990	1991	1995	1990	1991	1990	1990	1990	1990	1990	1990	1993	1993	1991	1990	1990	
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990	2007		2001	2000		2005	1995							2002	2003		2003	2010	2013	2005	2008	1999	2005		2008	2005		2010			2001	2016	
Convention on the Rights of Persons with Disabilities, 2006	2016	2008	2015	2013	2011	2009	2008	2008	2011	2008	2007	2012	2009	2008	2007	2014	2009	2014	2009	2008	2007	2007	2007	2007	2008	2008		2011	2010	2007	2015	2009	2013

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of United Nations, Treaty Collection [online] <http://treaties.un.org>.^a Shaded cells indicate that the agreement has only been signed.

Table I.3
Latin America and the Caribbean: ratification of selected Inter-American human rights treaties, 8 November 2016 ^a

	Antigua and Barbuda	Argentina	Bahamas	Barbados	Belize	Bolivia (Plurinational State of)	Brazil	Chile	Colombia	Costa Rica	Cuba	Dominica	Dominican Republic	Ecuador	El Salvador	Grenada	Guatemala	Guyana	Haiti	Honduras	Jamaica	Mexico	Nicaragua	Panama	Paraguay	Peru	Saint Kitts and Nevis	Saint Lucia	Saint Vincent and the Grenadines	Suriname	Trinidad and Tobago	Uruguay	Venezuela (Bolivarian Republic of)
American Convention on Human Rights, 1969	1984		1981			1979	1992	1990	1973	1970		1993	1978	1977	1978	1978	1978		1977	1977	1978	1981	1979	1978	1989	1978				1987	1991 ^b	1985	1977 ^b
Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights ("Protocol of San Salvador"), 1988	2003				2006	2006	1996	2001	1997	1999			1988	1993	1995	2000		1988	2011			1996	2009	1992	1997	1995				1990		1995	1989
Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, 2013	2013	2013			2015	2013	2013	2015	2014	2013				2013				2014								2016						2013	
Inter-American Convention against All Forms of Discrimination and Intolerance, 2013	2013	2013			2015	2013	2013	2015	2014					2013				2014						2014		2016						2013	
Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, 1999	2000				2003	2001	2001	2001	2003	1999		1999	2006	2004	2002	2002		2009	2011		1999	2000	2002	2001	2002	2001					2001	2006	
Inter-American Convention on the Granting of Civil Rights to Women, 1948	1957				2001	1950	1975	1959	1951	1949	1949	1980	1949	1948	1951	1970		1957	1955			1981	1956	1951	1963	1956				1982	1968	1993	
Inter-American Convention on Protecting the Human Rights of Older Persons, 2015	2015				2015	2015			2015																							2015	

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of Organization of American States (OAS), Inter-American Treaties [online] http://www.oas.org/en/sla/dil/inter_american_treaties.asp.

^a Shaded cells indicate that the agreement has only been signed.

^b The agreement has been terminated.

D) The rights of access to information, public participation and justice as human rights

The rights of access to information, public participation and justice (“access rights”) are human rights framed within the category of civil and political rights. They are governed by the International Covenant on Civil and Political Rights (articles 19, 25 and 2.3 and 14, respectively) and States are therefore obligated to respect and guarantee the provisions on these rights immediately and on an equal and non-discriminatory basis (article 2). This special protection afforded under international human rights law derives from the essential nature of these rights for democratic life and their role as catalysts for the realization of other rights, as they are vital to achieving good governance, transparency, accountability and inclusive and participatory public management.

The inclusion of these rights in the category of civil and political rights differentiates them from the economic, social and cultural rights set forth in the International Covenant on Economic, Social and Cultural Rights, whose realization is progressive in nature and dependent on the availability of resources (article 2). Notwithstanding this difference in category, access rights—as civil and political rights—can facilitate the achievement of certain economic, social and cultural rights, such as the right to health, to an adequate standard of living, to water or to a healthy environment.

With regard to the right to a healthy environment, the Special Rapporteur on human rights and the environment has indicated on numerous occasions that access rights are essential to guarantee the enjoyment of a safe, clean, healthy and sustainable environment.¹⁸ Access to information is fundamental not only to protect the right to life and security in cases of environmental degradation, but also to ensure that the environmental policies adopted are sustainable through informed, inclusive and participatory decision-making. Moreover, without access to justice the right to information and participation in environmental matters could not be upheld. The three rights of access are thus essential and inseparable in order to safeguard other human rights.

It is precisely in the environmental sphere where a virtuous circle linking access rights, human rights and the environment has been established more explicitly.¹⁹ Principle 10 of the Rio Declaration on Environment and Development (“Principle 10”), establishes that:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

Elements of Principle 10 have been included in various multilateral environmental agreements. For example, the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), indicates that the Parties shall “promote, on a permanent basis, access by the public to relevant information, and wide public participation” (article 19), that they “should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities” (article 3) and that they should promote the “more effective operation of existing national institutions and legal frameworks” (article 19). Important references to the three access rights are also contained in the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD),

¹⁸ See United Nations, “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox” (A/HRC/25/53), paragraph 29, 30 December 2013.

¹⁹ “Making this connection can create a kind of virtuous circle: strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights such as rights to life, health, property and privacy. The converse is also true. Failure to meet procedural obligations can result in a degraded environment, which interferes with the full enjoyment of other human rights”, United Nations, “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox” (A/HRC/22/43), para. 42, 24 December 2012.

the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).²⁰

Resolution 70/1 “Transforming our world: the 2030 Agenda for Sustainable Development”, adopted by the United Nations General Assembly on 25 September 2015,²¹ which establishes 17 Sustainable Development Goals and 169 targets, links access rights with human rights and sustainable development. Access rights are at the centre of the agenda and are mainstreamed in all of the Goals. However, Goal 16 stands out as it refers expressly to the three rights of access, making explicit the commitment of States to ensure: (i) public access to information and protection of fundamental freedoms; (ii) inclusive, participatory and representative decision-making; and, (iii) equal access to justice. Furthermore, the 2030 Agenda calls for the creation of effective, accountable and transparent institutions and the adoption of non-discriminatory laws and policies for sustainable development.

E) Implementation of access rights

Access to information, public participation and access to justice are civil and political rights and are therefore governed by the 1966 International Covenant on Civil and Political Rights, under which the obligations assumed by States are legally binding and immediately applicable. States must respect and guarantee such rights under equal and non-discriminatory terms, by abstaining from infringing recognized rights and adopting timely measures to put them into effect. In other words, while the obligation to respect requires the State to abstain from contravening rights, the obligation to guarantee requires the State to take proactive action to adopt the necessary actions to ensure the free and full exercise of these rights. Pursuant to the Vienna Convention on the Law of Treaties, States parties must meet the obligations imposed by the Covenant in good faith (article 26) and may not invoke the provisions of its internal law as justification for its failure to perform a treaty (article 27).

Furthermore, it is important to highlight that the Covenant establishes the obligation to respect and guarantee the rights of all individuals that are in the territory and subject to the jurisdiction of the State party. As indicated by the Human Rights Committee, this implies that the rights apply to every person under the authority or effective control of the State even if the person is not in the territory of the State. Moreover, the enjoyment of the rights is not limited to the citizens of a State party, but must be available to all individuals, regardless of their nationality.²²

At the same time, the Covenant foresees that the restrictions must not impair the essence of the right and stipulates the most favourable interpretation rule. Article 5 of the Covenant states that no provision may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for in the Covenant. It further reads that there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the Covenant pursuant to law, conventions, regulations or custom on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent. This last provision refers to a hermeneutical criterion that underpins international human rights law: the *pro homine* or *pro persona* principle.²³ According to article 31 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in the light of its object and purpose and, since the main object and purpose of human rights treaties is to recognize the rights of individuals, the broadest standard or most favourable interpretation should always be applied.

Under the Inter-American system, the American Convention on Human Rights sets forth the obligation of State Parties to respect the rights and freedoms recognized therein and ensure to all persons subject to their

²⁰ See, for example, article 6 of the United Nations Framework Convention on Climate Change; articles 8, 10 and 17 of the Convention on Biological Diversity; articles 4, 9 and 10 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and articles 8, 11 and 12 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

²¹ A/RES/70/1.

²² Human Rights Committee, “General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (CCPR/C/21/Rev.1/Add.13), para. 10, 2004.

²³ Also recognized in the other treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (article 23) and the Convention on the Rights of the Child (article 41).

jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (article 1). In addition, the States undertake to adopt such legislative or other measures as may be necessary to give effect to those rights or freedoms (article 2).

F) Right of access to information

Numerous international instruments recognize and establish access to information as a human right. Both the Universal Declaration of Human Rights (article 19) and the International Covenant on Civil and Political Rights (article 19) set out the right of every individual to seek, receive and impart information. Other specific treaties such as the Convention on the Rights of the Child (article 13), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 13) and the Convention on the Rights of Persons with Disabilities (article 21) contain more detailed provisions on this obligation in respect of the persons and groups to which they apply.

Paragraphs 18 and 19 of general comment No. 34 of the Human Rights Committee are particularly important since they establish the concepts of active and passive transparency with regard to access to information:

- “Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment.²⁴ The designation of such bodies may also include other entities when such entities are carrying out public functions. [...]”²⁵
- “To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests”.²⁶

In his 2013 report, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stressed that access to information is a right in and of itself upon which free and democratic societies depend and that it comprises both the right of the general public to have access to information of public interest and the rights of every individual to seek and receive information of public interest. He also added that obstacles to access to information can undermine the enjoyment of both civil and political rights and economic, social and cultural rights. Core requirements for democratic governance, such as transparency, the accountability of public authorities or the promotion of participatory decision-making processes, are practically unattainable without adequate access to information.²⁷ According to the Special Rapporteur, the authorities represent their population, offer public goods and, as a result, must be transparent in their actions and decisions. In his view, a culture of secrecy is acceptable only in very exceptional

²⁴ Paragraph 7 of general comment No. 34 establishes: “The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities”.

²⁵ Human Rights Committee, “General comment, No. 34. Article 19: Freedoms of opinion and expression” (CCPR/C/GC/34), para. 18, 2011.

²⁶ Ibid., para. 19.

²⁷ United Nations, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” (A/68/362), para. 3, 4 September 2013.

cases, when confidentiality can be fundamental to perform its functions effectively. In addition, information can only be considered reserved under exceptional circumstances.

The basic principles that must guide the design and implementation of law and practice on access to information are as follows:²⁸

- **Maximum disclosure:** All information held by public bodies, including all branches of the State—legislative, executive and judicial—and other public authorities, should be subject to disclosure and this presumption may be overcome only in very limited circumstances.
- **Obligation to publish:** Freedom of information implies not only that public bodies accede to requests for information, but also that they widely publish and disseminate documents of significant public interest, subject only to reasonable limits based on resources and capacity.
- **Promotion of open government:** The full implementation of national laws on access to information requires that the public be informed about their rights and that government officials adhere to a culture of openness. Dedicated efforts are required to disseminate information to the general public on the right to access information and to raise the awareness of and train government staff to respond appropriately to public demands.
- **Limited scope of exceptions:** Reasons for the denial of access to information should be clearly and narrowly designed, bearing in mind the three-part test suggested in the interpretation of the right to freedom of opinion and expression.²⁹ Non-disclosure of information must be justified on a case-by-case basis. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.
- **Processes to facilitate access:** Procedures to request information should allow for fair and rapid processing and include mechanisms for an independent review in cases of refusal. Public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. The law should provide for an individual right of appeal to an independent administrative body in respect of a refusal by a public body to disclose information.
- **Costs:** Individuals should not be deterred by excessive cost from making requests for information.
- **Open meetings:** In line with the notion of maximum disclosure, legislation should establish a presumption that meetings of governing bodies are open to the public.
- **Disclosure takes precedence:** To ensure maximum disclosure, laws which are inconsistent with this principle should be amended or repealed. The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it.
- **Protection for individuals who disclose relevant information:** National laws on the right to information should provide protection from liability for officials who, in good faith, disclose information pursuant to right to information legislation. Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, including the commission of a criminal offence or the failure to comply with a legal obligation. Special protection should be provided for those who release information concerning human rights violations.

Additionally, the mandate holders of the Human Rights Council have pointed to more specific obligations when access to information is related to certain matters. For example, the Special Rapporteur on human rights and the environment asserts that in order to protect human rights from violations caused by environmental

²⁸ United Nations, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue" (A/68/362), 4 September 2013.

²⁹ "Paragraph 3 [of article 19 of the International Covenant on Civil and Political Rights] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 [restrictions shall be necessary for respect of the rights or reputations of others; and for the protection of national security or of public order (ordre public), or of public health or morals]; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated." Human Rights Committee, "General comment, No. 34. Article 19: Freedoms of opinion and expression" (CCPR/C/GC/34), para. 22, 2011.

damage, States should provide access to information on the environment and provide for the assessment of environmental impacts that may interfere with the enjoyment of human rights.

In turn, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes argues that relevant information on this topic must be available, accessible and functional, in a manner consistent with the principle of non-discrimination. Furthermore, people who may be exposed to hazardous substances and wastes must be made aware of their right to information and understand its relevance. With regard to the exceptions regime, the Special Rapporteur has highlighted that certain types of information about hazardous substances cannot be legitimately claimed as confidential. It is not legitimate to claim that public health and safety information on hazardous substances is confidential. There is widespread recognition that health and safety information should not be confidential, and States have legally binding obligations to this end.³⁰

In the Inter-American system, the right of access to public information is contained not only in the American Convention on Human Rights (article 13) and the Inter-American Democratic Charter (article 4), but has also been comprehensively developed through the Model Inter-American Law on Access to Information. Some of the main elements of this model law are indicated below:

- It establishes a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure.
- “Information” refers to any type of data in custody or control of a public authority and “public authority” refers to all government authorities, including the executive, legislative and judicial branches at all levels.
- It recognizes the right of every person, on an equal and non-discriminatory basis, and without providing justifications, to obtain information free of charge or at a cost limited to the cost of reproduction.
- A reasonable interpretation of the provision that best gives effect to the right to information shall be adopted.
- It establishes that the authorities have an obligation to proactively disseminate information.
- Exceptions must be clear, specific and defined by law, as well as legitimate and strictly necessary in a democratic society.
- It guarantees the right of internal and external appeal, judicial review and the reversal of the onus of proof and establishes an Information Commission as an independent body.

G) Right to participate in decision-making

Article 21 of the Universal Declaration of Human Rights establishes that everyone has the right to take part in the government of his or her country and article 25 of the International Covenant on Civil and Political Rights deals with the right to take part in the conduct of public affairs. As determined by the Human Rights Committee, the conduct of public affairs is a broad concept related to the exercise of political power, which includes the exercise of legislative, executive and judicial powers, covers all aspects of government and public administration, and the formulation and implementation of policy at the international, national, regional and local levels. Participation in public affairs can take various forms: popular assemblies, citizen consultations, public debates and dialogues, associations and organizations. In addition, any conditions which apply to their exercise should be based on objective and reasonable criteria.

Other core human rights treaties ensure this right for specific groups. This is the case of the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities. The main obligations under the aforementioned treaties are as follows:

³⁰ United Nations, “Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Baskut Tuncak” (A/HRC/30/40), para. 42, 8 July 2015.

- **International Convention on the Elimination of All Forms of Racial Discrimination:** Prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, notably in the enjoyment of political rights (article 5). Afro-descendants have the right to be consulted prior to the adoption of decisions that may affect their rights, in accordance with international norms. With regard to indigenous peoples, the enjoyment of equal rights for their effective participation in public life shall be ensured and no decision directly related with their rights and interests shall be taken without their informed consent.
- **Convention on the Elimination of All Forms of Discrimination against Women:** Take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, ensure to women, on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government and participate in non-governmental organizations and associations concerned with the public and political life of the country (article 7). In addition, their right to participate in the elaboration and implementation of development planning at all levels shall be ensured (article 14).
- **Convention on the Rights of the Child:** Considering the best interests of the child, assuring to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child, and giving the child the opportunity to be heard in all matters that affect him or her (article 12).
- **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families:** Facilitate the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities (article 42).
- **Convention on the Rights of Persons with Disabilities:** Closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies to implement the Convention, and in other decision-making processes concerning issues relating to persons with disabilities (article 4). States shall ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others and promote actively a favourable environment for such participation (article 29). Accessibility (including to information and communication) is a precondition to enable persons with disabilities to participate on an equal basis.

The Declaration on the Right to Development likewise highlights the participation of persons in public management. Article 2 underscores that the human person is the central subject of development and should be the active participant and beneficiary of the right to development. At the same time, States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights (article 8).

A special reference should be made to the participation of indigenous and native peoples. The Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO) provides that governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly (free, prior and informed consultation). Furthermore, they shall establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them (article 6). The United Nations Declaration on the Rights of Indigenous Peoples requires that States consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (article 19). Moreover, States shall consult and cooperate in good faith in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (article 32).

The right to participate in public affairs has also been recognized in specific matters such as extreme poverty, water and sanitation and the environment. The Special Rapporteur on extreme poverty and human rights underlined the need to include people living in poverty in decision-making, given the existing vicious

circle between poverty and participation: the greater the inequality, the less the participation; the less the participation, the greater the inequality. Furthermore, she compiled a set of human rights principles that should govern all participatory processes, including their design, formulation, implementation, follow-up and evaluation: (i) respect for dignity; (ii) non-discrimination and equality; (iii) transparency and access to information; (iv) accountability; and (v) empowerment. For each principle, she provided a set of recommendations for States, available in her report.³¹

The Special Rapporteur on the human right to safe drinking water and sanitation likewise identified the following essential components for an active, free and meaningful participation that are applicable to her mandate and human rights as a whole:³²

- **Involving people in setting out the terms of engagement:** terms of participation, the scope of issues and the questions to be addressed, their framing and sequencing, and rules of procedure.
- **Creating space for participation:** States have an obligation to invite participation and to create opportunities from the beginning of deliberations on a particular measure and before any decisions have been taken.
- **Enabling people to access participatory processes:** States must enable people to eliminate barriers to accessing deliberative processes. People must have information on how to access these spaces and the procedures for getting involved.
- **Guaranteeing free and safe participation:** Free participation rules out any form of coercion or inducement, direct or indirect. Participation must be free from manipulation or intimidation. There must be no conditions attached.
- **Ensuring access to information:** Participation must be informed. People require accessible information on the issues at stake that enables them to form an opinion. To ensure equal access, information must be made available and be clear and consistent. It must be presented in different formats and in appropriate language. For people to be able to understand and verify the information presented, it must be provided well in advance of any opportunity to provide input. Cost must not be a barrier to accessing information.
- **Providing reasonable opportunity to influence decision-making:** Meaningful participation entails ensuring that people's views are considered and influence the decision.

Likewise, the American Declaration of the Rights and Duties of Man (article XX), the American Convention on Human Rights (article 23) and the Inter-American Democratic Charter (article 6) recognize the right to participate in public affairs. In addition, the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, adopted in 2001, contains important principles and recommendations for States on, for example, proactivity, inclusiveness, shared responsibility, openness, access, transparency and respect for public input. Recommendations are also made on information and communication, legal frameworks, institutional procedures and structures, education and training, funding for participation and opportunities and mechanisms for public participation.

H) Right of access to justice

Access to justice is another basic pillar of international human rights law. In addition to being a right in itself, access to justice is also a means by which to re-establish the exercise of rights that have not been recognized or violated. The International Covenant on Civil and Political Rights establishes that every person shall have the right to an effective remedy if his or her rights are violated (article 2.3). States shall provide adequate judicial and administrative mechanisms to address such infringement of rights. With regard to access to an effective remedy, international standards clearly indicate that the remedies have to be adaptable so as to consider the particular vulnerability of certain groups of people.

³¹ United Nations, "Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda" (A/HRC/23/36), 11 March 2013.

³² United Nations, "Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque" (A/69/213), 31 July 2014.

In addition, the requirements of rule of law³³ and due process impose certain obligations on States in judicial matters. The right to equality before courts and tribunals and to a fair trial are key elements for the protection of human rights and are procedural means to reinstate rule of law. Hence, States have to abide by certain standards in the administration of justice such as the principles of legality, effectiveness, publicity and transparency; the establishment of clear, fair, appropriate and independent procedures; the right of defence; and the right of appeal to a higher authority.

The right to appeal shall be aimed at providing relief to the persons whose rights have been violated. As the Human Rights Committee noted³⁴, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and the reform of relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. The Committee also observed that the right to an effective remedy may in certain circumstances require States to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

Equality before the courts of justice is achieved through the principles of equal access and equality of arms. As established by the Human Rights Committee³⁵, the right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or any other condition, who may find themselves in the territory or subject to the jurisdiction of the State. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this sense, all parties in a process shall have the same procedural rights.

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While the International Covenant on Civil and Political Rights explicitly addresses the guarantee of legal assistance in criminal proceedings (article 14.3 d), the Human Rights Committee encourages States to provide free legal aid in cases where individuals do not have sufficient means to pay for it. The Special Rapporteur on the independence of judges and lawyers has also highlighted that the definition of legal aid should be as broad as possible. It should include not only the right to free legal assistance in criminal proceedings but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations.³⁶ In addition, the apportionment of costs in a judicial proceeding that hinders access to justice de facto can pose challenges in terms of paragraph 1 of article 14. Specific obligations in this regard stem from other treaties such as International Convention on the Elimination of All Forms of Racial Discrimination (articles 5 and 6), Convention on the Elimination of All Forms of Discrimination against Women (article 15), Convention on the Rights of the Child (articles 12 and 40) and Convention on the Rights of Persons with Disabilities (articles 12 and 13).

The Committee on the Elimination of Discrimination against Women has identified six essential and related components to ensure access to justice:³⁷

- **Justiciability** requires unhindered access to justice and ability and empowerment to claim rights as legal entitlements.
- **Availability** requires the establishment of courts, quasi-judicial bodies or other bodies throughout the State party in urban, rural and remote areas, as well as their maintenance and funding.

³³ "Rule of law" refers to "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency", see United Nations, "The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General" (S/2004/616), 23 August 2004.

³⁴ Human Rights Committee, "General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add.13), paras. 16 and 19, 2004.

³⁵ Human Rights Committee, "General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial" (CCPR/C/GC/32), para. 9, 2007.

³⁶ United Nations, "Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut, on legal aid" (A/HRC/23/43), para. 27, 15 March 2013.

³⁷ Committee on the Elimination of Discrimination against Women, "General recommendation No. 33 on women's access to justice", (CEDAW/C/GC/33), 2015.

- **Accessibility** requires that all justice systems, both formal and quasi-judicial, are secure, affordable and physically accessible, and adapted and appropriate to the different needs.
- **Good quality of justice systems** requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable dispute resolution.
- **Provision of remedies** requires that justice systems provide viable protection and meaningful redress for any harm suffered.
- **Accountability of justice systems** is ensured through monitoring to guarantee that they function in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring of the actions of justice system professionals and of their legal responsibility if they violate the law.

Access to justice has also been recognized in specific domains. With regard to the right to water, the Committee on Economic, Social and Cultural Rights underscored that every person or group victim of a violation of this right shall have access to effective judicial or other types of recourse both at the national and international levels. Additionally, all victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition.³⁸ Similar obligations exist for the right to health, food and adequate housing.

With regard to access to environmental justice, it should be highlighted that both treaty bodies and special procedures have pointed to the obligation of States to provide effective recourse in cases of environmental damage. The Committee on Economic, Social and Cultural Rights has urged States to ensure that “adequate compensation and/or alternative accommodation and land for cultivation” are provided to the indigenous communities and local farmers affected by infrastructure projects, as well as “just compensation to and resettlement of indigenous peoples displaced by forestation”.³⁹

The Special Rapporteur on the independence of judges and lawyers has identified the following as the main barriers to access justice:

- **Financial barriers:** Costs include initiating and pursuing the proceedings, and possible delays. In addition there are lawyers' fees and other costs such as travel and loss of working time as a result of a court case.
- **Extreme poverty:** Financial factors take on even more importance when they compound other social, cultural or employment factors and lead to marginalization and social exclusion. The most serious obstacles barring access to justice for the very poor include: (a) their indigent condition; (b) illiteracy or lack of education and information; (c) the complexity of procedures; (d) mistrust, not to say fear, stemming from their experience of the justice system, either because they frequently find themselves in the position of accused, or because their own complaints are turned against them; (e) the slow pace of justice, despite the fact that their petitions often relate to very sensitive aspects of life (such as return of children) which need to be dealt with rapidly; and (f) in many countries, the fact that they are not allowed to be accompanied or represented by support organizations which could also bring criminal indemnification proceedings.
- **Barriers relating to information:** Clients' ignorance of their rights and all matters relating to their case.
- **Cultural barriers:** Language difficulties and different cultural and economic backgrounds of those involved.
- **Physical barriers:** The physical distance between client and court or the architectural layout.⁴⁰

The Inter-American framework recognizes similar rights in relation to access to justice. The right of every person to have simple and brief recourse to the courts to enforce their rights and guarantees of due process are embedded in its main legal texts.

³⁸ Committee on Economic, Social and Cultural Rights, “General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)” (E/C.12/2002/11), para. 55, 2002.

³⁹ See, United Nations, “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox” (A/HRC/25/53), sect. III.A.3, 30 December 2013.

⁴⁰ United Nations, “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy” (A/HRC/8/4), 13 May 2008.

I) Equality and non-discrimination

Equality and non-discrimination are a basic, immediate and cross-cutting principle in the protection of human rights and, as such, of access rights. Pursuant to article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. The International Covenant on Civil and Political Rights establishes the obligation of each State to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Although the International Covenant on Civil and Political Rights does not define the term “discrimination”, its meaning has been established by the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. All three treaties define discrimination as any distinction, exclusion or restriction made on the basis of certain characteristics which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. By way of example, the Human Rights Committee has indicated that for civil and political rights such characteristics include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms. For its part, the Committee on Economic, Social and Cultural Rights has noted that direct⁴¹ and indirect⁴² discrimination, as well as formal⁴³ and substantive⁴⁴ discrimination, must be eliminated in order to ensure non-discrimination. In order to eliminate such discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.⁴⁵

Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights expressly state that the rights they set forth are fully applicable to all human beings on an equal footing and that States parties shall ensure the equal right of men and women to the enjoyment of all rights (article 3 of both covenants). In both cases, the obligation is immediate. As underscored by the Human Rights Committee, “State parties [are required to] take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment each of such rights, the education of the population and of state officials in human rights and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant.

⁴¹ According to the Committee on Economic, Social and Cultural Rights, “direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant)”.

⁴² According to the Committee on Economic, Social and Cultural Rights, “indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.”

⁴³ “Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds.”

⁴⁴ “Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.”

⁴⁵ According to the Committee on Economic, Social and Cultural Rights, “such measures are legitimate as long as they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Some such measures to achieve non-discrimination may, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and persons with sensory impairments in health care facilities”.

The State party must not only adopt measures of protection but also positive measures in all areas so as to achieve the effective and equal empowerment of women”.⁴⁶ For its part, the Committee on Economic, Social and Cultural Rights has indicated that “non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights”.⁴⁷

In order to fulfil this obligation, States parties should take account of the factors that impede the equal enjoyment by women and men of each right specified in the treaty. In relation to access rights, the Human Rights Committee argues that the Parties shall: (i) take into account the factors which may impede women from exercising the rights protected under article 19 (access to information) on an equal basis; (ii) ensure that the law guarantees to women the rights contained in article 25 (right to participation) on equal terms with men and take effective and positive measures to promote and ensure women's participation in the conduct of public affairs; and (iii) ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms to men, particularly whether there are legal provisions preventing women from direct and autonomous access to the courts, whether women may give evidence as witnesses on the same terms as men and whether measures are taken to ensure women equal access to legal aid. In addition, States parties must ensure that everyone also has access to effective remedies to ensure the exercise of those rights. Such remedies should be appropriately adapted so as to take account of the particular vulnerability of certain categories of persons.

Meanwhile, the Inter-American system also recognizes the obligation to promote equality and non-discrimination. The American Convention on Human Rights states that the rights and freedoms shall be respected and guaranteed to all persons subject to the jurisdiction of a State without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (article 1). Similar provisions are found in the Protocol of San Salvador, the Inter-American Democratic Charter and the Inter-American Convention against All Forms of Discrimination and Intolerance.

J) References to specific groups

Human rights instruments seek to protect, in particular, those persons that are more prone to human rights violations. For this reason, human rights standards and provisions establish specific obligations and safeguards to protect more vulnerable individuals and groups. In addition, some human rights treaties focus specifically on certain groups such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. All of these instruments pay special attention to certain individuals and/or groups, however, in the standards analysed, there is no single term used to refer to them. Table I.4 includes a list of terms used in selected documents of relevance to access to information, participation and justice.

⁴⁶ Human Rights Committee, “General Comment No. 28. Article 3 (The equality of rights between men and women)”, (HRI/GEN/1/Rev.9), vol. I, para. 3, 2000.

⁴⁷ Committee on Economic, Social and Cultural Rights, “General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)” (E/C.12/GC/20), para. 7, 2009.

Table I.4

Terms used in reference to specific groups in selected documents

Term	2011–2016	2006–2010	2001–2005	1996–2000	1991–1995	Treaty/general comment/ concluding observation/report
Most vulnerable groups in the population and groups at risk of social exclusion	X					CCPR/C/URY/CO/5-7 E/C.12/2005/4
Disadvantaged or marginalized groups	X		X			E/C.12/GUY/CO/2-4 E/C.12/PRY/CO/4 E/C.12/GTM/CO/3
Groups at risk	X					A/68/262 A/HRC/25/55 A/70/217 E/C.12/JAM/CO/3-4
Groups in vulnerable situations	X					A/HRC/25/53 A/HRC/28/61
Groups particularly at risk		X				A/HRC/7/21 A/HRC/30/40
Socially vulnerable groups		X		X		E/C.12/2002/11 E/C.12/1999/5
Socially disadvantaged groups			X			E/C.12/2002/11 A/HRC/25/53 A/68/262
Vulnerable/most vulnerable groups	X	X			X	E/C.12/2002/11 CCPR/C/79/Add.42 A/HRC/22/43 A/HRC/28/61
Vulnerable, disadvantaged or marginalized groups	X			X		A/HRC/14 E/C.12/2000/4
Individuals and groups who have traditionally faced difficulties in exercising their right			X			E/C.12/2002/11
Most vulnerable sections	X					A/HRC/14 E/C.12/2000/4

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

K) Human rights defenders

Although there is not a specific definition of who is or can be a defender of human rights, the Declaration on human rights defenders refers to those “individuals, groups and associations [that contribute] to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals” (fourth paragraph of the preamble). In this sense, a human rights defender is considered to be any person who, individually or with others, acts in favour of one or more human rights of an individual or group.⁴⁸

The defence of human rights can be undertaken through professional activities (paid or unpaid) and in a non-professional context. Most defenders act locally or nationally, defending the rights of their communities and countries. As has been recognized by the Special Rapporteur on the situation of human

⁴⁸ Office of the United Nations High Commissioner for Human Rights, “Human Rights Defenders: Protecting the Right to Defend Human Rights”, *Fact Sheet*, No. 29 [online] <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf>.

rights defenders, certain groups of defenders face a greater risk. Among them are women, defenders of rights relating to land, the environment and corporate responsibility, and lawyers working to promote and protect human rights.⁴⁹

As highlighted by the Special Rapporteur, defenders working on land rights and natural resources are the second most vulnerable group when it comes to the danger of being killed because of their activities.⁵⁰ Furthermore, in a recent report, the Special Rapporteur described the extraordinary risks faced by those defending the rights of local communities, such as threats, harassment and physical attacks, when they oppose the implementation of projects that have a direct impact on natural resources, the land and the environment.⁵¹

In cases of violations, international standards outline specific duties for States and the responsibilities of everyone with regard to defending human rights. The Declaration establishes the need to support and protect human rights defenders in their work. It does not create new rights but instead brings together existing rights in a way that makes it easier to apply them to the practical role and situation of human rights defenders. States must, for example, protect, promote and implement all human rights; ensure that all persons under their jurisdiction are able to enjoy all social, economic, political and other rights and freedoms in practice; adopt such legislative, administrative and other steps as may be necessary to ensure effective implementation of rights and freedoms; provide an effective remedy for persons who claim to have been victims of a human rights violation; conduct prompt and impartial investigations of alleged violations of human rights; and take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

⁴⁹ United Nations, "Report of the Special Rapporteur on the situation of human rights defenders, Mr. Michel Forst" (A/70/217), 30 July 2015.

⁵⁰ United Nations, "Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, (A/HRC/4/37), 24 January 2007.

⁵¹ United Nations, "Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya" (A/68/262), 5 August 2013.

Annex I.1

Links to relevant documents

Below is a list of documents of the human rights system at the universal and Inter-American levels which are relevant to access to information, public participation and access to justice. The electronic version of this publication contains the links to such documents.

Universal system

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

- General Comment No. 18 on non-discrimination
- General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)
- General Comment No. 28 on the equality of rights between men and women) (Art. 3)
- General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant
- General Comment No. 32 on the right to equality before courts and tribunals and to fair trial (Art. 14)
- General Comment No. 34 on freedoms of opinion and expression (Art. 19)

International Covenant on Economic, Social and Cultural Rights

- General Comment No. 10 on the role of national human rights institutions in the protection of economic, social and cultural rights
- General Comment No. 12 on the right to adequate food (Art. 11)
- General Comment No. 14 on the right to the highest attainable standard of health (Art. 12)
- General Comment No. 15 on the right to water (Art. 11 and 12)
- General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3)
- General Comment No. 20 on non-discrimination in economic, social and cultural rights (Art. 2, paragraph 2)
- General Comment No. 21 on the right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)

International Convention on the Elimination of All Forms of Racial Discrimination

- General Comment No. 23 on the rights of indigenous peoples

- General Comment No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system
- General Comment No. 34 on racial discrimination against people of African descent Convention on the Elimination of All Forms of Discrimination against Women
- General Comment No. 23 on political and public life
- General Comment No. 24 on women and health
- General Comment No. 27 on older women and protection of their human rights
- General Comment No. 33 on women's access to justice
- General Comment No. 34 on the rights of rural women

Convention on the Rights of the Child

- General Comment No. 9 on the rights of children with disabilities
- General Comment No. 11 on indigenous children and their rights under the Convention
- General Comment No. 12 on the right of the child to be heard
- General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, paragraph 1)
- General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24)
- General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Convention on the Rights of Persons with Disabilities

- General Comment No. 1 on Art. 12 (equal recognition before the law)
- General Comment No. 2 on Art. 9 (accessibility)

Convention No. 169 of the International Labour Organization on Indigenous and Tribal Peoples

Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993

Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986

United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly resolution 61/295

Basic Principles on the Independence of the Judiciary

Guidelines on the Role of Prosecutors

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144

Guidelines against Intimidation or Reprisals ("San José Guidelines"), 2015, HRI/MC/2015/6

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/68/362, 4 September 2013

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/14/23, 20 April 2010

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/31/53, 28 December 2015

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/31/52, 1 February 2016

Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, on the right of access to information, A/HRC/30/40, 8 July 2015

Report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, on the right to information and participation, A/HRC/7/21, 18 February 2008

Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, on the right to participation, A/69/213, 31 July 2014

Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, on the right to participation of people living in poverty, A/HRC/23/36, 11 March 2013

Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, on the rights to freedom of peaceful assembly and of association natural resource exploitation, A/HRC/29/25, 28 April 2015

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, on extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013

Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, on access to justice, A/HRC/8/4, 13 May 2008

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, on free legal assistance, A/HRC/23/43, 15 March 2013

Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, on the situation of environmental human rights defenders, A/71/281, 3 August 2016

Report of the Special Rapporteur on the situation of human rights defender, Michel Forst, A/70/217, 30 July 2015

Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, on elements of a safe and enabling environment for human rights defenders, A/HRC/25/55, 23 December 2013

Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, on the relationship between large-scale development projects and the activities of human rights defenders, A/68/262, 5 August 2013

Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, on the specific risks and challenges faced by selected groups of defenders, including journalists and media workers, defenders working on land and environmental issues and youth and student defenders, A/HRC/19/55, 21 December 2011

Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas, on the right of persons with disabilities to participate in decision-making, A/HRC/31/62, 12 January 2016

Inter-American system

American Declaration of the Rights and Duties of Man

American Convention on Human Rights

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador"

Inter-American Convention Against All Forms of Discrimination and Intolerance

Inter-American Democratic Charter

Social Charter of the Americas

Declaration of Principles on Freedom of Expression

Model Inter-American Law on Access to Information

Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development

Chapter II:
Compilation
of international
standards

A) Implementation of Access Rights

Universal System

International Covenant on Civil and Political Rights (1966)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Human Rights Committee, General Observation no. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13

[...]

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.
4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.
5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by in the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.
6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.
7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.
8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give

rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.
10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

[...]

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.
15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes 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. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.
16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.
17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

[...]

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

[...]

Inter-American system

American Convention on Human Rights (1969)

Part I – State Obligations and Rights Protected

Chapter I – General Obligations

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, “person” means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

B) Right of Access to Information

Universal system

Universal Declaration of Human Rights (1948)

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

International Covenant on Civil and Political Rights (1966)

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order (ordre public), or of public health or morals.

Human Rights Committee, General Comment no. 34, Article 19 (freedom of opinion and expression), 2011, CCPR/C/GC/34

General considerations

1. This general comment replaces general comment No. 10 (nineteenth session).
2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.¹ They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.
5. Taking account of the specific terms of article 19, paragraph 1, as well as the relationship of opinion and thought (article 18), a reservation to paragraph 1 would be incompatible with the object and purpose of the Covenant.² Committee's opinion cannot be made subject to lawful derogation under article 4".³ Freedom of opinion is one such element, since it can never become necessary to derogate from it during a state of emergency.⁴
6. Taking account of the relationship of freedom of expression to the other rights in the Covenant, while reservations to particular elements of article 19, paragraph 2, may be acceptable, a general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant.⁵
7. The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.⁶ Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.⁷ The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.⁸
8. States parties are required to ensure that the rights contained in article 19 of the Covenant are given effect to in the domestic law of the State, in a manner consistent with the guidance provided by the Committee in its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant. It is recalled that States parties should provide the Committee, in accordance with reports submitted pursuant to article 40, with the relevant domestic legal rules,

¹ See communication No. 1173/2003, Benhadj v. Algeria, Views adopted on 20 July 2007; No. 628/1995, Park v. Republic of Korea, Views adopted on 5 July 1996.

² See the Committee's general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40, vol. I (A/50/40 (Vol. I)), annex V.

³ See the Committee's general comment No. 29 (2001) on derogation during a state of emergency, para. 13, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40, vol. I (A/56/40 (Vol. I)), annex VI.

⁴ General comment No. 29, para. 11.

⁵ General comment No. 24.

⁶ See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, Official Records of the General Assembly, Fiftyninth Session, Supplement No. 40, vol. I (A/59/40 (Vol. I)), annex III.

⁷ See communication No. 61/1979, Hertzberg et al. v. Finland, Views adopted on 2 April 1982.

⁸ General comment No. 31, para. 8; See communication No. 633/1995, Gauthier v. Canada, Views adopted on 7 April 1999.

administrative practices and judicial decisions, as well as relevant policy level and other sectorial practices relating to the rights protected by article 19, taking into account the issues discussed in the present general comment. They should also include information on remedies available if those rights are violated.

Freedom of Opinion

9. Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.⁹ The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.¹⁰
10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.¹¹ Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

Freedom of Expression

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.¹² It includes political discourse¹³, commentary on one's own¹⁴ and on public affairs¹⁵, canvassing¹⁶, discussion of human rights¹⁷, journalism¹⁸, cultural and artistic expression¹⁹, teaching²⁰, and religious discourse.²¹ It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive²², although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.
12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.²³ Means of expression include books, newspapers²⁴, pamphlets²⁵, posters, banners²⁶, dress and legal submissions²⁷. They include all forms of audio-visual as well as electronic and internet-based modes of expression.

⁹ See communication No. 550/93, *Faurisson v. France*, Views adopted on 8 November 1996.

¹⁰ See communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, Views adopted on 26 March 1986; No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.

¹¹ See communication No. 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.

¹² See communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.

¹³ See communication No. 414/1990, *Mika Miha v. Equatorial Guinea*.

¹⁴ See communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005.

¹⁵ See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006.

¹⁶ Concluding observations on Japan (CCPR/C/JPN/CO/5).

¹⁷ See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

¹⁸ See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.

¹⁹ See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.

²⁰ See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

²¹ *Ibid.*

²² *Ibid.*

²³ See communication No. 926/2000, *Shin v. Republic of Korea*.

²⁴ See communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007.

²⁵ See communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006.

²⁶ See communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994.

²⁷ See communication No. 1189/2003, *Fernando v. Sri Lanka*.

Freedom of expression and the media

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.²⁸ The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function.²⁹ The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.³⁰ The public also has a corresponding right to receive media output.³¹
14. As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.
15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.
16. States parties should ensure that public broadcasting services operate in an independent manner.³² In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

[...]

Right of access to information

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs³³ and the right of the general public to receive media output.³⁴ Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified. Pursuant to article 10 of the Covenant, a prisoner does not lose the entitlement to access to his medical records.³⁵ The Committee, in general comment No. 32 on article 14, set out the various entitlements to information that are held by those accused of a criminal offence³⁶. Pursuant to the

²⁸ See communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005.

²⁹ See communication No. 633/95, *Gauthier v. Canada*.

³⁰ See the Committee's general comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote), para. 25, Official Records of the General Assembly, Fifty-first Session, Supplement No. 40, vol. I (A/51/40 (Vol. I)), annex V.

³¹ See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

³² Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

³³ See communication No. 633/95, *Gauthier v. Canada*.

³⁴ See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

³⁵ See communication No. 726/1996, *Zheludkov v. Ukraine*, Views adopted on 29 October 2002.

³⁶ See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 33, Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI.

provisions of article 2, persons should be in receipt of information regarding their Covenant rights in general.³⁷ Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.³⁸

19. To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.³⁹ The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.

Freedom of Expression and Political Rights

20. The Committee, in general comment No. 25 on participation in public affairs and the right to vote, elaborated on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.⁴⁰ The attention of States parties is drawn to the guidance that general comment No. 25 provides with regard to the promotion and the protection of freedom of expression in that context.

The application of article 19 (3)

21. Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.⁴¹ The Committee also recalls the provisions of article 5 paragraph 1, of the Covenant according to which "nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant".
22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.⁴² Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.⁴³

³⁷ General comment No. 31.

³⁸ See communication No. 1457/2006, *Poma v. Peru*, Views adopted on 27 March 2009.

³⁹ Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994)).

⁴⁰ See General comment No. 25 on article 25 of the Covenant, para. 25.

⁴¹ See the Committee's general comment No. 27 on article 12, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40, vol. I (A/55/40 (Vol. I)), annex VI, sect. A.

⁴² See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

⁴³ See the Committee's general comment No. 22, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex VI.

23. States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.⁴⁴ Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.⁴⁵ Journalists are frequently subjected to such threats, intimidation and attacks because of their activities.⁴⁶ So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyer.⁴⁷ All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted⁴⁸ and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.⁴⁹
24. Restrictions must be provided by law. Law may include laws of parliamentary privilege⁵⁰ and laws of contempt of court.⁵¹ Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.⁵²
25. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly⁵³, and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.⁵⁴ Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.
26. Laws restricting the rights enumerated in article 19, paragraph 2, including the laws referred to in paragraph 24, must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant.⁵⁵ Laws must not violate the non-discrimination provisions of the Covenant. Laws must not provide for penalties that are incompatible with the Covenant, such as corporal punishment.⁵⁶
27. It is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression.⁵⁷ If, with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.⁵⁸
28. The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term “rights” includes human rights as recognized in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights article under 17 (see para. 37).⁵⁹ Such restrictions must be constructed with care: while it may be

⁴⁴ See communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

⁴⁵ See communication No. 1353/2005, *Njiru v. Cameroon*, Views adopted on 19 March 2007.

⁴⁶ See, for instance, concluding observations on Algeria (CCPR/C/DZA/CO/3); concluding observations on Costa Rica (CCPR/C/CRI/CO/5); concluding observations on Sudan (CCPR/C/SDN/CO/3).

⁴⁷ See communication No. 1353/2005, *Njiru v. Cameroon*; concluding observations on Nicaragua (CCPR/C/NIC/CO/3); concluding observations on Tunisia (CCPR/C/TUN/CO/5); concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR); concluding observations on Colombia (CCPR/CO/80/COL).

⁴⁸ *Ibid.* and concluding observations on Georgia (CCPR/C/GEO/CO/3).

⁴⁹ Concluding observations on Guyana (CCPR/C/79/Add.121).

⁵⁰ See communication No. 633/95, *Gauthier v. Canada*.

⁵¹ See communication No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008.

⁵² See general comment No. 32.

⁵³ See communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995.

⁵⁴ See general comment No. 27.

⁵⁵ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 30 March 1994.

⁵⁶ General comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A.*

⁵⁷ See communication No. 1553/2007, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006.

⁵⁸ See communication No. 132/1982, *Jaona v. Madagascar*, Views adopted on 1 April 1985.

⁵⁹ See communication No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004.

permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote.⁶⁰ The term “others” relates to other persons individually or as members of a community.⁶¹ Thus, it may, for instance, refer to individual members of a community defined by its religious faith⁶² or ethnicity.⁶³

29. The second legitimate ground is that of protection of national security or of public order (*ordre public*), or of public health or morals.
30. Extreme care must be taken by States parties to ensure that treason laws⁶⁴ and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.⁶⁵ Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.⁶⁶ The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.⁶⁷
31. On the basis of maintenance of public order (*ordre public*) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place.⁶⁸ Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings.⁶⁹
32. The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.
33. Restrictions must be “necessary” for a legitimate purpose. Thus, for instance, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.⁷⁰ On the other hand, the Committee has considered that a State party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the right and freedom of children of that faith in a school district.⁷¹
34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the

⁶⁰ *Ibid.*

⁶¹ See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

⁶² See communication No. 550/93, *Faurisson v. France*; concluding observations on Austria (CCPR/C/AUT/CO/4).

⁶³ Concluding observations on Slovakia (CCPR/CO/78/SVK); concluding observations on Israel (CCPR/CO/78/ISR).

⁶⁴ Concluding observations on Hong Kong (CCPR/C/HKG/CO/2).

⁶⁵ Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

⁶⁶ Concluding observations on Uzbekistan (CCPR/CO/71/UZB).

⁶⁷ See communication No. 518/1992, *Sohn v. Republic of Korea*, Views adopted on 18 March 1994.

⁶⁸ See communication No. 1157/2003, *Coleman v. Australia*.

⁶⁹ See communication No. 1373/2005, *Dissanayake v. Sri Lanka*.

⁷⁰ See communication No. 359, 385/89, *Ballantyne, Davidson and McIntyre v. Canada*.

⁷¹ See communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006.

administrative and judicial authorities in applying the law”.⁷² The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain⁷³.

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.⁷⁴
36. The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression if necessary.⁷⁵ In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a “margin of appreciation”⁷⁶ and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.⁷⁷

Limitative scope of restrictions on freedom of expression in certain specific areas

37. Among restrictions on political discourse that have given the Committee cause for concern are the prohibition of door-to-door canvassing,⁷⁸ restrictions on the number and type of written materials that may be distributed during election campaigns,⁷⁹ blocking access during election periods to sources, including local and international media, of political commentary⁸⁰ and limiting access of opposition parties and politicians to media outlets.⁸¹ Every restriction should be compatible with paragraph 3. However, it may be legitimate for a State party to restrict political polling imminently preceding an election in order to maintain the integrity of the electoral process.⁸²
38. As noted earlier in paragraphs 13 and 20, concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.⁸³ Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant.⁸⁴ Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.⁸⁵ Accordingly, the Committee expresses concern regarding laws on such matters as, *lese majesty*,⁸⁶ *desacato*,⁸⁷ disrespect for authority,⁸⁸ disrespect for flags and symbols, defamation of the head of state⁸⁹ and the protection of the honour of public officials,⁹⁰ and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.⁹¹

⁷² General comment No. 27, para. 14. See also Communications No. 1128/2002, *Marques v. Angola*; No. 1157/2003, *Coleman v. Australia*.

⁷³ See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.

⁷⁴ See communication No. 926/2000, *Shin v. Republic of Korea*.

⁷⁵ See communication No. 518/1992, *Sohn v. Republic of Korea*.

⁷⁶ See communication No. 511/1992, *Ilmari Lämsmä, et al. v. Finland*, Views adopted on 14 October 1993.

⁷⁷ See communications Nos. 518/92, *Sohn v. Republic of Korea*; No. 926/2000, *Shin v. Republic of Korea*.

⁷⁸ Concluding observations on Japan (CCPR/C/JPN/CO/5).

⁷⁹ *Ibid.*

⁸⁰ Concluding observations on Tunisia (CCPR/C/TUN/CO/5).

⁸¹ Concluding observations on Togo (CCPR/CO/76/TGO); concluding observations on Moldova (CCPR/CO/75/MDA).

⁸² See communication No. 968/2001, *Kim v. Republic of Korea*, Views adopted on 14 March 1996.

⁸³ See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.

⁸⁴ *Ibid.*

⁸⁵ See communication No. 1128/2002, *Marques v. Angola*.

⁸⁶ See communications Nos. 422-424/1990, *Aduayom et al. v. Togo*, Views adopted on 30 June 1994.

⁸⁷ Concluding observations on the Dominican Republic (CCPR/CO/71/DOM).

⁸⁸ Concluding observations on Honduras (CCPR/C/HND/CO/1).

⁸⁹ See concluding observations on Zambia (CCPR/ZMB/CO/3), para.25.

⁹⁰ See concluding observations on Costa Rica (CCPR/C/CRI/CO/5), para. 11.

⁹¹ *Ibid.*, and see concluding observations on Tunisia (CCPR/C/TUN/CO/5), para. 91.

39. States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3.⁹² Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3. States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations.⁹³ The criteria for the application of such conditions and licence fees should be reasonable and objective,⁹⁴ clear,⁹⁵ transparent,⁹⁶ non-discriminatory and otherwise in compliance with the Covenant.⁹⁷ Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.⁹⁸
40. The Committee reiterates its observation in general comment No. 10 that “because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression”. The State should not have monopoly control over the media and should promote plurality of the media.⁹⁹ Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.
41. Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisement¹⁰⁰ are not employed to the effect of impeding freedom of expression.¹⁰¹ Furthermore, private media must not be put at a disadvantage compared to public media in such matters as access to means of dissemination/distribution and access to news.¹⁰²
42. The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government¹⁰³ can never be considered to be a necessary restriction of freedom of expression.
43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.¹⁰⁴
44. Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self publication in print, on

⁹² See concluding observations on Viet Nam (CCPR/CO/75/VNM), para. 18, and concluding observations on Lesotho (CCPR/CO/79/Add.106), para. 23.

⁹³ Concluding observations on Gambia (CCPR/CO/75/GMB).

⁹⁴ See concluding observations on Lebanon (CCPR/CO/79/Add.78), para. 25.

⁹⁵ Concluding observations on Kuwait (CCPR/CO/69/KWT); concluding observations on Ukraine (CCPR/CO/73/UKR).

⁹⁶ Concluding observations on Kyrgyzstan (CCPR/CO/69/KGZ).

⁹⁷ Concluding observations on Ukraine (CCPR/CO/73/UKR).

⁹⁸ Concluding observations on Lebanon (CCPR/CO/79/Add.78).

⁹⁹ See concluding observations on Guyana (CCPR/CO/79/Add.121), para. 19; concluding observations on the Russian Federation (CCPR/CO/79/RUS); concluding observations on Viet Nam (CCPR/CO/75/VNM); concluding observations on Italy (CCPR/CO/79/Add. 37)

¹⁰⁰ See concluding observations on Lesotho (CCPR/CO/79/Add.106), para. 22.

¹⁰¹ Concluding observations on Ukraine (CCPR/CO/73/UKR).

¹⁰² Concluding observations on Sri Lanka (CCPR/CO/79/LKA); and see concluding observations on Togo (CCPR/CO/76/TGO), para. 17.

¹⁰³ Concluding observations on Peru (CCPR/CO/70/PER).

¹⁰⁴ Concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR).

the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

45. It is normally incompatible with paragraph 3 to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings)¹⁰⁵ to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified countries¹⁰⁶ or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses). States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.¹⁰⁷
46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism”¹⁰⁸ and “extremist activity”¹⁰⁹ as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.
47. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression.¹¹⁰ All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.¹¹¹ In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.¹¹² States parties should consider the decriminalization of defamation¹¹³ and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.¹¹⁴
48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of

¹⁰⁵ Concluding observations on Uzbekistan (CCPR/CO/83/UZB); concluding observations on Morocco (CCPR/CO/82/MAR).

¹⁰⁶ Concluding observations on Democratic People's Republic of Korea (CCPR/CO/72/PRK).

¹⁰⁷ Concluding observations on Kuwait (CCPR/CO/69/KWT).

¹⁰⁸ Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).

¹⁰⁹ Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

¹¹⁰ Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

¹¹⁴ See communication No. 909/2000, *Kankanamge v. Sri Lanka*, Views adopted on 27 July 2004.

article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.¹¹⁵

49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.¹¹⁶ The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.

Relationship between articles 19 and 20

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.¹¹⁷
51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.
52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.

Committee of Economic, Social and Cultural Rights, General Comment no. 15, The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 2002, E/C.12/2002/11

[...]

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

[...]

- a) *Accessibility.* Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

[...]

- iv. *Information accessibility:* accessibility includes the right to seek, receive and impart information concerning water issues.¹¹⁸

[...]

¹¹⁵ Concluding observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man (CCPR/C/79/Add.119). See also concluding observations on Kuwait (CCPR/CO/69/KWT).

¹¹⁶ So called "memory-laws", see communication, No. 550/93, Faurisson v. France. See also concluding observations on Hungary (CCPR/C/HUN/CO/5) paragraph 19.

¹¹⁷ See communication No. 736/1997, Ross v. Canada, Views adopted on 18 October 2000.

¹¹⁸ See para. 48 of this General Comment.

Specific legal obligations

[...]

(c) Obligations to fulfil

25. The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

[...]

Remedies and accountability

56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

[...]

Committee on Economic, Social and Cultural Rights, General Comment no.14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, E/C.12/2000/4

[...]

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

[...]

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.
12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

[...]

- (b) *Accessibility*. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

[...]

- iv. Information accessibility: accessibility includes the right to seek, receive and impart information and ideas¹¹⁹ concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

[...]

Specific legal obligations

34. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.
35. Obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.

[...]

37. The obligation to fulfil (facilitate) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to fulfil (provide) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to fulfil (promote)

¹¹⁹ See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.

the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.

[...]

44. The Committee also confirms that the following are obligations of comparable priority:

[...]

- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

[...]

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...]

- (viii) The right to freedom of opinion and expression;

[...]

Convention on the Rights of the Child (1989)

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

[...]

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Committee on the Rights of the Child, General Comment no. 16, State obligations regarding the impact of the business sector on children's rights, 2013, CRC/C/GC/16

I. Introduction and Objectives

[...]

- 4. It is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations. In this regard, States should take into account that:

[...]

- (a) Childhood is a unique period of physical, mental, emotional and spiritual development and violations of children's rights, such as exposure to violence, child labour or unsafe products or environmental hazards may have lifelong, irreversible and even transgenerational consequences.
- (b) Children are often politically voiceless and lack access to relevant information. They are reliant on governance systems, over which they have little influence, to have their rights realized. This makes it hard for them to have a say in decisions regarding laws and policies that impact their rights. In the process of decision-making, States may not adequately consider the impact on children of business-related laws and policies, while, conversely, the business sector often exerts a powerful influence on decisions without reference to children's rights.

[...]

VI. Framework for implementation

A. Legislative, regulatory and enforcement measures:

[...]

3. Children's rights and due diligence by business enterprises

- 64. States should lead by example, requiring all State-owned enterprises to undertake child-rights due diligence and to publicly communicate their reports on their impact on children's rights, including regular reporting. States should make public support and services, such as those provided by an export credit agency, development finance and investment insurance conditional on businesses carrying out child-rights due diligence.
- 65. As part of child-rights due diligence, large business enterprises should be encouraged and, where appropriate, required to make public their efforts to address child-rights impacts. Such communication should be available, efficient and comparable across enterprises and address measures taken by business to mitigate potential and actual adverse impacts for children caused by their activities. Business enterprises should be required to publish the actions taken to ensure that the goods and services they produce or commercialize do not involve serious violations of children's rights, such as slavery or forced labour. Where reporting is mandatory, States should put in place verification and enforcement mechanisms to ensure compliance. States may support reporting by creating instruments to benchmark and recognize good performance with regard to children's rights.

[...]

D. Legislative, regulatory and enforcement measures:

[...]

3. Child-rights impact assessments

- 78.** Ensuring that the best interests of the child are a primary consideration in business-related legislation and policy development and delivery at all levels of government demands continuous child-rights impact assessments. These can predict the impact of any proposed business-related policy, legislation, regulations, budget or other administrative decisions which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of laws, policies and programmes on children's rights.
- 79.** Different methodologies and practices may be developed when undertaking child-rights impact assessments. At a minimum they must use the framework of the Convention and the Optional Protocols thereto, as well as relevant concluding observations and general comments issued by the Committee. When States conduct broader impact assessments of business-related policy, legislation or administrative practices, they should ensure that these assessments are underpinned by the general principles of the Convention and the Optional Protocols thereto and have special regard for the differentiated impact on children of the measures under consideration.
- 80.** Child-rights impact assessments can be used to consider the impact on all children affected by the activities of a particular business or sector but can also include assessment of the differential impact of measures on certain categories of children. The assessment of the impact itself may be based upon input from children, civil society and experts, as well as from relevant government departments, academic research and experiences documented in the country or elsewhere. The analysis should result in recommendations for amendments, alternatives and improvements and be publicly available.

[...]

E. Collaborative and awareness-raising measures

- 82.** While it is the State that takes on obligations under the Convention, the task of implementation needs to engage all sectors of society, including business, civil society and children themselves. The Committee recommends that States adopt and implement a comprehensive strategy to inform and educate all children, parents and caregivers that business has a responsibility to respect children's rights wherever they operate, including through child-friendly and age-appropriate communications, for example through the provision of education about financial awareness. Education, training and awareness-raising about the Convention should also be targeted at business enterprises to emphasize the status of the child as a holder of human rights, encourage active respect for all of the Convention's provisions and challenge and eradicate discriminatory attitudes towards all children and especially those in vulnerable and disadvantaged situations. In this context, the media should be encouraged to provide children with information about their rights in relation to business and raise awareness among businesses of their responsibility to respect children's rights.
- 83.** The Committee highlights that national human rights institutions can be involved in raising awareness of the Convention's provisions amongst business enterprises, for instance by developing good practice guidance and policies for businesses and disseminating them.

[...]

Committee on the Rights of the Child, General Comment no. 15, The right of the child to the enjoyment of the highest attainable standard of health (article 24), 2013, CRC/C/GC/15

[...]

15. In its general comment No. 4, the Committee underlined the best interests of the child to have access to appropriate information on health issues. Special attention must be given to certain categories of children, including children and adolescents with psychosocial disabilities. Where hospitalization or placement in an institution is being considered, this decision should be made in accordance with the principle of the best interests of the child, with the primary understanding that it is in the best interests of all children with disabilities to be cared for, as far as possible, in the community in a family setting and preferably within their own family with the necessary supports made available to the family and the child.

[...]

58. The obligations under this provision include providing health-related information and support in the use of this information. Health-related information should be physically accessible, understandable and appropriate to children's age and educational level.
59. Children require information and education on all aspects of health to enable them to make informed choices in relation to their lifestyle and access to health services. Information and life skills education should address a broad range of health issues, including: healthy eating and the promotion of physical activity, sports and recreation; accident and injury prevention; sanitation, hand washing and other personal hygiene practices; and the dangers of alcohol, tobacco and psychoactive substance use. Information and education should encompass appropriate information about children's right to health, the obligations of Governments, and how and where to access health information and services, and should be provided as a core part of the school curriculum, as well as through health services and in other settings for children who are not in school. Materials providing information about health should be designed in collaboration with children and disseminated in a wide range of public settings.

[...]

Committee on the Rights of the Child, General Comment no. 12, Children's right to be heard 2009, CRC/C/GC/12

I. Introduction

1. Article 12 of the Convention on the Rights of the Child (the Convention) is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.

[...]

III. The right to be heard: a right of the individual child and a right of groups of children

[...]

A. Legal Analysis

15. Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. This right imposes a clear legal obligation on States

parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.

16. The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests.
17. Article 12 as a general principle provides that States parties should strive to ensure that the interpretation and implementation of all other rights incorporated in the Convention are guided by it.¹²⁰

[...]

B. The right to be heard and the links with other provisions of the Convention

68. Article 12, as a general principle, is linked to the other general principles of the Convention, such as article 2 (the right to non-discrimination), article 6 (the right to life, survival and development) and, in particular, is interdependent with article 3 (primary consideration of the best interests of the child). The article is also closely linked with the articles related to civil rights and freedoms, particularly article 13 (the right to freedom of expression) and article 17 (the right to information). Furthermore, article 12 is connected to all other articles of the Convention, which cannot be fully implemented if the child is not respected as a subject with her or his own views on the rights enshrined in the respective articles and their implementation.

[...]

3. Articles 12, 13 and 17

80. Article 13, on the right to freedom of expression, and article 17, on access to information, are crucial prerequisites for the effective exercise of the right to be heard. These articles establish that children are subjects of rights and, together with article 12, they assert that the child is entitled to exercise those rights on his or her own behalf, in accordance with her or his evolving capacities.
81. The right to freedom of expression embodied in article 13 is often confused with article 12. However, while both articles are strongly linked, they do elaborate different rights. Freedom of expression relates to the right to hold and express opinions, and to seek and receive information through any media. It asserts the right of the child not to be restricted by the State party in the opinions she or he holds or expresses. As such, the obligation it imposes on States parties is to refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue. Article 12, however, relates to the right of expression of views specifically about matters which affect the child, and the right to be involved in actions and decisions that impact on her or his life. Article 12 imposes an obligation on States parties to introduce the legal framework and mechanisms necessary to facilitate active involvement of the child in all actions affecting the child and in decision-making, and to fulfil the obligation to give due weight to those views once expressed. Freedom of expression in article 13 requires no such engagement or response from States parties. However, creating an environment of respect for children to express their views, consistent with article 12, also contributes towards building children's capacities to exercise their right to freedom of expression.
82. Fulfilment of the child's right to information, consistent with article 17 is, to a large degree, a prerequisite for the effective realization of the right to express views. Children need access to information in formats appropriate to their age and capacities on all issues of concern to them. This applies to information, for example, relating to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures. Consistent with articles 17 and 42, States parties should include children's rights in the school curricula.

¹²⁰ See the Committee's general comment No. 5 (2003) on general measures of implementation for the Convention on the Rights of the Child (CRC/GC/2003/5).

83. The Committee also reminds States parties that the media are an important means both of promoting awareness of the right of children to express their views, and of providing opportunities for the public expression of such views. It urges various forms of the media to dedicate further resources to the inclusion of children in the development of programmes and the creation of opportunities for children to develop and lead media initiatives on their rights.

[...]

Committee on the Rights of the Child, General Comment no. 11, Indigenous children and their rights under the Convention, 2009, CRC/C/GC/11

[...]

Access to information

40. The Committee underlines the importance that the media have particular regard for the linguistic needs of indigenous children, in accordance with articles 17 (d) and 30 of the Convention. The Committee encourages States parties to support indigenous children to have access to media in their own languages. The Committee underlines the right of indigenous children to access information, including in their own languages, in order for them to effectively exercise their right to be heard.

[...]

Committee on the Rights of the Child, General Comment no. 9, The rights of children with disabilities, 2006, CRC/C/GC/9

[...]

B. Access to appropriate information and mass media

37. Access to information and means of communication, including information and communication technologies and systems, enables children with disabilities to live independently and participate fully in all aspects of life. Children with disabilities and their caregivers should have access to information concerning their disabilities so that they can be adequately educated on the disability, including its causes, management and prognosis. This knowledge is extremely valuable as it does not only enable them to adjust and live better with their disabilities, but also allows them to be more involved in and to make informed decisions about their own care. Children with disabilities should also be provided with the appropriate technology and other services and/or languages, e.g. Braille and sign language, which would enable them to have access to all forms of media, including television, radio and printed material as well as new information and communication technologies and systems, such as the Internet.
38. On the other hand, States parties are required to protect all children, including children with disabilities from harmful information, especially pornographic material and material that promotes xenophobia or any other form of discrimination and could potentially reinforce prejudices.

[...]

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Article 13

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.

3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputation of others;
 - (b) For the protection of the national security of the States concerned or of public order (*ordre public*) or of public health or morals;
 - (c) For the purpose of preventing any propaganda for war;
 - (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence

Convention on the Rights of Persons with Disabilities (2006)

Article 9. Accessibility

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

[...]

- (b) Information, communications and other services, including electronic services and emergency services.

States Parties shall also take appropriate measures to:

[...]

- (f) Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- (g) Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

[...]

Article 21. Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) Recognizing and promoting the use of sign languages.

Committee on the Rights of Persons with Disabilities, General comment no. 2, Article 9 (Accessibility), 2014, CRPD/C/GC/2

II. Introduction

1. Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. Without access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies. It is no coincidence that accessibility is one of the principles on which the Convention on the Rights of Persons with Disabilities is based (art. 3 (f)). Historically, the persons with disabilities movement has argued that access to the physical environment and public transport for persons with disabilities is a precondition for freedom of movement, as guaranteed under article 13 of the Universal Declaration of Human Rights and article 12 of the International Covenant on Civil and Political Rights. Similarly, access to information and communication is seen as a precondition for freedom of opinion and expression, as guaranteed under article 19 of the Universal Declaration of Human Rights and article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

[...]

5. While different people and organizations understand differently what information and communications technology (ICT) means, it is generally acknowledged that ICT is an umbrella term that includes any information and communication device or application and its content. Such a definition encompasses a wide range of access technologies, such as radio, television, satellite, mobile phones, fixed lines, computers, network hardware and software. The importance of ICT lies in its ability to open up a wide range of services, transform existing services and create greater demand for access to information and knowledge, particularly in underserved and excluded populations, such as persons with disabilities. Article 12 of the International Telecommunication Regulations (adopted in Dubai in 2012) enshrines the right for persons with disabilities to access international telecommunication services, taking into account the relevant International Telecommunication Union (ITU) recommendations. The provisions of that article could serve as a basis for reinforcing States parties' national legislative frameworks.
6. In its general comment No. 5 (1994) on persons with disabilities, the Committee on Economic, Social and Cultural Rights evoked the duty of States to implement the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities.¹²¹ The Standard Rules highlight the significance of the accessibility of the physical environment, transport, information and communication for the equalization of opportunities for persons with disabilities. The concept is developed in rule 5, in which access to the physical environment, and access to information and communication are targeted as areas for priority action for States. The significance of accessibility can be derived also from general comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health (para. 12). [...]
7. The World Report on Disability Summary, published in 2011 by the World Health Organization and the World Bank within the framework of the largest consultation ever and with the active involvement of hundreds of professionals in the field of disability, stresses that the built environment, transport systems and information and communication are often inaccessible to persons with disabilities (p. 10). Persons with disabilities are prevented from enjoying some of their basic rights, such as the right to seek employment or the right to health care, owing to a lack of accessible transport. The level of implementation of accessibility laws remains low in many countries and persons with disabilities are often denied their right to freedom of expression owing to the inaccessibility of information and communication. Even in countries where sign language interpretation services exist for deaf persons, the number of qualified interpreters is usually too low to meet the increasing demand for their services, and the fact that the interpreters have to travel individually to clients makes the use of their services too expensive. Persons with intellectual and psychosocial disabilities as well as

¹²¹ General Assembly resolution 48/96, annex.

deaf-blind persons face barriers when attempting to access information and communication owing to a lack of easy-to-read formats and augmentative and alternative modes of communication. They also face barriers when attempting to access services due to prejudices and a lack of adequate training of the staff providing those services.

[...]

9. Accessibility was recognized by the mainstream ICT community since the first phase of the World Summit on Information Society, held in Geneva in 2003. Introduced and driven by the disability community, the concept was incorporated in the Declaration of Principles adopted by the Summit, which in paragraph 25 state, “the sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities and by facilitating access to public domain information, including by universal design and the use of assistive technologies”.¹²²

[...]

III. Normative content

[...]

15. The strict application of universal design to all new goods, products, facilities, technologies and services should ensure full, equal and unrestricted access for all potential consumers, including persons with disabilities, in a way that takes full account of their inherent dignity and diversity. It should contribute to the creation of an unrestricted chain of movement for an individual from one space to another, including movement inside particular spaces, with no barriers. Persons with disabilities and other users should be able to move in barrier-free streets, enter accessible low-floor vehicles, access information and communication, and enter and move inside universally designed buildings, using technical aids and live assistance where necessary. The application of universal design does not automatically eliminate the need for technical aids. Its application to a building from the initial design stage helps to make construction much less costly: making a building accessible from the outset might not increase the total cost of construction at all in many cases, or only minimally in some cases. On the other hand, the cost of subsequent adaptations in order to make a building accessible may be considerable in some cases, especially with regard to certain historical buildings. While the initial application of universal design is more economical, the potential cost of subsequent removal of barriers may not be used as an excuse to avoid the obligation to remove barriers to accessibility gradually. Accessibility of information and communication, including ICT, should also be achieved from the outset because subsequent adaptations to the Internet and ICT may increase costs. It is therefore more economical to incorporate mandatory ICT accessibility features from the earliest stages of design and production.

[...]

17. Article 9, paragraph 1, requires States parties to identify and eliminate obstacles and barriers to accessibility to, inter alia:

[...]

- (b) Information, communications and other services, including electronic services and emergency services.

[...]

21. Without access to information and communication, enjoyment of freedom of thought and expression and many other basic rights and freedoms for persons with disabilities may be seriously undermined and restricted. Article 9, paragraph 2 (f) to (g), of the Convention therefore provide that States parties should promote live assistance and intermediaries, including guides, readers and professional sign language interpreters (para. 2 (e)), promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information, and promote access for persons

¹²² See “Declaration of Principles: Building the Information Society: a global challenge in the new Millennium”, adopted by the World Summit on the Information Society at its first phase, held in Geneva in 2003 (WSIS-03/GENEVA/DOC/4-E), para. 25.

with disabilities to new information and communications technologies and systems, including the Internet, through the application of mandatory accessibility standards. Information and communication should be available in easy-to-read formats and augmentative and alternative modes and methods to persons with disabilities who use such formats, modes and methods.

[...]

III. Obligations of State Parties

[...]

28. States parties are obliged to adopt, promulgate and monitor national accessibility standards. If no relevant legislation is in place, adopting a suitable legal framework is the first step. States parties should undertake a comprehensive review of the laws on accessibility in order to identify, monitor and address gaps in legislation and implementation. Disability laws often fail to include ICT in their definition of accessibility, and disability rights laws concerned with non-discriminatory access in areas such as procurement, employment and education often fail to include access to ICT and the many goods and services central to modern society that are offered through ICT. It is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (art. 4, para. 3), as well as all other relevant stakeholders, including members of the academic community and expert associations of architects, urban planners, engineers and designers. Legislation should incorporate and be based on the principle of universal design, as required by the Convention (art. 4, para. 1 (f)). It should provide for the mandatory application of accessibility standards and for sanctions, including fines, for those who fail to apply them.
29. It is helpful to mainstream accessibility standards that prescribe various areas that have to be accessible, such as the physical environment in laws on construction and planning, transportation in laws on public aerial, railway, road and water transport, information and communication, and services open to the public. However, accessibility should be encompassed in general and specific laws on equal opportunities, equality and participation in the context of the prohibition of disability-based discrimination. Denial of access should be clearly defined as a prohibited act of discrimination. Persons with disabilities who have been denied access to the physical environment, transportation, information and communication, or services open to the public should have effective legal remedies at their disposal. When defining accessibility standards, States parties have to take into account the diversity of persons with disabilities and ensure that accessibility is provided to persons of any gender and of all ages and types of disability. Part of the task of encompassing the diversity of persons with disabilities in the provision of accessibility is recognizing that some persons with disabilities need human or animal assistance in order to enjoy full accessibility (such as personal assistance, sign language interpretation, tactile sign language interpretation or guide dogs). It must be stipulated, for example, that banning guide dogs from entering a particular building or open space would constitute a prohibited act of disability-based discrimination.
30. It is necessary to establish minimum standards for the accessibility of different services provided by public and private enterprises for persons with different types of impairments. Reference tools such as the ITU-T recommendation Telecommunications Accessibility Checklist for standardization activities (2006) and the Telecommunications accessibility guidelines for older persons and persons with disabilities (ITU-T recommendation F.790) should be mainstreamed whenever a new ICT-related standard is developed. That would allow the generalization of universal design in the development of standards. States parties should establish a legislative framework with specific, enforceable, time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private entities of their previously inaccessible services into accessible ones. States parties should also ensure that all newly procured goods and services are fully accessible for persons with disabilities. Minimum standards must be developed in close consultation with persons with disabilities and their representative organizations, in accordance with article 4, paragraph 3, of the Convention. The standards can also be developed in collaboration with other States parties and international organizations and agencies through international cooperation, in accordance with article 32 of the Convention. States parties are encouraged to join ITU study groups in the radiocommunication, standardization and development sectors

of the Union, which actively work at mainstreaming accessibility in the development of international telecommunications and ICT standards and at raising industry's and governments' awareness of the need to increase access to ICT for persons with disabilities. Such cooperation can be useful in developing and promoting international standards that contribute to the interoperability of goods and services. In the field of communication-related services, States parties must ensure at least a minimum quality of services, especially for the relatively new types of services, such as personal assistance, sign language interpretation and tactile signing, aiming at their standardization.

[...]

- 32.** As part of their review of accessibility legislation, States parties must also consider their laws on public procurement to ensure that their public procurement procedures incorporate accessibility requirements. It is unacceptable to use public funds to create or perpetuate the inequality that inevitably results from inaccessible services and facilities. Public procurements should be used to implement affirmative action in line with the provisions of article 5, paragraph 4, of the Convention in order to ensure accessibility and de facto equality for persons with disabilities.

[...]

IV. Relationship with other articles of the Convention

[...]

- 36.** Ensuring full access to the physical environment, transportation, information and communication, and services open to the public is indeed a vital precondition for the effective enjoyment of many rights covered by the Convention. In situations of risk, natural disasters and armed conflict, the emergency services must be accessible to persons with disabilities, or their lives cannot be saved or their well-being protected (art. 11). Accessibility must be incorporated as a priority in post-disaster reconstruction efforts. Therefore, disaster risk reduction must be accessible and disability-inclusive.

[...]

- 38.** Articles 9 and 21 intersect on the issue of information and communication. Article 21 provides that States parties “shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice”. It goes on to describe in detail how the accessibility of information and communication can be ensured in practice. It requires that States parties “provide information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities” (art. 21 (a)). Furthermore, it provides for “facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions” (art. 21 (b)). Private entities that provide services to the general public, including through the Internet, are urged to provide information and services in accessible and usable formats for persons with disabilities (art. 21 (c)) and the mass media, including providers of information through the Internet, are encouraged to make their services accessible to persons with disabilities (art. 21 (d)). Article 21 also requires States parties to recognize and promote the use of sign languages, in accordance with articles 24, 27, 29 and 30 of the Convention.

[...]

United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)

[...]

Article 15

- 1.** Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

[...]

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

[...]

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/14/23, 20 April 2010

[...]

III. Main themes

[...]

1. Right of access to information

[...]

32. Governments should take the necessary legislative and administrative measures to improve access to public information for everyone. There are specific legislative and procedural characteristics that any access-to-information policy must have, including: observance of the principle of maximum disclosure; the presumption of the public nature of meetings and key documents; broad definitions of the type of information that is accessible; reasonable fees and time limits; independent review of refusals to disclose information; and sanctions for noncompliance.¹²³
33. If mechanisms to promote the right of access to public information are lacking, then the members of society will not be informed or able to participate, and decision-making will not be democratic. Consequently, the Special Rapporteur urges Governments to adopt legislation to ensure access to public information and to establish specific mechanisms for that purpose. He therefore welcomes the initiative of the United Mexican States to set up the Federal Institute of Access to Public Information (IFAI) as an independent national body.

[...]

IV. Conclusions and Recommendations

A. Conclusions

105. Freedom of opinion and expression is an individual and collective right which affords people the opportunity to issue, seek, receive and impart pluralistic and diverse information that enables them to develop their own lines of reasoning and opinions and to express them in any way they see fit. Freedom of expression is therefore exercised through two routes: the right to access information and the right to self-expression through any medium.

[...]

B. Recommendations

[...]

121. States should adopt the legislative and administrative measures necessary to facilitate access to public information and should establish specific mechanisms for that purpose.

[...]

¹²³ Annual Report of the Special Rapporteur for Freedom of Expression of the Organization of American States, 2003, Chapter IV, para. 32.

127. States should empower women by upgrading their theoretical knowledge and practical skills, improving their access to information technology and promoting their participation in the development of these technologies as a means of fostering and increasing their participation in public affairs and decision-making on issues likely to have a direct bearing on their development.

[...]

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/68/362, 4 September 2013

I. Introduction

[...]

2. Global and regional human rights standards secure not only the right freely to impart information but also the right freely to seek and receive it as part of freedom of expression. The right to access information is one of the central components of the right to freedom of opinion and expression, as established by the Universal Declaration of Human Rights (art. 19), the International Covenant on Civil and Political Rights (art. 19 (2)) and regional human rights treaties.
3. Obstacles to access to information can undermine the enjoyment of both civil and political rights, in addition to economic, social and cultural rights. Core requirements for democratic governance, such as transparency, the accountability of public authorities or the promotion of participatory decision-making processes, are practically unattainable without adequate access to information. Combating and responding to corruption, for example, require the adoption of procedures and regulations that allow members of the public to obtain information on the organization, functioning and decision-making processes of its public administration.¹ In this sense, global commitments to promote development also reflect the centrality of access to information; for example, in its recent report (A/67/890, annex), the High-level Panel of Eminent Persons on the Post-2015 Development Agenda calls for a transparency revolution.

[...]

B. Right to access information

18. The right to seek and receive information is an essential element of the right to freedom of expression. It is, as noted in a previous report of the Special Rapporteur, a right in and of itself and one of the rights upon which free and democratic societies depend (E/CN.4/2000/63, para. 42). Accordingly, the Special Rapporteur has, since the establishment of the mandate, carried out a number of studies regarding certain aspects of its implementation (see, for example, E/CN.4/1999/64, E/CN.4/2000/63, E/CN.4/2003/67, E/CN.4/2005/64 and Corr. 1, A/HRC/11/4 and A/HRC/17/27). In more recent reports, the Special Rapporteur has focused on rights and limitations regarding access to the Internet, which are in numerous respects closely linked to the right to seek and receive information (A/HRC/17/27, sects. II to VI, and A/66/290, sects. III to V).
19. The right to access information has many aspects. It encompasses both the general right of the public to have access to information of public interest from a variety of sources and the right of the media to access information, in addition to the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights. As noted previously, the right to freedom of opinion and expression is an enabler of other rights (A/HRC/17/27, para. 22) and access to information is often essential for individuals seeking to give effect to other rights.
20. Furthermore, public authorities act as representatives of the public, fulfilling a public good; therefore, in principle, their decisions and actions should be transparent. A culture of secrecy is acceptable only in very exceptional cases, when confidentiality may be essential for the effectiveness of their

work. There is consequently a strong public interest in the disclosure of some types of information. Moreover, access to certain types of information can affect the enjoyment by individuals of other rights. In such cases, information can be withheld only in very exceptional circumstances, if at all.

[...]

22. Notably, article 6 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (known also as the Declaration on Human Rights Defenders), adopted by the General Assembly in resolution 53/144, expressly provides for access to information on human rights, stating that everyone has the right, individually and in association with others, (a) to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems; and (b) as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms.

[...]

IV. Promoting the right to access information at the national level

70. Over the past 20 years, numerous national norms have been adopted with the aim of promoting the right to access information. It is currently estimated that more than 50 national constitutions guarantee a right to information or of access to documents, or impose an obligation on State institutions to make information available to the public. More than 90 countries have adopted national laws establishing the right to request information and procedures for the public to obtain government-held information,¹²⁴ thus responding to their human rights obligations.

[...]

A. Principles guiding the design and implementation of national laws on access to information

74. Notwithstanding the positive steps taken by a number of States, as reflected in the many national legal instruments regulating access to information, multiple obstacles are frequently encountered in their implementation. Altering long-standing practices of government workforces is a complex process, especially when public bodies have been established or subjected to reforms during a previous authoritarian rule. The provision of information in a timely manner requires not only improvement of the technical capacity of public bodies to process and share information, but also the training and awareness-raising of public officials at all levels with regard to their duty to respond to public requests for information, while assigning absolute priority to information relating to human rights violations.
75. While reviewing multiple experiences that promote the right to access information, experts have developed some core principles to guide the design and implementation of relevant laws and practices.¹²⁵ The same principles had been endorsed and presented to the Commission on Human Rights by the Special Rapporteur on the right to freedom of opinion and expression in 2000 and were further reflected in other declarations prepared by international mechanisms for promoting freedom of expression.¹²⁶ The Special Rapporteur considers that these principles continue to represent a crucial tool for translating into practice the various human rights obligations concerning the right to information.

¹²⁴ See www.right2info.org/access-to-information-laws/access-to-information-laws-overview-andstatutory#_ftn7; and Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (Paris, United Nations Educational, Scientific and Cultural Organization (UNESCO), 2008).

¹²⁵ Article 19 Global Campaign for Free Expression, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999).

¹²⁶ Joint declarations by the Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression, 1999 (E/CN.4/2000/63, annex I) and 2004 (www.oas.org/en/iachr/expression/showarticle.asp?artiD=319&IID=1).

76. The core principles include:

- (a) **Maximum disclosure.** National legislation on access to information should be guided by the principle of maximum disclosure. All information held by public bodies should be subject to disclosure and this presumption may be overcome only in very limited circumstances;
- (b) **Obligation to publish.** Freedom of information implies not only that public bodies accede to requests for information, but also that they widely publish and disseminate documents of significant public interest, subject only to reasonable limits based on resources and capacity;
- (c) **Promotion of open government.** The full implementation of national laws on access to information requires that the public be informed about their rights and that government officials adhere to a culture of openness. Dedicated efforts are required to disseminate information to the general public on the right to access information and to raise the awareness of and train government staff to respond appropriately to public demands;
- (d) **Limited scope of exceptions.** Reasons for the denial of access to information should be clearly and narrowly designed, bearing in mind the three-part test suggested in the interpretation of the right to freedom of opinion and expression.¹²⁷ Non-disclosure of information must be justified on a case-by-case basis. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information;
- (e) **Processes to facilitate access.** Procedures to request information should allow for fair and rapid processing and include mechanisms for an independent review in cases of refusal. Public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. The law should provide for an individual right of appeal to an independent administrative body in respect of a refusal by a public body to disclose information;
- (f) **Costs.** Individuals should not be deterred by excessive cost from making requests for information;
- (g) **Open meetings.** In line with the notion of maximum disclosure, legislation should establish a presumption that meetings of governing bodies are open to the public;
- (h) **Disclosure takes precedence.** To ensure maximum disclosure, laws which are inconsistent with this principle should be amended or repealed. The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it.
- (i) **Protection for individuals who disclose relevant information (whistleblowers).** National laws on the right to information should provide protection from liability for officials who, in good faith, disclose information pursuant to right to information legislation. Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, including the commission of a criminal offence or the failure to comply with a legal obligation. Special protection should be provided for those who release information concerning human rights violations.

B. Challenges in the implementation of national laws on access to information

77. As indicated in a comprehensive comparative study of national experiences promoting access to information,¹²⁸ the adoption of national laws should be regarded only as the first step: full implementation requires political will (full endorsement by various relevant authorities of the principles enshrined by the new normative framework), an active civil society (advocating and monitoring the implementation of the norms) and respect for the rule of law. In fact, a number of frequent obstacles can be noted in the review of national practices implementing legal frameworks protecting the right to information.¹²⁹

¹²⁷ Human Rights Committee, general comment No. 34, para. 22.

¹²⁸ Toby Mendel, *Freedom of Information, A Comparative Legal Survey*, 2nd ed. (Paris, UNESCO, 2008), principles 1 to 9.

¹²⁹ *Ibid.*, and David Banisar, *Freedom of Information around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006).

1. Lack of technical capacity

- 78.** The overall lack of capacity to process information is an obvious problem for public institutions. Some public institutions have no human or technical capacity to manage and communicate data adequately. Technological advances notwithstanding, officials are also often unaware of the information stored by the bodies that they service and are unable to locate it.

2. Unreasonable delays and lack of responses

- 79.** Unreasonable delays in responding to requests for information are a very frequent concern. National laws often establish the requirement for public institutions to respond to a request without delay, setting in some cases a maximum time frame for response. These deadlines, however, are sometimes not enforced.
- 80.** The absence of any response by the public authorities responsible for the provision of information is also critical. The lack of mechanisms to monitor independently the compliance of public bodies with regulations on access to information and the lack of specific sanctions for wrongful denial of access or the destruction of information by public officials certainly contribute to the limited enforcement of some national laws.

3. Restrictive procedures

- 81.** There are concerns regarding the inclusion of unnecessary procedural formalities that unreasonably restrict possibilities for submitting demands for information. This can include, for example, requirements for those who request information to show a specific legal interest or to submit separate requests to each of the multiple entities involved in providing a response to a given request.

4. Imposition of fees

- 82.** There are financial costs related to the collection of information and national laws often allow public institutions to charge fees to the requestor. Some fees can cover costs relating to, for example, applications, searching or copying. The charging of fees for gaining access to information can also, however, be a barrier to such access, in particular for those living in poverty. In the absence of any oversight, some fees can be imposed abusively.

5. Inclusion of vague and inappropriate exceptions within the law

- 83.** The inclusion of vaguely defined or inappropriate exceptions in national laws on access to information is also a common obstacle that seriously compromises the impact of the instruments. Inappropriate exceptions include, for example, reference to the protection of good relations with other States and intergovernmental organizations. As mentioned above, the widespread and unspecified use of national security concerns as a reason for the denial of access to information is another common occurrence. Some laws explicitly exclude some public bodies from the ambit of national norms, preventing consideration of whether information pertaining to those bodies should be disclosed at all.

6. Conflict with other norms providing grounds for secrecy

- 84.** In some cases, the continued use of parallel national laws and regulations justifying multiple grounds for secrecy, some predating the adoption of the laws regulating access to information, continues to hamper information access.
- 85.** The review of national experiences also demonstrates important positive elements in existing laws and practices. It is clear that provisions establishing objective procedural guarantees which detail the processes required to request and obtain information, in addition to the responsibilities of public bodies in these processes, are a central element for the successful implementation of national norms. The establishment of a broad scope for the right to access to information in national laws is central to the success of the norms. The inclusion of pragmatic instructions among principles, such as that of ensuring that access is rapid, inexpensive and not unduly burdensome, is also positive.
- 86.** There are also good practices regarding the appointment of dedicated officials to assist in the implementation of national laws on access to information. These can be established through the

appointment of information officers, or the establishment of an office, such as the Mexican Federal Institute for Access to Information. Such mechanisms may undertake multiple functions relating to the promotion of access to information, such as processing requests, ensuring the proactive publication of information by public bodies, providing assistance to applicants, proposing adapted.

V. Conclusions and recommendations

[...]

90. If State officials act as representatives of the people of the nation and seek the common good, every decision or initiative taken by them should, in principle, be publicly known. The right to access information, however, can in exceptional circumstances be subject to limitations so as to protect the rights of others and the effectiveness of some State initiatives. Nevertheless, such limitations cannot override the public interest to know and to be informed.

[...]

97. The Special Rapporteur calls upon States to implement the measures set out below:

Revision or adoption of national laws to ensure the right to access information

98. The adoption of a national normative framework that objectively establishes the right to access information held by public bodies in the broadest possible terms is crucial to give effect, at the national level, to the right to access information. Legislation should be grounded by the principle of maximum disclosure.
99. National laws should contain a clearly and narrowly defined list of exceptions or an explanation of the grounds for refusing the disclosure of information. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information, and should be determined by an independent body, preferably a court, and not the body holding the information.
100. Alternative laws establishing additional grounds for secrecy must be revised or revoked in order to ensure that they meet the norms on access to information.
101. National laws should establish the right to lodge complaints or appeals to independent bodies in cases in which requests for information have not been dealt with properly or have been refused.

Ensuring that national norms and practices for access to information allow for simplified procedures

102. The effectiveness of national legislation on the right to information depends on the establishment and implementation of procedures that ensure that access is rapid, inexpensive and not unduly burdensome.
103. States should, in particular, consider the appointment of a focal point, such as an information commissioner, to assist in the implementation of national norms on access to information or the creation of a State institution responsible for access to information. Such mechanisms could be mandated to process requests for information, assist applicants, ensure the proactive dissemination of information by public bodies, monitor compliance with the law and present recommendations to ensure adherence to the right to access information.

Enhancement of the capacity of public bodies and officials to respond adequately to demands for information and ensure accountability in case of non-compliance

104. The adoption of national norms should be followed by concerted efforts to enhance the technical capacity of State institutions to manage and disseminate information. Moreover, public officials must be trained and have their awareness raised in order to fulfil their responsibilities regarding the adequate maintenance of records and dissemination of information. Further efforts are also necessary to raise public awareness of the right to access information and the existing mechanisms to exercise it.

105. Public bodies and officials who wilfully obstruct access to information must be held accountable and, when appropriate, sanctioned. The quality of the responses of public bodies to information requests should be monitored periodically.

[...]

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013

[...]

IV. Human rights obligations relating to the environment

[...]

A. Procedural obligations

29. One of the most striking results of the mapping exercise is the agreement among the sources reviewed that human rights law imposes certain procedural obligations on States in relation to environmental protection. They include duties (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm.

1. Duties to assess environmental impacts and make information public

30. The Universal Declaration of Human Rights (art. 19) and the International Covenant on Civil and Political Rights (art. 19) state that the right to freedom of expression includes the freedom “to seek, receive and impart information”. The right to information is also critical to the exercise of other rights, including rights of participation. In the words of the then Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, the rights to information and participation are “both rights in themselves and essential tools for the exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others” (A/HRC/7/21, p. 2).
31. Human rights bodies have repeatedly stated that in order to protect human rights from infringement through environmental harm, States should provide access to environmental information and provide for the assessment of environmental impacts that may interfere with the enjoyment of human rights.
32. For example, in its general comment No. 15 (2002) on the right to water, the Committee on Economic, Social and Cultural Rights stated that individuals should be given full and equal access to information concerning water and the environment (para. 48), and in its responses to country reports, it has urged States to assess the impacts of actions that may have adverse environmental effects on the right to health and other rights within its purview.¹³⁰ Similarly, the Special Rapporteur on the situation of human rights defenders has stated that information relating to large-scale development projects should be publicly available and accessible (A/68/262, para. 62), and the Special Rapporteur on the human right to safe drinking water and sanitation has stated that States need to conduct impact assessments “in line with human rights standards” when they plan projects that may have an impact on water quality (A/68/264, para. 73).¹³¹

¹³⁰ ICESCR report, sect. III.A.1.

¹³¹ For other statements by special rapporteurs on access to information and assessment of environmental impacts, see Report on special procedures, sect. III.A.1.

33. Regional bodies have also concluded that States must provide environmental information and provide for assessments of environmental impacts on human rights. For example, on the basis of the right to respect for private and family life as set out in the European Convention on Human Rights (art. 8), the European Court has stated:

Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question¹³².

34. International instruments illustrate the importance of providing environmental information to the public. Principle 10 of the Rio Declaration states: "At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities... States shall facilitate and encourage public awareness and participation by making information widely available."¹³³ Many environmental treaties, including the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (art. 15), the Stockholm Convention on Persistent Organic Pollutants (art. 10), and the United Nations Framework Convention on Climate Change (art. 6(a)), require environmental information to be provided to the public. The Aarhus Convention includes particularly detailed obligations.¹³⁴ Illustrating the link between its obligations and those of human rights law, many Aarhus parties have discussed their compliance with that agreement in their reports under the universal periodic review process.¹³⁵
35. Most States have adopted environmental impact assessment laws, in accordance with principle 17 of the Rio Declaration, which states that "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." The World Bank requires environmental assessment of all Bank-financed projects to "ensure that they are environmentally sound and sustainable"¹³⁶.

[...]

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015

[...]

III. Good practices in the use of human rights obligations relating to the environment

22. The following description of good practices in the use of human rights obligations in relation to environmental protection is organized into nine categories: (a) procedural obligations generally; (b) the obligation to make environmental information public; (c) the obligation to facilitate public

¹³² *Taskin v. Turkey*, 2004-X European Court of Human Rights 179, para. 119. See also *Öneryildiz v. Turkey*, 2004-XII European Court of Human Rights 1, para. 90 (applying the right to information in connection with the right to life); *Ogoniland* case, para. 53 (deriving obligations from the right to health and the right to a healthy environment); Inter-American Court, *Claude-Reyes et al. v. Chile*, Judgement of 19 September 2006 (ordering State to adopt necessary measures to ensure right of access to State-held information).

¹³³ See also: "Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters" adopted at the eleventh special session of the United Nations Environment Programme Governing Council/ Global Ministerial Environmental Forum.

¹³⁴ For other examples, see the Multilateral environment agreements (MEA) report, sect. III.A.1.

¹³⁵ Individual report on the General Assembly and the Human Rights Council, including the universal periodic review process, sect. III.

¹³⁶ World Bank Operational Policy 4.01, para. 1. See also: World Bank Inspection Panel, Report No. 40746-ZR, 31 August 2007, para. 346 (finding that the failure to prepare an environmental assessment violated the Operational Policy).

participation in environmental decision-making; (d) the obligation to protect the rights of expression and association; (e) the obligation to provide access to legal remedies; (f) substantive obligations; (g) obligations relating to non-State actors; (h) obligations relating to transboundary harm; and (i) obligations relating to those in vulnerable situations. Practices that fall into more than one category were placed in the category that seemed most relevant.

[...]

A. Procedural Obligations

25. Human rights law imposes procedural obligations on States in relation to environmental protection, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm (A/HRC/25/53, para. 29). These obligations also have support in international environmental instruments, particularly Principle 10 of the Rio Declaration, which provides that “each individual shall have appropriate access to information concerning the environment that is held by public authorities” and “the opportunity to participate in decision-making processes”, and that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.
26. The following sections of this report describe good practices in the use of each of these procedural obligations. This section describes several practices that are relevant to the full range of procedural obligations.
27. One such practice was the adoption in 2010 by the UNEP Governing Council of the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 26 voluntary guidelines that assist States to implement their commitments to Principle 10.¹³⁷ UNEP is preparing a comprehensive guide for the implementation of the Bali Guidelines, which will be published in 2015.
28. Another good practice is the implementation of these procedural obligations through regional agreements. In 1998, the States members of the United Nations Economic Commission for Europe adopted the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which states that:

to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with provisions of this Convention (art. 1).

The Convention sets out detailed requirements for the implementation of each of these access rights. As of January 2015, the Convention has 47 Parties, which include virtually all of the States in Europe as well as a number of States in Central Asia.
29. To facilitate the implementation of the Convention, the Organization for Security and Co-operation in Europe maintains a network of Aarhus Centres, including in Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Montenegro, Serbia and Tajikistan. The Centres disseminate environmental information, carry out educational and training projects, and provide venues where the public can discuss environmental concerns. For example, the Khujand Aarhus Centre in northern Tajikistan conducted a campaign in the town of Taboshar to raise its residents’ awareness of the health risks associated with a nearby abandoned uranium mine.
30. Nineteen States in Latin America and the Caribbean, with the assistance of the Economic Commission for Latin America and the Caribbean, decided in November 2014 to begin negotiation of a new regional agreement that would implement the access rights set out in Principle 10, with a view to completing the negotiation by December 2016. Together with the Aarhus Convention, this initiative will provide invaluable models to other regions considering similar agreements.

¹³⁷ UNEP Governing Council Dec. SS.XI/5 (26 February 2010).

31. Civil society organizations have also engaged in exemplary practices designed to facilitate the exercise of procedural rights to information, participation and remedy. One of the most notable is The Access Initiative (TAI), a global network of more than 150 civil society organizations that work together to promote procedural rights. TAI has developed a toolkit that helps civil society to assess environmental governance in their countries and to identify opportunities to make positive changes. Together with the World Resources Institute, TAI is also developing an Environmental Democracy Index, which will measure country-specific realization of the three procedural rights according to indicators based on the Bali Guidelines. The Index should be available in 2015.

B. Obligation to make environmental information public

32. Human rights bodies have made clear that to protect human rights from environmental harm, States should provide access to environmental information (A/HRC/25/53, para. 31). Many States have adopted laws providing for such access. For example, Chile has enacted a law that includes a detailed statement of the right of everyone to have access to environmental information in the possession of the Government, and that provides for administrative and judicial review of alleged violations. The Czech Republic has adopted a law that allows individuals to request access to different types of information through multiple means, and that requires the Government to provide the information as quickly as possible and at the latest within 30 days of the request. Any decision to deny requested information is subject to administrative and judicial review.
33. Some States have undertaken innovative approaches to obtaining environmental information. For example, El Salvador operates an Environmental Observatory that systematically monitors potential environmental threats based on observations by a network of local observers. The Observatory provides early warning of natural disasters, including hurricanes and earthquakes, so that responses can minimize their effects on life and property.
34. Another good practice is the publication of annual reports on the state of the environment. Examples include reports by the Czech Republic that evaluate the state of the Czech environment based on 36 indicators, reports by South Africa focusing on enforcement activities, and reports by Spain that were recently redesigned to facilitate their viewing by electronic means, including on mobile devices.
35. Some of the most innovative practices in respect of environmental information concern education and awareness-raising. For example, Algeria includes environmental education as one of the key topics of its national plan of action for environment and sustainable development. It has designed and implemented educational tools for different levels of schools, as well as organizing seminars and workshops to train teachers. Ghana has instituted the AKOBEN programme to assess the performance of mining and manufacturing operations through a five-colour rating scheme that is easily understood by the public. Costa Rica's Certificate of Sustainable Tourism programme assigns companies in the tourism industry a "sustainability level" rating, which provides information to consumers about the degree to which businesses comply with or exceed environmental standards.
36. Another good practice in this area is to raise awareness at the international level of the relationship between human rights and environmental protection. UNEP has taken several important initiatives in this respect. In addition to organizing the consultations with the Independent Expert described above, it has published reports on human rights and the environment, including a joint report with OHCHR to the Rio+20 UN Conference on Sustainable Development in 2012 and a compendium of resources on human rights and the environment in 2014.
37. At the regional level, in October 2013, the Asia-Europe Meeting convened more than 130 government officials, academics, and civil society representatives from 48 Asian and European countries to discuss the challenges presented by environmental harm to the protection of human rights. In September 2014, the ASEAN Intergovernmental Commission on Human Rights organized a workshop on human rights, environment and climate change in Yangon, Myanmar, to discuss the linkages between environmental sustainability and human rights in light of the inclusion of the right to a safe, clean and sustainable environment in the ASEAN Human Rights Declaration adopted in 2012.

38. Civil society organizations have also engaged in good practices in education. For example, in Uganda, the National Association of Professional Environmentalists conducts a Sustainability School Programme that builds the capacity of local communities to seek transparency and accountability of oil companies and Governments on environmental matters.
39. States have adopted a wide variety of online tools that provide good practices in facilitating access to environmental information. The Czech Republic has created the Integrated Pollution Register (www.irz.cz), a publicly accessible electronic database that documents environmental releases of 93 substances from domestic facilities. Serbia's Ecoregister (www.ekoregistar.sepa.gov.rs/en) is a public online database that includes more than 5,000 documents, including educational materials, statistical data on environmental information, environmental impact assessments, and monitoring plans for private companies. Search options allow users to find relevant information by geography, institution or document type, among other criteria. Users can also suggest new institutions and documents for consideration. Other tools are more focused. The South African Department of Environmental Affairs has created the South African Waste Information Centre (<http://sawic.environment.gov.za>), a website that provides information about waste management. A particularly creative approach to web-based information is Finland's Tarkkailija, or "Observer" (www.etarkkailija.fi), which allows users to identify themes and locations that they would like to monitor. Tarkkailija then collects information from more than 400 websites and informs the users whenever new information relevant to their criteria becomes available.
40. Examples of good practices can also be found at the subnational level. Ontario, Canada, has a web-based Environmental Registry (www.ebr.gov.on.ca) that allows the public to access a wide spectrum of environmental information, including public notices of environmental matters proposed by the Government and guidelines for commenting on the proposals.
41. There are also good practices in the use of online tools at the regional level. The Aarhus Clearinghouse (<http://aarhusclearinghouse.unece.org>) is an easy-to-use website that disseminates information on good practices in the implementation of the Aarhus Convention. The Commission for Environmental Cooperation, a regional organization created by Canada, Mexico and the United States of America, compiles and disseminates information on pollutant releases and transfers throughout North America through its Taking Stock report and website (www.cec.org/takingstock). The website allows users to obtain and analyse information based on location, type of pollutant and other criteria.

[...]

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on climate change and human rights, A/HRC/31/52/ 1 February 2016

[...]

IV. Human rights obligations relating to climate change

[...]

B. Procedural obligations

50. As the mapping report explains, human rights bodies agree that to protect against environmental harm that impairs the enjoyment of human rights, States have several procedural obligations, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm (see A/

HRC/25/53, paras. 29-43). They are also supported by provisions in international environmental instruments, including principle 10 of the 1992 Rio Declaration on Environment and Development.

1. Assessing and providing information

51. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide that the right to freedom of expression includes the freedom to seek, receive and impart information. The right to information is also critical to the exercise of other rights, and human rights bodies have stated that to protect human rights from infringement through environmental harm, States should provide access to environmental information and provide for the assessment of environmental impacts that may interfere with the enjoyment of human rights.
52. At the international level, States have adopted an exemplary practice in the assessment and provision of information about climate change. Through the Intergovernmental Panel on Climate Change, States have provided for expert assessments of the scientific aspects of climate change, the vulnerability of socioeconomic and natural systems, and options for mitigation of and adaptation to climate change. By regularly publishing detailed reports summarizing the state of scientific and technical knowledge, the Panel has given Governments and people around the world information about the effects of climate change and the consequences of various approaches to addressing it.
53. States have also recognized the importance of undertaking assessments and providing information about climate change at the national level. Article 6 (a) of the United Nations Framework Convention on Climate Change requires its parties to promote and facilitate educational and public awareness programmes, as well as public access to information, and article 12 of the Paris Agreement calls on its parties to cooperate in taking measures to enhance such measures. UNEP describes the efforts by many States to assess the impacts of climate change and to make this information publicly available.¹³⁸ States that have not yet adopted such policies should do so, with international assistance if necessary.
54. In particular, the Special Rapporteur agrees with the suggestion of UNEP that wherever possible States should assess the climate effects of major activities within their jurisdiction, “such as programmatic decisions about fossil fuel development, large fossil fuel-fired power plants, and fuel economy standards”.¹³⁹ Such assessments should include the transboundary effects of the activities. But even with respect to the effects of climate change that are felt within a State, assessments are an important method of clarifying impacts, especially on vulnerable communities, and thereby providing a basis for adaptation planning, as article 7 (9) of the Paris Agreement recognizes. 55. Assessments and public information are also important with respect to actions designed to alleviate the effects of climate change. As noted above, the obligations of States to respect and protect human rights apply with no less force when they are taking mitigation or adaptation measures. Article 4 (1) (f) of the United Nations Framework Convention on Climate Change encourages its parties to employ impact assessments of such measures with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment.

Report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, on the right to information and participation, A/HRC/7/21, 18 February 2008

[...]

IV. Right to information and participation

31. The Special Rapporteur has decided to focus the present report on the importance of the right to information and participation in relation to his mandate. He continues to receive information and communications with regard to the violation of the right to information in environmental matters. Trends show that States, corporations and other private entities generally do not share vital

¹³⁸ UNEP report, p. 34

¹³⁹ *Ibid.*, p. 16

information about the potential effects of pollution and irreversible damage to the environment until an incident has occurred. In such cases and when an incident has occurred, the relevant authorities and/or actors are often reluctant to disclose information of vital importance to the victims and their defence. Such information is either withheld, falsified, provided after a delayed amount of time or given piecemeal in order to confuse or be deemed unusable. Governmental authorities often justify this behaviour on national security grounds, transnational corporations for considerations of trade secrecy.

32. The Special Rapporteur considers that the right to information and participation are both rights in themselves and also essential to the exercise of other rights, such as the right to life, the right to the highest attainable standard to health and the right to adequate food, among others. Lack of information denies people the opportunity to develop their potential to the fullest and realize the full range of their human rights.
33. The Special Rapporteur considers the right to information and participation highly relevant in the context of the adverse effects of the illicit movement and dumping of toxic and dangerous products on the environment and on the enjoyment of basic human rights. Public access to information when requested and the obligation of public authorities to disclose and inform, irrespective of requests, are imperative for the prevention of environmental human rights problems and the protection of the environment.
34. The Special Rapporteur notes that there are many cases that have been brought to his attention of disputes between citizens and Governments in developing countries and between developing countries and transnational corporations over the movement of toxic and dangerous products and wastes. Disputes often arise owing to a lack of information or the failure of the State or of corporations to ensure full disclosure of the potential dangers of activities carried out by those corporations to individuals, communities and the environment. He notes that, in many cases, even Governments claim not to have access to the necessary information on the potential dangers to human beings and the environment.
35. The Special Rapporteur would like to stress that the responsibility of States is particularly important when dealing with the issue of toxic waste, including the disposal of nuclear wastes, and the production or use of pesticides, chemical products and toxins because of the dangers to the health and well-being of human beings that they pose.
36. National security, "trade secrets", the principle of confidentiality of matters sub iudice, or other grounds invoked against reasonable requests for information on toxic and dangerous products and wastes must be applied with caution. The Special Rapporteur stresses that Governments may only invoke such grounds insofar as they are in conformity with the relevant derogation or limitation clauses of international human rights instruments. The use of such concepts must be regularly reviewed to ensure that the public's right to information is not unduly restricted.¹⁴⁰
37. The Special Rapporteur considers it important that individuals, communities and neighbouring countries have information regarding hazardous materials and conditions at industrial facilities located in their vicinity in order to undertake disaster risk reduction and preparedness wherever there is a danger of large-scale industrial accidents, like those in Chernobyl and Bhopal. Individuals, communities and neighbouring countries must have information regarding the full extent of environmental impact of proposed development projects in their regions in order to participate meaningfully in decisions that could expose them to increased pollution, environmental degradation and other such effects. Individuals, communities and neighbouring countries must have information regarding pollutants and wastes associated with industrial and agricultural processes. The Special Rapporteur considers it a clear duty of the State to disclose such information.
38. In developing countries, the Special Rapporteur notes the frequent violation of the right to information regarding the transboundary movement of wastes and dangerous products. Among other things, the

¹⁴⁰ See the final report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/9), para. 213.

Special Rapporteur notes with great concern that toxic wastes and dangerous products are often not labelled in the local language, which further exposes the population to severe health and environmental risks. In addition, it must be mentioned that hazardous products and wastes in developing nations are frequently dumped in rural and isolated areas, where there is a high prevalence of illiteracy and inadequate information.

39. Widespread political instability in many developing countries means that vital information that is necessary to the health, environment and well-being of the population is often withheld from the public, apparently on the grounds that it is necessary to uphold national security, and prevent civil unrest. In his previous report to the Council (A/HRC/5/5), the Special Rapporteur stated that one of the consequences of armed conflicts was the trafficking of dangerous products and wastes and their illicit dumping. Armed conflicts can also have a negative impact on the right to information and participation, which in turn increases the likelihood that toxic wastes and products will be illicitly moved and dumped.
40. Although the media could play an indispensable role in information dissemination in communities, countries and regions, as well as both the rural and urban areas about the illegal movement of hazardous products and wastes, it is often the case in developing countries that the freedom of the press is severely curtailed or simply does not exist.
41. The rights to information and participation, and their particular importance for both human rights and environment matters, are, however, well reflected in the international legal framework, in both human rights law and environmental law. Some basic elements of that legal framework and the importance of monitoring mechanisms are described below.

A. Legal framework

1. International instruments

42. The right to information is frequently presented as an individual and group right that constitutes an essential feature of democratic processes and of the right to participation in public life. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; that right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers. Article 21 of the Declaration would be rendered meaningless unless individuals and groups have access to relevant information on which to base the exercise of the vote or otherwise express the will of the people.
43. The right as a legally binding treaty obligation is enshrined in article 19 of the International Covenant on Civil and Political Rights. Article 19 (2) stipulates that everyone should have the right to freedom of expression; that right should include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Article 19 (3) does allow certain restrictions, but they should only be such as are provided by law and are necessary (a) for the respect of the rights and reputations of others; (b) for the protection of national security or of public order, or of public health and morals. Article 25 of the Covenant in turn prescribes that every citizen should have the right and the opportunity to take part in the conduct of public affairs.
44. While there are no explicit references in the core international human rights treaties to the right to information and participation with regard to environmental matters, the Special Rapporteur would like to recall that the Rio Declaration on Environment and Development¹⁴¹ focused on the right to information, participation and remedies with regard to environmental conditions. Principle 10 of the Rio Declaration stipulates that participation of all concerned citizens should be practised when environmental issues are concerned. At the national level, it calls for each individual to have appropriate access to all appropriate information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. It further calls upon States to facilitate

¹⁴¹ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. I, Resolutions Adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

and encourage public awareness and participation by making information widely available. It further calls upon States to ensure that access to judicial and administrative proceedings, including redress and remedy, is provided.

45. Principle 18 of the Declaration calls upon States to immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. It reminds States that efforts should be made by the international community to help States that are afflicted by such calamities. Principles 20, 21 and 22 call for the wide participation of women, youth, indigenous peoples and other communities in protecting the environment and fostering development.
46. Article 15 (2) of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade of 10 September 1998¹⁴² requires each State party to ensure, to the extent practicable, that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in annex III to the Convention.
47. The Stockholm Convention on Persistent Organic Pollutants of 22 May 2001 aims at protecting human health and the environment from persistent organic pollutants. Article 10 (i) provides that each party should, within its capabilities, promote and facilitate provision to the public of all available information on persistent organic pollutants and ensure that the public has access to public information and that the information is kept up to date. The Convention also calls for education and public awareness programmes to be developed, in particular for women, children and the poorly educated (art. 10 (1) (c)). Parties to the Convention are also obligated to make accessible to the public, on a timely and regular basis, the results of their research, development and monitoring activities pertaining to persistent organic pollutants (art. 11 (2) (e)). The Convention stipulates that, although parties that exchange information pursuant to the Convention should protect any confidential information, information on health and safety of humans and the environment should not be regarded as confidential (art. 9 (5)).
48. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal sets out obligations for the exchange of information for both the State concerned and interested parties. In article 4 (2) (f), the Convention clearly requires that information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the States concerned and that it clearly state the effects of the proposed movement on human health and the environment. In article 4 (2) (h), it encourages cooperation through activities with other parties and/or interested organizations for the dissemination of information on transboundary movements in order to improve environmentally sound management and to work towards the prevention of illegal traffic. Article 13 (1) provides that parties to the Convention should ensure that, should an accident occur during the transboundary movement of wastes and other wastes or their disposal and that is likely to present risks to human health and the environment in other States, those States are immediately informed.¹⁴³
49. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25 June 1998,¹⁴⁴ takes a very comprehensive approach to the recognition of the importance of the right to information and public participation. As at 17 September 2007, there were 41 parties to the Convention. Although it was open for signature only to State members of the Economic Commission for Europe and those with consultative status with it (art. 17), article 19 of the Convention opens the door to accession by other States on the condition that they are members of the United Nations and that the accession is approved by the meeting of the parties to the Convention. In the preamble, it states that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations”. In the following paragraph, it states that, in order to be

¹⁴² Available from www.pic.int.

¹⁴³ The text of the Convention is available from the Basel Convention website, www.basel.int.

¹⁴⁴ The text of the Convention is available from the website of the Economic Commission for Europe, www.unece.org.

able to assert that right and observe that duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and, in that regard, citizens may need assistance in order to exercise their rights.

50. Articles 4 and 5 of the Convention obligates States parties to collect and publicly disseminate information, and to make such information available to the public in response to requests. Each party to the Convention is to publish a national report on the state of the environment every three to four years. In addition to the national report, the party is obliged to disseminate legislative and policy documents, treaties and other international instruments relating to the environment. Each party must ensure that public authorities, upon request, provide environmental information to a requesting person without the latter having to state an interest. Information should be made public within one month, or, in exceptional cases, in not more than two months (art. 4 (2)). In addition to providing information on request, each State party must be proactive, ensuring that public authorities collect and update environmental information relevant to their functions. This requires States parties to establish mandatory systems to obtain information on proposed and existing activities which could significantly affect the environment. (art. 5 (1)). The Convention does provide for a number of exceptions in article 4 (4) to the duty to inform, in the light of other political, economic and legal considerations, but they are to be interpreted in a restrictive way and take into account the public interest served by disclosure.
51. Public participation is guaranteed by articles 6 to 8 of the Convention. Public participation is required in regard to all decisions on whether to permit or renew permission for industrial, agricultural and construction activities listed in annex I to the Convention, as well as other activities which may have a significant impact on the environment (art. 6 (1) (a)-(b)). The public must be informed in detail about the proposed activity early in the decision-making process and be given time to prepare and participate in the decision-making (art. 6 (2)-(3)). In addition to providing for public participation in decisions on specific projects, the Convention calls for public participation in the preparation of environmental plans, programmes, policies, laws and regulations (arts. 7 and 8).

2. Regional Instruments

[...]

d) Latin America and the Caribbean

56. Article 13 (1) of the American Convention on Human Rights of 1969 states that “everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”.
57. Principle 4 of the Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights in October 2000, specifically recognizes that “access to information held by the State is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies”.
58. On 10 June 2003, the Organization of American States (OAS) General Assembly adopted a resolution on access to public information: strengthening democracy. In its resolution, OAS considers that access to public information is a requisite for the very functioning of democracy, greater transparency, and good governance. It also reaffirms that everyone has the freedom to seek, receive, have access to and impart information and that access to public information is a requisite for the very exercise of democracy.

[...]

B. Implementation and monitoring mechanisms for the realization of the right to information.

62. The Special Rapporteur notes that, although the list of standards mentioned above is not exhaustive, it provides for several examples of legal norms and standards that do exist on the right to information

both at the international and regional levels. There are several projects that monitor access to information held by national authorities and international or supranational organizations, such as the Access to Information Monitoring Tool of the Open Society Justice Initiative.¹⁴⁵

63. The Special Rapporteur would like to appeal to States to implement the right to information by establishing specific legislation conforming to international norms and standards. Ensuring effective implementation of the right to information requires proper training in their responsibilities for persons involved in implementing the law in how to deal with requests for information and how to interpret the law.
64. The Special Rapporteur also encourages Governments to be proactive in promoting the right to information and to educate the public on how to claim it. He would like to remind States that right to information laws should not only require public authorities to provide information upon request but also impose a duty on public bodies to actively disclose, disseminate and publish information. One such example of facilitating proactive disclosure of information would include the creation of systems informing the public on right to information laws. The implementation of right to information laws would also entail the setting up of systematic records management, including managing, recording and archiving.
65. States should also set up information commissions as general oversight bodies to regulate the implementation and oversight of right to information laws, or ensure that such functions, together with the necessary capacity and resources, are entrusted to national human rights institutions. The Special Rapporteur notes that, although many models of information commissions already exist in different regions, they usually have similar functions, acting as external independent authorities with a clear mandate to supervise the implementation of the right to information.

V. Conclusions and Recommendations

66. The Special Rapporteur would like to stress that the right to participation in public life is linked very closely with the right to information (and to education). The right to popular participation in decision-making is enshrined in article 21 of the Universal Declaration of Human Rights and several other international instruments. The exercise of the right to participation would be meaningless if there was no access to relevant information on issues of concern.
67. The Special Rapporteur believes that the Human Rights Council may want to recognize explicitly the right to information as a precondition for good governance and the realization of all other human rights. States should move towards implementing the right to information enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Special Rapporteur notes that information held by the State should be considered to be held in trust for the public, not as belonging to the Government. Although the State can invoke national security or defence clauses, it is the view of the Special Rapporteur that this responsibility should not be abused by States or used to derogate from their duty to protect and promote the rights of their citizens in relation to the adverse effects of toxic and dangerous products and wastes.
68. The Special Rapporteur would like to appeal to both developed and developing States to adhere more strictly to international normative frameworks, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The Special Rapporteur notes that there are currently 170 parties to the Convention and appeals to those States that have not already done so to consider ratifying it. The Special Rapporteur also urges States to take into account, and if possible become parties to, other legal instruments such as the Aarhus Convention, which are central to the full realization of the right to information with regard to environmental matters, which in turn would help combat the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.

[...]

¹⁴⁵ www.justiceinitiative.org/activities/foi/foe/foi_aimt.

Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, on the right of access to information, A/HRC/30/40, 8 July 2015

[...]

II. Importance of information on hazardous substances and wastes

7. Information is critical to the enjoyment of human rights and fundamental to good governance. Information about hazardous substances is essential to prevent risks, mitigate harms, conduct focused research on safer alternatives, provide treatment and remedy, and ensure transparency, participation and consent in decision- and policymaking.
8. Information from the scientific community continues to unearth a broad range of adverse health impacts that are linked to various hazardous substances. For example, research shows that daughters of women with above-average levels of one hazardous substance during pregnancy have a fourfold increase in the risk of breast cancer later in life.¹⁴⁶ It has been estimated that 62 per cent of the total production of industrial substances are toxic.¹⁴⁷ The ongoing human exposure to toxic and otherwise hazardous chemicals is estimated to carry tremendous costs for public resources, public health and society at large.¹⁴⁸ However, the actual extent of the impacts of hazardous substances remains largely unknown.

A. Global challenge of information on substances and wastes

9. Securing adequate information on the risks of hazardous substances and wastes has been an incessant global challenge. In 1992, the United Nations Conference on Environment and Development identified two major problems linked to hazardous substances: (a) the lack of sufficient scientific information for the assessment of risks on a great number of substances; and (b) the lack of resources for the assessment of chemicals where information is available.¹⁴⁹ In 2001, the European Commission reiterated that the lack of knowledge about the impact of many chemicals on human health and the environment was a cause for concern.¹⁵⁰
10. In 2006, stakeholders of the Strategic Approach to International Chemicals Management acknowledged that there is a lack of clear, accessible, timely and appropriate information on chemicals for ready use by local populations.¹⁵¹ To address that global challenge, the global community adopted the Dubai Declaration on International Chemicals Management, in paragraph 21 of which stakeholders pledged to facilitate public access to appropriate information and knowledge on chemicals throughout their life cycle, including the risks that they pose to human health and the environment.
11. In the Special Rapporteur's view, the current patchwork of global treaties for chemicals and wastes does not sufficiently require countries to generate and assess information on the production, use or release of potentially hazardous substances for numerous purposes, including in relation to their obligation to respect and protect human rights and to mitigate the negative impacts of these substances on the human rights of individuals and communities. Furthermore, there is no global system to generate or share missing information among all countries. This major shortcoming has resulted in a lack of available information; inability to access information; and not-so-useful information, particularly with respect to the dangers confronting those who are most at risk of harm from hazardous substances

¹⁴⁶ Barbara Cohn and others, "DDT exposure in utero and breast cancer", *Journal of Clinical Endocrinology and Metabolism* (16 June 2015).

¹⁴⁷ Joint EEA-JRC report (see footnote 6 above), p. 21.

¹⁴⁸ See UNEP, *Costs of Inaction on the Sound Management of Chemicals* (2013).

¹⁴⁹ United Nations Conference on Environment and Development, Agenda 21, chap. 19 (1992).

¹⁵⁰ Commission of the European Communities, *White Paper: Strategy for a future Chemicals Policy* (2001), p. 4.

¹⁵¹ Strategic Approach to International Chemicals Management (SAICM), Overarching Policy Strategy, 2006, para. 8 (b).

and wastes. There remain grave information gaps on numerous substances that are used, produced, released and disposed as waste by industrial and governmental activities.¹⁵²

12. Information gaps appear to be largest in non-members of the Organization for Economic Cooperation and Development (OECD). Non-OECD members may often have fewer resources for generating and assessing information about hazardous substances, and may also be simultaneously experiencing large increases in the production, import, use and release of hazardous substances and wastes in their territories.¹⁵³
13. Substances have repeatedly come onto the market, often resulting in widespread human exposure, only to be removed later because of evidence of harm or unreasonable risk emerging. While concerns about toxic chemicals and other hazardous substances are growing, the United Nations Environment Programme states that, of the tens of thousands of chemicals on the market, only a fraction has been thoroughly evaluated to determine their effects on human health and the environment.¹⁵⁴
14. In some countries, businesses are not required to produce any information to determine the safety of a chemical before production by workers and use in products sold to consumers, such as toys and furniture. For 85 per cent of tens of thousands of new substances, regulators in one country did not receive any toxicity data from the chemical manufacturer when they were notified of the intent to manufacture the new substance.¹⁵⁵
15. Loopholes in laws intended to prevent the use of hazardous substances in food have been exploited by businesses, adding newly developed chemical additives to food without government oversight or public access to the information about the identity or safety of the substance. For illustration, businesses in the United States of America have “found their chemicals safe for use in food despite potentially serious allergic reactions, interactions with common drugs, or proposed uses much greater than company-established safe doses”.¹⁵⁶ In addition, pesticides have been used before required information is available to completely assess their safety for workers, local communities and consumers.¹⁵⁷
16. Despite ongoing exposure of children and adults to hazardous substances in cosmetics, food, toys, furniture, electronics, building materials and other common, everyday items, information provided to consumers on the hazardous substances present in these items “covers too few substances and does not reach everyone who needs information to make active choices and assess and handle risks”.¹⁵⁸
17. Excessive and unjustified claims of confidentiality have kept information about the risks of hazardous substances secret, and “far in excess of what is needed to protect trade secrets”.¹⁵⁹ Approximately 15,000 of over 24,000 new substances developed since 1982 cannot be meaningfully identified by the public as having known or unknown risks.¹⁶⁰

¹⁵² These include, for example: (a) the number and amount produced and used around the world; (b) hazardous properties, for example the ability to cause cancer, damage reproductive systems or interfere with hormone systems; (c) incidence of adverse effects linked to individual substances and mixtures thereof; (d) adverse impacts of childhood exposure to hazardous substance; (e) disaggregated information regarding the elevated risks to population groups such as minorities and the poor; (f) potential and actual uses; (g) potential and actual exposures; (h) methods for safe handling, storage and disposal; (i) safer substitutes, mitigation measures and other alternatives to reduce or eliminate the risk of harm; (j) amounts released into the air, water and soil, as well as the types and quantities injected underground; (k) transport and travel of substances in and between air, soil and water; (l) contents of everyday products including cosmetics, cleaning products, furniture, building materials, other sources of common, everyday human exposure; (m) enforcement of existing rules and regulations; and (n) information on amounts of waste generated and where it is disposed.

¹⁵³ UNEP, *Global Chemicals Outlook* (see footnote 5 above), pp. 13–17.

¹⁵⁴ *Ibid.*, p. 20

¹⁵⁵ See United States Environment Protection Agency, Office of Inspector General, Evaluation report (17 February 2010), p. 6, available from www.epa.gov/oig/reports/2010/20100217-10-P-0066.pdf.

¹⁵⁶ Natural Resources Defense Council, “Generally recognized as secret: chemicals added to food in the United States” (12 May 2014), available from www.nrdc.org/food/safety-loop-hole-for-chemicals-in-food.asp.

¹⁵⁷ United States Government Accountability Office (GAO), “Pesticides: EPA should take steps to improve its oversight of conditional registrations” (August 2013), available from www.gao.gov/assets/660/656825.pdf.

¹⁵⁸ Swedish Chemical Agency, “Chemical substances in articles” (2011), p. 14, available from www.kemi.se/Documents/Publikationer/Trycksaker/Rapporter/Rapport3-11-Kemikalier-i-varor.pdf

¹⁵⁹ Sheila Ferguson and others, “Influence of CBI requirements on TSCA implementation” (March 1992), p. 20, available from www.regulations.gov#!documentDetail;D=EPA-HQ-OPPT-2002-0054-0074; see also GAO, “Observations on the Toxic Substances Control Act and EPA implementation” (13 June 2013), available from www.gao.gov/products/GAO-13-696T.

¹⁶⁰ Earthjustice, “Petition for rulemaking to establish time limits for confidentiality claims applicable to information received under Toxic Substances Control Act” (2014), available from <http://earthjustice.org/sites/default/files/files/TSCA-CBI-Sunset-Petition.pdf>.

18. In the case of the tragedy in Bhopal, India, where thousands lost their lives and tens of thousands have been born into a toxic environment, Union Carbide Corporation (acquired by the Dow Chemical Company) admitted that one highly hazardous gas was released, but did not provide information about other pollutants released. This information is necessary to understand the magnitude of impacts due to the industrial accident and to ensure effective remedy.
19. Furthermore, settlement agreements for alleged harm with broad confidentiality provisions can prevent timely action to avoid additional harm and hinder access to an effective remedy for other victims, particularly those who do not have the resources for legal counsel.
20. In the context of people harmed by pollution resulting from extractive industries, the unavailability or unreliability of baseline information has been a recurring challenge. Baseline information about the presence of hazardous substances in air, water and soil are important to understand the cause and effect of industrial activity and to ensure access to justice and to an effective remedy for victims whose rights may have been violated. In addition, some have voiced a concern that information generated has a bias to emphasize high levels of naturally occurring toxic metals to neutralize pollution concerns and responsibility for wrongdoing. Furthermore, examination of the provided information through independent experts is often missing.
21. Regarding hazardous waste, there is no clear, global overview of the volume of hazardous waste generated, the exact sources of or destinations for the waste, the hazardous substances present, or methods of handling.¹⁶¹ Unfortunately, it is often only after people suffer adverse effects that the illegal dumping of toxic waste is uncovered.

B. Human rights implications of the right to information on hazardous substances and wastes

22. The right to information is a right in and of itself and one of the rights upon which free and democratic societies depend (see E/CN.4/2000/63, para. 42). The right to information derives from the right to freedom of expression and the right to take part in public affairs stipulated in articles 19 and 25 respectively of the International Covenant on Civil and Political Rights. Similar provisions are also found in several international and regional human rights instruments, as well as in national constitutions and laws. According to the Special Rapporteur on the promotion and protection of the right to freedom of expression, this right encompasses the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights (see A/68/362, para. 19).
23. Concerns have been raised that, in many countries, people lack basic information about and influence over the quality of their drinking water, the air they breathe, the land they live on and the food they eat (see ECE/MP.PP/2014/27/Add.1, para. 16). In this context, better access to information can enable the exercise of economic, social and cultural rights, including the right to the highest attainable standard of physical and mental health, the right to food, the right to safe drinking water and sanitation, and the right to a healthy environment.
24. Information is a precondition for the realization of several civil and political rights. In the context of hazardous substances and wastes, information gaps create a fundamental impediment to realizing the right to free, active and meaningful public participation by individuals and communities to decide what risks they are willing to accept. Principle 10 of the 1992 Rio Declaration on Environment and Development explicitly clarifies that information on hazardous materials and activities is necessary to ensure participation of all to achieve the best possible outcome on environmental issues.¹⁶²
25. For numerous people who die prematurely because of hazardous substances every year, information on risks, mitigation measures and safer alternatives can help prevent harm and save lives, implicating the right to life.
26. Furthermore, information gaps regarding hazardous properties, uses and exposure to hazardous substances, together with latency periods, genetic variation, lifestyle choices and other variables, create a complex array of uncertainties and unknowns that can obstruct access to an effective remedy for victims.
27. Meaningful consent relies upon and cannot be achieved without information. Under article 7 of the International Covenant on Civil and Political Rights, people have the right not to be subjected without free consent to medical or scientific experimentation, which includes human exposure to substances

¹⁶¹ Secretariat of the Basel Convention, *Vital Waste Graphics 3* (2012), p. 7, available from, www.zoinet.org/web/sites/default/files/publications/vitalwaste_BR.PDF.

¹⁶² *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1), part one, chap. I.

the potential adverse effects of which are unknown. In the context of hazardous substances, lack of information, together with a lack of consent to be exposed to substances and their risks, directly affect this right. Furthermore, protecting the ability of individuals to exercise consent to having hazardous substances enter their bodies is indivisible, interdependent and interrelated to numerous human rights, including, among others, the right to self-determination, human dignity and health, as well as freedom from discrimination (see A/64/272, para. 19, and E/C.12/2000/4, para. 8).

28. Indigenous peoples have the right to give their free, prior and informed consent about the exploitation of resources on their land and about the storage and disposal of hazardous substances in their lands or territories, and other rights that require information about hazardous substances.¹⁶³
29. Access to information is necessary to evaluate the implications of hazardous substances with respect to groups that are at higher risk of harm from hazardous substances. Low-income or minority communities, indigenous peoples and other groups may be disproportionately at risk of adverse impacts owing to higher levels of exposure.
30. Children are particularly at risk of serious and irreversible effects from exposure to a myriad of hazardous substances in their homes, schools and playgrounds. Children are often exposed to higher levels of hazardous substances than adults and this exposure comes during critical periods of development, when children are at greatest risk of adverse impacts from carcinogens, hormone disrupting chemicals, mutagens, reproductive toxicants and other hazardous substances.
31. Workers are also exposed to above-average levels of hazardous substances, with regular reports of inadequate training and adverse health impacts from preventable accidents and occupational exposure. Workers have the right to remove themselves from situations they believe are hazardous, which is contingent on information about the known and unknown risks of the substances to which they are exposed.

C. Normative content of the right to information on hazardous substances and wastes

32. International human rights standards together with international chemical standards can serve to clarify the normative content of the right to information on hazardous substances and wastes. In the Special Rapporteur's view, the right to information on hazardous substances and wastes would require that relevant information be available, accessible and functional, in a manner consistent with the principle of non-discrimination. Furthermore, it needs to be ensured that people who may be exposed to hazardous substances and wastes are aware that they have a right to information and understand its relevance.

1. Availability

33. Information is available when current reliable information has been generated and collected in a manner adequate to assess the magnitude of potential adverse impacts on the rights of people from hazardous substances and wastes. Necessary information on hazardous substances and wastes can include, for example, their intrinsic hazards and properties, actual and potential uses and releases, as well as protective measures and regulations. It also includes details about the amounts of substances present in people and their environments compared with risks, and the prevalence of adverse impacts linked to hazardous substances, such as cancer, impaired brain function, heart disease and other non-communicable diseases.

2. Accessibility

34. Information about hazardous substances and wastes is accessible when everyone can seek, obtain, receive and hold available information, unless there is an overriding legitimate public-interest justification for non-disclosure. Information must be both physically and economically accessible, and there must be public awareness about its availability and how to make use of the information. Information is physically accessible when information is provided in a timely manner, either in response to public inquiries or when the information holder or information generator actively disseminates information.¹⁶⁴ The information requested should be provided and made available to the requester in a timely manner. In

¹⁶³ See United Nations Declaration on the Rights of Indigenous Peoples, arts. 29 and 32; International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169).

¹⁶⁴ For instance, article 49, paragraph 2, of the Georgian Law on Nuclear and Radiation Safety stipulates that the population of Georgia despite its civil status has a right to receive timely information about the nuclear and radiation situation.

addition, information should be physically accessible at the time of purchase and when using a product containing hazardous substances. To be economically accessible, the cost of accessing information should be kept at a minimum, possibly charging only the cost incurred for reproduction of information.

3. Functionality

35. Information should be fit for its intended purpose. Making information available or accessible does not necessarily make it functional. In order to fulfil the criteria of availability and accessibility, information should be functional. Information about hazardous substances is not functional unless it works to prevent harm, to enable democratic decision-making, and to ensure accountability, access to justice and an effective remedy.
36. To be functional, information should be scientifically accessible, imparting knowledge with a reasonable degree of effort on the part of the intended user. Certain professionals will always require substantially more technical information about hazardous substances and wastes than potentially affected consumers and community members. For example, the technical information about hazardous substances appropriate for regulators and researchers is not user-friendly for consumers at the point of purchase. Technicalities must be translated into a language that is functional, to enable individuals and groups of individuals to make informed choices. In doing so, underlying data from which conclusions are drawn should be accessible to ensure the veracity of such conclusions.

4. Non-discrimination and equality

37. Non-discrimination is a pillar of human rights law. In relation to information, it is essential to ensure that the risks presented by hazardous substances and wastes be made compliant with this principle. Disaggregated and specialized information is required to understand and prevent disproportionate implications and impacts of hazardous substances and wastes on individuals and specific population groups, including different ages, incomes, ethnicities, genders as well as minorities and indigenous peoples. The right to information should be implemented with particular care so that no one is excluded through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or inattention to their particular circumstances.

D. Limitations to the right to information on hazardous substances and wastes

38. Confidentiality claims must be legitimate in accordance with international human rights standards. Under the principle of maximum disclosure there is a presumption that all information held by public bodies should be subject to disclosure, subject to a narrow set of public-interest limitations. To this end, the right to information is subject to certain legitimate, public-interest limitations in accordance with article 19 (3) of the International Covenant on Civil and Political Rights. Any limitation must be provided by law; it must be to protect the rights or reputation of others or to protect national security, public order, public health or morals; and it must be proved to be necessary and to be no more restrictive than is required to achieve the purported aim (see A/HRC/14/23, paras. 72–87).
39. An analysis of relevant human rights provisions indicates several common criteria, namely, conformity with the law, principle of legitimacy, principle of proportionality and necessity, reasonable purpose and objective and protection of the right of others (see A/68/362, para. 51). Grounds for refusal of access to information should be interpreted in a restrictive way, taking into account the public interest served by disclosure. The balancing of interests is widely established under national and international laws. It is not legitimate to limit access to information because the information seeker did not provide an interest or reasons for the request to access information.¹⁶⁵
40. It is generally acknowledged that there is an overriding public interest in the disclosure of information concerning serious violations of human rights and humanitarian law (see A/68/362, para. 37). Article 6 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms expressly provides that everyone has the right to information regarding human rights violations. Countries have

¹⁶⁵ UNEP, Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010), guideline 1; Claude Reyes et al. v. Chile, Series C No. 151, 19 September 2006, Inter-American Court of Human Rights; and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 4, para. 1 (a).

laws to override confidentiality claims in cases where the information requested relates to human rights violations or is relevant to investigate, prevent or avoid violations thereof.

41. Among the types of information that should never be confidential is information about systematic or widespread human right violations, and information about other violations of human rights that would prevent accountability, meaningful public participation or access to an effective remedy (*ibid.*). The potential for the mismanagement of hazardous substances and wastes to lead to systematic or widespread human rights violations is widely known.
42. To this end, certain types of information about hazardous substances cannot be legitimately claimed as confidential. It is not legitimate to claim that public health and safety information on hazardous substances is confidential. There is widespread recognition that health and safety information should not be confidential, and States have legally binding obligations to this end.¹⁶⁶
43. The interpretation of what constitutes health and safety information varies. The Stockholm Convention on Persistent Organic Pollutants provides implicit and non-exhaustive guidance as to what constitutes health and safety information, by virtue of what is necessary to implement the Convention. Health and safety information necessary to implement the Convention includes: chemical identity, physical properties, information about the ability of the substance to travel across borders in wind and water, and evidence of adverse effects to human health¹⁶⁷ such as cancer and other non-communicable diseases. In addition, the Convention compels the disclosure of information on the use of substances eligible for listing under the Convention, otherwise the use of such substances may be prohibited.
44. Emissions of hazardous substances into the environment and the unsound disposal of waste is public health information that should only in very rare circumstances be confidential. For example, Spain does not allow for emissions reported under its Pollutant Release and Transfer Register to be claimed as confidential.¹⁶⁸ This information is necessary to assess the potential for human exposure to hazardous substances and wastes, inextricable from protecting human rights.
45. Recurring challenges to realizing the right to information in the context of hazardous substances are exceptions for commercial secrets. The refusal to disclose information because it would adversely affect the value of intellectual property or the confidentiality of commercial businesses or industrial information is not legitimate if it may hamper public health or the overall public interest.¹⁶⁹ According to one Government's self-assessment, the "current process for handling confidential business information requests is weighted toward the protection of industry information rather than public access",¹⁷⁰ contrary to the intent of the law. It is not legitimate to protect a competitive advantage of businesses that create risks to public health and other public interests. Under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights the disclosure of certain types of health and safety information is unobjectionable "except where necessary to protect the public".¹⁷¹
46. The Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters does allow for the protection of intellectual property and commercial information, but not if the information sought concerns emissions into the environment. In interpreting the supremacy of the public interest in information about emissions into the environment over confidentiality claims under the Convention, a General Court of the European Union held in 2013 that:

if the institution concerned receives an application for access to a document, it must disclose it where the information requested relates to emissions into the environment, even if such

¹⁶⁶ Stockholm Convention on Persistent Organic Pollutants, art. 9; and Minamata Convention on Mercury, art. 17. See also the Dubai Declaration on International Chemicals Management.

¹⁶⁷ Stockholm Convention, annex D, para. 1 (e) (i).

¹⁶⁸ Spanish Ministry of Environment, "First Spanish Protocol on Pollutant Release and Transfer Registers Implementation Report" (December 2013–January 2014), p. 19, available from www.prtr-es.es/Data/images/20131216_EN_1erINFORMEP_PRTR_ESPANA.pdf.

¹⁶⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 7–8. Often used as an umbrella term, confidential business information may include trade secrets, which in some legal systems (mostly civil law) are not considered intellectual property.

¹⁷⁰ United States Environmental Protection Agency, Evaluation report (see footnote 18 above).

¹⁷¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 39 (3).

disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property.¹⁷²

47. The General Court mentions that “an overriding public interest in disclosure exists where the information requested relates to emissions into the environment”.¹⁷³ The Court's decision reversed the European Commission's refusal to grant access to information about the widely used pesticide glyphosate, which was categorized as probably carcinogenic to humans by the International Agency for Research on Cancer of the World Health Organization (WHO) in 2015.

III. Implementation of the right to information on hazardous substances and wastes

A. Obligations of States

48. States are the primary duty-bearers to respect, protect and fulfil human rights, and are bound to take all the steps necessary to ensure the right to information with respect to the adverse impacts of hazardous substances and wastes. States must ensure that related information is available, accessible and functional for everyone. This obligation not only requires States to refrain from interfering with the distribution and the free flow of information but also requires States to provide or make information public with or without request (see general comment No. 34 of the Human Rights Committee on the freedoms of opinion and expression, para. 19).
49. The obligation to implement the right to information on hazardous substances and wastes stems from various rights including those rights that are implicated through adverse impacts of hazardous substances and wastes and rights that specifically stipulate the obligation of States to provide access to information. For example, in the context of the right to the highest attainable standard of health, as the right is an inclusive right extending to underlying determinants of health such as access to health-related education and information, access to information is an essential feature of the right itself and of an effective health system (see A/HRC/7/11, para. 40). Twenty years after principle 10 of the Rio Declaration on Environment and Development, at the United Nations Conference on Sustainable Development in 2012, stakeholders made a number of appeals to improve transparency, access to information and public participation.¹⁷⁴ Good governance and a truly sustainable economy require the informed involvement of members of the public, be it in their role as voters, consumers or shareholders (ECE/MP.PP/2014/27/Add.1).

1. To generate, collect, assess and update

50. To respect, protect and fulfil human rights, States have a duty to investigate the actual and potential human rights impacts of hazardous substances and wastes throughout their life cycle. As such, States have a duty to generate, collect, assess and update information on hazardous substances and wastes. Substances must be assessed for: (a) their hazardous properties, such as the ability to cause cancer or explode; (b) the likelihood of exposure, including for those at risk of disproportionate levels of exposure; (c) the risk of harm; and (d) options available to prevent harm.
51. This duty needs to be carried out regularly, systematically and with special attention given to continuing innovation in the development of new substances with unique risks, and information being generated about the risks of hazardous substances. Because neither industry nor science is static, States must continue to perform this duty diligently, as close as possible to the pace of scientific advancements. An example of this duty is found under article L124–7 of the French Environment Code which calls on the public authorities to make sure that the information about the environment that they have collected is precise and up to date and can enable comparison.

¹⁷² Judgement of the General Court (Second Chamber) of 8 October 2013, *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v. European Commission*, case T545/11, para. 38.

¹⁷³ *Ibid.*, para. 37.

¹⁷⁴ General Assembly resolution 66/288, para. 43. Today, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the Kiev Protocol on Pollutant Release and Transfer Registers remain the only legally binding instruments established to implement principle 10 of the Rio Declaration on Environment and Development.

52. States have a duty to ensure that information about public health and other public interests is available to individuals, and that each person can exercise his or her human right to information. For example, the European Court of Human Rights held that the State had breached its duty to provide “essential information that would have enabled [the nearby community] to assess risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at [the chemical] factory”.¹⁷⁵ Significantly, the State was not in possession of the information.¹⁷⁶
53. While many countries do not have specific domestic legislation or policies in place to ensure that a minimum amount of critical information is generated, collected, assessed and updated on the properties, uses and fate potentially of all hazardous substances, certain States have taken action individually and jointly to address the information gaps that prevent States from assessing actual and potential human rights impacts from hazardous substances and wastes. The OECD Mutual Acceptance of Data system and high production volume chemicals programme helped to generate, collect and assess information on the most widely used hazardous substances and wastes efficiently and through international cooperation.
54. The European Union has led efforts to generate, collect and assess information on the hazardous properties and uses of approximately 30,000 industrial substances. Under the 2006 European Union Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals, businesses must provide States with a minimum amount of information on the hazardous properties of industrial chemicals produced or imported at or above one ton per year. If information is not available, it must be generated by businesses that wish to register the substance for use. Reporting requirements under the Regulation, where information about hazardous industrial substances must flow up and down the value chain, to and from chemical manufacturers and downstream users, help to ensure that substances are being used safely and information is updated.
55. In the aftermath of the tragedy in Bhopal, several countries adopted laws to generate, assess and update information about the risk of large-scale chemical accidents and regular industrial emissions of hazardous substances. In some countries, local governments are required to plan for emergencies involving hazardous substances, and communities have a “right to know”¹⁷⁷ about hazardous substances in their vicinity. The European Union’s Seveso Directive was updated in 2012 to improve access to information. The new Seveso (III) Directive recognizes the duty of European Union member States to “make information available on where to find information on the rights of persons affected by a major accident”,¹⁷⁸ in addition to the duty to actively disseminate and update this information.
56. To generate information on regular releases or disposal of hazardous substances from stationary industrial sources into air, water and land, several countries have established toxics release inventories or pollutant release and transfer registers. Today, many of these systems are established according to the Kiev Protocol on Pollutant Release and Transfer Registers. Pollutant release and transfer registers are effective for furthering environmental democracy, through encouraging the active participation of all interested stakeholders in processes that contribute to better decision-making, planning and implementation of policies and programmes at all levels. All these systems include the generation of updated information on the release of hundreds of hazardous substances and the availability of information through map-based or other database search functions.
57. States have recognized the importance of measuring the amounts of hazardous substances in people, also referred to as “biomonitoring”. Biomonitoring studies can provide important information to prevent harm, data points for cause and effect, and evidence of the efficacy of measures being taken to reduce exposure to hazardous substances. Some studies have shown that over 500 different hazardous substances are found in adults and over 200 in children.¹⁷⁹ Although less biomonitoring

¹⁷⁵ European Court of Human Rights, *Guerra and Others v. Italy* (116/1996/735/932), Judgement, 19 February 1998, summary.

¹⁷⁶ *Ibid.*, para. 59.

¹⁷⁷ For example, the United States Emergency Planning and Community Right-to-Know Act (1986).

¹⁷⁸ Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances (Seveso III), preamble, para. 19.

¹⁷⁹ See Environmental Working Group, “Toxic chemicals found in minority cord blood” (2 December 2009), available from www.ewg.org/news/news-releases/2009/12/02/toxic-chemicals-found-minority-cord-blood. UNEP states that these studies are indicative of a global problem.

information is available from developing countries, “it is reasonable to conclude that to the extent that people are exposed to the same chemicals, the results will be similar”.¹⁸⁰ While certain countries and international organizations have taken initiatives, biomonitoring is underutilized around the world.

58. States are also investigating epidemiological information on adverse effects linked to hazardous substances and wastes. Numerous States have cancer registries, which “play an important role in research into the cause of cancer”.¹⁸¹
59. However, despite this progress there remain serious information gaps and obstacles to generating, collecting, assessing and updating information gaps.
60. In one country, the paradoxical situation exists where a State must have information that an “unreasonable” risk of harm exists before it can compel businesses to generate substantial amounts of missing information to assess whether such a risk exists.¹⁸² It is important to have a minimum amount of information for all substances to ensure the safe use of hazardous substances and to avoid situations where one hazardous substance is substituted with a different hazardous substance of equal or even greater concern. And where laws exist, challenges have emerged with the enforcement of these laws. For example, 69 per cent of submissions by chemical manufactures that were evaluated by authorities were not in compliance with the information requirements of the Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals.¹⁸³ Furthermore, pollutant release and transfer registers are not in place in many countries.

2. To effectively disseminate information

61. States have a duty to effectively disseminate information to everyone who may be adversely affected by the production, storage, use, release and disposal of hazardous substances and wastes. This includes the obligation to communicate information both actively and on demand, as well as to make information functional.
62. Over 100 countries have laws reflecting the duty to provide information that is held by public authorities on request, subject to certain exceptions and limitations.¹⁸⁴ In these countries, applicants are often entitled to obtain information within a specific time frame and without specifying the reasons for the request.
63. States have a duty to actively disseminate information to businesses, governmental authorities and the public, which is necessary to protect individuals and communities from the negative impact of hazardous substances on their health and well-being. In addition to jurisprudence articulating this duty in the context of various human rights,¹⁸⁵ States have acknowledged within a global policy framework that public awareness is a basic need for decision-making, including products and articles containing hazardous substances.¹⁸⁶
64. Informing consumers about hazardous substances in products has been a challenge. To help realize the right of consumers to know whether they are buying products with hazardous substances, States have created mechanisms to enable consumers to request information from companies. Article 33 of the Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals gives European consumers the right to ask whether consumer articles contain certain types of hazardous substances. In addition, labelling requirements enable consumers to understand quickly which hazardous substances are present or may have been during production. The Government of the United Kingdom of Great Britain and Northern Ireland operates a web-based environmental information service called “What’s in your backyard?” that enables members of the public to find information on hazardous substances waste on a local basis by entering their postcode.¹⁸⁷ In addition, Denmark’s Environmental Protection

¹⁸⁰ UNEP, *Global Chemicals Outlook* (see footnote 5 above), p. 21.

¹⁸¹ Members of International Association of Cancer Registries, available from www.iacr.com.fr/index.php?option=com_comprofiler&task=userslist&Itemid=476.

¹⁸² United States, Toxic Substances Control Act, sect. 4 (a) (1) (A) (i).

¹⁸³ European Chemicals Agency, “Compliance checks: statistics”, available from www.echa.europa.eu/regulations/reach/evaluation/compliance-checks/5-percent-compliance-checks-2010-registration-dossiers/statistics.

¹⁸⁴ See www.RTI-Rating.org.

¹⁸⁵ See, for example, European Court of Human Rights, *Öneryildiz v. Turkey*, application No. 48939/99, 30 November 2004, para. 90.

¹⁸⁶ SAICM, Overarching Policy Strategy (see footnote 13 above).

¹⁸⁷ See <http://apps.environment-agency.gov.uk/wiyby/default.aspx>.

Agency website has a selection of “green tips” for consumers, especially on chemicals in products. Furthermore, major hospitals in Copenhagen have national poison hotlines, which provide information on chemicals in relation to poisoning and mainly household, domestic accidents involving chemicals.

65. In addition to government initiatives, mobile phone applications such as ToxFox — which checks whether cosmetic products contain hazardous substances — are available to help consumers have access to information at the point of purchase, thereby empowering them.¹⁸⁸ At the global level, UNEP is leading the “chemicals in products” project to increase the availability of and access to information on the use of chemicals throughout the life cycle of certain types of products.
66. Although efforts are being made, public access to information about hazardous substances and wastes remains limited around the world.

3. To identify and inform those at risk of disproportionate impacts

67. In order to protect those most at risk, States must ensure that disaggregated information is available and accessible regarding the risks of hazardous substances to various population groups, such as children or pregnant women. Similarly, the information should be monitored and disaggregated by sex and population group, such as workers in industries with exposure to hazardous substances, low-income communities, indigenous peoples or minorities, or other groups who are at high risk of adverse impacts. In addition, States must ensure information flows effectively to communities at risk to enable them to be aware of risks and options to prevent harm.
68. Recently the Environmental Protection Agency of the United States released high-resolution maps that show disproportionate emissions in certain regions and locales in its territory. Such high-resolution data, coupled with population data can help States identify, investigate and mitigate disproportionate impacts on low-income, minority and other communities. Disaggregated information on adverse effects linked to hazardous substances, such as cancer, can help to identify those at risk of disproportionate impacts, and help to provide an effective remedy. In addition, biomonitoring initiatives can also help to provide disaggregated information, for example on hazardous substances in mother’s breast milk passed onto children.
69. To help overcome the challenge of making information accessible to workers and others at risk, a long-standing tool nationally and internationally is classification and labelling. These laws help to ensure businesses, workers and the public have access to information about the risks associated with hazardous substances in the workplace. To this end, States have pledged to implement “hazard communication mechanisms”,¹⁸⁹ such as the Globally Harmonized System of Classification and Labelling of Chemicals, and to use safety data sheets. Training of workers is required for these tools to work effectively.

4. To ensure confidentiality claims are legitimate

70. Ensuring the legitimacy of confidentiality claims is an inherent challenge given that the information to be scrutinized for legitimacy is secret. Secrecy serves as a barrier to accountability, remedy and democratic decision-making by consumers and communities. It can also prevent international cooperation from tackling the global challenge of managing hazardous substances and wastes. Given the challenges described above, increased vigilance is required on the part of States to protect against illegitimate confidentiality claims.
71. Several international agreements on hazardous substances stipulate that health and safety information about hazardous substances should not be considered as confidential.¹⁹⁰ In line with the obligations under these international treaties, States must ensure that confidentiality claims are legitimate to protect and realize human rights. When a State imposes restrictions on the exercise of freedom

¹⁸⁸ See www.bund.net/themen_und_projekte/chemie/toxfox_der_kosmetikcheck/toxfox_app/.

¹⁸⁹ SAICM, Overarching Policy Strategy (see footnote 13 above), para. 15 (b) (ii).

¹⁹⁰ See, for example, article 17 of the Minamata Convention on Mercury stipulating that information on the health and safety of humans and the environment shall not be regarded as confidential; and article 9 (5) of the Stockholm Convention stipulating that information on health and safety of humans and the environment shall not be regarded as confidential.

of expression which encompasses the right to seek and receive information, these may not put in jeopardy the right itself (see general comment No. 34, para. 21).

72. States have taken various steps to help ensure the legitimacy of confidentiality claims with respect to hazardous substances and wastes. States have clarified that that information should be disclosed despite confidentiality of business information in cases where a substance is a hazardous chemical substance¹⁹¹ and environmental information should not be rendered confidential.¹⁹²
73. To ensure access to an effective remedy for unjustified claims of confidentiality, States have implemented appeals mechanisms. Either an administrative appeals body or courts, or a combination of the two, are used by States. For example, in Mexico an administrative body (Federal Institute for Access to Information) handles appeals in the event of a denial. France and the United Kingdom also use administrative bodies for this purpose. The Republic of Korea and Ukraine allow appeals through the courts, and the United States uses administrative bodies for the first appeal, followed by the courts for further appeals.
74. Despite clarifying statements, appeals mechanisms and global agreement that health and safety information about hazardous substances should not be confidential, there remain serious problems with the confidentiality of information not serving the public interest by preventing access to health and safety information about hazardous substances and wastes.

5. To engage in international cooperation to help make information available and accessible

75. Under numerous legal instruments, States have a duty to engage in international cooperation to protect human rights, which includes efforts to protect human rights from impacts resulting from the misuse of hazardous substances and wastes. International trade in hazardous substances, whether as chemical products or as constituents of articles and waste, is accelerating driven in large part by globalization. Furthermore, many of the challenges to States to protect those within their territory from hazardous substances result from actions or inactions abroad, such as the export of products containing hazardous substances or the release of hazardous substances that can travel long distances through wind, water and food sources.
76. Lists of hazardous substances and information-sharing about their potential uses help to enable international cooperation on hazards and potential risks, particularly useful for countries with limited resources and businesses that prefer to avoid using or selling products with hazardous substances. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade could be particularly useful in this respect.
77. In many ways, including some described above, States have cooperated with one another to share information over the past several years. However, economic interests continue to create obstacles for sharing information on hazardous substances and wastes internationally.

B. Responsibilities of businesses

78. Businesses have a responsibility to respect human rights. The Guiding Principles on Business and Human Rights elaborate on existing standards and practices for States and businesses.¹⁹³ Businesses have a responsibility to respect, at a minimum, all internationally recognized human rights.
79. Under the Dubai Declaration on International Chemicals Management, chemical manufacturers and other industries committed themselves “to respecting human rights and fundamental freedoms”,¹⁹⁴ which includes the right to information.
80. Virtually every industry and business sector is linked to the production, use, release or disposal of hazardous substances and wastes up and down the value chain. The failure of governments to require a minimum level of health and safety information on industrial chemicals introduced into the flow of

¹⁹¹ Republic of Korea, Enforcement Rules of the Act on the Regulation, Evaluation, etc. of Chemical Substances (2013), art. 35.

¹⁹² Georgia, The General Administrative Code of Georgia (1999), art. 42.

¹⁹³ United Nations, *Guiding Principles on Business and Human Rights* (2011).

¹⁹⁴ Dubai Declaration on International Chemicals Management, para. 10.

commerce has exposed downstream businesses to numerous risks from selling products containing hazardous substances, including the potential for substantial legal liability and reputational risks, as well as the costs of clean-up and other necessary protection measures.

81. In order to meet their responsibility to respect human rights, businesses should have a policy commitment to respect human rights, a process for human rights due diligence, and a process to enable an effective remedy for human rights impacts they cause or to which they contribute.¹⁹⁵
82. Information-related obstacles are one of the most significant challenges confronting victims who seek an effective remedy for human rights violations they suffer from hazardous substances and wastes. In performing human rights due diligence, businesses should identify, prevent, mitigate and account for how they address their adverse human rights impacts.¹⁹⁶ The concept of human rights due diligence requires more than compliance with existing laws for hazardous substances and wastes. The due diligence process should include, inter alia, assessments of actual and potential impacts and communicating information about how actual and potential impacts are mitigated and addressed.¹⁹⁷

1. To identify and assess adverse impacts

83. When conducting due diligence, businesses should identify and assess actual and potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.¹⁹⁸
84. A fundamental challenge for all businesses is that “understanding of health impacts of [hazardous substances] remains limited”.¹⁹⁹ This is a crucial element relevant to all businesses in order to ensure they are carrying out their due diligence process. For substances where hazards are understood, ensuring that these substances are used safely is another substantial challenge for businesses.
85. Consensus has grown that greater responsibility should lie with businesses to make information available about the risks and impacts of hazardous substances. In 2006, States and industry stressed the responsibility of industry to make available to stakeholders such data and information on health and environmental effects of chemicals as are needed.²⁰⁰
86. In identifying and assessing adverse impacts, ensuring the integrity of information about hazardous substances has been a reoccurring challenge. In some cases, scientists may not have disclosed financial ties with chemical manufacturers and other possible conflicts of interest when making statements as “independent” scientific experts. In other cases, the integrity of pollution sampling and information monitoring has been of concern.

2. To effectively communicate information

87. There is a shared responsibility between businesses that supply and use hazardous substances to communicate information to determine risks and prevent harm.²⁰¹ According to the principles adopted by the American Chemistry Council, companies throughout the chain of commerce should be responsible for providing necessary hazard, use, and exposure information.²⁰²
88. Businesses have a responsibility to publicly communicate information about the risks created by their activities and how they mitigate and address both actual and potential human rights impacts with which they might be involved,²⁰³ including businesses that use, produce and release hazardous substances. As indicated by Guiding Principle 21, these communications should:

¹⁹⁵ Guiding Principle 15.

¹⁹⁶ Guiding Principle 17.

¹⁹⁷ Guiding Principle 17.

¹⁹⁸ Guiding Principles 18.

¹⁹⁹ Joint EEA-JRC report (see footnote 6 above), p. 21.

²⁰⁰ Dubai Declaration on International Chemicals Management, para. 20.

²⁰¹ ILO Convention No. 170 (1990) concerning Safety in the use of Chemicals at Work.

²⁰² American Chemistry Council, “10 principles for modernizing TSCA [Toxic Substances Control Act]”.

²⁰³ Guiding Principle 21.

- a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
- b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
- c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Information about these measures should flow among businesses, as well as from businesses to governmental authorities and the public.

89. Businesses have a responsibility to provide any and all information necessary to respect human rights affected by hazardous substances. To this end, emissions to the environment should not be considered confidential.²⁰⁴ The Zero Discharge of Hazardous Chemicals (ZDHC)²⁰⁵ industry initiative sees a system like the one of pollutant release and transfer registers as one "that would meet one of the ZDHC key principles of engaging stakeholders to improve the apparel and footwear supply chain system".²⁰⁶
90. Businesses are increasingly disclosing the ingredients of products they make and sell. This not only helps to meet their responsibility to consumers and communities, but also helps to ensure that adverse impacts do not result from improper disposal or reuse.
91. While some consumer products provide limited access to information about hazardous substances (or the absence of a few hazardous substances in their products), there are serious deficiencies in the amount and type of information consumers have regarding the hazardous chemicals present in products they use. Critically, there is a deficit of information about actual and potential impacts of hazardous substances. Furthermore, information is missing about the adverse human rights impacts from hazardous substances implicated in the production of consumer products. There is also a lack of information about the actual and potential impacts after products are discarded for recycling or disposal.
92. Businesses also have a responsibility to communicate information to individuals or groups at disproportionate risk of adverse impacts.²⁰⁷ In general, but especially for children, local communities in high-risk areas and others at risk of disproportionate impacts, it is not sufficient to simply identify the name of the hazardous substance. It is essential to explain and create awareness about what harm may result. This concept has been adopted for tobacco products, where packages do not identify the hazardous substance, but rather cancer and other adverse effects. However, for cosmetics and other consumer products with substances listed, often only the substance is listed (some of which may be masked by generic terms such as "fragrance"), not the potential adverse effect. And of course, most products do not contain their constituent substances at all, including hazardous substances.

3. To engage in cross-border cooperation

93. The ongoing expansion of supply chains and business relationships around the world — resulting in increased production, use and disposal of hazardous substances and wastes in countries with limited capacity to ensure their safe use and disposal — heightens the responsibility of businesses to ensure their products do not cause or contribute to human rights violations because of hazardous substances, both at home and abroad.²⁰⁸
94. Businesses need to have appropriate tracking mechanisms in place to ensure that actual and potential human rights impacts are addressed, whether they cause or contribute to these impacts.²⁰⁹

²⁰⁴ Most businesses obliged to report under the Kiev Protocol on Pollutant Release and Transfer Registries do not claim confidentiality very often, and in some countries confidentiality claims are decreasing from year to year. See ECE/MP.PRTR/2014/5, para. 174.

²⁰⁵ See www.roadmaptozero.com/.

²⁰⁶ Zero Discharge of Hazardous Chemicals Programme, *Right to Know Disclosure Methodology Research* (2014), available from www.roadmaptozero.com/df.php?file=pdf/RightToKnowDisclosureMethodologies.pdf.

²⁰⁷ *OECD Guidelines for Multinational Enterprises* (2011), Commentary on human rights, chap. IV, para. 40.

²⁰⁸ See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2013).

²⁰⁹ Guiding Principle 20.

95. When information is submitted to one State about the health and safety of any substance, it should be in the public domain. Whether or not a country has identical, appropriate or reliable systems to protect confidentiality is not pertinent when it comes to health and safety information about hazardous substances and wastes, because this should not be confidential.

IV. Conclusion and recommendations

96. The Special Rapporteur emphasizes that the right to information on hazardous substances and wastes is central to the enjoyment of human rights and fundamental freedoms. The Special Rapporteur argues in the present report that information should be available, accessible and functional for everyone, consistent with the principle of non-discrimination.
97. People have a right to know whether they are being exposed to hazardous substances. Yet, whether on consumer products or food, information is not available or accessible. Over the past several decades, tens of thousands of different hazardous substances have been used by businesses with inadequate information on their properties and uses, as well as their fate as waste, to assess their impacts on human rights. The right of victims to an effective remedy, the right to meaningful participation, the right not to be subject to experimentation without consent, the right to the highest attainable standard of health and several other human rights have all been frustrated by large information gaps throughout the life cycle of substances and wastes.
98. Today, information is neither available nor accessible about, inter alia, the safety of tens of thousands of chemicals on the market; the potential sources of exposure to substances with known and unknown hazards; the amount of human exposure to hazardous substances; and the impacts of exposure to a large number of hazardous substances starting from conception.
99. To protect human rights affected by hazardous substances, States are duty-bound to generate, collect, assess and update information; effectively communicate such information, particularly to those disproportionately at risk of adverse impacts; to ensure confidentiality claims are legitimate; and to engage in international cooperation to ensure that foreign Governments have the information necessary to protect the rights of people in their territory.
100. In discharging their duty to conduct human rights due diligence, businesses are responsible for identifying and assessing the actual and potential impacts of hazardous substances and wastes, either through their own activities or as a result of their business relationships; to communicate information to other businesses, governments and the public effectively.
101. In the light of these observations, the Special Rapporteur offers the following recommendations:
- a. To ensure information is available:
 - (i) States must generate, collect, assess and update information about the properties, uses, emissions and the fate of hazardous substances and wastes necessary for assessing actual and potential impacts on human rights, including the right to life and health;
 - (ii) States should ensure that individuals and communities, especially those at risk of disproportionate impacts, have information about hazardous substances in their environment, bodies, food and consumer products, including the adverse effects that may result from exposure. Better use of biomonitoring information, in conjunction with disease registers, should be made, particularly for those at high risk of adverse impacts;
 - (iii) Businesses should undertake robust human rights due diligence for actual and potential impacts of hazardous substances and wastes linked to their activities, including identifying and assessing adverse impacts that may result therefrom;
 - (iv) Where States require businesses to help generate, collect, assess and update information about hazardous substances and wastes, they must ensure that adequate and appropriate mechanisms are in place to ensure the integrity of the information generated and assessments performed, through government oversight, the involvement of third parties, or some combination thereof to ensure the reliability of information. Direct or indirect financial ties and other conflicts of interest must be disclosed;

- (v) States should ensure that reliable baseline information is generated for the presence of hazardous substances in air, water and soil that may be released by extractive or other industrial activities before such activities begin;
- (vi) Where information is unavailable, States should make the public aware of missing information and exercise caution to prevent possible adverse impacts while information is generated, collected and assessed;
- b. To ensure information is accessible:
 - (i) States must actively inform the public of the risks of hazardous substances and wastes, including those at risk of disproportionate impacts. States should ensure that people have access in adequate languages and formats to information on specific adverse impacts of hazardous substances released into their environment and in everyday products;
 - (ii) States must immediately communicate to the public imminent threats to public health and the environment. States should ensure that all information that would enable the public to prevent harm is disseminated. Businesses whose activities result in imminent threats must convey to the government authorities and the public a threat to public health or the environment, providing full access to information about risks, impacts and mitigation measures;
 - (iii) States should create a centralized system that is physically and economically accessible regrouping all relevant information on hazardous substances and wastes and its impact on human health and the environment, including concerns raised with national and subnational authorities and businesses;
 - (iv) States and businesses should be guided by the principle of full disclosure, allowing secrecy only when the necessity and legitimacy of confidentiality are proved. States must require that claims of confidentiality be justified and periodically resubstantiated. Grounds for the refusal of access to information must be interpreted in a restrictive way, taking into account the public interest served by disclosure. If information exempted from disclosure can be separated out without prejudice to the confidentiality of the information exempted, public authorities must disseminate the remainder of the information requested
 - (v) States should ensure any limitations to the right of access to information on hazardous substance and wastes should be in conformity with the law, the principle of proportionality and necessity, reasonable purpose and objective and protection of the right of others
 - (vi) Information relevant to the protection of and respect for human rights should never be considered “confidential” or “secret”. Health and safety information about hazardous substances and wastes should not be confidential, including emissions into the environment, toxicity studies and chemical identity;
 - (vii) States and businesses should provide an exhaustive list of information or types of information that is not publicly accessible but provided to governments, including the reason for non-disclosure;
 - (viii) States should improve the traceability of the human rights impacts of hazardous substances and wastes in the global supply chain. Businesses should ensure that information on human rights impacts of hazardous substances and wastes flows up and down the supply/value chain, including between operations in foreign countries
 - (ix) States must ensure that court proceedings and settlement agreements on alleged impacts of hazardous substances and wastes do not have confidentiality attached;
 - (x) States must ensure access to an effective remedy and have a grievance mechanism for individuals to appeal against denials of access to information;

- c. To ensure information is functional:
 - (i) States must ensure that information is presented in a form that allows the recipient to protect, respect, fulfil and enjoy human rights;
 - (ii) States must ensure that all necessary information is available and accessible to ensure access to an effective remedy and meaningful public participation;
 - (iii) Businesses should communicate information to Governments, and be subject to regulation and strict guidelines about information. Businesses should also communicate to the public relevant information about hazardous substances in their supply chains and products in a user-friendly format;
 - (iv) States and businesses should publish information in the languages of linguistic minorities and indigenous peoples, and pay special attention in providing information to those most at risk;
- d. To ensure non-discrimination in the generation, collection or production of information:
 - (i) States must ensure disaggregated information is available on actual and potential impacts to those at heightened risk of adverse impacts due to their proximity or geographic location, physical conditions, economic status, occupation, gender or age;
 - (ii) States must ensure that information is available and accessible on the risks of childhood exposure to hazardous substances and wastes, paying close attention to pre and postnatal periods;
- e. To increase international and cross-border cooperation:
 - (i) States should create a global database of information on hazardous substances and wastes, including a repository of intrinsic properties, uses, protective measures and regulations/restrictions and other information necessary to protect human rights from hazardous substances;
 - (ii) States should implement the Guiding Principles on Business and Human Rights with special attention to hazardous substances and wastes, particularly to the responsibility of the chemical manufacturers to realize the right to information;
 - (iii) States should accelerate the implementation of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, develop Pollutant Release and Transfer Registers, and implement the Globally Harmonized System of Classification and Labelling of Chemicals;
 - (iv) States should ensure that foreign governments have access to all available health and safety information about hazardous substances and wastes that may be produced, released, used or transported abroad.

Inter-American System

American Convention on Human Rights (1969)

Article 13. Freedom of thought and expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.

[...]

Inter-American Democratic Charter (2001)

Article 4

Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.

[...]

Declaration on Principles of Freedom of Expression (2000)

[...]

2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.
3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

[...]

Model Inter-American Law on Access to Information (2010), adopted by AG/RES. 2607 (XL-O/10)

Recalling:

That the Heads of States and Governments of the Americas, in the Declaration of Nuevo Leon, made a commitment to provide the legal and regulatory frameworks necessary to guarantee the right of access to information;

[...]

Reaffirming:

The American Convention on Human Rights, in particular Article 13 on Freedom of Thought and Expression;

The Inter-American Commission on Human Rights' Inter-American Declaration of Principles on Freedom of Expression;

The Inter-American Court of Human Rights' decision in *Claude Reyes v. Chile*, which formally recognized the right of access to information as part of the fundamental right to freedom of expression;

The Inter-American Juridical Committee's Principles on the Right of Access to Information;

The "Recommendations on Access to Information" drafted by the OAS Department of International Law, in coordination with the organs, agencies, and entities of the Inter-American system, civil society, State experts, and the Permanent Council's Committee on Juridical and Political Affairs;

The Annual Reports of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights;

The Carter Center's Atlanta Declaration and American Regional Findings and Plan of Action for the Advancement of the Right of Access to Information, and

Underscoring:

That access to information is a fundamental human right and an essential condition for all democratic societies;

That right of access to information applies broadly to all information in possession of public authorities, including all information which is held or recorded in any format or medium;

That the right of access to information is based on the principle of maximum disclosure;

That exceptions to the right of access should be clearly and narrowly established by law;

That even in the absence of a specific request, public bodies should disseminate information about their functions on a routine and proactive basis and in a manner that assures that the information is accessible and understandable;

That the process of requesting information should be regulated by clear, fair and non-discriminatory rules which set clear and reasonable timelines, provide for assistance to those requesting information, assure that access is free or limited to the cost of reproduction of records and require specific grounds for the refusal of access;

That individuals should be afforded the right to bring an appeal against any refusal or obstruction to provide access to information before an administrative body, and to bring an appeal against the decisions of such administrative body before the courts;

That sanctions should be imposed against any individual who willfully denies or obstructs access to information in breach of the rules set forth in this law;

That measures should be taken to promote, implement and enforce the right of access to information in the Americas,

[...]

I. Definitions, scope, and purpose, right of access and interpretation

Definitions

1. In this Law, unless the context otherwise requires:

- (a)** "Information" refers to any type of data in custody or control of a public authority;
- (b)** "Information Officer" refers to the individual or individuals appointed by a public authority pursuant to Articles 29 and 30 of this Law;
- (c)** "Record" refers to any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the public authority that holds it, and whether or not it is classified;
- (d)** "Publish" refers to the act of making information available in a form generally accessible to members of the public and includes all print, broadcast and electronic forms of dissemination;
- (e)** "Public Authority" refers to any governmental authority or private organization falling under Article 3 of this Law;
- (f)** "Interested Third Parties" refers to persons who may have a direct interest in non-disclosure of information they provided voluntarily to a public authority, because it will affect their privacy or their commercial interests;
- (g)** "Personal Information" means information which relates to a living individual who can be identified from that information; and
- (h)** "Senior Official" means any public official whose salary whom exceeds [USD\$100,000].

Scope and Purpose

2. This Law establishes a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure, so that all information held by public

bodies is complete, timely and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system.

3. This Law applies to all public authorities, including the executive, legislative 14 Model Inter-American Law on Access to Public Information and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake. All of these bodies are required to make information available pursuant to the provisions of this Law.
4. To the extent of any inconsistency, this Law shall prevail over any other statute.

Right of access to information

5. Any person making a request for information to any public authority covered by this Law shall be entitled, subject only to the provisions of Part IV of this Law:
 - i. to be informed whether or not the public authority in question holds a record containing that information or from which that information may be derived;
 - ii. if the public authority does hold such a record, to have that information communicated to the requester in a timely manner;
 - iii. to an appeal where access to the information is denied;
 - iv. to make an anonymous request for information;
 - v. to make a request without providing justifications for why the information is requested;
 - vi. to be free from discrimination based on the nature of the request; and
 - vii. to be provided with the information free of charge or at a cost limited to the cost of reproduction.
6. The requester shall not be sanctioned, punished or prosecuted in response to the exercise of the right of access to information. Model Inter-American Law on Access to Public Information:
7. (1) The Information Officer must make reasonable efforts to assist the requester in connection with the request, respond to the request accurately and completely, and subject to the regulations, provide timely access to the records in the format requested.
- (2) The Information Commission must make reasonable efforts to assist the requester in connection with the appeal

Interpretation

8. When interpreting a provision of this Law, everyone tasked with interpreting this Law, or any other legislation or regulatory instrument that may affect the right to information, must adopt any reasonable interpretation of the provision that best gives effect to the right to information.

II. Measures to promote access

Adoption of publication schemes

9. (1) Every public authority shall adopt and disseminate widely, including on its website, a publication scheme approved by the Information Commission, within [six] months of: a) or b) its establishment:
 - a. the coming into force of this Law; or
 - b. its establishment.
- (2) The publication scheme shall set out:
 - a. the classes of records that the authority will publish on a proactive basis; and
 - b. the manner in which it will publish these records.

- (3)** In adopting a publication scheme, a public authority shall have regard to the public interest:
 - a.** in allowing access to the information it holds; and
 - b.** in making information available proactively so as to minimize the need for individuals to make requests for information.
- (4)** Every public authority shall publish information in accordance with its approved publication scheme.

[...]

Key classes of information

- 12. (1)** The following are the key classes of information subject to proactive disclosure by a public authority:
- a.** a description of its organizational structure, functions, duties, locations of its departments and agencies, operating hours, and names of its officials;
 - b.** the qualifications and salaries of senior officials;
 - c.** the internal and external oversight, reporting and monitoring mechanisms relevant to the public authority including its strategic plans, corporate governance codes and key performance indicators, including any audit reports;
 - d.** its budget and its expenditure plans for the current fiscal year, and Model Inter-American Law on Access to Public Information 17 past years, and any annual reports on the manner in which the budget is executed;
 - e.** its procurement procedures, guidelines and policies, contracts granted, and contract execution and performance monitoring data;
 - f.** the salary scales, including all components and sub-components of actual salary, relevant to all employee and consultant categories within the public authority (including all data related to current reclassification of posts);
 - g.** relevant details concerning any services it provides directly to members of the public, including customer service standards, charters and protocols;
 - h.** any direct request or complaints mechanisms available to members of the public regarding acts, or a failure to act, by that public authority;
 - i.** a description of the powers and duties of its senior officers, and the procedure they follow to make decisions;
 - j.** any statutes, policies, decisions, rules, guidelines, manuals or other records containing interpretations, practices or precedents regarding the discharge by that public authority of its functions, that affect the general public;
 - k.** any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that public authority;
 - l.** a simple guide containing adequate information about its recordkeeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information and an internal appeal;
 - m.** its Disclosure Log, in accordance with Article 17, containing a list of requests received and records released under this Law, which shall be automatically available, and its Information Asset Register, in accordance with Article 16;
 - n.** a complete list of subsidies provided by the public authority;
 - o.** frequently requested information; and
 - p.** any additional information deemed appropriate by the public authority.

- (2) The publication schemes adopted by every public authority shall, within [seven] years of the adoption of the first publication scheme by that public authority in accordance with Article 8 (1), cover all of the key classes of information set out in paragraph 11.
- (3) The public authority must create and archive a digital image of its website, complete with information required by its approved publication scheme, on a yearly basis.

Policy Documents and Specific Populations

- 13. (1) Public authorities must make copies of each of its policy documents available for inspection. In order for policy documents to be publicly available.
- (2) No one shall be subject to any prejudice because of the application of a policy that is not disclosed pursuant to paragraph (1).
- 14. Public authorities shall release public information which affects a specific population in a manner and form that is accessible to that population, unless there is a good legal, policy, administrative or public interest reason not to.

Other Laws & Mechanisms Providing for Disclosure of Information

- 15. This Law does not limit the operation of another Law or administrative scheme that:
 - a. requires information concerning records in the possession, custody or control, of government to be made available to members of the public;
 - b. enables a member of the public to access records in the possession, custody or control of government; or
 - c. requires the publication of information concerning government operations.
- 16. Whenever an individual makes a request for information, it should be treated at least as favourably as a request under this Law.

Information Asset Registers

- 17. (1) Every public authority shall create and maintain an updated Information Asset Register listing:
 - a. every category of information published by the public agency;
 - b. every published record; and
 - c. every record available for purchase by members of the public.
- (2) The Information Commission may set standards regarding information asset registers.
- (3) Every public authority shall ensure that its Information Asset Register complies with any standard set by the Information Commission.

Request and Disclosure Logs

- 18. (1) Public authorities shall create, maintain and publish a Request and Disclosure Log of all information released in response to a request made under this Law on its website and in the reception area of all its offices accessible by members of the public, subject to protection of privacy of the original requesting party.
- (2) The Information Commission may set standards regarding information Request and Disclosure Logs.
- (3) Every public authority shall ensure that its Request and Disclosure Logs comply with any standard set by the Information Commission.

Previously Released Information

- 19. (1) Public authorities must ensure and facilitate access to all records previously released, in the most convenient way possible, to persons requesting such information.

- (2) Requests for records contained in Request and Disclosure Logs shall be made available as soon as practicable if they are in electronic form and no later than [three] working days after the records are sought if they are not in electronic form.
- (3) Where a response to a request for information has been provided in electronic form, it shall proactively be made available on the public authority's website.
- (4) If a second request is made for the same information, it shall proactively be made available on the public authority's website.

III. Accessing Information Held by Public Authorities

Request for Information

- 20. The request for information may be filed in writing, by electronic means, orally in person, by phone, or by any alternative means, with the relevant Information Officer. In all cases, the request shall be properly logged pursuant to Article 20 of this Law.
- 21. Unless the information can be provided immediately, all requests shall be registered and assigned a tracking number, which shall be provided to the requester along with contact information for the Information Officer assigned to the request.
- 22. No fee shall be charged for making a request.
- 23. Requests for information shall be registered in the order in which they are received and handled in a fair and non-discriminatory manner.
- 24. (1) a request for information shall contain the following information:
 - a. contact information for the receipt of notices and delivery of the information requested;
 - b. a sufficiently precise description of the information requested, in order to allow the information to be found; and
 - c. the preferred form in which the information should be provided.
- (2) If the form in which the information should be provided is not indicated, the information requested shall be provided in the most efficient and cost-effective manner for the public authority.
- 25. (1) The public authority in receipt of a request must reasonably interpret the scope and nature of the request.
- (2) In the event the receiving authority is uncertain as to the scope and nature of a request, it must contact the requester to clarify what is being requested. The receiving authority must make reasonable efforts to assist the requester in connection to the request, and respond accurately and completely.
- 26. (1) If the receiving authority reasonably determines that it is not the proper authority to handle the request, it must, as soon as possible and in any case within [five] working days, forward the request to the proper authority for processing.
- (2) The receiving authority must also notify the requester that his/her request has been routed to another public authority for processing.
- (3) The forwarding authority must provide the requester with contact information for the Information Officer at the public authority where the request has been routed.

Third Party Response to Notification

- 27. Interested third parties shall be informed within [5] days of a request being received, and given [10] days to make written representations to the relevant authority either:
 - (a) consenting to disclosure of the information; or
 - (b) stating reasons why the information should not be disclosed.

Cost of Reproduction

- 28. (1)** The requester shall only pay for the cost of reproduction of the information requested and, if applicable, the cost of the delivery, if requested. Information provided electronically shall be free of charge.
- (2)** The costs of reproduction shall not exceed the actual cost of the material in which it is reproduced; delivery shall not exceed the actual cost of the same service in the market. The costs, for this purpose, shall be set periodically by the Information Commission.
- (3)** The public authorities shall provide information free of all charges, including reproduction and delivery, for any citizen below an income set by the Information Commission.
- (4)** The Information Commission will set additional rules regarding fees, which may include the possibility that information will be provided for free if in the public interest and that no charge may be levied for a minimum number of pages.

Form of Access

- 29.** Public authorities shall facilitate access to inspection by making available facilities for such purpose.

Information Officer

- 30.** The head of the public authority responsible for responding to requests must designate an Information Officer who shall be the focal point for implementing this law in that public authority. The contact information for each such Information Officer must be posted on the website of the public authority and made readily available to the public.
- 31.** The Information Officer shall, in addition to any obligations specifically provided for in other sections of this Law, have the following responsibilities:
- a.** to promote within the public authority the best possible practices in relation to record maintenance, archiving and disposal; and
 - b.** to serve as a central contact within the public authority for receiving requests for information, for assisting individuals seeking to obtain information and for receiving individual complaints regarding the performance of the public authority to inform disclosure.

Searching for Records

- 32.** Upon receipt of a request for information, the public authority in receipt of the request must undertake a reasonable search for records which respond to the request.

Records Management

- 33.** The [body responsible for archives] must develop, in coordination with the Information Commission, a records management system which will be binding on all public authorities.

Missing Information

- 34.** When a public authority is unable to locate information responsive to a request, and records containing that information should have been maintained, it is required to make reasonable efforts to gather the missing information and provide it to the requester.

Time to Respond

- 35. (1)** Each public authority must respond to a request as soon as possible and in any event, within [twenty] working days of its receipt.
- (2)** In the event the request was routed to the public authority from another authority, the date of receipt shall be the date the proper authority received the request, but in no event shall that date exceed [ten] working days from the date the request was first received by a public authority designated to receive requests.

Extension

- 36. (1)** Where necessary because of a need to search for or review of voluminous records, or the need to search offices physically separated from the receiving office, or the need to consult with other public authorities prior to reaching a disclosure determination, the public authority processing the request may extend the time period to respond to the request by up to [twenty] working days.
- (2)** In any event, the failure of the public authority to complete the processing of the request within [twenty] working days, or, if the conditions specified in paragraph 1 are met, the failure to respond to the request within [forty] working days, shall be deemed a denial of the request.
- (3)** In highly exceptional cases, involving large amounts of information, the public authority may appeal to the Information Commission for an extension beyond [forty] working days.
- (4)** Where a public authority fails to meet the standards of this article, no charge should be imposed for providing the information, and any denial or redaction must be specifically approved by the Information Commission.
- 37.** Under no circumstances may a third party notification excuse the public authority from complying with the time periods established in this law.

Notice to the Requester

- 38.** As soon as the public authority has reasonable grounds to believe that satisfaction of a request will either incur reproduction charges above a level set by the Information Commission or take longer than [twenty] working days, it shall inform the requester and give him/her the opportunity to narrow or modify the scope of the request.
- 39. (1)** Public authorities shall provide access in the form requested, unless this would:
- a.** harm the record;
 - b.** breach copyright not held by public authority; or
 - c.** be impractical because of the need to redact some information contained in the record, pursuant to Section IV of this Law.
- (2)** Where information requested in electronic format is already available on the internet, the public authority may simply indicate to the requester the exact URL where the requester may access the information.
- (3)** In cases where the requester requested the information in a nonelectronic format, the public authority may not answer the request by making reference to a URL.
- 40. (1)** Where information is provided to the requester, he/she shall be notified and informed of any relevant applicable fees and/or arrangements for access.
- (2)** In the event that any information or part of the information is withheld from a requester because it falls under the exceptions to disclosure under Section IV of this Law, the requester must be given:
- a.** a reasonable estimate of the volume of material that is being withheld;
 - b.** a description of the precise provisions of this Law used for the withholding; and
 - c.** notification of the right to appeal.

IV. Exceptions

Exceptions to Disclosure

- 41.** Public authorities may deny access to information only in the following circumstances, when it is legitimate and strictly necessary in a democratic society, based on the standards and jurisprudence of the Inter-American system:

a. Allowing access would harm the following private interests:

- (1) right to privacy, including life, health, or safety;
- (2) legitimate commercial and economic interests; or,
- (3) patents, copyrights and trade secrets.

Exceptions in this sub-paragraph do not apply when the individual has consented to its disclosure or where it was clear when the information was provided that it was part of a class of information that was subject to disclosure.

The exception under sub-paragraph (a) 1 does not apply to matters related to the functions of public officials or in cases where the individual in question has been deceased in excess of [20] years.

b. Allowing access would create a clear, probable and specific risk of substantial harm, [which should be further defined by law] to the following public interests:

- (1) public safety;
- (2) national security;
- (3) the future provision of free and open advice within and among public authorities;
- (4) effective formulation or development of policy;
- (5) international or intergovernmental relations;
- (6) law enforcement, prevention, investigation and prosecution of crime;
- (7) ability of the State to manage the economy;
- (8) legitimate financial interest of a public authority; and
- (9) tests and audits, and testing and auditing procedures.

The exceptions under sub-paragraphs (b) 3, 4 and 9, do not apply to facts, analysis of facts, technical data or statistical information.

The exception under sub-paragraph (b) 4 does not apply once the policy has been enacted.

The exception under sub-paragraph (b) 9 does not apply to the results of a particular test or audit once it is concluded.

c. Allowing access would constitute an actionable breach of confidence in communication, including legally privileged information.

Partial Disclosure

- 42.** For circumstances in which the totality of the information contained in a record is not exempted from disclosure by an exception in Article 40, protected information may be redacted. Information not exempted from disclosure in a same record, however, must be delivered to the requesting party and made available to the public.

Historical Disclosure

- 43.** The exceptions under Article 40 (b) do not apply to a record that is more than [12] years old. Where a public authority wishes to reserve the information from disclosure, this period can be extended for another [12] years only by approval by the Information Commission.

Public Interest Override

- 44.** Public Authorities may not refuse to indicate whether or not it holds a record, or refuse to disclose that record, pursuant to the exceptions contained in Article 40 unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure.
- 45.** The exceptions in Article 40 do not apply in cases of serious violations of human rights or crimes against humanity.

V. Appeals

Internal Appeal

46. (1) A requester may, within [60] working days of a refusal to respond, or of any other breach of rules in this Law for responding to a request, lodge an internal appeal with the head of the public authority.
- (2) The head of the public authority must issue a written decision stating adequate reasons, within [10] working days from receipt of the notice of appeal, and deliver a copy of that decision to the requester.
- (3) If the requester decides to present an internal appeal, he/she must wait the full term of the timelines in this provision prior to lodging an external appeal.

External Appeal

47. (1) Any requester who believes that his or her request for information has not been processed in accordance with the provisions of this Law, whether or not he or she has lodged an internal appeal, has the right to file an appeal with the Information Commission.
- (2) Such an appeal shall be filed within [60] working days of a decision being appealed against, or the expiration of the timelines for responding to the request or an internal appeal established by this Law.
- (3) Such an appeal shall contain:
 - a. the public authority with which the request was filed;
 - b. the contact information of the requester;
 - c. the grounds upon which the appeal is based; and
 - d. any other information that the requester considers relevant.
48. Upon receiving an appeal, the Information Commission may attempt to mediate between the parties with a view toward disclosure of the information without going through a formal appeal process.
49. (1) The Information Commission shall log the appeal in a centralized tracking system and inform all interested parties, including interested third parties, about the appeal and their rights to make representations.
- (2) The Information Commission shall set fair and nondiscriminatory rules regarding the processing of appeals which ensure that all parties have an appropriate opportunity to make representations.
- (3) In the event the Information Commission is uncertain as to the scope and/or nature of a request and/or appeal, it must contact the appellant to clarify what is being requested and/or appealed.
50. (1) Information Commission shall decide appeals, including attempts to mediate, within [60] working days and may, in exceptional circumstances, extend this timeline by another [60] working days.
- (2) The Information Commission, in deciding the case, may:
 - a. reject the appeal;
 - b. require the public authority to take such steps as may be necessary to comply with its obligations under this Law, such as, but not limited to, providing the information and/or reducing the fee;
- (3) The Information Commission shall serve notice of its decision to the requester, the public authority and any interested party. Where the decision is unfavorable to the requester, he or she shall be informed of his or her right to appeal.
- (4) If a public authority does not comply with the Information Commission's decision within the time limits established in that decision, the Information Commission or the requester may file a petition with the [proper] court in order to compel compliance.

Court Review

51. A requester may file a case with the court only to challenge a decision of the Information Commission, within [60] days of an adverse decision or the expiration of the term provided in the law.
52. The court shall come to a final decision on all procedural and substantive aspects of the case as early as possible.
53. (1) The burden of proof shall lie with the public authority to establish that the information requested is subject to one of the exceptions contained in Article 40. In particular, the public authority must establish:
 - a. that the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system;
 - b. that disclosure will cause substantial harm to an interest protected by this Law; and
 - c. that the likelihood and gravity of that harm outweighs the public interest in disclosure of the information.
- (2) The burden of proof shall also lie with the public authority to defend any other decision that has been challenged as a failure to comply with the Law.

VI. Information Commission

Establishment of the Information Commission

54. (1) An Information Commission is hereby established, which shall be in charge of promoting the effective implementation of this Law;
- (2) The Information Commission shall have full legal personality, including the power to acquire, hold, and dispose of property, and the power to sue and be sued;
- (3) The Information Commission shall have operative, budgetary and decision-making autonomy and shall report to the legislature;
- (4) The legislature shall approve the budget of the Information Commission, which shall be sufficient to enable the Commission to perform its duties adequately.

[...]

C) Right to participate in public decision-making

Universal system

Universal Declaration of Human Rights (1948)

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

International Covenant on Civil and Political Rights (1966)

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c. To have access, on general terms of equality, to public service in his country.

Human Rights Committee, General Comment n° 25, Article 25 (The right to participate in public affairs, voting rights and the right of equal access to public service), 1996, CCPR/C/21/Rev.1/Add.7

1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.
2. The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.
3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of "every citizen". State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.
4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The number indicates the session at which the general comment was adopted. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.
5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.
6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported

by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b).
8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association

[...]

Committee on Economic, Social and Cultural Rights, General Comment no. 21 on the right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 2010, E/C.12/GC/21/Rev.1

[...]

A. Components of article 15, paragraph 1 (a)

[...]

“Cultural life”

10. Various definitions of “culture” have been postulated in the past and others may arise in the future. All of them, however, refer to the multifaceted content implicit in the concept of culture.
11. In the Committee’s view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression “cultural life” is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.

[...]

13. The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

“To participate” or “to take part”

14. The terms “to participate” and “to take part” have the same meaning and are used interchangeably in other international and regional instruments.

15. There are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.
- (a) Participation covers in particular the right of everyone — alone, or in association with others or as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity;
 - (b) Access covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities;
 - (c) Contribution to cultural life refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.

B. Elements of the right to take part in cultural life

16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.
- (a) Availability is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;
 - (b) Accessibility consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination. It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.
 - (c) Acceptability entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;
 - (d) Adaptability refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;

- (e) Appropriateness refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples. The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.

[...]

E. Persons and communities requiring special protection

[...]

7. Indigenous peoples

- 36. States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.
- 37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.³⁶ States parties should respect the principle of free,

[...]

Committee on Economic, Social and Cultural Rights, General Comment no. 15, The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 2002, E/C.12/2002/11

[...]

- 16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:
 - (a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated.

[...]

- (d) El acceso de los pueblos indígenas a los recursos de agua en sus tierras ancestrales sea protegido de toda transgresión y contaminación ilícitas. Los Estados deben facilitar recursos para que los pueblos indígenas planifiquen, ejerzan y controlen su acceso al agua.

[...]

Specific legal obligations

(b) Obligation to protect

[...]

24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

[...]

Core obligations

37. In General Comment No. 3 (1990), the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:

[...]

- f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; they it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;

[...]

Legislation, strategies and policies

[...]

48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes, that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.
49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.
50. States parties may find it advantageous to adopt framework legislation to operationalise their right to water strategy. Such legislation should include: (a) targets or goals to be attained and the timeframe for their achievement; (b) the means by which the purpose could be achieved; (c) the

intended collaboration with civil society, private sector and international organizations; (d) institutional responsibility for the process; (e) national mechanisms for its monitoring; and (f) remedies and recourse procedures.

[...]

Remedies and accountability

- 56.** Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

[...]

Committee on Economic, Social and Cultural Rights, General Comment no. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, E/C.12/2000/4

[...]

- 11.** The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

[...]

- 54.** The formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.
- 55.** The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.
- 56.** States should consider adopting a framework law to operationalise their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

[...]

Committee on Economic, Social and Cultural Rights, General Comment no. 12, The right to adequate food (article 11 in the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5

[...]

- 23.** The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

[...]

- 29.** In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.

[...]

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.

[...]

- c)** Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

[...]

Committee on the Elimination of Racial Discrimination, General Comment no. 34, Racial discrimination against people of African descent, 2011, CERD/C/GC/34

[...]

II. Rights

- 3.** People of African descent shall enjoy all human rights and fundamental freedoms in accordance with international standards, in conditions of equality and without any discrimination.
- 4.** People of African descent live in many countries of the world, either dispersed among the local population or in communities, where they are entitled to exercise, without discrimination, individually or in community with other members of their group, as appropriate, the following specific rights:

[...]

- (d) The right to prior consultation with respect to decisions which may affect their rights, in accordance with international standards.

[...]

- 6. Racism and structural discrimination against people of African descent, rooted in the infamous regime of slavery, are evident in the situations of inequality affecting them and reflected, inter alia, in the following domains: their grouping, together with indigenous peoples, among the poorest of the poor; their low rate of participation and representation in political and institutional decision-making processes; additional difficulties they face in access to and completion and quality of education, which results in the transmission of poverty from generation to generation; inequality in access to the labour market; limited social recognition and valuation of their ethnic and cultural diversity; and a disproportionate presence in prison populations.

[...]

IV. The place and role of special measures

- 18. Adopt and implement special measures meant to eliminate all forms of racial discrimination against people of African descent, taking into account the Committee's general recommendation No. 32 (2009).
- 19. Formulate and put in place comprehensive national strategies with the participation of people of African descent, including special measures in accordance with articles 1 and 2 of the Convention, in order to eliminate discrimination against people of African descent and ensure their full enjoyment of all human rights and fundamental freedoms.

[...]

IX. Civil and political rights

- 42. Ensure that authorities at all levels in the State respect the right of members of communities of people of African descent to participate in decisions that affect them.
- 43. Take special and concrete measures to guarantee people of African descent the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage and to have due representation in all branches of government.
- 44. Promote awareness among members of the communities of people of African descent of the importance of their active participation in public and political life and eliminate obstacles to such participation.
- 45. Take all necessary steps, including special measures, to secure equal opportunities for participation of people of African descent in all central and local government bodies.
- 46. Organize training programmes to improve the political policymaking and public administration skills of public officials and political representatives who belong to communities of people of African descent.

[...]

Committee on the Elimination of Racial Discrimination, General Comment no. 23, Rights of indigenous peoples, 1997, A/52/18, Annex V

[...]

- 4. The Committee calls in particular upon States parties to:
 - (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
 - (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
 - (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

[...]

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

[...]

- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 14

[...]

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;

[...]

- (f) To participate in all community activities;

[...]

Committee on the Elimination of Discrimination Against Women, General comment no. 34 on the rights of rural women, 2016, CEDAW/C/GC/34

[...]

A. Right to participate in and benefit from rural development (art. 14, para. 2 (a))

35. Rural women must be regarded as drivers of sustainable development. Notwithstanding the vital role of rural women in agriculture and rural development, policies and initiatives are often not gender-responsive and rural women often do not benefit from enabling frameworks. The rights of rural women are also often not taken into consideration in disarmament, demobilization and reintegration efforts in conflict and post-conflict environments.
36. States parties should establish enabling institutional, legal and policy frameworks to ensure that rural development, agricultural and water policies, including with respect to forestry, livestock, fisheries and aquaculture, are gender-responsive and have adequate budgets. States parties should ensure:
 - (a) The integration and mainstreaming of a gender perspective in all agricultural and rural development policies, strategies, plans (including operational plans) and programmes, enabling rural women to act and be visible as stakeholders, decision makers and beneficiaries, in line with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, the Voluntary Guidelines for Securing Sustainable Small-Scale

Fisheries in the Context of Food Security and Poverty Eradication, general recommendation No. 23 (1997) on political and public life and the Sustainable Development Goals. States parties should ensure that those policies, strategies, plans and programmes have evidence-based monitoring and clear evaluation frameworks;

- (b) The establishment of gender units with senior-level staff in ministries relevant to rural development, supported by adequate budgets, institutional procedures, accountability frameworks and effective coordination mechanisms;
- (c) The protection of the rights of rural women, specifically when planning rural development programmes linked to disarmament, demobilization and reintegration efforts in conflict and post-conflict environments, in line with general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations.

[...]

F. Political and public life (art. 14, paras. 2 (a) and 2 (f), read alongside art. 7)

53. Rural women have a right to participate in decision-making at all levels and in community-level discussions with high authorities, yet they are inadequately represented as elected officials, as civil servants, in rural extension and water, forestry or fishery services, in cooperatives and in community or elders' councils. Their limited participation may be due to a lack of education, language and literacy constraints, limited mobility and transport, conflict and security concerns, discriminatory gender norms and stereotypes and a lack of time owing to childcare, the task of fetching water and other responsibilities. Limited knowledge of relevant legal, political and institutional procedures may also limit their effective participation in decision-making processes.
54. To ensure the active, free, effective, meaningful and informed participation of rural women in political and public life, and at all levels of decision-making, States parties should implement general recommendations Nos. 23 and 25, and specifically:
 - (a) Establish quotas and targets for rural women's representation in decision-making positions, specifically in parliaments and governance bodies at all levels, including in land, forestry, fishery and water governance bodies, as well as natural resource management. In this regard, clear objectives and time frames should be in place to reach substantive equality of women and men;
 - (b) Ensure that rural women and their organizations can influence policy formulation, implementation and monitoring at all levels and in all areas that affect them, including through participation in political parties and in local and self-governing bodies, such as community and village councils. States parties should design and implement tools to monitor rural women's participation in all public entities in order to eradicate discrimination;
 - (c) Address unequal power relations between women and men, including in decision-making and political processes at the community level, and remove barriers to rural women's participation in community life through the establishment of effective and gender-responsive rural decision-making structures. States parties should develop action plans that address practical barriers to rural women's participation in community life and implement campaigns to raise awareness about the importance of their participation in community decision-making;
 - (d) Ensure the participation of rural women in the development and implementation of all agricultural and rural development strategies, and that they are able to participate effectively in planning and decision-making relating to rural infrastructure and services, including water, sanitation, transportation and energy, as well as in agricultural cooperatives, farmers' producer organizations, rural workers' organizations, self-help groups and agro-processing entities. Rural women and their representatives should be able to participate directly in the assessment, analysis, planning, design, budgeting, financing, implementation, monitoring and evaluation of all agricultural and rural development strategies;

- (e) Ensure that rural development projects are implemented only after participatory gender and environmental impact assessments have been conducted with the full participation of rural women, and after obtaining their free, prior and informed consent. The results of participatory assessments shall be considered to be fundamental criteria for taking any decision regarding the implementation of such projects. Effective measures should be taken to mitigate possible adverse environmental and gender impacts;
- (f) In the case of States parties in conflict or post-conflict situations, ensure the participation of rural women as decision makers in peacebuilding efforts and processes, in line with general recommendation No. 30.

[...]

**Committee on the Elimination of Discrimination Against Women, General
Comment no. 27, Older women and protection of their human rights,
2010, CEDAW/C/GC/27**

[...]

17. Older women are often discriminated against through lack of opportunity to participate in political and decision-making processes. Lack of identity documentation as well as transportation means may prevent older women from voting. In some countries, older women may not form or participate in associations or other non-governmental groups to campaign for their rights. Further, mandatory retirement ages may differ for women and men with women being forced to retire earlier, which may cause discrimination against older women, including those who wish to represent their Governments at the international level.

[...]

25. Climate change impacts differently on women and especially older women. Older women are more vulnerable due to physical and biological differences that can disadvantage their initial response to natural hazards, social norms and given roles that affect the way they react to a disaster, and an inequitable distribution of aid and resources caused by social hierarchies. Their limited access to resources and decision-making processes increases their vulnerability to climate change.

[...]

35. States parties should ensure that climate change and disaster risk reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women. States parties should also facilitate the participation of older women in decision-making for climate change mitigation and adaptation.

[...]

39. States parties have an obligation to ensure that older women have the opportunity to participate in public and political life and hold public office at all levels and that older women have the necessary documentation to register to vote and run as candidates for election.

[...]

49. States parties should ensure that older women are included and represented in rural and urban development planning processes. States parties should provide affordable water, electricity and other utilities to older women. Policies to increase access to safe water and adequate sanitation should ensure that related technologies are designed so that they are accessible and do not require undue physical strength. 50. States parties should ensure the protection of older women with refugee status or who are stateless, as well as those who are internally displaced or are migrant workers, through the adoption of gender- and age-sensitive appropriate laws and policies.

[...]

Committee on the Elimination of Discrimination Against Women, General Comment no. 24, Women and health, 1999, A/54/38/Rev.1, cap. I.

[...]

31. States parties should also, in particular:

- (a) Place a gender perspective at the centre of all policies and programmes affecting women's health and should involve women in the planning, implementation and monitoring of such policies and programmes and in the provision of health services to women.

[...]

Committee on the Elimination of Discrimination Against Women, General Observation no. 23, Political and public life, 1997, A/52/38

States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referendums and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Background

1. The Convention on the Elimination of All Forms of Discrimination against Women places special importance on the participation of women in the public life of their countries. The preamble to the Convention states in part: "Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity."
2. The Convention further reiterates in its preamble the importance of women's participation in decision-making as follows: "Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields."
3. Moreover, in article 1 of the Convention, the term "discrimination against women" is interpreted to mean: "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
4. Other conventions, declarations and international analyses place great importance on the participation of women in public life and have set a framework of international standards of equality. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Political Rights of Women, the Vienna Declaration, paragraph 13 of the Beijing Declaration and Platform for Action, general recommendations 5 and 8 under the Convention, general comment No. 25 adopted by the Human Rights Committee, the recommendation adopted by the Council of the European Union on balanced participation of women and men in the decision-making process and the European Commission's "How to Create a Gender Balance in Political Decisionmaking".
5. Article 7 obliges States parties to take all appropriate measures to eliminate discrimination against women in political and public life and to ensure that they enjoy equality with men in political and public life. The obligation specified in article 7 extends to all areas of public and political life and

is not limited to those areas specified in subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life.

6. The Convention envisages that, to be effective, this equality must be achieved within the framework of a political system in which each citizen enjoys the right to vote and be elected at genuine periodic elections held on the basis of universal suffrage and by secret ballot, in such a way as to guarantee the free expression of the will of the electorate, as provided for under international human rights instruments, such as article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights.
7. The Convention's emphasis on the importance of equality of opportunity and of participation in public life and decision-making has led the Committee to review article 7 and to suggest to States parties that in reviewing their laws and policies and in reporting under the Convention, they should take into account the comments and recommendations set out below.

Comments

8. Public and private spheres of human activity have always been considered distinct, and have been regulated accordingly. Invariably, women have been assigned to the private or domestic sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior. By contrast, public life, which is respected and honoured, extends to a broad range of activity outside the private and domestic sphere. Men historically have both dominated public life and exercised the power to confine and subordinate women within the private sphere.
9. Despite women's central role in sustaining the family and society and their contribution to development, they have been excluded from political life and the decision-making process, which nonetheless determine the pattern of their daily lives and the future of societies. Particularly in times of crisis, this exclusion has silenced women's voices and rendered invisible their contribution and experiences.
10. In all nations, the most significant factors inhibiting women's ability to participate in public life have been the cultural framework of values and religious beliefs, the lack of services and men's failure to share the tasks associated with the organization of the household and with the care and raising of children. In all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.
11. Relieving women of some of the burdens of domestic work would allow them to engage more fully in the life of their communities. Women's economic dependence on men often prevents them from making important political decisions and from participating actively in public life. Their double burden of work and their economic dependence, coupled with the long or inflexible hours of both public and political work, prevent women from being more active.
12. Stereotyping, including that perpetrated by the media, confines women in political life to issues such as the environment, children and health, and excludes them from responsibility for finance, budgetary control and conflict resolution. The low involvement of women in the professions from which politicians are recruited can create another obstacle. In countries where women leaders do assume power this can be the result of the influence of their fathers, husbands or male relatives rather than electoral success in their own right.

Political Systems

13. The principle of equality of women and men has been affirmed in the constitutions and laws of most countries and in all international instruments. Nonetheless, in the last 50 years, women have not achieved equality, and their inequality has been reinforced by their low level of participation in public

and political life. Policies developed and decisions made by men alone reflect only part of human experience and potential. The just and effective organization of society demands the inclusion and participation of all its members.

14. No political system has conferred on women both the right to and the benefit of full and equal participation. While democratic systems have improved women's opportunities for involvement in political life, the many economic, social and cultural barriers they continue to face have seriously limited their participation. Even historically stable democracies have failed to integrate fully and equally the opinions and interests of the female half of the population. Societies in which women are excluded from public life and decision-making cannot be described as democratic. The concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both. The examination of States parties' reports shows that where there is full and equal participation of women in public life and decision-making, the implementation of their rights and compliance with the Convention improves.

Temporary special measures

15. While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.

Summary

16. The critical issue, emphasized in the Beijing Platform for Action,⁵ is the gap between the de jure and de facto, or the right as against the reality of women's participation in politics and public life generally. Research demonstrates that if women's participation reaches 30 to 35 per cent (generally termed a "critical mass"), there is a real impact on political style and the content of decisions, and political life is revitalized.
17. In order to achieve broad representation in public life, women must have full equality in the exercise of political and economic power; they must be fully and equally involved in decision-making at all levels, both nationally and internationally, so that they may make their contribution to the goals of equality, development and the achievement of peace. A gender perspective is critical if these goals are to be met and if true democracy is to be assured. For these reasons, it is essential to involve women in public life to take advantage of their contribution, to assure their interests are protected and to fulfil the guarantee that the enjoyment of human rights is for all people regardless of gender. Women's full participation is essential not only for their empowerment but also for the advancement of society as a whole.

[...]

The right to participate in formulation of government policy (art. 7, para. (b))

24. The participation of women in government at the policy level continues to be low in general. Although significant progress has been made and in some countries equality has been achieved, in many countries women's participation has actually been reduced.

25. Article 7 (b) also requires States parties to ensure that women have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels. This would facilitate the mainstreaming of gender issues and contribute a gender perspective to public policy-making.
26. States parties have a responsibility, where it is within their control, both to appoint women to senior decision-making roles and, as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests.
27. States parties have a further obligation to ensure that barriers to women's full participation in the formulation of government policy are identified and overcome. These barriers include complacency when token women are appointed, and traditional and customary attitudes that discourage women's participation. When women are not broadly represented in the senior levels of government or are inadequately or not consulted at all, government policy will not be comprehensive and effective.
28. While States parties generally hold the power to appoint women to senior cabinet and administrative positions, political parties also have a responsibility to ensure that women are included in party lists and nominated for election in areas where they have a likelihood of electoral success. States parties should also endeavour to ensure that women are appointed to government advisory bodies on an equal basis with men and that these bodies take into account, as appropriate, the views of representative women's groups. It is the Government's fundamental responsibility to encourage these initiatives to lead and guide public opinion and change attitudes that discriminate against women or discourage women's involvement in political and public life.
29. Measures that have been adopted by a number of States parties in order to ensure equal participation by women in senior cabinet and administrative positions and as members of government advisory bodies include: adoption of a rule whereby, when potential appointees are equally qualified, preference will be given to a woman nominee; the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body; a quota for women members of cabinet and for appointment to public office; and consultation with women's organizations to ensure that qualified women are nominated for membership in public bodies and offices and the development and maintenance of registers of such women in order to facilitate the nomination of women for appointment to public bodies and posts. Where members are appointed to advisory bodies upon the nomination of private organizations, States parties should encourage these organizations to nominate qualified and suitable women for membership in these bodies.

[...]

The right to participate in non-governmental and public and political organizations (art. 7, para. (c))

32. An examination of the reports of States parties demonstrates that, on the few occasions when information concerning political parties is provided, women are underrepresented or concentrated in less influential roles than men. As political parties are an important vehicle in decision-making roles, Governments should encourage political parties to examine the extent to which women are full and equal participants in their activities and, where this is not the case, should identify the reasons for this. Political parties should be encouraged to adopt effective measures, including the provision of information, financial and other resources, to overcome obstacles to women's full participation and representation and ensure that women have an equal opportunity in practice to serve as party officials and to be nominated as candidates for election.
33. Measures that have been adopted by some political parties include setting aside for women a certain minimum number or percentage of positions on their executive bodies, ensuring that there is a balance between the number of male and female candidates nominated for election, and ensuring that women are not consistently assigned to less favourable constituencies or to the least advantageous positions on a party list. States parties should ensure that such temporary special measures are specifically permitted under anti-discrimination legislation or other constitutional guarantees of equality.
34. Other organizations such as trade unions and political parties have an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules and in the composition of their memberships with gender-balanced representation on their executive

boards so that these bodies may benefit from the full and equal participation of all sectors of society and from contributions made by both sexes. These organizations also provide a valuable training ground for women in political skills, participation and leadership, as do non-governmental organizations (NGOs).

Article 8 (International level)

States parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Comments

35. Under article 8, Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs. This requires that they be included in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences.
36. From an examination of the reports of States parties, it is evident that women are grossly underrepresented in the diplomatic and foreign services of most Governments, and particularly at the highest ranks. Women tend to be assigned to embassies of lesser importance to the country's foreign relations and in some cases women are discriminated against in terms of their appointments by restrictions pertaining to their marital status. In other instances spousal and family benefits accorded to male diplomats are not available to women in parallel positions. Opportunities for women to engage in international work are often denied because of assumptions about their domestic responsibilities, including that the care of family dependants will prevent them accepting appointment.
37. Many Permanent Missions to the United Nations and to other international organizations have no women among their diplomats and very few at senior levels. The situation is similar at expert meetings and conferences that establish international and global goals, agendas and priorities. Organizations of the United Nations system and various economic, political and military structures at the regional level have become important international public employers, but here, too, women have remained a minority concentrated in lower-level positions.
38. There are few opportunities for women and men, on equal terms, to represent Governments at the international level and to participate in the work of international organizations. This is frequently the result of an absence of objective criteria and processes for appointment and promotion to relevant positions and official delegations.
39. The globalization of the contemporary world makes the inclusion of women and their participation in international organizations, on equal terms with men, increasingly important. The integration of a gender perspective and women's human rights into the agenda of all international bodies is a government imperative. Many crucial decisions on global issues, such as peacemaking and conflict resolution, military expenditure and nuclear disarmament, development and the environment, foreign aid and economic restructuring, are taken with limited participation of women. This is in stark contrast to their participation in these areas at the non-governmental level.
40. The inclusion of a critical mass of women in international negotiations, peacekeeping activities, all levels of preventive diplomacy, mediation, humanitarian assistance, social reconciliation, peace negotiations and the international criminal justice system will make a difference. In addressing armed or other conflicts, a gender perspective and analysis is necessary to understand their differing effects on women and men.

Recommendations

Articles 7 and 8

41. States parties should ensure that their constitutions and legislation comply with the principles of the Convention, and in particular with articles 7 and 8.
42. States parties are under an obligation to take all appropriate measures, including the enactment of appropriate legislation that complies with their Constitution, to ensure that organizations such

as political parties and trade unions, which may not be subject directly to obligations under the Convention, do not discriminate against women and respect the principles contained in articles 7 and 8.

43. States parties should identify and implement temporary special measures to ensure the equal representation of women in all fields covered by articles 7 and 8.
44. States parties should explain the reason for, and effect of, any reservations to articles 7 or 8 and indicate where the reservations reflect traditional, customary or stereotyped attitudes towards women's roles in society, as well as the steps being taken by the States parties to change those attitudes. States parties should keep the necessity for such reservations under close review and in their reports include a timetable for their removal.

Article 7

45. Measures that should be identified, implemented and monitored for effectiveness include, under article 7, paragraph (a), those designed to:
 - (a) Achieve a balance between women and men holding publicly elected positions;
 - (b) Ensure that women understand their right to vote, the importance of this right and how to exercise it;
 - (c) Ensure that barriers to equality are overcome, including those resulting from illiteracy, language, poverty and impediments to women's freedom of movement;
 - (d) Assist women experiencing such disadvantages to exercise their right to vote and to be elected.
46. Under article 7, paragraph (b), such measures include those designed to ensure: also paragraph 134, which reads in part:
 - (a) equality of representation of women in the formulation of government policy;
 - (b) Women's enjoyment in practice of the equal right to hold public office;
 - (c) Recruiting processes directed at women that are open and subject to appeal.
47. Under article 7, paragraph (c), such measures include those designed to:
 - (a) ensure that effective legislation is enacted prohibiting discrimination against women;
 - (b) Encourage non-governmental organizations and public and political associations to adopt strategies that encourage women's representation and participation in their work.
48. When reporting under article 7, States parties should:
 - (a) Describe the legal provisions that give effect to the rights contained in article 7;
 - (b) Provide details of any restrictions to those rights, whether arising from legal provisions or from traditional, religious or cultural practices;
 - (c) Describe the measures introduced and designed to overcome barriers to the exercise of those rights;
 - (d) Include statistical data, disaggregated by sex, showing the percentage of women relative to men who enjoy those rights;
 - (e) Describe the types of policy formulation, including that associated with development programmes, in which women participate and the level and extent of their participation;
 - (f) Under article 7, paragraph (c), describe the extent to which women participate in non-governmental organizations in their countries, including in women's organizations;
 - (g) Analyse the extent to which the State party ensures that those organizations are consulted and the impact of their advice on all levels of government policy formulation and implementation;
 - (h) Provide information concerning, and analyse factors contributing to, the underrepresentation of women as members and officials of political parties, trade unions, employers' organizations and professional associations.

Article 8

49. Measures which should be identified, implemented and monitored for effectiveness include those designed to ensure a better gender balance in membership of all United Nations bodies, including the Main Committees of the General Assembly, the Economic and Social Council and expert bodies, including treaty bodies, and in appointments to independent working groups or as country or special rapporteurs.
50. When reporting under article 8, States parties should:
- (a) Provide statistics, disaggregated by sex, showing the percentage of women in their foreign service or regularly engaged in international representation or in work on behalf of the State, including membership in government delegations to international conferences and nominations for peacekeeping or conflict resolution roles, and their seniority in the relevant sector;
 - (b) Describe efforts to establish objective criteria and processes for appointment and promotion of women to relevant positions and official delegations;
 - (c) Describe steps taken to disseminate widely information on the Government's international commitments affecting women and official documents issued by multilateral forums, in particular, to both governmental and nongovernmental bodies responsible for the advancement of women;
 - (d) Provide information concerning discrimination against women because of their political activities, whether as individuals or as members of women's or other organizations.

Convention on the Rights of the Child (1989)**Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

[...]

Committee on the Rights of the Child, General Comment no. 16, State obligations regarding the impact of business on children's rights, 2013, CRC/C/GC/16

[...]

III. General principles of the Convention as they relate to business activities

[...]

B. The best interests of the child (art. 3, para. 1)

57. Article 3, paragraph 1, of the Convention provides that the best interests of the child shall be a primary consideration for States in all actions concerning children. States are obliged to integrate and apply this principle in all legislative, administrative and judicial proceedings concerning business activities and operations that directly or indirectly impact on children. For example, States must ensure that the best interests of the child are central to the development of legislation and policies that shape

business activities and operations, such as those relating to employment, taxation, corruption, privatization, transport and other general economic, trade or financial issues.

[...]

D. The right of the child to be heard (article 12)

21. Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. States should hear children's views regularly – in line with general comment No. 12 – when developing national and local-level business-related laws and policies that may affect them. In particular, States should consult with children who face difficulties in making themselves heard, such as the children of minority and indigenous groups, children with disabilities as stated in articles 4, paragraph 3, and 7 of the Convention on the Rights of Persons with Disabilities, and children in similar situations of vulnerability. Governmental bodies, such as education and labour inspectorates, concerned with regulating and monitoring the activities and operations of business enterprises should ensure that they take into account the views of affected children. States should also hear children when child-rights impact assessments of proposed business-related policy, legislation, regulations, budget or other administrative decisions are undertaken.

[...]

23. There may be instances when business consults communities that may be affected by a potential business project. In such circumstances, it can be critical for business to seek the views of children and consider them in decisions that affect them. States should provide businesses with specific guidance emphasizing that such processes must be accessible, inclusive and meaningful to children and take into account the evolving capacities of children and their best interests at all times. Participation should be voluntary and occur in a child-friendly environment that challenges and does not reinforce patterns of discrimination against children. Where possible, civil society organizations that are competent in facilitating child participation should be involved.

[...]

VI. Framework for implementation

[...]

D. Coordination and monitoring measures

[...]

77. When States develop national strategies and plans of action for implementation of the Convention and the Optional Protocols thereto, they should include explicit reference to the measures required to respect, protect and fulfil children's rights in the actions and operations of business enterprises. States should also ensure that they monitor progress in implementation of the Convention in the activities and operations of business. This can be achieved both internally through the use of child rights impact assessments and evaluations, as well as through collaboration with other bodies such as parliamentary committees, civil society organizations, professional associations and national human rights institutions. Monitoring should include asking children directly for their views on the impact of business on their rights. Different mechanisms for consultation can be used, such as youth councils and parliaments, social media, school councils and associations of children.

[...]

E. Collaborating and awareness-raising measures

[...]

84. Civil society has a critical role in the independent promotion and protection of children's rights in the context of business operations. This includes monitoring and holding business accountable; supporting children to have access to justice and remedies; contributing to child-rights impact

assessments; and raising awareness amongst businesses of their responsibility to respect children's rights. States should ensure conditions for an active and vigilant civil society, including effective collaboration with and support to independent civil society organizations, child and youth-led organizations, academia, chambers of commerce and industry, trade unions, consumer associations and professional institutions. States should refrain from interfering with these and other independent organizations and facilitate their involvement in public policy and programmes relating to children's rights and business.

[...]

Committee on the Rights of the Child, General Comment no. 15, The right of the child to the highest attainable level of health (article 24), 2013, CRC/C/GC/15

[...]

10. All policies and programmes affecting children's health should be grounded in a broad approach to gender equality that ensures young women's full political participation; social and economic empowerment; recognition of equal rights related to sexual and reproductive health; and equal access to information, education, justice and security, including the elimination of all forms of sexual and gender-based violence.

[...]

E. Right of the child to be heard

19. Article 12 highlights the importance of children's participation, providing for children to express their views and to have such views seriously taken into account, according to age and maturity.²¹⁰ This includes their views on all aspects of health provisions, including, for example, what services are needed, how and where they are best provided, barriers to accessing or using services, the quality of the services and the attitudes of health professionals, how to strengthen children's capacities to take increasing levels of responsibility for their own health and development, and how to involve them more effectively in the provision of services, as peer educators. States are encouraged to conduct regular participatory consultations, which are adapted to the age and maturity of the child, and research with children, and to do this separately with their parents, in order to learn about their health challenges, developmental needs and expectations as a contribution to the design of effective interventions and health programmes.

[...]

101. States should engage all sectors of society, including children, in implementation of children's right to health. The Committee recommends that such engagement include: the creation of conditions conducive to the continual growth, development and sustainability of civil society organizations, including grass-roots and community-level groups; active facilitation of their involvement in the development, implementation and evaluation of children's health policy and services; and provision of appropriate financial support or assistance in obtaining financial support.

E. The action cycle

108. States parties' fulfilment of their obligations under article 24 requires engagement in a cyclical process of planning, implementation, monitoring and evaluation to then inform further planning, modified implementation and renewed monitoring and evaluation efforts. States should ensure the meaningful participation of children and incorporate feedback mechanisms to facilitate necessary adjustments throughout the cycle.

[...]

²¹⁰ See general comment No. 12 (2009) on the right of the child to be heard, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 41 (A/65/41)*, annex IV.

1. Planning

- 110.** The Committee notes that, in order to inform the implementation, monitoring and evaluation of activities to fulfil obligations under article 24, States should carry out situation analyses of existing problems, issues and infrastructure for delivery of services. The analysis should assess the institutional capacity and the availability of human, financial, and technical resources. Based on the outcome of the analysis, a strategy should be developed involving all stakeholders, both State and non-State actors and children.

[...]

Committee on the Rights of the Child, General Comment no. 12, The right of the child to be heard, 2009, CRC/C/GC/12

I. Introduction

- 1.** Article 12 of the Convention on the Rights of the Child (the Convention) is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.
- 2.** The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.
- 3.** Since the adoption of the Convention in 1989, considerable progress has been achieved at the local, national, regional and global levels in the development of legislation, policies and methodologies to promote the implementation of article 12. A widespread practice has emerged in recent years, which has been broadly conceptualized as "participation", although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.
- 4.** States parties reaffirmed their commitment to the realization of article 12 at the twentyseventh special session of the General Assembly on children in 2002. However, the Committee notes that, in most societies around the world, implementation of the child's right to express her or his view on the wide range of issues that affect her or him, and to have those views duly taken into account, continues to be impeded by many long-standing practices and attitudes, as well as political and economic barriers. While difficulties are experienced by many children, the Committee particularly recognizes that certain groups of children, including younger boys and girls, as well as children belonging to marginalized and disadvantaged groups, face particular barriers in the realization of this right. The Committee also remains concerned about the quality of many of the practices that do exist. There is a need for a better understanding of what article 12 entails and how to fully implement it for every child.

[...]

III. The right of the child to be heard: a right of the individual child and a right of groups of children

9. The general comment is structured according to the distinction made by the Committee between the right to be heard of an individual child and the right to be heard as applied to a group of children (e.g. a class of schoolchildren, the children in a neighbourhood, the children of a country, children with disabilities, or girls). This is a relevant distinction because the Convention stipulates that States parties must assure the right of the child to be heard according to the age and maturity of the child (see the following legal analysis of paragraphs 1 and 2 of article 12).
10. The conditions of age and maturity can be assessed when an individual child is heard and also when a group of children chooses to express its views. The task of assessing a child's age and maturity is facilitated when the group in question is a component of an enduring structure, such as a family, a class of schoolchildren or the residents of a particular neighbourhood, but is made more difficult when children express themselves collectively. Even when confronting difficulties in assessing age and maturity, States parties should consider children as a group to be heard, and the Committee strongly recommends that States parties exert all efforts to listen to or seek the views of those children speaking collectively.
11. States parties should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard.
12. The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.
13. These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such processes. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.

[...]

A. Legal analysis

[...]

1. *Literal analysis of article 12*

a) *Article 12, paragraph 1*

i. *"Shall assure"*

19. Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for States parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children. This obligation contains two elements in order to ensure that mechanisms are in place to solicit the views of the child in all matters affecting her or him and to give due weight to those views.

ii. *"Capable of forming his or her own views"*

20. States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.
21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

- First, in its recommendations following the day of general discussion on implementing child rights in early childhood in 2004, the Committee underlined that the concept of the child as rights holder is “... anchored in the child’s daily life from the earliest stage”. Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.
- Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.
- Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.
- Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.

iii. *“The right to express those views freely”*

22. The child has the right “to express those views freely”. “Freely” means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard. “Freely” also means that the child must not be manipulated or subjected to undue influence or pressure. “Freely” is further intrinsically related to the child’s “own” perspective: the child has the right to express her or his own views and not the views of others.
23. States parties must ensure conditions for expressing views that account for the child’s individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.
24. The Committee emphasizes that a child should not be interviewed more often than necessary, in particular when harmful events are explored. The “hearing” of a child is a difficult process that can have a traumatic impact on the child.
25. The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child’s parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child’s clarified decisions.

iv. *“In all matters affecting the child”*

26. States parties must assure that the child is able to express her or his views “in all matters affecting” her or him. This represents a second qualification of this right: the child must be heard if the matter under discussion affects the child. This basic condition has to be respected and understood broadly.
27. The Open-ended Working Group established by the Commission on Human Rights, which drafted the text of the Convention, rejected a proposal to define these matters by a list limiting the consideration of a child’s or children’s views. Instead, it was decided that the right of the child to be heard should refer to “all matters affecting the child”. The Committee is concerned that children are often denied the right to be heard, even though it is obvious that the matter under consideration is affecting them and they are capable of expressing their own views with regard

to this matter. While the Committee supports a broad definition of “matters”, which also covers issues not explicitly mentioned in the Convention, it recognizes the clause “affecting the child”, which was added in order to clarify that no general political mandate was intended. The practice, however, including the World Summit for Children, demonstrates that a wide interpretation of matters affecting the child and children helps to include children in the social processes of their community and society. Thus, States parties should carefully listen to children’s views wherever their perspective can enhance the quality of solutions.

v. *“Being given due weight in accordance with the age and maturity of the child”*

28. The views of the child must be “given due weight in accordance with the age and maturity of the child”. This clause refers to the capacity of the child, which has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process. Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views.
29. By requiring that due weight be given in accordance with age and maturity, article 12 makes it clear that age alone cannot determine the significance of a child’s views. Children’s levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child’s capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination.
30. Maturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of article 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child.
31. Consideration needs to be given to the notion of the evolving capacities of the child, and direction and guidance from parents (see para. 84 and sect. C below).

[...]

B. The right to be heard and the links with other provisions of the Convention

[...]

1. Articles 12 and 3

70. The purpose of article 3 is to ensure that in all actions undertaken concerning children, by a public or private welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child are a primary consideration. It means that every action taken on behalf of the child has to respect the best interests of the child. The best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration. The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.
71. The best interests of the child, established in consultation with the child, is not the only factor to be considered in the actions of institutions, authorities and administration. It is, however, of crucial importance, as are the views of the child.
72. Article 3 is devoted to individual cases, but, explicitly, also requires that the best interests of children as a group are considered in all actions concerning children. States parties are consequently under an obligation to consider not only the individual situation of each child when identifying their best interests, but also the interests of children as a group. Moreover, States parties must examine the actions of private and public institutions, authorities, as well as legislative bodies. The extension of the obligation to “legislative bodies” clearly indicates that every law, regulation or rule that affects children must be guided by the “best interests” criterion.

- 73. There is no doubt that the best interests of children as a defined group have to be established in the same way as when weighing individual interests. If the best interests of large numbers of children are at stake, heads of institutions, authorities, or governmental bodies should also provide opportunities to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children.
- 74. There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

2. Articles 12, 2 and 6

- 75. The right to non-discrimination is an inherent right guaranteed by all human rights instruments including the Convention on the Rights of the Child. According to article 2 of the Convention, every child has the right not to be discriminated against in the exercise of his or her rights including those provided under article 12. The Committee stresses that States parties shall take adequate measures to assure to every child the right to freely express his or her views and to have those views duly taken into account without discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States parties shall address discrimination, including against vulnerable or marginalized groups of children, to ensure that children are assured their right to be heard and are enabled to participate in all matters affecting them on an equal basis with all other children.
- 76. In particular, the Committee notes with concern that, in some societies, customary attitudes and practices undermine and place severe limitations on the enjoyment of this right. States parties shall take adequate measures to raise awareness and educate the society about the negative impact of such attitudes and practices and to encourage attitudinal changes in order to achieve full implementation of the rights of every child under the Convention.
- 77. The Committee urges States parties to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view and her view be given due weight, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12.
- 78. The Committee welcomes the obligation of States parties in article 7 of the Convention on the Rights of Persons with Disabilities to ensure that children with disabilities are provided with the necessary assistance and equipment to enable them to freely express their views and for those views to be given due weight.
- 79. Article 6 of the Convention on the Rights of the Child acknowledges that every child has an inherent right to life and that States parties shall ensure, to the maximum extent possible, the survival and development of the child. The Committee notes the importance of promoting opportunities for the child's right to be heard, as child participation is a tool to stimulate the full development of the personality and the evolving capacities of the child consistent with article 6 and with the aims of education embodied in article 29.

[...]

5. Article 12 and the implementation of child rights in general

- 86. In addition to the articles discussed in the preceding paragraphs, most other articles of the Convention require and promote children's involvement in matters affecting them. For these manifold involvements, the concept of participation is ubiquitously used. Unquestionably, the lynchpin of these involvements is article 12, but the requirement of planning, working and developing in consultation with children is present throughout the Convention.
- 87. The practice of implementation deals with a broad range problems, such as health, the economy, education or the environment, which are of interest not only to the child as an individual, but to groups

of children and children in general. Consequently, the Committee has always interpreted participation broadly in order to establish procedures not only for individual children and clearly defined groups of children, but also for groups of children, such as indigenous children, children with disabilities, or children in general, who are affected directly or indirectly by social, economic or cultural conditions of living in their society.

88. This broad understanding of children's participation is reflected in the outcome document adopted by the twenty-seventh special session of the General Assembly entitled "A world fit for children". States parties have promised "to develop and implement programmes to promote meaningful participation by children, including adolescents, in decision-making processes, including in families and schools and at the local and national levels" (para. 32, subpara. 1). The Committee has stated in its general comment No. 5 on general measures of implementation for the Convention on the Rights of the Child: "It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions."

C. The implementation of the right to be heard in different settings and situations

89. The right of the child to be heard has to be implemented in the diverse settings and situations in which children grow up, develop and learn. In these settings and situations, different concepts of the child and her or his role exist, which may invite or restrict children's involvement in everyday matters and crucial decisions. Various ways of influencing the implementation of the child's right to be heard are available, which States parties may use to foster children's participation.

[...]

3. In health care

98. The realization of the provisions of the Convention requires respect for the child's right to express his or her views and to participate in promoting the healthy development and well-being of children. This applies to individual health-care decisions, as well as to children's involvement in the development of health policy and services.
99. The Committee identifies several distinct but linked issues that need consideration in respect of the child's involvement in practices and decisions relating to her or his own health care.
100. Children, including young children, should be included in decision-making processes, in a manner consistent with their evolving capacities. They should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities.

[...]

11. In national and international settings

127. Much of the opportunity for children's participation takes place at the community level. The Committee welcomes the growing number of local youth parliaments, municipal children's councils and ad hoc consultations where children can voice their views in decision-making processes. However, these structures for formal representative participation in local government should be just one of many approaches to the implementation of article 12 at the local level, as they only allow for a relatively small number of children to engage in their local communities. Consulting hours of politicians and officials, open house and visits in schools and kindergartens create additional opportunities for communication.
128. Children should be supported and encouraged to form their own child-led organizations and initiatives, which will create space for meaningful participation and representation. In addition, children can contribute their perspectives, for example, on the design of schools, playgrounds, parks, leisure and cultural facilities, public libraries, health facilities and local transport systems in order to ensure more appropriate services. In community development plans that call for public consultation, children's views should be explicitly included.
129. Such participation opportunities are, meanwhile, established in many countries also on the district, regional, federal state and national levels, where youth parliaments, councils and conferences

provide forums for children to present their views and make them known to relevant audiences. NGOs and civil society organizations have developed practices to support children, which safeguard the transparency of representation and counter the risks of manipulation or tokenism.

- 130.** The Committee welcomes the significant contributions by UNICEF and NGOs in promoting awareness-raising on children's right to be heard and their participation in all domains of their lives, and encourages them to further promote child participation in all matters affecting them, including at the grass-roots, community, and national or international levels, and to facilitate exchanges of best practices. Networking among child-led organizations should be actively encouraged to increase opportunities for shared learning and platforms for collective advocacy.
- 131.** At the international level, children's participation at the World Summits for Children convened by the General Assembly in 1990 and 2002, and the involvement of children in the reporting process to the Committee on the Rights of the Child have particular relevance. The Committee welcomes written reports and additional oral information submitted by child organizations and children's representatives in the monitoring process of child rights implementation by States parties, and encourages States parties and NGOs to support children to present their views to the Committee.

D. Basic requirements for the implementation of the right of the child to be heard

- 132.** The Committee urges States parties to avoid tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight. It emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing article 12.
- 133.** If participation is to be effective and meaningful, it needs to be understood as a process, not as an individual one-off event. Experience since the Convention on the Rights of the Child was adopted in 1989 has led to a broad consensus on the basic requirements which have to be reached for effective, ethical and meaningful implementation of article 12. The Committee recommends that States parties integrate these requirements into all legislative and other measures for the implementation of article 12.
- 134.** All processes in which a child or children are heard and participate, must be:
- (a) Transparent and informative** - children must be provided with full, accessible, diversity-sensitive and age-appropriate information about their right to express their views freely and their views to be given due weight, and how this participation will take place, its scope, purpose and potential impact;
 - (b) Voluntary** - children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage;
 - (c) Respectful** - children's views have to be treated with respect and they should be provided with opportunities to initiate ideas and activities. Adults working with children should acknowledge, respect and build on good examples of children's participation, for instance, in their contributions to the family, school, culture and the work environment. They also need an understanding of the socio-economic, environmental and cultural context of children's lives. Persons and organizations working for and with children should also respect children's views with regard to participation in public events;
 - (d) Relevant** - the issues on which children have the right to express their views must be of real relevance to their lives and enable them to draw on their knowledge, skills and abilities. In addition, space needs to be created to enable children to highlight and address the issues they themselves identify as relevant and important;
 - (e) Child-friendly** - environments and working methods should be adapted to children's capacities. Adequate time and resources should be made available to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities;

- (f) **Inclusive** - participation must be inclusive, avoid existing patterns of discrimination, and encourage opportunities for marginalized children, including both girls and boys, to be involved (see also para. 88 above). Children are not a homogenous group and participation needs to provide for equality of opportunity for all, without discrimination on any grounds. Programmes also need to ensure that they are culturally sensitive to children from all communities;
- (g) **Supported by training** - adults need preparation, skills and support to facilitate children's participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities. Children themselves can be involved as trainers and facilitators on how to promote effective participation; they require capacity-building to strengthen their skills in, for example, effective participation awareness of their rights, and training in organizing meetings, raising funds, dealing with the media, public speaking and advocacy;
- (h) **Safe and sensitive to risk** - in certain situations, expression of views may involve risks. Adults have a responsibility towards the children with whom they work and must take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation. Action necessary to provide appropriate protection will include the development of a clear child-protection strategy which recognizes the particular risks faced by some groups of children, and the extra barriers they face in obtaining help. Children must be aware of their right to be protected from harm and know where to go for help if needed. Investment in working with families and communities is important in order to build understanding of the value and implications of participation, and to minimize the risks to which children may otherwise be exposed;
- (i) **Accountable** - a commitment to follow-up and evaluation is essential. For example, in any research or consultative process, children must be informed as to how their views have been interpreted and used and, where necessary, provided with the opportunity to challenge and influence the analysis of the findings. Children are also entitled to be provided with clear feedback on how their participation has influenced any outcomes. Wherever appropriate, children should be given the opportunity to participate in follow-up processes or activities. Monitoring and evaluation of children's participation needs to be undertaken, where possible, with children themselves.

E. Conclusions

135. Investment in the realization of the child's right to be heard in all matters of concern to her or him and for her or his views to be given due consideration, is a clear and immediate legal obligation of States parties under the Convention. It is the right of every child without any discrimination. Achieving meaningful opportunities for the implementation of article 12 will necessitate dismantling the legal, political, economic, social and cultural barriers that currently impede children's opportunity to be heard and their access to participation in all matters affecting them. It requires a preparedness to challenge assumptions about children's capacities, and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training.

[...]

Committee on the Rights of the Child, General Comment no. 11, Indigenous children and their rights under the Convention, 2009, CRC/C/GC/11

[...]

Respect for the views of the child

37. The Committee considers that, in relation to article 12, there is a distinction between the right of the child as an individual to express his or her opinion and the right to be heard collectively, which allows children as a group to be involved in consultations on matters involving them.
38. With regard to the individual indigenous child, the State party has the obligation to respect the child's right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation

is to be respected in any judicial or administrative proceeding. Taking into account the obstacles which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one's opinion.

39. When the right is applied to indigenous children as a group, the State party plays an important role in promoting their participation and should ensure that they are consulted on all matters affecting them. The State party should design special strategies to guarantee that their participation is effective. The State party should ensure that this right is applied in particular in the school environment, alternative care settings and in the community in general. The Committee recommends States parties to work closely with indigenous children and their communities to develop, implement and evaluate programmes, policies and strategies for implementation of the Convention.

[...]

Committee on the Rights of the Child, General Comment no. 9, The rights of children with disabilities, 2006, CRC/C/GC/9

[...]

B. Article 23

11. Paragraph 1 of article 23 should be considered as the leading principle for the implementation of the Convention with respect to children with disabilities: the enjoyment of a full and decent life in conditions that ensure dignity, promote self reliance and facilitate active participation in the community. The measures taken by States parties regarding the realization of the rights of children with disabilities should be directed towards this goal. The core message of this paragraph is that children with disabilities should be included in the society. Measures taken for the implementation of the rights contained in the Convention regarding children with disabilities, for example in the areas of education and health, should explicitly aim at the maximum inclusion of those children in society.

[...]

B. National plans of action and strategy

18. The need for a national plan of action that integrates all the provisions of the Convention is a well-recognized fact and has often been a recommendation made by the Committee to States parties. Plans of action must be comprehensive, including plans and strategies for children with disabilities, and should have measurable outcomes. The draft convention on the rights of persons with disabilities, in its article 4, paragraph 1 c, emphasizes the importance of inclusion of this aspect stating that States parties undertake "to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes" (A/AC.265/2006/4, annex II). It is also essential that all programmes be adequately supplied with financial and human resources and equipped with built-in monitoring mechanisms, for example, indicators allowing accurate outcome measurements. Another factor that should not be overlooked is the importance of including all children with disabilities in policies and programmes. Some States parties have initiated excellent programmes, but failed to include all children with disabilities.

[...]

H. Civil Society

25. Although caring for children with disabilities is an obligation of the State, NGOs often carry out these responsibilities without the appropriate support, funding or recognition from Governments. States parties are therefore encouraged to support and cooperate with NGOs enabling them to participate in the provision of services for children with disabilities and to ensure that they operate in full compliance with the provisions and principles of the Convention. In this regard the Committee draws the attention of States parties to the recommendations adopted on its day of general discussion on the private sector as a service provider, held on 20 September 2002 (CRC/C/121, paras. 630-653)

[...]

Article 12 – Respect for the views of the child

- 32.** More often than not, adults with and without disabilities make policies and decisions related to children with disabilities while the children themselves are left out of the process. It is essential that children with disabilities be heard in all procedures affecting them and that their views be respected in accordance with their evolving capacities. In order for this principle to be respected, children should be represented in various bodies such as parliament, committees and other forums where they may voice views and participate in the making of decisions that affect them as children in general and as children with disabilities specifically. Engaging children in such a process not only ensures that the policies are targeted to their needs and desires, but also functions as a valuable tool for inclusion since it ensures that the decision-making process is a participatory one. Children should be provided with whatever mode of communication they need to facilitate expressing their views. Furthermore, States parties should support the training for families and professionals on promoting and respecting the evolving capacities of children to take increasing responsibilities for decision-making in their own lives.

[...]

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Article 42

[...]

- 2.** States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.

[...]

Convention on the Rights of Persons with Disabilities (2006)

Article 3. General principles

The principles of the present Convention shall be:

[...]

- c)** Full and effective participation and inclusion in society;

[...]

Article 4. General Obligations

[...]

- 3.** In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

[...]

Article 29. Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- a.** Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

- i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;
- b. Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:
- i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
 - ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels

Committee on the Rights of Persons with Disabilities, General Comment no. 2, Article 9 (accessibility), 2014, CRPD/C/GC/2

I. Introduction

1. Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. Without access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies. It is no coincidence that accessibility is one of the principles on which the Convention on the Rights of Persons with Disabilities is based (art. 3 (f)). Historically, the persons with disabilities movement has argued that access to the physical environment and public transport for persons with disabilities is a precondition for freedom of movement, as guaranteed under article 13 of the Universal Declaration of Human Rights and article 12 of the International Covenant on Civil and Political Rights. Similarly, access to information and communication is seen as a precondition for freedom of opinion and expression, as guaranteed under article 19 of the Universal Declaration of Human Rights and article 19, paragraph 2, of the International Covenant on Civil and Political Rights.
 2. Article 25 (c) of the International Covenant on Civil and Political Rights enshrines the right of every citizen to have access, on general terms of equality, to public service in his or her country. The provisions of this article could serve as a basis to incorporate the right of access into the core human rights treaties.
- [...]
4. The International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination clearly establish the right of access as part of international human rights law. Accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access. The Convention on the Rights of Persons with Disabilities includes accessibility as one of its key underlying principles —a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities. Accessibility should be viewed not only in the context of equality and non-discrimination, but also as a way of investing in society and as an integral part of the sustainable development agenda.
- [...]
12. Given these precedents and the fact that accessibility is indeed a vital precondition for persons with disabilities to participate fully and equally in society and enjoy effectively all their human rights and

fundamental freedoms, the Committee finds it necessary to adopt a general comment on article 9 of the Convention on accessibility, in accordance with its rules of procedure and the established practice of the human rights treaty bodies.

II. Normative Content

13. Article 9 of the Convention on the Rights of Persons with Disabilities stipulates that, “to enable persons with disabilities to live independently and participate fully in all aspects of life, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”. It is important that accessibility is addressed in all its complexity, encompassing the physical environment, transportation, information and communication, and services. The focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication, and services. As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise. Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity. This approach stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity. Accessibility should be provided to all persons with disabilities, regardless of the type of impairment, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, legal or social status, gender or age. Accessibility should especially take into account the gender and age perspectives for persons with disabilities.
14. Article 9 of the Convention clearly enshrines accessibility as the precondition for persons with disabilities to live independently, participate fully and equally in society, and have unrestricted enjoyment of all their human rights and fundamental freedoms on an CRPD/C/GC/2 5 equal basis with others. Article 9 has roots in existing human rights treaties, such as article 25 (c) of the International Covenant on Civil and Political Rights on the right to equal access to public service, and article 5 (f) of the International Convention on the Elimination of All Forms of Racial Discrimination on the right of access to any place or service intended for public use. When those two core human rights treaties were adopted, the Internet, which has changed the world dramatically, did not exist. The Convention on the Rights of Persons with Disabilities is the first human rights treaty of the 21st century to address access to ICTs; and it does not create new rights in that regard for persons with disabilities. Furthermore, the notion of equality in international law has also changed over the past decades, with the conceptual shift from formal equality to substantive equality having an impact on the duties of States parties. States’ obligation to provide accessibility is an essential part of the new duty to respect, protect and fulfil equality rights. Accessibility should therefore be considered in the context of the right to access from the specific perspective of disability. The right to access for persons with disabilities is ensured through strict implementation of accessibility standards. Barriers to access to existing objects, facilities, goods and services aimed at or open to the public shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility.

[...]

22. New technologies can be used to promote the full and equal participation of persons with disabilities in society, but only if they are designed and produced in a way that ensures their accessibility. New investments, research and production should contribute to eliminating inequality, not creating new barriers. Article 9, paragraph 2 (h), therefore calls on States parties to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost. The use of hearing enhancement systems, including ambient assistive systems

to assist hearing aid and induction loop users, and passenger lifts pre-equipped to allow use by persons with disabilities during emergency building evacuations constitute just some of the examples of technological advancements in the service of accessibility.

- 23.** Since accessibility is a precondition for persons with disabilities to live independently, as provided for in article 19 of the Convention, and to participate fully and equally in society, denial of access to the physical environment, transportation, information and communication technologies, and facilities and services open to the public should be viewed in the context of discrimination. Taking “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities” (art. 4, para. 1 (b)) constitutes the main general obligation for all States parties. “States parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds” (art. 5, para. 2). “In order to promote equality and eliminate discrimination, States parties shall take all appropriate steps to ensure that reasonable accommodation is provided” (art. 5, para. 3).

[...]

IV. Relationship with other articles of the Convention

[...]

- 43.** Article 29 of the Convention guarantees persons with disabilities the right to participate in political and public life, and to take part in running public affairs. Persons with disabilities would be unable to exercise those rights equally and effectively if States parties failed to ensure that voting procedures, facilities and materials were appropriate, accessible and easy to understand and use. It is also important that political meetings and materials used and produced by political parties or individual candidates participating in public elections are accessible. If not, persons with disabilities are deprived of their right to participate in the political process in an equal manner. Persons with disabilities who are elected to public office must have equal opportunities to carry out their mandate in a fully accessible manner.

[...]

- 47.** International cooperation, as described in article 32 of the Convention, should be a significant tool in the promotion of accessibility and universal design. The Committee CRPD/C/GC/2 14 recommends that international development agencies recognize the significance of supporting projects aimed at improving ICT and other access infrastructure. All new investments made within the framework of international cooperation should be used to encourage the removal of existing barriers and prevent the creation of new barriers. It is unacceptable to use public funds to perpetuate new inequalities. All new objects, infrastructure, facilities, goods, products and services must be fully accessible for all persons with disabilities. International cooperation should be used not merely to invest in accessible goods, products and services, but also to foster the exchange of know-how and information on good practice in achieving accessibility in ways that will make tangible changes that can improve the lives of millions of persons with disabilities worldwide. International cooperation on standardization is also important, as is the fact that organizations of persons with disabilities must be supported so that they can participate in national and international processes to develop, implement and monitor accessibility standards. Accessibility must be an integral part of any sustainable development effort, especially in the context of the post-2015 development agenda.
- 48.** The monitoring of accessibility is a crucial aspect of the national and international monitoring of the implementation of the Convention. Article 33 of the Convention requires States parties to designate focal points within their governments for matters relating to the implementation of the Convention, as well as to establish national frameworks to monitor implementation which include one or more independent mechanisms. Civil society should also be involved and should participate fully in the monitoring process. It is crucial that the bodies established further to article 33 are

duly consulted when measures for the proper implementation of article 9 are considered. Those bodies should be provided with meaningful opportunities to, inter alia, take part in the drafting of national accessibility standards, comment on existing and draft legislation, submit proposals for draft legislation and policy regulation, and participate fully in awareness-raising and educational campaigns. The processes of national and international monitoring of the implementation of the Convention should be performed in an accessible manner that promotes and ensures the effective participation of persons with disabilities and their representative organizations. Article 49 of the Convention requires that the text of the Convention be made available in accessible formats. This is an innovation in an international human rights treaty and the Convention on the Rights of Persons with Disabilities should be seen as setting a precedent in that respect for all future treaties.

Committee on the Rights of Persons with Disabilities, General comment no. 1, Article 12 (Equal recognition before the law), 2014, CRPD/C/GC/1

[...]

Article 29: Political participation

- 48.** Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.
- 49.** States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity.

V. Implementation at the national level

- 50.** In the light of the normative content and obligations outlined above, States parties should take the following steps to ensure the full implementation of article 12 of the Convention on the Rights of Persons with Disabilities:
 - (a)** Recognize persons with disabilities as persons before the law, having legal personality and legal capacity in all aspects of life, on an equal basis with others. This requires the abolition of substitute decision-making regimes and mechanisms that deny legal capacity and which discriminate in purpose or effect against persons with disabilities. It is recommended that States parties create statutory language protecting the right to legal capacity on an equal basis for all.
 - (b)** Establish, recognize and provide persons with disabilities with access to a broad range of support in the exercise of their legal capacity. Safeguards for such support must be premised on respect for the rights, will and preferences of persons with disabilities. The support should meet the criteria set out in paragraph 29 above on the obligations of States parties to comply with article 12, paragraph 3, of the Convention.
 - (c)** Closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation, policies and other decision-making processes that give effect to article 12.

[...]

International Labour Organisation Indigenous and Tribal Peoples Convention (n° 169) (1989)

[...]

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
 - (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
 - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
 - (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

[...]

Article 6

1. In applying the provisions of this Convention, governments shall:
 - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabitants.

[...]

United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)

[...]

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

[...]

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

[...]

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

[...]

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

[...]

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Declaration on the Right to Development, adopted by the General Assembly, 41/128 (1986)

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

[...]

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

[...]

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013

[...]

IV. Human rights obligations relating to the environment

[...]

A. Procedural obligations

29. One of the most striking results of the mapping exercise is the agreement among the sources reviewed that human rights law imposes certain procedural obligations on States in relation to environmental protection. They include duties (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm.

[...]

2. Duties to facilitate public participation in environmental decision-making

36. The baseline rights of everyone to take part in the government of their country and in the conduct of public affairs are recognized in the Universal Declaration of Human Rights (art. 21) and the International Covenant on Civil and Political Rights (art. 25), respectively. Again, human rights bodies have built on this baseline in the environmental context, elaborating a duty to facilitate public participation in environmental decision-making in order to safeguard a wide spectrum of rights from environmental harm.
37. The Special Rapporteur on hazardous substances and wastes and the Special Rapporteur on the situation of human rights defenders have stated that governments must facilitate the right to

participation in environmental decision-making (see A/HRC/7/21 and A/68/262).²¹¹ The Committee on Economic, Social and Cultural Rights has encouraged States to consult with stakeholders in the course of environmental impact assessments, and has underlined that before any action is taken that interferes with the right to water, the relevant authorities must provide an opportunity for “genuine consultation with those affected” (general comment No. 15 (2002), para. 56). Regional human rights tribunals agree that individuals should have meaningful opportunities to participate in decisions concerning their environment.²¹²

38. The need for public participation is reflected in many international environmental instruments. Principle 10 of the Rio Declaration states: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level... Each individual shall have... the opportunity to participate in decision-making processes.” In 2012, in *The Future We Want*, the outcome document of the United Nations Conference on Sustainable Development (Rio+20 Conference), States recognized that “opportunities for people to influence their lives and future, participate in decision-making and voice their concerns are fundamental for sustainable development” (A/CONF.216/16, para. 13). Environmental treaties that provide for public participation include the Stockholm Convention on Persistent Organic Pollutants (art. 10), the Convention on Biological Diversity (art. 14(1)), the United Nations Convention to Combat Desertification (arts. 3 and 5), and the United Nations Framework Convention on Climate Change (art. 6(a)). The Aarhus Convention has particularly detailed requirements (arts. 6–8).²¹³
39. The rights of freedom of expression and association are of special importance in relation to public participation in environmental decision-making. The Special Rapporteur on the situation of human rights defenders has said that those working on land rights and natural resources are the second-largest group of defenders at risk of being killed (A/HRC/4/37), and that their situation appears to have worsened since 2007 (A/68/262, para. 18). Her last report described the extraordinary risks, including threats, harassment, and physical violence, faced by those defending the rights of local communities when they oppose projects that have a direct impact on natural resources, the land or the environment (A/68/262, para. 15).
40. States have obligations not only to refrain from violating the rights of free expression and association directly, but also to protect the life, liberty and security of individuals exercising those rights.²¹⁴ There can be no doubt that these obligations apply to those exercising their rights in connection with environmental concerns. The Special Rapporteur on the situation of human rights defenders has underlined these obligations in that context (A/68/262, paras. 16 and 30), as has the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41, para. 21), the Committee on Economic, Social and Cultural Rights,²¹⁵ the Inter-American Court of Human Rights,²¹⁶ and the Commission on Human Rights, which called upon States “to take all necessary measures to protect the legitimate exercise of everyone’s human rights when promoting environmental protection and sustainable development” (resolution 2003/71).

[...]

²¹¹ For statements by other special rapporteurs, see Report on special procedures, sect. III.A.2.

²¹² Regional agreements report, sect. II.B.1; Inter-American report, sect. III.A.2.

²¹³ MEA report, sect. III.A.2.

²¹⁴ International Covenant on Civil and Political Rights, art. 2; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, arts. 2, 9 and 12.

²¹⁵ ICESCR report, sect. III.A.4.

²¹⁶ For example, *Kawas Fernández v. Honduras*, Merits, Reparations and Costs, Judgement dated 3 April 2009 (Ser. C No. 196). For other cases, see Inter-American report, sect. III.A.4.

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015

[...]

III. Good practices in the use of human rights obligations relating to the environment

22. The following description of good practices in the use of human rights obligations in relation to environmental protection is organized into nine categories: (a) procedural obligations generally; (b) the obligation to make environmental information public; (c) the obligation to facilitate public participation in environmental decision-making; (d) the obligation to protect the rights of expression and association; (e) the obligation to provide access to legal remedies; (f) substantive obligations; (g) obligations relating to non-State actors; (h) obligations relating to transboundary harm; and (i) obligations relating to those in vulnerable situations. Practices that fall into more than one category were placed in the category that seemed most relevant.
23. Because of space limitations, this report describes the practices only briefly. A fuller description of each practice is available at the websites noted above.
24. The Independent Expert is well aware that there are many more good practices in this field than those that this project has identified. The practices included here should be taken as illustrative, rather than exhaustive, of the many innovative and exemplary efforts being made to bring a human rights perspective to environmental protection.

A. Procedural Obligations

25. Human rights law imposes procedural obligations on States in relation to environmental protection, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm (A/HRC/25/53, para. 29). These obligations also have support in international environmental instruments, particularly Principle 10 of the Rio Declaration, which provides that “each individual shall have appropriate access to information concerning the environment that is held by public authorities” and “the opportunity to participate in decision-making processes”, and that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
26. The following sections of this report describe good practices in the use of each of these procedural obligations. This section describes several practices that are relevant to the full range of procedural obligations.
27. One such practice was the adoption in 2010 by the UNEP Governing Council of the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 26 voluntary guidelines that assist States to implement their commitments to Principle 10.²¹⁷ UNEP is preparing a comprehensive guide for the implementation of the Bali Guidelines, which will be published in 2015.
28. Another good practice is the implementation of these procedural obligations through regional agreements. In 1998, the States members of the United Nations Economic Commission for Europe adopted the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which states that:

to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with provisions of this Convention (art. 1).

²¹⁷ UNEP Governing Council Dec. SS.XI/5 (26 February 2010).

The Convention sets out detailed requirements for the implementation of each of these access rights. As of January 2015, the Convention has 47 Parties, which include virtually all of the States in Europe as well as a number of States in Central Asia.

29. To facilitate the implementation of the Convention, the Organization for Security and Co-operation in Europe maintains a network of Aarhus Centres, including in Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Montenegro, Serbia and Tajikistan. The Centres disseminate environmental information, carry out educational and training projects, and provide venues where the public can discuss environmental concerns. For example, the Khujand Aarhus Centre in northern Tajikistan conducted a campaign in the town of Taboshar to raise its residents' awareness of the health risks associated with a nearby abandoned uranium mine.
30. Nineteen States in Latin America and the Caribbean, with the assistance of the Economic Commission for Latin America and the Caribbean, decided in November 2014 to begin negotiation of a new regional agreement that would implement the access rights set out in Principle 10, with a view to completing the negotiation by December 2016. Together with the Aarhus Convention, this initiative will provide invaluable models to other regions considering similar agreements.
31. Civil society organizations have also engaged in exemplary practices designed to facilitate the exercise of procedural rights to information, participation and remedy. One of the most notable is The Access Initiative (TAI), a global network of more than 150 civil society organizations that work together to promote procedural rights. TAI has developed a toolkit that helps civil society to assess environmental governance in their countries and to identify opportunities to make positive changes. Together with the World Resources Institute, TAI is also developing an Environmental Democracy Index, which will measure country-specific realization of the three procedural rights according to indicators based on the Bali Guidelines.

[...]

C. Obligation to facilitate public participation in environmental decision-making

42. Human rights bodies have made clear that States have a duty to facilitate public participation in environmental decision-making. This obligation flows from the rights of individuals to participate in the government of their country and in the conduct of public affairs, and is also necessary to safeguard a broad range of rights from environmental harm(A/HRC/23/55, para. 36).
43. A large number of States have adopted exemplary statutes providing for public participation in the development of environmental laws. For example, Chile's Environmental Framework Law provides that the Ministry of Environment should encourage and facilitate public participation in the formulation of policies, plans and environmental standards. To give effect to this provision, the Ministry created a website called e-PAC (<http://epac.mma.gob.cl/Pages/Home/index.aspx>), which allows citizens to provide comments on every proposed rule or regulation. Greece launched the Open Governance Project in 2009, which requires that draft regulations be made available online for public consultation. Similarly, national agencies in the United States of America must publish notices of proposed rulemaking, and the public has an opportunity to submit written comments that the agencies must take into account.
44. In addition, many States have adopted statutes requiring public participation in environmental impact assessment (EIA) procedures. For example, India amended its EIA law in 2006 to require a public consultation period once a draft EIA is prepared. The law in Trinidad and Tobago provides the public with the opportunity to submit comments on an EIA for at least 30 days after notice for comment is advertised. In the United States, agencies must provide public notice of hearings related to EIAs, and the public may provide comments and seek judicial review of EIA decisions.
45. Some States have taken additional steps to promote informed participation by those most affected by environmental harms. Antigua and Barbuda based its Sustainable Island Resource Management Zoning Plan on extensive stakeholder consultation. In 2009, the Government of Finland implemented the Action Programme on eServices and eDemocracy, which was designed to develop new tools for citizen participation in land-use planning. One aspect of the programme is Harava, an interactive

map-based application used by local governments to collect feedback from citizens, including by marking on an online map where they believe a new protected area should be located. Another programme, called Alvari, has been adopted at the subnational level in Finland by the city of Tampere. It created public advisory groups that have participated in more than 350 planning-related decisions since 2007.

46. Mexico has established consultative councils for sustainable development, which can provide forums for designing and evaluating public policies on environmental issues, as well as helping to reach consensus among interested parties in environmental decision-making. Currently, Mexico has a national council and six regional councils, each of which is composed of representatives of civil society organizations, academia, the corporate sector and government agencies. In the United States of America, the Environmental Protection Agency has established “community advisory groups” to provide a public forum for local community members to express their concerns relating to the clean-up of hazardous waste sites, and to provide the Agency with community preferences for site remediation.
47. Civil society organizations can also play an important role in facilitating public participation. In Mongolia, the Asia Foundation has worked with government agencies, citizens and corporations to create Local Multi-Stakeholder Councils (LMSCs) composed of representatives of mining companies, local governments and communities. The objective of the LMSCs is to ensure a balanced ecosystem and responsible resource use through active participation of many stakeholders. As of 2013, the project had facilitated the establishment of 31 LMSCs. In a number of African countries, Namati, a non-profit organization, has trained “community paralegals” to empower individuals and communities to protect their lands and national resources. For example, in Myanmar, Namati and a local partner organization have trained more than 30 paralegals to help families to register and protect their land rights.
48. At the regional level, a good example of facilitating public participation is the Joint Public Advisory Committee (JPAC) to the North American Commission for Environmental Cooperation. The JPAC is composed of 15 citizens, five from each country in North America, who come together to advise the Commission. The JPAC holds meetings and workshops throughout the year in different locations within the three countries. Decisions of the JPAC and records from its meetings are available on the Commission’s website (www.cec.org).
49. An often overlooked aspect of the obligation to facilitate public participation is the value of assessing the effectiveness of different approaches to such participation. In Mexico, the environmental agency has created an index (the Índice de Participación Ciudadana del Sector Ambiental, or IPC) that evaluates citizen participation in various institutions relating to environmental decision-making, on the basis of indicators in four main categories: public participation; transparency; inclusion and equality; and citizen complaints. The agency published the first IPC in 2010, and subsequent IPCs have used the 2010 report as a baseline in order to assess whether public participation is improving.

[...]

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on climate change and human rights, A/HRC/31/52, 1 February 2016

[...]

IV. Human rights obligations relating to climate change

[...]

B. Procedural obligations

50. As the mapping report explains, human rights bodies agree that to protect against environmental harm that impairs the enjoyment of human rights, States have several procedural obligations, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate

public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm (see A/ HRC/25/53, paras. 29-43). They are also supported by provisions in international environmental instruments, including principle 10 of the 1992 Rio Declaration on Environment and Development.

[...]

2. Facilitating public participation

56. The obligation to facilitate public participation in environmental decision-making has strong roots in human rights law. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the baseline rights of everyone to take part in the government of their country and in the conduct of public affairs. Again, human rights bodies have built on this baseline in the environmental context, clarifying the duty to facilitate public participation in environmental decision-making in order to safeguard a wide spectrum of rights from environmental harm.
57. There can be no doubt that this duty encompasses decision-making in relation to climate policy. States have long emphasized the importance of public participation in addressing climate change. Article 6 (a) of the United Nations Framework Convention on Climate Change requires its parties to promote and facilitate public participation, and the General Assembly has recognized “the need to engage a broad range of stakeholders at the global, regional, national and local levels, including national, subnational and local governments, private businesses and civil society, and including youth and persons with disabilities, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change”.²¹⁸ Similarly, article 12 of the Paris Agreement requires its parties to cooperate in taking appropriate measures to enhance public participation.
58. Many States have adopted laws that provide for public participation in developing environmental policy (see A/HRC/28/61, paras. 42-49). Some, such as Guatemala and Jordan, provide for public participation in the formulation of climate policy in particular. All States should ensure that their laws provide for effective public participation in climate and other environmental decision-making, including by marginalized and vulnerable groups, and that they fully implement their laws in this respect. Such participation not only helps to protect against abuses of other human rights; it also promotes development policies that are more sustainable and robust.
59. To be effective, public participation must include the provision of information to the public in a manner that enables interested persons to understand and discuss the situation in question, including the potential effects of a proposed project or policy, and must provide real opportunities for the views of the affected members of the public to be heard and to influence the decision-making process.²¹⁹ These principles are of special importance for members of marginalized and vulnerable groups, as other mandate holders have described in more detail (see, e.g., A/64/255, paras. 63-64; A/66/285, paras. 81-82; and A/67/299, para. 37). In some cases, as the Special Rapporteur on the right to housing has stated, it may be necessary to build the capacity of members of such groups in order to facilitate their informed participation (see A/64/255, para. 63). Again, these requirements apply not only to decisions about how much climate protection to pursue, but also to the measures through which the protection is achieved. Decisions on mitigation or adaptation projects must be made with the informed participation of the people who would be affected by the projects.
60. To enable informed public participation, the rights of freedom of expression and association must be safeguarded for all people in relation to all climate-related actions, including for individuals who oppose projects designed to mitigate or adapt to climate change. To try to repress persons trying to express their views on a climate-related policy or project, whether they are acting individually or together with others, is a violation of their human rights. States have clear obligations to refrain

²¹⁸ General Assembly resolution 67/210, para. 12.

²¹⁹ UNEP report, pp. 17-18.

from interfering with those seeking to exercise their rights, and States must also protect them from threats, harassment and violence from any source (see A/HRC/25/53, para. 40).

61. At the international level, States should ensure that projects supported by climate finance mechanisms respect and protect all human rights, including the rights of information, participation and freedom of expression and association. As the recent UNEP report describes in detail, these mechanisms vary in their current levels of protection. Some, such as the Adaptation Fund, include safeguards that are generally considered to be satisfactory, while others, such as the Clean Development Mechanism, have been criticized for failing to provide for adequate stakeholder consultation and thereby resulting in human rights violations through displacement and the destruction of livelihoods.²²⁰ The Special Rapporteur strongly agrees with the recommendation in the UNEP report that “the safeguards for the various climate funds and other mechanisms used to finance mitigation and adaptation projects should be made uniform and revised to fully account for human rights considerations”.²²¹

[...]

Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, The right to participation, A/69/213, 31 July 2014

I. Introduction

1. The Special Rapporteur submits the present report to the General Assembly in accordance with Human Rights Council resolutions 16/2 and 21/2. The report examines the right to participation in the context of the human right to safe drinking water and sanitation. During the course of her mandate, she has witnessed the positive impact of authentic participation in ensuring more sustainable and inclusive results, as well as persisting problems stemming from the lack of meaningful participation.
2. There are many positive examples of participatory processes in the water and sanitation sector. However, these seem to be isolated instances rather than systematic approaches to ensuring participation at all levels. Participation is not a single event, but a continuous process. Institutionalizing genuine participation and embedding it in the political culture is challenging, but when done properly, as the Special Rapporteur on extreme poverty and human rights has noted, the gains in terms of strengthening public life and people's ability to make autonomous decisions and in being able to claim and enjoy their rights, as well as achieving sustainability, are clear (A/HRC/23/36, paras. 16-18).
3. The Special Rapporteur is concerned that “participation” is sometimes a façade. Where processes fail to pay attention to power relationships, including entrenched hierarchies, patriarchal structures and mechanisms of exclusion, they can perpetuate, or even reinforce, inequalities. An ostensibly “participatory” process may lend legitimacy to entrenched inequalities. It would be naïve to assume that participation per se is empowering; empowerment does not occur automatically, and the greatest challenge in realizing the right to participation may be to ensure that everyone can realize his or her right to participation on the basis of equality.
4. Participation is a human right. As such, it is an obligation that demands compliance. What is more, participation brings wide-ranging advantages in terms of empowerment and sustainability. It is essential for guaranteeing democracy, and it strengthens people's autonomy, agency and dignity.
5. A number of instruments provide detailed guidance on participation in particular areas or for certain population groups. However, guidance from a human rights perspective relating to all areas of decision-making on water and sanitation is still lacking. For example, what are the minimum standards for ensuring the right to participation? What does active, free and meaningful participation imply and how can it be implemented? How can participation be embedded systematically at all levels, for all population groups?

²²⁰ *Ibid.*, pp. 36-39.

²²¹ *Ibid.*, p. 41.

6. Much of the discourse around participation has taken place in the context of development cooperation, urging donors, non-governmental organizations (NGOs) and international organizations to adopt a human rights-based and participatory approach to their programming. While acknowledging that these actors play significant roles, the present report focuses on participation in national processes. National processes are of the utmost importance for the realization of the right to participation, and other actors should support States in developing these processes.
7. To inform her views on the issue, the Special Rapporteur convened a consultation of experts from different backgrounds, gathering both technical expertise and knowledge gained through experience. She also sent out a questionnaire on participation in the realization of the right to water and sanitation and received more than 50 responses from States and other stakeholders.²²²
8. The present report outlines the legal basis of the right to participation. It then discusses a number of elements that need to be in place to make participation active, free and meaningful, and addresses difficulties in ensuring participation. It then discusses participation at different levels of decision-making and concludes with a number of recommendations.

II. Legal basis of the right to participation

9. The right to participation is enshrined in numerous human rights instruments. The Universal Declaration of Human Rights sets out in article 21 (a) that everyone has the right to take part in the government of their country. The Declaration on the Right to Development, which has come to significantly influence the understanding of participation, states in article 2 (3) that participation to be “active, free and meaningful”.²²³
10. Article 25 (a) of the International Covenant on Civil and Political Rights guarantees the right “to take part in the conduct of public affairs, directly or through freely chosen representatives”. In interpreting this provision, the Human Rights Committee, in paragraph 5 of general comment No. 25 (1996), states that “the conduct of public affairs ... relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels”.
11. Treaties adopted subsequent to the International Covenant expand the understanding of participation. Article 7 (b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women’s equal rights to “participate in the formulation of government policy and the implementation thereof” and to “participate in non-governmental organizations and associations concerned with the public and political life of the country”. Article 14 (2) (a) specifies that women living in rural areas have the right to “participate in the elaboration and implementation of development planning at all levels”.
12. Article 12 of the Convention on the Rights of the Child guarantees the child’s right to be heard and to have his or her views taken into account. By requiring not only that children be given the opportunity to express their views in all matters affecting them but also that those views be given due weight, the Convention seeks to ensure that children’s participation is meaningful.
13. “Full and effective participation and inclusion in society” is one of the general principles of the Convention on the Rights of Persons with Disabilities (art. 3 (c)). Article 29 of the Convention, devoted to participation in political and public life, details measures that States shall take to “ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others”.
14. The Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization identifies participation as its cornerstone in articles 6 and 7. Article 6 (1) (b) states that Governments shall “establish means by which these [indigenous] peoples can freely participate, to at least the same extent as other sectors of the population”, in applying the provisions of the Convention. The United Nations Declaration on the Rights of Indigenous Peoples provides for a more far-reaching standard, requiring “free, prior and informed consent” on various matters that are the subject of the Declaration.

²²² For more information, see: www.ohchr.org/EN/Issues/WaterAndSanitation/SRWWater/Pages/ContributionsParticipation.aspx.

²²³ See Committee on the Rights of the Child, general comment No. 12 (2009), para. 28.

15. In Europe, article 5 (i) of the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) of the Economic Commission for Europe (EEC) identifies “access to information and public participation in decision-making concerning water and health” as a principle, and articles (5) (b) and 6 (2) require public participation in target-setting and developing water-management plans. Moreover, the ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) guarantees the right to participate in decisions on specific activities, in the establishment of plans, programmes and policies and in the development of laws (arts. 6-8). Efforts are under way to develop a similar instrument under the auspices of the Economic Commission for Latin America and the Caribbean.²²⁴ The Special Rapporteur welcomes these developments.
16. Other regional instruments include the African Charter on Human and Peoples’ Rights (art. 13 (1)), the American Convention on Human Rights (art. 23 (1) (a)), the Inter-American Democratic Charter (art. 2) and the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) concerning the right to free elections (art. 3). Article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides for equal participation of women in the political and decision-making process. Furthermore, the right to participation is enshrined in many national legal systems.
17. The right to participation is firmly grounded in human rights law. Starting from rather general provisions on participation in the conduct of public affairs, recent developments spell out the requirements in more detail. Instruments on child rights, the rights of persons with disabilities and indigenous rights respond to particular challenges faced by certain groups. They also mark a trend towards a broader and more robust understanding of participation that demands inclusive, active, free and meaningful participation in all areas at all stages.

III. Elements of active, free and meaningful participation

18. Active, free and meaningful participation rules out token forms of participation, the mere sharing of information or superficial consultation. This section identifies essential elements of active, free and meaningful participation in order to clarify what participation means in human rights terms.

A. Involving people in setting out the terms of engagement

19. Participants must be involved in determining the terms of participation, the scope of issues and the questions to be addressed, their framing and sequencing, and rules of procedure. The power to take part in setting the terms of the engagement plays a big role in shaping the conversation. Having no say over the design of the very process of engagement can result in some issues being tacitly decided beforehand and excluded from the participatory space altogether. The choice of mode of engagement determines whether people will be willing and able to participate. Efforts should be made, for instance, to involve residents in deciding venues, meeting times, and what balance of electronic and face-to-face interaction should be struck.

B. Creating space for participation

20. In some instances, empowered participatory governance has been successful, i.e., people have effectively mobilized to influence policy-making. For example, communities in California successfully mobilized, leading to the adoption of Assembly Bill 685, the California Human Right to Water Bill. Communities in California’s Central Valley formed a coalition of NGOs, the Safe Water Alliance, and successfully engaged legislators to act on their behalf.²²⁵ In the Rupnagar slum in Bangladesh, a girls’ club encourages neighbours to follow safe menstrual hygiene practices. The club members produce sanitary napkins and go door to door to promote hygienic behaviour (see A/HRC/15/55 and Corr.1, para. 69); they also negotiated for and obtained a legal water connection.

²²⁴ <http://www.eclac.cl/rio20/principio10/default.asp?idioma=IN>.

²²⁵ International Human Rights Law Clinic, *The Human Right to Water Bill in California: An Implementation Framework for State Agencies* (Berkeley, University of California School of Law, May 2013). Available from www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL.pdf

21. States must provide the opportunity to engage and develop such initiatives. However, States must not justify inaction by placing the entire burden on the people taking the initiative. States have an obligation to invite participation and to create opportunities from the beginning of deliberations on a particular measure and before any decisions, even *de facto* decisions, have been taken; once preliminary decisions are taken, or promises made, it becomes much more difficult to agree on outcomes. Spaces for participation should be both formal (for instance, referendums or public inquiries) and informal.

C. Enabling people to access participatory processes

22. States not only have to create or promote spaces for participation, but also must enable people to eliminate barriers to accessing deliberative processes. People must have information on how to access these spaces and the procedures for getting involved. One expert has interpreted article 12 of the Convention on the Rights of the Child to require “space” and “voice”, i.e., the child must have the opportunity to express his/her views with adequate facilitation.²²⁶ The Committee on the Rights of the Child points out that “[t]hose responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child.... The decision maker must adequately prepare the child before the hearing, and has to take account of the views of the child in this regard”.²²⁷ Article 29 of the Convention on the Rights of Persons with Disabilities requires States parties to ensure that persons with disabilities can effectively and fully participate in public life and actively promote an adequate environment for that purpose.
23. The most persistent barrier to participation may lie in surmounting a culture of low expectations and cynicism, beliefs harboured both by individuals and public officials. States should revise the incentive structures for public officials so that they are rewarded for facilitating genuine participation rather than regarding it merely as an item to be mechanically ticked off on a checklist. This may require training on facilitation and inter-personal skills.
24. Enabling participation can take many forms. For example, in supporting village-level autonomy in development planning in the late 1990s, the State of Kerala in India offered seminars to teach the basics of conducting assessments and formulating development plans.²²⁸ Other barriers may relate to language, literacy, meeting times, venue, advance registration and physical access. Sufficient time needs to be allowed for the participatory process. If deadlines for the receipt of public input are too tight, some interested actors may be shut out. The Aarhus Convention requires timely and effective notification of the concerned public as well as reasonable time frames for participation (art. 6 (2)).

D. Guaranteeing free and safe participation

25. Free participation rules out any form of coercion or inducement, direct or indirect. Participation must be free from manipulation or intimidation. There must be no conditions attached, such as tying access to water and sanitation to attendance of a public hearing. Participation must not be secured through bribery or the promise of a reward.²²⁹
26. Participation must be safe. People must not be or feel threatened when attending meetings or otherwise participating. They must be able to voice their concerns freely or request information without fear of reprisals or discrimination. Some individuals, including sex workers, undocumented migrants, survivors of human trafficking or rejected asylum seekers, face particular barriers and fear exposing themselves when taking part in official processes. Similarly, sanitation workers in many countries may not want to be identified because of stigma attached to their job. States must take specific measures to enable people to take part without fear of exposure, e.g., by allowing for anonymous participation.

²²⁶ Laura Lundy, “‘Voice’ is not enough: conceptualizing article 12 of the United Nations Convention on the Right of the Child”, *British Educational Research Journal*, vol. 33, No. 6 (December 2007), p. 933

²²⁷ Committee on the Rights of the Child, general comment No. 12 (2009), para. 41.

²²⁸ Archon Fung and Erik Olin Wright, “Deepening democracy: innovations in empowered participatory governance”, *Politics and Society*, vol. 29, No. 1 (March 2001), *Political Sociology*, p. 16.

²²⁹ Guidelines on Free, Prior and Informed Consent (Geneva, UN-REDD Programme (United Nations collaborative initiative on Reducing Emissions from Deforestation and Degradation), 2013), p. 18 (hereafter UN-REDD Guidelines). Available from www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53.

E. Ensuring access to information

27. Participation must be informed. People require accessible information on the issues at stake that enables them to form an opinion. Access to information must be “full and equal”, not favouring some and excluding others.²³⁰ To ensure equal access, information must be made available and be clear and consistent. It must be presented in different formats and in appropriate language. This requires communicating through various channels and media such as radio, photographs and oral presentations; simply posting information online does not make it accessible to everyone. For people to be able to understand and verify the information presented, it must be provided well in advance of any opportunity to provide input. 10 Cost must not be a barrier to accessing information. The Aarhus Convention explicitly requires that people may inspect information relevant for decision-making at no cost (art. 6 (6)).
28. Information must be objective, i.e., cover the potential positive and negative impacts of the measures being considered, as well as comprehensive, i.e., not leave out significant element.²³¹
29. Access to information must be guided by the principle of maximum disclosure. Exceptions should be narrow and must relate to a legitimate aim.²³² Public bodies should proactively publish information rather than merely react to crises or complaints. Requests for information should be processed rapidly and fairly. The State must ensure that the right to participation is not undermined by claiming commercial confidentiality, which must be limited to legitimate interests. Meetings by public bodies should generally be open to the public.²³³

F. Providing reasonable opportunity to influence decision-making

30. Meaningful participation entails ensuring that people's views are considered and influence the decision. Often, consultations are oriented towards securing people's consent rather than involving them in the design of measures. If people are allowed “voice without influence”²³⁴, i.e., they are involved in processes that have no impact on policy-making, the potential for frustration is enormous. The Aarhus Convention requires that public bodies take due account of the outcome of public participation and notify the public of the decision made, along with reasons and considerations on which the decision is based (art. 6 (8) and (9)). In relation to child rights, it is required that children have an “audience” and “influence”, i.e., that their views be listened to and acted upon as appropriate.²³⁵ The child must be informed of the outcome and how her or his views were considered.²³⁶
31. The process that preceded the adoption by Brazil of its national plan for water and sanitation is an illustration of good practice: the Government made publicly available a record of all the contributions received, indicating that over two thirds of the suggestions had been incorporated into the plan and giving reasons why the remaining ones were not included (A/HRC/27/55/Add.1, para. 93). Similarly, authorities in Tuscany, Italy, are required to answer proposals made regarding policies and explain why they are adopted or rejected.²³⁷

IV. Difficulties in ensuring participation

32. Ensuring participation poses a number of difficulties. The greatest efforts may be needed to ensure that all those concerned have the opportunity to influence decision-making and that existing power structures are addressed. But other challenges exist as well.

²³⁰ Committee on Economic, Social and Cultural Rights, general comment No. 15 (2003) on the right to water, para. 48.

²³¹ UN-REDD Guidelines, p. 19.

²³² Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, International Standards Series (London, 1999), p. 5. Available from www.article19.org/data/files/pdfs/standards/righttoknow.pdf.

²³³ See Article 19, The Free Flow Principles: Freedom of Expression and the Rights to Water and Sanitation, International Standards Series (London, 2014), p. 9.

²³⁴ John Gaventa, “Introduction: exploring citizenship, participation and accountability”, IDS Bulletin, vol. 33, No. 2 (2002), p. 1.

²³⁵ Lundy, p. 933.

²³⁶ Committee on the Rights of the Child, general comment No. 12 (2009), para. 45.

²³⁷ Region of Tuscany Law No. 69/2007, Norme sulla promozione della partecipazione alla elaborazione delle politiche regionali e locali, art. 10.

A. Complementing representative democracy with direct participation

33. Some argue that direct participation is unnecessary where structures for representative democracy exist. Decisions by elected representatives would already be regarded as legitimate, given the mandate conferred by the electorate. However, article 25 of the International Covenant on Civil and Political Rights provides both for the right to vote and the right to participate in public affairs. Periodic elections are a blunt instrument for achieving public participation, let alone for ensuring inclusion.²³⁸ The realization of human rights is a dynamic process, and elections alone are not enough. Participatory processes complement representative democratic structures and allow for more direct influence by the public.

B. Continuous State support and oversight in the context of community management

34. The terms “user participation” and “community ownership” have been used in connection with the water and sanitation sector for decades. However, participation was thought of merely in terms of how it would affect project costs and outcomes. In practice, delegation to communities was seen to imply a sufficient degree of participation so that, by delegating, State authorities could withdraw and not exercise their obligations. While communities can play a role in service provision, States retain the obligation to ensure that services are adequate by providing support, regulation and oversight. Where services are decentralized, States must ensure that communities have adequate resources to fulfil their responsibilities.

C. Balancing technical expertise and knowledge gained through experience

35. Some decisions require technical expertise. However, that is often used as a pretext for excluding people from participating in decision-making on issues presented as being “too complicated” for lay people to understand. Many decisions viewed as purely technical are in fact value choices, and the public must participate in making them. Experts still have a role to play, but that role is ideally one of facilitator, helping to synthesize and communicate expert knowledge and enabling people to take informed decisions.
36. Negative examples abound of the failure to achieve the appropriate balance between technical expertise and knowledge gained through experience. For example, there have been cases where providing communities with latrines using subsidies and a standard model design was expected to solve the rural sanitation problem. However, it emerged that the latrines were often not used, or were used as storage facilities or to house livestock. On the other hand, where modifications to water and sanitation facilities are needed to ensure accessibility by disabled persons, specialist knowledge plays a useful role by informing the process of analysing the strengths and weaknesses of each option so that people can make an informed choice in light of their particular needs.²³⁹ Testimony can be extremely powerful and effective for bringing people’s experiences to bear. “Poverty truth commissions” can lead to a useful inversion of power dynamics, with those who have become experts through experience testifying and those “in power” hearing the testimony.²⁴⁰ The process ensures that people experiencing poverty are at the heart of developing solutions.

D. Factoring in the costs of participatory processes

37. Participatory processes cost money and take time. In addition to costs for the State and service providers, the time and opportunity costs for the people participating must not be overlooked. This is not an argument against encouraging participation, but it should serve as a reminder of the dilemmas involved. In order to justify the costs and avoid frustration, participation must be meaningful and actually influence decision-making.
38. From the perspective of Governments and service providers, the cost of undoing or redoing a project because of people’s objections can be higher than the costs of participatory processes. The wastefulness of facilities that end up not being utilized demonstrates that investing in participatory

²³⁸ Fung and Wright, p. 5.

²³⁹ Véanse ejemplos en Hazel Jones y Bob Reed, *Water and Sanitation for Disabled People and Other Vulnerable groups: Designing Services to Improve Accessibility* (Longborough, (Reino Unido), Water, Engineering and Development Centre (WEDC), 2005).

²⁴⁰ Véase, por ejemplo, el caso de Escocia: www.faithincommunityscotland.org/poverty-truthcommission.

processes is cost-effective. The cost of participation should be factored in from the beginning, not viewed as an external expense. In the Olivia Road case heard by the Constitutional Court of South Africa, the municipal government argued that given the large number of people in need it would be impractical and costly to expect meaningful engagement. The Court disagreed, stating that the city of Johannesburg should have taken the consequences of its policies into account when it drew up its strategy.²⁴¹ A joint programme by the United Nations Development Programme and the United Nations Children's Fund (UNICEF) on institutional development and water infrastructure in Bosnia and Herzegovina allocated a significant share of the budget to strengthening the inclusion of residents in participatory municipal water governance²⁴².

E. Balancing competing interests

39. Ensuring participation and gathering everyone's views inevitably brings diverse and competing interests to the fore. For instance, the interests of property owners and occupiers might clash. Utility workers or small-scale service providers have interests that differ from those of water users. The framework for balancing competing interests is human rights and the law. Many tensions will be resolved by applying the legislative framework, as doing so would automatically rule out illegitimate interests.
40. The challenge is to balance a diversity of legitimate interests and to find solutions that, while perhaps not taking all competing views fully on board, are acceptable to everyone. The key actions in this regard are interaction, bringing all views to the table, having an open discussion, analysing the different interests and corresponding rights at stake, agreeing on a way forward and then monitoring progress on the agreed plan. Decisions must take all opinions into account, according due protection to minority concerns rather than simply adopting the majority view.

F. Ensuring inclusion

41. Participatory processes will not automatically include everyone. Assuming that they do would not only be naïve, but also carry the risk of entrenching inequalities. Men, majority ethnic groups, wealthier and more educated households, and people with higher social status tend to participate to a disproportionate degree. For instance, the Special Rapporteur raised concerns about the lack of opportunities for indigenous peoples in Canada to participate in decision-making on funding for water and sanitation.²⁴³ Communities cannot be considered a coherent and integrated whole; rather, inherent hierarchies and entrenched patterns of inequalities must be acknowledged.
42. Inclusion must be deliberate. The first step is to identify those who are marginalized and the barriers they face. This requires deliberate efforts because a history of marginalization will often have resulted in making such groups invisible to policy makers. Processes to identify everyone concerned can be more successful by working together with a wide range of local NGOs and the national human rights institution as well as others who are in a position to identify the most marginalized, including people who tend not to join groups or associations.
43. Efforts must enable effective participation. For example, a mode of engagement that relies on writing would marginalize the illiterate. Where approaches such as questionnaires are used, it is essential to recognize the risks of elite capture and counter it with other opportunities such as simple versions of a questionnaire and oral discussions. Even when they are able to take part in meetings, marginalized groups often exercise self-censorship, being intimidated either by the presence of others with "higher" status or formal procedures. One approach to avoid this is starting the process with more homogenous groups for discussing particular issues, e.g., groups of women or of young people, and then bring their input into the larger process. At the international level, the United Nations Environment Programme engages with "major groups" rather than civil society as a whole, including children and youth, farmers, indigenous peoples, women, and workers and trade unions.²⁴⁴

²⁴¹ Tribunal Constitucional de Sudáfrica, *Occupiers of 51 Olivia Road v. City of Johannesburg*, CCT 24/07, párr. 19.

²⁴² www.mdgfund.org/program/securingaccesswaterthroughinstitutionaldevelopmentandinfrastructure.

²⁴³ Véase [https://spdb.ohchr.org/hrdb/24th/public_-_OL_Canada_14.05.13_\(3.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_OL_Canada_14.05.13_(3.2013).pdf).

²⁴⁴ www.unep.org/civil-society.

44. Another approach is having an explicit discussion on the rules for deliberation, accompanied by a conscious attempt to draw out the voices of marginalized individuals. Otherwise, the process can easily default to existing patterns and hierarchies, with their attendant unacknowledged communication protocols. Two different approaches demonstrate this. Villagers serving on health watch committees in Bangladesh were inducted through a series of workshops, at which they agreed on the rules of deliberation (when and how to speak, addressing every member with respect, etc.). The minutes of meetings of the health watch committees show evidence of genuine balanced deliberations, whereas a similar initiative, where no rules on deliberation were agreed, was dominated by the voices of medical professionals and members with higher social status.²⁴⁵
45. An assessment of barriers must address all types of obstacles: physical, economic, institutional, attitudinal and social. Physical barriers affect persons with disabilities, but they also relate to decisions on meeting times and childcare. Social barriers include prejudices and stereotypes. Gender norms and stereotypes play a significant role in determining what degree of control men and women exercise. In many instances, social norms legitimize women's exclusion from decision-making. Social norms explain, for instance, why authorities fail to take seriously reports of women being subjected to indignities and risks of sexual violence when accessing sanitation facilities outside their home.²⁶ As the Special Rapporteur has noted elsewhere, taboos around menstruation, combined with inadequate access to water and sanitation, explain why a significant number of girls consistently lose a week of schooling each month (A/HRC/21/42, para. 22). Without a deliberate effort to draw out their own analysis and ideas, solutions will often fail to address women's and girls' needs.
46. With regard to water management, principle No. 3 of the Dublin Statement on Water and Sustainable Development, adopted by the International Conference on Water and the Environment in 1992, acknowledges that "[w]omen play a central part in the provision, management and safeguarding of water.... [I]mplementation of this principle requires positive policies ... to equip and empower women to participate at all levels in water resources programmes, including decision-making and implementation".²⁷ While women's participation is essential, care must be taken to avoid reinforcing existing stereotypes about women and girls being solely responsible for water management, which in many instances implies water collection.
47. Children are among those most often excluded from participatory processes, and it must not be assumed that adults will automatically represent their views. It is essential to create the space and allow sufficient time for child-led processes, including to identify issues that are of concern to them, as well as collaborative environments for adults and children.
48. Deliberate inclusion is even more crucial in circumstances where marginalization is based on stigma, which "legitimizes" exclusion by making it socially "justifiable" (ibid., para. 78). Where necessary and appropriate, participatory processes should include a "safe space" where social norms can be openly discussed and brought to the surface. Concerned individuals and groups can deliberate on what action to take and whom to involve among public and private institutions. For individuals and groups who have been marginalized, it is particularly important to have assurances that their participation counts and that voice will translate into influence.

G. Balancing direct participation and representation of groups

49. Direct participation poses challenges in terms of processing and responding to the variety of inputs. Channelling participation through representatives other than democratically elected officials is seen as a solution to making participation manageable, but it poses difficult questions and runs the risk of creating and reinforcing exclusions. People hold rights as individuals and have varied and often conflicting views and interests, which makes it difficult for anyone to represent anyone else. The Convention on the Rights of Persons with Disabilities, for instance, stresses that persons with disabilities must be enabled to participate, not only organizations working on their behalf (arts. 29, 33 (3)). However, there is a need to facilitate participatory processes and come to decisions that reflect everyone's interest to the largest extent possible.

²⁴⁵ Simeen Mahmoud, "Spaces for participation in health systems in rural Bangladesh: the experience of stakeholder community groups", in *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas*, Andrea Cornwall and Vera Schattan Coelho, eds. (Londres, Zed, 2007), pág. 65.

50. Stakeholder participation has been used extensively in an attempt to address such challenges. Organized groups viewed as representing the interests of concerned people are invited. People do not engage with policymakers directly, but through collective entities “representing” them: NGOs, neighbourhood associations or community-based groups. In some instances, stakeholder participation has been limited to a few well-established NGOs, raising doubts about whether their involvement amounts to genuinely inclusive participation. Moreover, “stakeholders” do not necessarily represent individuals and their interests, but can also include companies, donors and other actors, rather than rights holders as such.
51. Stakeholder participation can enhance or detract from meaningful participation depending on a range of factors, including:
 - (a) Accurate, sensitive and transparent identification, so that the invited groups are in fact representative of those most concerned. When selection is appropriate, stakeholder participation has an advantage over an “unaffiliated” approach. It can be employed to ensure targeted participation by all concerned, including marginalized groups whose interests are likely to be overlooked in the pursuit of the common interest;
 - (b) The degree to which the collective entity is indeed representative of the interests of those it claims to represent;
 - (c) Stakeholder participation must be supplemented by a deliberate effort to identify concerned people who may not be reached through this method and to devise a way to fill the gap. Examples include extremely poor people, who are not likely to join associations, or stigmatized persons.
52. Another approach to balancing direct participation with group representation would be to elect representatives inside the process only once it has started rather than before. Other approaches that have been used include random selection, which has the advantage of avoiding biases in selection and getting different perspectives.²⁴⁶
53. The Royal Commission on the Future of Health Care in Canada (Romanow Commission), set up by the Government of Canada in 2001, used the citizens dialogue methodology. Deliberative forums brought together statistically representative groups of “unaffiliated citizens”, with instructions to “speak for themselves, not as representatives of special interests”²⁴⁷. The initiative was acclaimed as an exercise in extensive public consultation; however, it has been criticized for having inadequately addressed aboriginal health care. Although some participants were aboriginal, the structure of the process made no deliberate effort to overcome dynamics of marginalization and encourage their participation.²⁴⁸
54. The examples show that regardless of the approaches used, the greatest challenges consistently relate to ensuring inclusion. There is always the danger of elite capture, of only listening to the established and more powerful voices. Therefore, what is most crucial are deliberate efforts to guarantee inclusion.

V. Participation at all levels of decision-making

55. The focus of participation has often been on decision-making at the local and even the project level. For instance, principle No. 2 of the Dublin Statement stresses that a participatory approach “means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects”.
56. Many decisions can be taken at the local level; this has the advantage of being close to the people concerned. However, participation must not be limited to local decisions. People must have the opportunity to participate wherever decisions are taken. In some instances, people have invested

²⁴⁶ Yves Sintomer, Carsten Herzberg y Anja Röcke, “From Porto Alegre to Europe: potential and limitations of participatory budgeting”, *International Journal of Urban and Regional Research*, vol. 32, núm. 1, (2008), pág. 173.

²⁴⁷ Judith Maxwell, Karen Jackson and Barbara Legowski, *Report on Citizens' Dialogue on the Future of Health Care in Canada*, Commission on the Future of Health Care in Canada, 2002, p. 94. Available from http://www.cprn.org/documents/12704_en.PDF.

²⁴⁸ See Bettina von Lieres and David Kahane, “Inclusion and representation in democratic deliberations: lessons from Canada's Romanow Commission”, in Cornwall and Coelho, p. 133

time and energy in processes at the local level, but the decisions taken are not acted upon and cannot be implemented as local bodies lack the power to do so, in particular where institutional decentralization is not matched by fiscal devolution. Broader power structures often constrain the scope of decision-making at the local level. In such instances, not only are people's expectations frustrated, but participation cannot be considered meaningful.

57. Many far-reaching decisions shaping the overall direction of policies and priorities are taken at the national level. In other words, people must not only have the opportunity to decide on the location of a borehole or latrine, but also on the priorities set by the Government, the distribution and redistribution of resources and the strategic decisions on legislative and policy frameworks. Decisions are also taken at the international level, and some international processes have far-reaching implications and may influence priorities at the national level for years and decades. For instance, in the process of discussing the post-2015 sustainable development agenda, international organizations sought to create spaces for voicing ideas, proposals and concerns.²⁴⁹ However, the questions remain whether these voices translate into influence on actual decision-making on future development goals at the political level and whether such participation can be considered meaningful.

A. Planning and formulation of policy and legal frameworks

58. Participation must be ensured in the formulation of legislation and policies. For instance, in Uruguay, the inclusion of the right to water and sanitation in the Constitution (art. 47) was achieved through a referendum. At the same time, legislation and policies are useful instruments for recognizing the right to participate and spelling out the requirements for participation. Many countries include in their constitutions the right to participation or enshrine participation as a principle. For instance, the Constitution of Uganda guarantees the right to participate "in the affairs of government" (art. 38 (1)). In the European Union, the acknowledgement of citizen initiatives in the Treaty of Lisbon furthers the growing significance of participation.²⁵⁰
59. The legal and policy frameworks need to be as detailed as possible in setting out the institutions and procedures that will enable participation. Unless this is done, the right to participation can remain intangible. For instance, although South Africa's National Water Act contains robust provisions on public engagement in integrated water resource management, it was only after detailed guidelines were issued regarding the development of catchment management strategies that officials began to seek participation.²⁵¹
60. Participation at the national level inevitably presents challenges of scale. Care must be taken to ensure the representativeness of the entities involved, and measures must be taken to focus on the participation of groups and individuals whose interests tend to be overlooked. The Constitutional Court of South Africa developed the concept of "meaningful engagement" in the *Olivia Road*²⁵² case, holding that people have a right to participate in decisions affecting the enjoyment of social rights, including in developing plans of action. While courts cannot implement participatory processes, they may act as an important trigger in institutionalizing structures for engagement.²⁵³
61. En el Brasil, el Gobierno emprendió un proceso participativo de base amplia para elaborar su plan nacional de agua y saneamiento. El proceso incluía talleres y consultas, además de otros mecanismos de participación a través de los consejos de política nacional encargados de las ciudades, los recursos hídricos y el medio ambiente, así como a través de Internet. Algunos componentes del proceso incluían debates técnicos, mientras que en otros se utilizaba un lenguaje más sencillo (véase A/HRC/27/55/Add.1).

²⁴⁹ See, for example, www.worldwewant2015.org.

²⁵⁰ Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, document 6655/08, 2008, arts. 10 and 11.

²⁵¹ Derick du Toit and Sharon Pollard, "Updating public participation in IWRM [Integrated Water Resource Management]: a proposal for a focused and structured engagement with catchment management strategies", *Water SA*, vol. 34, No. 6 (2008).

²⁵² *Occupiers of 51 Olivia Road v. City of Johannesburg*, CCT 24/07, para. 35.

²⁵³ Brian Ray, "Proceduralisation's triumph and engagement's promise in socio-economic rights litigation", *South African Journal on Human Rights*, vol. 27, No. 1 (2011), p. 107.

B. Financing and budgeting

62. Participation in decisions on financing and budgeting is extremely important. If people are not involved in decisions on the allocation of resources, then legislation and policies, however well designed, may not translate into prioritization. However, public participation, or even information, in the area of finance is the exception rather than the rule.
63. Participation involves determining which and how strategies and programmes are funded, how the Government can raise revenue, how existing funding can be restructured and what alternative solutions should be sought. For example, in Milton Keynes, in the United Kingdom of Great Britain and Northern Ireland, a referendum was held resulting in an agreement to higher council taxes for improved service provision.²⁵⁴ Service providers should also engage residents in designing the mode of payment. The residents of Kayole-Soweto, Kenya, negotiated a social connection policy with Nairobi Water, enabling them to spread out their payment of the connection fee over two years.²⁵⁵
64. The most robust example of participation in budgeting is participatory budgeting, a process that gives individuals the right to actually allocate resources²⁵⁶. One of the best-known examples is Porto Alegre, Brazil²⁵⁷. Delegates elected from the various areas of the city form a participatory budgeting council that formulates and approves the city's budget. The input is informed by forums held in the various areas. The council has the power to call the city officials to account for the previous year's expenditure, and planned expenditure is only approved if the council is satisfied with the accounts.
65. Even where participatory budgeting has not been adopted, some principles must be applied to enable the public to play a role in decisions on raising revenue and allocating resources. Information on the budget and financing processes must be made accessible. There must be public deliberation on any trade-offs between the different options from which the Government must choose; what residents identify as priorities is sometimes dissociated from the action that service providers and/or Governments take. During her visit to Brazil, the Special Rapporteur encountered an example. Residents of the Complexo do Alemão in Rio de Janeiro identified water and sanitation as their priority. However, the Government prioritized the construction of a cable car in the settlement (A/HRC/27/55/Add.1, para. 95). Meaningful participation would demand that residents' views be given due weight and that their priorities not be dismissed.
66. An essential part of the budget cycle is determining whether allocations are spent as planned. Civil society can play a role in facilitating people's engagement in budget monitoring. WaterAid Nepal, for instance, has developed materials for assisting communities to monitor the Government's budgetary allocations to the water and sanitation sector²⁵⁸. Another tool used to monitor government expenditure is the public expenditure tracking survey, a process through which residents can follow the flow of public funds. For instance, in the United Republic of Tanzania, communities use such tracking to monitor government spending of funds allocated for water and sanitation. They request explanations from the relevant authorities, which result in greater responsiveness and accountability. The methodology has received the support of the Government, which has promulgated a series of national guidelines for the process.²⁵⁹

²⁵⁴ Lawrence Pratchett, ed., "Introduction: defining democracy renewal", in *Renewing Local Democracy? The Modernisation Agenda in British Local Government* (Taylor and Francis, 2000), p. 10.

²⁵⁵ Celestine N. Musembi, "Watered down: gender and the human right to water and sanitation in Mathare, Nairobi", in *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa*, Anne Hellum and Patricia Kameri-Mbote, eds. (forthcoming, 2014).

²⁵⁶ Yves Sintomer, Carsten Herzberg and Giovanni Allegretti, *Participatory Budgeting Worldwide: Updated Version Dialog Global*, No. 25, 10 (Bonn, Service Agency Communities in One World, 2013).

²⁵⁷ Zander Navarro, "Participatory budgeting in Porto Alegre, Brazil", in *Citizens in Charge: Managing Local Budgets in East Asia and Latin America*, Isabel Licha, ed. (Washington, D.C., Inter-American Development Bank, 2004), pp. 247-291.

²⁵⁸ Catarina de Albuquerque and Virginia Roaf, *On the Right Track: Good Practices in Realizing the Rights to Water and Sanitation* (Lisbon, 2012), p. 187. 41 *Ibid.*, pp. 187-188.

²⁵⁹ *Ibid.*, pág. 210.

C. Service provision

67. Participation in the context of service provision relates to a range of decisions, including on the type, location and improvement of services and whether and how to involve the private sector. Lessons can also be drawn from community-led total sanitation.²⁶⁰ Finally, emergencies require special attention.

Decisions on type and improvement of services

68. The people concerned must be involved in decisions on what kind of service to provide. They may be decisions on whether to supply water through standpipes or water kiosks, where to situate latrines and how to maintain them. Inclusiveness in this process is crucial so that services are designed to respond to the interests and requirements of marginalized individuals as well as “the average person”. The design of service provision must be based on a sound understanding of the local context. Solutions should build on existing norms and practices to the extent that these are consistent with human rights. However, local rules and customs must not be idealized, but carefully scrutinized for their adherence to human rights standards, in particular non-discrimination and equality, to ensure that existing patterns of marginalization are not reinforced.
69. In the Beja case, a South African court dealt with an agreement between the local government and the community regarding decisions on the design of toilets. The court held that such agreements must satisfy certain minimum requirements, including consultation with authorized representatives following the sharing of information and technical support, where necessary.²⁶¹ The court found that these requirements had not been met. It also voiced concern that “a majority within a community [cannot] approve arrangements in terms of which the fundamental rights of a vulnerable minority within that community will be violated.”²⁶² It found a denial of effective community participation in decision-making.²⁶³
70. Initiatives taken by residents can also have a significant impact on the improvement of services and sanitary conditions. For instance, Rialto Rights in Action has been campaigning in Dublin for improvement of the conditions in Dolphin House, a large public housing complex. The campaign seeks to empower people to claim their right to housing. Residents gathered evidence of wastewater invasion through toilets and baths and mould. They developed indicators based on human rights that are monitored regularly, including sewage invasion and dampness; records were kept of responses received from the Dublin City Council and on instances of inclusion of residents in decision-making. Residents successfully engaged with the media and, following public pressure, by 2013 the city had refurbished 40 of the worst-affected housing units. While progress has not been as quick as initially agreed, a regeneration plan is in progress.²⁶⁴

Private sector participation

71. The public must participate in decisions on whether to delegate service provision to private entities. In many countries, the decision to involve the private sector as part of reforms required by international financial institutions or in the context of austerity measures was not publicly debated. Even in times of economic crisis, the Government must ensure the broadest possible participation. International financial institutions should not make private sector participation a conditionality, thereby pre-empting public involvement in decision-making. In a communication with the Government of Portugal, the Special Rapporteur raised concerns about the lack of meaningful participation and of information on contractual agreements in processes to promote private sector participation (A/HRC/25/74, p. 27).
72. Transparency and participation must be safeguarded in tendering, bidding, negotiating contracts, deciding on the rate model and on the extension of services. The terms of reference and the draft contract should be made available for public scrutiny and comment. The State can protect the right

²⁶⁰ www.communityledtotalsanitation.org.

²⁶¹ Western Cape High Court of South Africa, Cape Town, *Beja and others v. Premier of the Western Cape* (21332/10), judgement of 29 April 2011, para. 98.

²⁶² *Ibid.*, párr. 99.

²⁶³ *Ibid.*, párr. 146.

²⁶⁴ Rory Hearne and Padraic Kenna, “Using the human rights based approach to tackle housing deprivation in an Irish urban housing estate”, *Journal of Human Rights Practice*, vol. 6, No. 1 (March 2014), pp. 1-25

to participation through contractual arrangements with non-State service providers and through its regulatory role.

73. In Berlin, a coalition of concerned individuals and civil society groups initiated a referendum that succeeded in making the contracts relating to a public - private partnership for provision of water services in 1999 available for public scrutiny, though only years after the city entered into the contract.²⁶⁵

Disconnection of services

74. The Committee on Economic, Social and Cultural Rights, in its general comment No. 15 (2002) on the right to water, states that before any services are disconnected, certain conditions must be met, inter alia: (a) genuine consultation with those affected (including ascertaining ability to pay); (b) timely and full disclosure of information; and (c) reasonable notice (para. 56).
75. Some countries' water laws reflect such requirements. The South African Water Services Act requires that disconnections must be preceded by notice and the persons concerned provided with the reasons for the action, and informed of their right of appeal (sects. 11 (4) and 4 (3)). The courts have reversed some disconnections because the process had not been fair.²⁶⁶

Community-led total sanitation

76. A positive lesson in people's agency can be learned from community-led total sanitation, which relies on a community's capacity for collective action to end open defecation. The approach challenges the dominance of "expert" solutions and subsidies, focusing instead on reflection and behaviour change through mobilization. It looks beyond the individual to create open defecation-free communities. Facilitators engage the community in analysing the implications of open defecation on health, dignity and women's security. The process usually succeeds in making clear that unless the entire community uses latrines, everyone is affected.²⁶⁷

Emergencies

77. Responding to emergencies poses particular challenges for participation. There is often a concern that States and humanitarian actors need to be able to act quickly and that participatory processes would slow down responses. However, many decisions on disaster response are taken beforehand, and participation is essential at the planning stage. Moreover, in many instances emergency responses develop into more long-term programmes. In relation to menstrual hygiene management during an emergency, for instance, a solution might be to include a standard response for distributing sanitary kits to make sure that immediate needs are met on the basis of cultural preferences as far as they are known, or assumed. This response should be monitored subsequently to assess whether it meets women's and girls' needs, and then adjusted accordingly.²⁶⁸ The need for a rapid response should not be used as an excuse to pre-empt participation. What is needed instead, in particular given the wide range of actors involved in this context, is a broader discussion on how participation can be ensured in cases of emergencies and provision of humanitarian assistance through participatory planning in advance, as well as in monitoring and adjusting emergency responses. The standards contained in The Sphere Handbook recognize that participation by people affected by disaster is integral to humanitarian response²⁶⁹.

D. Projects that may threaten the realization of human rights

78. Meaningful participation must be ensured in any situation where people's access to water or sanitation is (potentially) affected by a project. Mining, for instance, can have serious consequences on both water quantity and quality that can extend across generations (see, for example, A/HRC/24/41,

²⁶⁵ De Albuquerque and Roaf, p. 163.

²⁶⁶ For example, High Court of South Africa, Residents of Bon Vista Mansions v. Southern Metropolitan Local Council, case No. 01/12312, 2002.

²⁶⁷ Kamal Kar and Robert Chambers, Handbook on Community-Led Total Sanitation (Plan UK and Institute of Development, 2008), p. 9.

²⁶⁸ Marni Sommer, "Menstrual hygiene management in humanitarian emergencies: gaps and recommendations", Waterlines, vol. 31, Nos. 1 and 2 (January 2012), pp. 83 and 96

²⁶⁹ The Sphere Project, Humanitarian Charter and Minimum Standards in Humanitarian Response (The Sphere Handbook), 2011, p. 53.

para. 15). Such situations are often marked by an atmosphere of mistrust and power imbalances. Environmental and social impact assessments are needed not only to assess the impact of a project, including on human rights, but are also invaluable for the community to gain clarity. Ideally, impact assessments should be undertaken collaboratively with the community. At a minimum, there must be full disclosure of the findings.

79. A case in India concerning the renewal of a mining lease affirmed the right to participation.²⁷⁰ The court held that, even though the required information was not made available in time for the public hearing, the relevant authority was required to provide the reasons for the decision to renew the lease. It emphasized that the purpose of the legal requirements was to make public hearings meaningful including full information on the advantages and disadvantages of the project and its likely impact.

E. Monitoring, evaluation and accountabilitys

80. People must be involved in monitoring and evaluation and, ideally, in designing the relevant framework. Where States, donors, NGOs or other external actors undertake monitoring and evaluation without involving the people concerned, the findings — too often treated as confidential — should be made available.
81. Participatory approaches to monitoring and evaluation are gaining ground. Participatory monitoring and evaluation differs from conventional approaches in that local people take charge of the process.²⁷¹ The participants themselves design the methodology, define the indicators, collect and analyse the data and decide how it should inform action.
82. One approach to participation in this area is participatory geographic information systems, which rely on maps. They merge technical spatial information with a local community's location-specific knowledge, often producing rich data including on land use, water sources, differentiated access to resources and sites of actual or potential environmental hazards.²⁷² For instance, OpenStreetMap²⁷³ initiatives in informal settlements in Nairobi have generated detailed data, indicating how many households share a toilet, whether there are gender-specific toilets, whether the toilets have disability access and whether the toilets provide sanitary bins for women. Such data provide a powerful tool for monitoring trends and patterns of neglect or underinvestment. They can also provide a baseline, which becomes useful in monitoring the environmental impact of extractive industries, for instance, leading to demands for remedial action. Communities have also used self-enumeration, popularized by Shack/Slum Dwellers International, to collect data²⁷⁴. It has been an effective tool for countering the view that it is impossible to plan for service provision in informal settlements because of a lack of reliable data.
83. More broadly, social accountability mechanisms refer to mechanisms through which residents or civil society hold State officials or service providers to account. Social accountability has the power to increase the pressure on officials to explain and justify their decisions; fear of damage to one's reputation can sometimes be a stronger deterrent or incentive than legal proceedings. The Equitable Access Score - Card²⁷⁵ developed by ECE and the World Health Organization (WHO) offers a tool that can help Governments and other stakeholders establish a baseline, discuss actions to be taken and evaluate progress through self-assessment. This process, as shown by the experiences of France, Portugal and Ukraine, can enable an objective debate and generate input for policy processes.
84. Some initiatives involve partnerships between communities, service providers and the Government. Examples include service charters developed jointly between water user associations and service

²⁷⁰ High Court of Delhi at New Delhi, Writ petition (civil) No. 9340/2009 and CM APPL Nos. 7127/09, 12496/2009, judgement of 26 November 2009.

²⁷¹ Marisol Estrella and John Gaventa, *Who Counts Reality? Participatory Monitoring and Evaluation: A Literature Review*, Institute of Development Studies (IDS) Working Paper No. 70, 1998, p. 16.

²⁷² Giacomo Rambaldi, "Participatory 3-dimensional modelling for policy change and planning: the practice and the potential", in *Who Counts? The Power of Participatory Statistics*, Jeremy Holland, ed. (Practical Action, 2013), pp. 1-224.

²⁷³ www.openstreetmap.org.

²⁷⁴ See the Map-Mathare and Map-Kibera initiatives, available from www.jambonewspot.com/in-kenya-using-tech-to-put-an-invisible-mathare-slum-on-the-map; <http://matharesiokenya.wordpress.com/category/map-mathare-2/>; <http://mapkibera.org/work/locations>. See also www.majidata.go.ke.

²⁷⁵ UNECE and WHO/Europe, *The Equitable Access Score-Card: supporting policy processes to achieve the human right to water and sanitation* (ECE/MP.WH/8), 2013, p. 9.

providers.²⁷⁶ These charters spell out the obligations of each party and become the basis for monitoring the quality of services: whether water supply is regular, whether water charges remain affordable, whether sanitation service providers are maintaining the agreed level of cleanliness,²⁷⁷ and whether service has gradually been expanded to underserved areas.

85. For social accountability mechanisms to work, people must be able to access the relevant information, whether from Government or service providers. The linkage with formal accountability mechanisms such as regulators, ombudspersons and judicial review strengthens social accountability. For instance, the national human rights commissions in Colombia, Ecuador and Peru play an active role in monitoring the relevant government bodies and service providers to ensure that water and sanitation services are delivered in a non-discriminatory manner.²⁷⁸ This role could be made more participatory by linking it up with social accountability initiatives.
86. In addition to participation in accountability, there must also be accountability for ensuring participation. Courts and other mechanisms play an important role in ensuring accountability in cases of failure to ensure active, free and meaningful participation, i.e., when the right to participation itself has been violated. As evidenced by the case law referenced in the present report, courts play an important role in demanding compliance with States' obligations to ensure participation.

VI. Conclusions and Recommendations

87. Participation is a human right and States have corresponding obligations to ensure participation. Participation is essential for democracy and people's autonomy, agency and dignity. Yet, the human right to participation has not yet received the necessary attention and implementation has lagged. While there are excellent practices that ensure participation, these appear to be isolated rather than institutionalized. Participation is not a one-off exercise, but a continuous process that must be embedded in the political culture.
88. In many instances only token attention has been paid to participation. All too often, only the well off and powerful, as determined by gender, ethnicity, income and other factors, "participate" in decision-making, to the exclusion of marginalized members of society. The greatest challenge may lie in ensuring participation on the basis of equality. When participatory processes do not unveil and address entrenched power structures and marginalization, they carry the risk of being manipulative and of reinforcing and "legitimizing" inequalities. Equality and non-discrimination demand structural transformation to remove barriers to meaningful participation for all. They also require deliberation and redistributive action to remedy past patterns of resource allocation that have reinforced marginalization.
89. The human rights framework stresses that participation is not just "useful" or a "good idea"; it gives rise to obligations that States have to comply with. The human rights principle of accountability is indispensable in ensuring that decision makers actually take the action necessary to translate voice into influence. As such, participation is an antidote to corruption, exposing maladministration and vested interests. Public officials are answerable and accountable to the public, including on how public input is taken into account in decision-making. There are consequences for failure to fulfil obligations that can ultimately be enforced in court.
90. In line with the above, the Special Rapporteur offers the following conclusions and recommendations:
91. States must take the following measures:
 - a) States must take measures to institutionalize participation, including by:
 - (i) Considering recognizing the right to participation in national constitutions;
 - (ii) Spelling out the instruments, processes, responsible institutions and other details of participatory processes in legislation and policies;
 - (iii) Incorporating the costs of participatory processes in the initial design of any measures;

²⁷⁶ See, for example, Water and Sanitation for the Urban Poor (WSUP), "Getting communities engaged in water and sanitation projects: participatory design and consumer feedback", WSUP Topic Brief No. 007, February 2013.

²⁷⁷ See, for example, Neil Overy, The Social Justice Coalition and Access to Basic Sanitation in Informal Settlements in Cape Town, South Africa, International Budget Partnership, Study No. 11, 2013.

²⁷⁸ De Albuquerque and Roaf, p. 203.

- (iv) Equipping institutions to facilitate participatory processes and training officials in the interpersonal skills needed for participatory engagement;
 - (v) Balancing technical expertise with knowledge gained through experience, encouraging technical experts to act as facilitators and to enable people to make informed choices;
 - b) States must take concrete and deliberate measures to ensure that participatory processes are inclusive and do not inadvertently further entrench inequalities, including by:
 - (i) Identifying groups that are typically marginalized;
 - (ii) Using a wide variety of methods and channels to reach different groups;
 - (iii) Eliminating institutional, physical, economic, attitudinal, social or other barriers that specific groups may face;
 - (iv) Addressing gender stereotypes;
 - c) To ensure active, free and meaningful participation, States must ensure that the following elements are in place:
 - (i) Involving people in setting out the terms of the engagement;
 - (ii) Creating space for participation;
 - (iii) Enabling people to access participatory processes;
 - (iv) Guaranteeing free and safe participation;
 - (v) Ensuring access to information;
 - (vi) Providing reasonable opportunities to influence decision-making and feedback on what proposals have been taken into account and what proposals have been rejected, and why;
 - d) States must ensure participation at all levels of decision-making, including strategic decisions on the overall direction of legislation and policies, priorities in the use of resources and questions of distribution and redistribution. This includes:
 - (i) Planning and formulation of policy and legal frameworks;
 - (ii) Financing and budgeting;
 - (iii) Service provision, including decisions on the type, location and improvement of services, whether and how to involve the private sector, and decisions on disconnections and on services in emergency situations. The Special Rapporteur particularly encourages a broader discussion among all relevant actors on participation in the context of emergencies;
 - (iv) Projects that may threaten the realization of human rights and impact assessments carried out in that context;
 - (v) Monitoring, evaluation and accountability;
 - e) States must ensure access to justice where the human right to participation has been violated.
- 92.** Further, States and other stakeholders should take the following measures:
- a) States should ratify international and regional instruments that guarantee the human right to participation, as well as the respective complaint mechanisms. In processes before international mechanisms, States should encourage civil society participation to make these processes meaningful;
 - b) United Nations treaty bodies, the special procedures of the Human Rights Council, other international mechanisms and regional mechanisms should pay increasing attention to the right to participation. The Special Rapporteur sees a need for standard-setting on the right to participation, e.g., through the elaboration of general comments on the right to participation in the context of civil, cultural, economic, political and social rights. She also encourages the Human Rights Council to address participation;

- c) Civil society organizations, national human rights institutions, community-based organizations and others should contribute to promoting active, free and meaningful participation of all people concerned and support people to participate in decision-making processes;
- d) International organizations and multilateral and bilateral donors should support participatory processes at the national level. They should not impose conditionalities that circumvent participatory processes at the national level. Where appropriate, they should consider adjustments to programming and project structures, recognizing that participatory processes and achieving long-term sustainable results require time.

Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, *The right to participation of people living in poverty*, A/HRC/23/36, 11 March, 2013

[...]

III. Participation, power and poverty

- 12. Lack of power is a universal and basic characteristic of poverty. Poverty is not solely a lack of income, but rather is characterized by a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce each other. Powerlessness manifests itself in many ways, but at its core is an inability to participate in or influence decisions that profoundly affect one's life, while decisions are made by more powerful actors who neither understand the situation of people living in poverty, nor necessarily have their interests at heart.
- 13. The right of people living in poverty to participate fully in society and in decision-making is blocked by multiple compounding obstacles – economic, social, structural, legal and systemic.²⁷⁹ All of these relate to their lack of financial, social and political power. Discrimination and stigma, disempowerment, lack of income, mistrust and fear of authorities all limit the possibilities and incentives for people living in poverty to participate. [...]
- 14. Material deprivation and disempowerment create a vicious circle: the greater the inequality, the less the participation; the less the participation, the greater the inequality.²⁸⁰ When the participation of people living in poverty is not actively sought and facilitated, they are not able to participate in decision-making and their needs and interests are not taken into account when policy is designed and implemented. This exacerbates their exclusion and often perpetuates the privilege of elites who are able to influence policy directly, or of groups such as the middle class who have a considerable voice in the media or other public spaces. Lack of participation in decision-making and in civil, social and cultural life is thus recognized by the international community as a defining feature and cause of poverty, rather than just its consequence.²⁸¹

[...]

- 16. Through meaningful and effective participation, people can exercise their agency, autonomy and self-determination. Participation also limits the capacity of elites to impose their will on individuals and groups who may not have the means to defend their interests. Conceived as a right, participation is a means of challenging forms of domination that restrict people's agency and self-determination. It gives people living in poverty power over decisions that affect their lives, transforming power structures in society and creating a greater and more widely shared enjoyment of human rights.
- 17. Rights-based participation is particularly necessary in order to ensure that the poorest and most marginalized people can make their voices heard, because of its principled foundations of dignity, non-discrimination and equality. Therefore, in contrast to some supposedly "participatory" processes that are pro forma, tokenistic or undertaken to give predetermined policies a veneer of legitimacy,

²⁷⁹ Many are similar to obstacles they confront in trying to access other rights; see A/67/278 (2012).

²⁸⁰ Council of Europe, *Living in Dignity in the XXIst Century, Poverty and Inequality in Societies of Human Rights: the Paradox of Democracies*, 2013, p. 125.

²⁸¹ Programme of Action of the World Summit for Social Development (1995), A/CONF.166/9, chapter II, para. 19

rights-based participation aims to be transformative rather than superficial or instrumental. It promotes and requires the active, free, informed and meaningful participation of persons living in poverty at all stages of the design, implementation and evaluation of policies that affect them, based on a comprehensive analysis of their rights, capacity and vulnerabilities, power relations, gender relations and the roles of different actors and institutions.²⁸²

[...]

19. Moreover, as participation is not merely a means to an end (e.g. poverty reduction) but rather a fundamental human right and valuable in and of itself, the most important outcomes – such as exercising self-determination, rights consciousness, assertiveness and empowerment, increased capacity and social capital – may be intangible or difficult to measure. While acknowledging the instrumental benefits participation may have, this report focuses on participation as an inherent right that aims to empower those living in poverty, and seeks to identify the conduct and actions that States must undertake to respect, protect and promote this right for people living in poverty.
20. This report focuses on the intrinsic value of participation as a fundamental right to which individuals are inherently entitled by virtue of their humanity. This right to take part and exert influence in decision-making processes that affect one's life is inextricably linked to the most fundamental understanding of being human and the purpose of rights: respect of dignity and the exercise of agency, autonomy and self-determination. The right to participation imposes concrete obligations on States voluntarily assumed in several binding human rights instruments.²⁸³

[...]

24. There is no doubt that initiating and sustaining meaningful and effective participatory processes requires time, patience, resources and planning. However, it is not a simple policy option that policymakers can choose not to implement. States (all branches at the local, national and international levels) have a legal obligation to implement inclusive, meaningful and non-discriminatory participatory processes and mechanisms, and to engage constructively with the outcomes. With political will, all States are in a position to improve the enjoyment of this right. The practices of some States, United Nations agencies and civil society organizations has shown that it is possible for States to create or support participatory mechanisms that succeed in empowering disadvantaged members of the public and improving policy. Experience shows that the benefits and opportunities outweigh the risks and challenges.

[...]

V. Human rights-based approach to participation

35. While the existing legal framework does not refer specifically to how to ensure and support the participation of people living in poverty, a systematic and teleological interpretation²⁸⁴ of several human rights norms, standards and principles can provide guidance. In the present section, several key human rights principles will be examined with the aim of determining how the right to participation of people living in poverty should be understood and realized from a human rights perspective. The subsequent section then provides concrete recommendations to States on how to operationalise these principles.
36. The following human rights principles should guide all participatory processes, including the design, formulation, implementation, follow-up and evaluation. With each principle are listed guidelines which are intended to demonstrate what specific measures that principle would necessitate in order to achieve a participatory process that is human rights compliant, inclusive of and accessible to people living in poverty. The guidelines listed are not exhaustive,²⁸⁵ nor will each apply or be appropriate in every circumstance.

²⁸² ActionAid, *People's Action in Practice: ActionAid's Human Rights Based Approach 2.0*, 2012.

²⁸³ See section IV below.

²⁸⁴ Art. 31 of the Vienna Convention on the Law of Treaties.

²⁸⁵ Due to the nature and limitations of this document, this section refers in general to the enjoyment of the right to participation by people living in poverty. Additional measures would be needed to facilitate the participation of certain specific groups or individuals such as children, older persons, persons with disabilities and indigenous peoples. The present report does not include an outline of such specific measures.

A. Respect for dignity, autonomy and agency

- 37. Dignity is the foundation of all human rights, inextricably linked to the principles of equality and non-discrimination. When based on human rights, participation can help to reclaim the dignity and autonomy of people living in poverty by recognizing them as active agents with rights and responsibilities, and enabling agency in decisions that directly affect their lives.
- 38. Respect for the inherent dignity of those living in poverty must inform all participatory processes and strategies, and each person's expertise, experience and input must be valued. First and foremost, participation must be premised on the recognition of each person as a valid speaking partner with a unique and valuable knowledge to contribute. Participatory processes should begin with and be premised on understandings and perspectives of people living in poverty, and give value to these, rather than assuming that they will comply with officials' assumptions, methods or thinking.²⁸⁶
- 39. To fully respect dignity and autonomy, participatory processes must be meaningful for those living in poverty and they should be able to exert influence over the final outcome. They should be included in all stages of the relevant decision-making processes so that they have the chance to set priorities or question the agenda in fundamental ways.

B. Non-discrimination and equality

- 40. All human beings must be able to enjoy and exercise their human rights on a basis of equality, free from discrimination of any kind. The principle of equality and non-discrimination implies that everyone should have equal and effective opportunities for making their views known to other members of society, and to be part of decision-making processes. Particular efforts must be made to ensure that certain groups who suffer structural forms of discrimination –including but not limited to women, ethnic minorities and persons with disabilities– have equal opportunities to express their views, including by assigning specific resources, mechanisms and strategies for this purpose.
- 41. Non-discrimination and equality are core elements of the international human rights framework.²⁸⁷ These principles must be respected in all stages of the participatory process, from selection of the participants to evaluation.
- 42. People living in poverty experience discrimination on the grounds of poverty itself (E/C.12/GC/20, paras. 34–35), but also frequently due to membership in other disadvantaged sectors of the population, including but not limited to indigenous peoples, persons with disabilities, ethnic minorities and people living with HIV/AIDS. Particular attention must be paid to upholding the right to equality between men and women.²⁸⁸ Thus, when designing, implementing and monitoring participatory processes, States must take into account the different experiences of men and women and gender power relations in the community. They must recognize the multiple forms of discrimination that women experience, and address women's specific needs throughout the different phases of their life cycle (childhood, adolescence, adulthood and old age). Participatory processes must also acknowledge the responsibilities of care providers without reinforcing patterns of discrimination and negative stereotyping.
- 43. Even where participatory mechanisms exist, people living in poverty face serious constraints in accessing or exerting influence through them,²⁸⁹ such as lack of information, low levels of education and illiteracy. At the logistical level, participatory processes often require time and resources that people living in poverty simply do not have; for example, they may have to pay for transportation to reach a meeting venue, find childcare or take time off work, thereby sacrificing hourly pay. Many

²⁸⁶ P. Beresford and M. Hoban, *Participation in Anti-poverty and Regeneration Work and Research: Overcoming Barriers and Creating Opportunities*, Joseph Rowntree Foundation, 2005, p. 34.

²⁸⁷ See, e.g., Universal Declaration of Human Rights, article 2; International Covenant on Civil and Political Rights, articles 2 and 26; International Covenant on Economic, Social and Cultural Rights, article 2.2; International Convention on the Elimination of All Forms of Racial Discrimination, article 1; Convention on the Elimination of All Forms of Discrimination Against Women, article 1; Convention on the Rights of the Child, article 2; and Convention on the Rights of Persons with Disabilities, article 5.

²⁸⁸ See, e.g., International Covenant on Civil and Political Rights, article 3; International Covenant on Economic, Social and Cultural Rights, article 3; and Convention on the Elimination of All Forms of Discrimination Against Women, article 1.

²⁸⁹ See Mansuri and Rao, *Localizing Development*, p. 5.

people living in poverty live in remote rural locations and do not speak the official language; thus, they may find it difficult to access information about participatory processes or reach meeting venues.

44. The principle of equality and non-discrimination requires affirmative action to ensure that everyone has equal opportunities to participate. This means that the barriers that prevent vulnerable and disadvantaged groups from participating must be identified and actively tackled to ensure substantive equality. A human rights approach requires focusing on power asymmetries at the community level and on the removal of physical, economic, legal, cultural and political obstacles that prevent marginalized groups from enjoying their right to participation. Participatory processes should not only avoid perpetuating asymmetries of power in the communities, but should actively seek to enable the most disadvantaged and excluded members of the community to participate as a matter of priority.
45. Simply increasing the number of people living in poverty present in existing decision-making spaces is not sufficient. Realizing the right to participation of people living in poverty requires prioritizing their meaningful involvement from the very beginning of the process, including priority-setting, and a number of political risks (e.g., co-option and manipulation) need to be considered.
46. Before implementing the participatory process, States or other facilitators should consider and put in place the specific resources, mechanisms and strategies needed to enable the participation of people living in poverty, in particular those most marginalized and excluded. To prevent discrimination, officials must be trained and educated to avoid stigma and stereotypes.
47. Every community or demographic has its own power dynamics; therefore, even participatory mechanisms targeted at people living in poverty are vulnerable to “elite capture” by more powerful individuals within a community. Processes that do not actively reach out to new and marginalized groups will reinforce the status quo and undermine the principle of equality. Therefore, to prevent dominant groups from co-opting participatory processes, officials must be trained to detect and understand how power is exercised to control and exclude disadvantaged groups. They should diagnose and counteract power relations and ensure that their own actions do not reproduce or legitimize these power dynamics.
48. Appropriate mechanisms for coordinating participation must be developed; these should be participatory themselves. In terms of the inclusion and identification of participants, programmes must be targeted to ensure the involvement of all stakeholders who may be or perceive themselves to be affected by the policy, decision or programme in question. The principles of non-discrimination and equality necessitate that participants must be identified in a transparent and proactive way. This should include undertaking a stakeholder analysis or mapping to identify vulnerable or disadvantaged groups with a stake in the outcomes of the decision; ensuring that the most marginalized groups and communities are identified and engaged from the outset, taking into account the obstacles they face; and dedicating resources to reach out to them.²⁹⁰
49. Based on the principle of equality between women and men, this preparation must include a gender analysis, and members of both sexes must be given the chance to represent their views, including, if necessary, through specially targeted consultations (for example, women-only spaces) and support. Processes to identify participants must not rely on community elites in a manner that can reinforce existing inequalities, for example by requiring attestation from officials or community elites that a person is likely to be “affected” by the outcome of a decision.²⁹¹ NGOs with close knowledge of and links with the community in question can assist in identifying those within the community who are most excluded, and support their inclusion and participation.
50. In addition, the principles of equality and non-discrimination require that participatory processes and mechanisms meet the standards of availability, accessibility, adaptability and acceptability.
51. In the context of participation, availability means that channels of participation, access to information and accountability mechanisms must be made available in sufficient quantity (and be of sufficient quality) to meet the needs of the community in question.

²⁹⁰ Foti and de Silva, *A Seat at the Table*, p. 15.

²⁹¹ *Ibid.*, p. 11.

52. These mechanisms, opportunities and processes must be physically and economically accessible to all, without discrimination and without disproportionate cost or risk. This implies that the obstacles which prevent the poorest and most marginalized people from participating must be addressed, including additional and overlapping obstacles due to age, disability, ethnicity, language, geographical location or other factors.
53. Mechanisms, processes and channels should be adaptable to the local context, taking into account the specific needs of communities or individuals in different social and cultural settings, and also adaptable to changing local, national and international contexts and standards.
54. In terms of acceptability, the processes and channels of participation, information and accountability mechanisms must be designed and implemented in a form that respects the cultural values, norms and practices of all those groups that request and use them. They must be respectful of diversity, using terminology and references accepted by the community, and the space used for participatory processes should also be culturally adequate for the community.
55. For instance, in terms of accessibility, organizers must ensure that the meeting locations are neither exclusionary nor prove to be a further obstacle to participation for people living in poverty. Community-based processes will reduce costs and travel time for participants, increasing the likelihood of their involvement. Participatory processes must also extend to remote rural communities. Organizers must provide adequate notice, via an appropriate mode of communication; this will vary depending on the community, taking into consideration the principles of acceptability and adaptability. Traditional and personal methods of communication should be considered and may be more likely to reach people living in poverty than official bulletins or announcements on websites.
56. Similarly, organizers should consult with individuals to identify a time for meetings that does not detrimentally impact wage-earning possibilities or care responsibilities – for example, after regular work hours and during seasons when migrant labourers are at home and available.²⁹² Organizers and facilitators must be trained to have sufficient understanding of the social, cultural and political context; build trust and respect, be non-judgemental; and motivate and support participants. Similarly, it may be necessary to conduct capacitybuilding activities with participants in advance of the main process.
57. In order to ensure that people living in poverty can participate on an equal basis, participants should be reimbursed for all costs related to attendance at meetings, including upfront, hidden and opportunity costs. At a minimum, participants must be reimbursed for transportation costs, and, if appropriate, their time, and on-site childcare should be provided. Organizers must provide a secure, safe atmosphere. Participation procedures must allow for the full expression of the views of people living in poverty, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome.²⁹³
58. It is essential that societal and intra-community power relations are openly recognized and clarified²⁹⁴ at the start of the process, in order to confront the factors that often obstruct debates and prevent issues of inequality from being raised in decision-making arenas. Taking account of different kinds of power relations (visible, hidden and invisible) and the particular needs of marginalized groups, officials and advocates should take steps to ensure that such groups can organize their views, express them frankly and be heard. In order to ensure full substantive equality in enjoyment of the right to participation, where appropriate to enable full and free expression (particularly in very patriarchal or socially stratified communities), separate meetings should be held for excluded or vulnerable groups. For instance, in some communities it may be appropriate to separate participants by age group and sex. However, so as not to further entrench exclusion, the discussions should be brought together in a central plenary at critical moments so each group can share their analysis and actions.²⁹⁵ Similarly, although power dynamics may necessitate separate meetings and processes for people living in poverty in order to facilitate their full participation and free expression, where appropriate, participatory mechanisms should include opportunities for members of different social groups to interact and share points of view.

²⁹² *Ibid.*, p. 19.

²⁹³ A/HRC/18/42, Annex para.8.

²⁹⁴ Beresford and Hoban, *Participation in Anti-poverty and Regeneration Work and Research*, p. 34.

²⁹⁵ ActionAid, *People's Action in Practice*, p. 59.

59. The format and level of formality of the meeting must not be alienating or difficult to negotiate for people living in poverty. Organizers must allow sufficient time for participants to debate and seek consensus or common positions from which to develop representative and legitimate messages. The methodology of the process must not rely wholly on written materials, as this would exclude those who are illiterate or have poor reading skills. Instead, more inclusive and accessible methodologies should be used, including different media such as pictograms or theatre. Accessibility and adaptability requires that meetings should be conducted in the minority language appropriate to the community where necessary; if this is not possible, well-trained interpreters must be provided.

C. Transparency and access to information

60. From a human rights perspective, effective access to public information is a precondition for exercising other human rights. Exercise of the right to participation depends on transparency and access to complete, up-to-date and comprehensible information. People must have the capacity and opportunity to use the information, understand their entitlements and be able to evaluate the quality of the services, policies or programmes in question. Transparency is essential to ensure rights holders are fully aware of the aims and scope of the process, the other actors involved and their role and level of influence.
61. Organizers should provide appropriately designed information and tools well in advance, so individuals can make informed choices at each stage of the participatory process. Information should not only be made available, but must conform to the principles of accessibility, acceptability and adaptability. This means information should be made available in a manner accessible to the poorest and most disadvantaged, taking into account the constraints they suffer, including illiteracy and language barriers. It should be free of charge, relevant, up-to-date, understandable, free of technical language or jargon, and in local languages. Outreach and dissemination should be undertaken according to the local context and through channels that reach the poorest, for example, in non-written form, radio announcements or community theatre.
62. Organizers should hold preparatory meetings well in advance to agree on the parameters, goals, purposes and scope, with the involvement of the potential participants. Acceptable forms of facilitation, chairing and leadership should also be agreed with participants in advance.²⁹⁶ The level and nature of involvement on offer must be clarified to potential participants, as well as the roles and responsibilities of facilitators, policymakers, participants and other stakeholders.
63. When participants meet for the first time, the purposes and scope of the process should be made clear and agreed; this includes setting realistic expectations and clarifying any limitations. Participants must know why they have been asked to participate and how their opinions will be used, and should clearly understand what degree of influence they can expect to have on the final outcome. Similarly, the other considerations and actors that are feeding into the process must be revealed. There must be a mechanism and/or procedures in place by which participants can easily request and access additional information that they feel they need.
64. Once the decision-making body has taken its decision, it should promptly notify participants and the public; both the text of the decision and the justifications for it must be made public, in media accessible to people living in poverty. In addition, reports of the process and meetings held should be made available in all relevant languages and in an accessible manner, while respecting confidentiality.

D. Accountability

65. Accountability is a critical feature of a human rights approach to participation. Participation understood as a right implies rights holders and duty bearers who can and must be held to account for failure to respect, protect and fulfil that right. To this end, people need access to procedures and institutions that provide redress and remedy, and mechanisms to ensure that their Government fulfils the right of access to information and the right to participation.²⁹⁷

²⁹⁶ Beresford and Hoban, *Participation in Anti-poverty and Regeneration Work and Research*, p. 27.

²⁹⁷ Foti et al, *Voice and Choice*, p. 9.

66. Organizers should ensure that there are effective complaint mechanisms in place in advance of the process starting. Responsibilities and the relevant chain of accountability for decision-making and the process itself should be made clear from the outset, and participants should be made aware of their rights and responsibilities. Participants must periodically evaluate the process, with indicators derived from their priorities. Where appropriate, independent advisers should monitor the process.
67. At the end of the process, a final assessment of what has been agreed and what has not should be presented, to be discussed and agreed with participants,²⁹⁸ as well as information on next steps in the decision-making process and those responsible. The confidentiality of the participants must be respected in any final report or summary of the process.
68. A participatory process should be followed by concerted action and participatory evaluation. People living in poverty must have effective access to grievance mechanisms in order to hold decision-makers accountable if they feel the outcomes of the participatory process have not been adequately considered, or to seek remedy in case of any abuse. Similarly, there should be accessible accountability mechanisms in place to protest policies or programmes implemented with a lack of participation. Such mechanisms must be accessible and adaptable; for example, a variety of cost-free channels should be provided, as necessary, for the needs and constraints of people living in poverty. Complaint and grievance mechanisms must be sufficiently resourced, culturally appropriate and designed to facilitate the broadest participation possible by vulnerable and disadvantaged groups, in particular by women.
69. For States, the participation of people living in poverty in decisions that affect their lives is a legal obligation rather than a policy option. This means that a person cannot be excluded or “disinvited” from participation, for example if what they say challenges the status quo. The right to participation must be enforceable and the lack of participation must be challengeable through the courts. Therefore, appropriate laws, policies, institutions, procedures and redress mechanisms that will enable accountability for lack of participation, exclusion from participation, or manipulated or co-opted participation, are a crucial foundation for any rights-based participatory process. These mechanisms must be transparent, and must conform to the standards of availability, accessibility, acceptability and adaptability. Ultimately, policymakers and public officials must be accountable for responding to the demands of the people.
70. The question of who can claim to legitimately represent people living in poverty is an extremely sensitive issue. Ideally, people living in poverty should be directly involved in any decision-making process (see section E below). However, where they are represented by civil society actors such as facilitators or community workers, these actors should give full account of their work to the community. They should also be held responsible for any abuse of their position, breach of trust or acting beyond their mandate.

E. Empowerment

71. From a human rights perspective, participation must be premised on empowerment as the ultimate goal. Thus, participation should not be extractive or instrumental, but instead aimed at building the capacity, social capital, confidence, rights awareness and knowledge of people living in poverty.
72. Currently, many participatory processes are limited to “consultation” —a higher authority giving information to or extracting information from members of the public. Participatory processes that are not designed and implemented with a human rights perspective may in fact be disempowering, and serve to exclude or reinforce existing power structures. In contrast, human rights-based participation is an important tool to empower people living in poverty by allowing them to exercise their voice to influence relevant decision-making processes.
73. There is an important distinction between closed, invited and claimed policy spaces²⁹⁹ in terms of their empowering potential. Spaces for policy influence should not be closed or predetermined, but

²⁹⁸ R. McGee and A. Norton, *Participation in Poverty Reduction Strategies: A Synthesis of Experience with Participatory Approaches to Policy Design, Implementation and Monitoring*, IDS Working Paper No. 109, 2000, p. 70.

²⁹⁹ L. VeneKlasen et al., *Rights-based Approaches and Beyond: Challenges of Linking Rights and Participation*, IDS Working Paper No. 235, 2004, p. 5.

must allow for ideas to emerge from the ground up,³⁰⁰ and participation must occur early enough in a process to set priorities and influence deliberation, drafting and outcome. It must not be limited to marginal or peripheral issues, but should focus on key issues such as public services, budgets and fiscal policy. Empowerment must be a primary and stated goal of such a process, through providing a participatory learning process that helps people to analyse local problems and develop solutions that use and promote rights.

74. A foundation of an educated and informed public who knows their rights is crucial to build effective participation. In particular, people living in poverty must be empowered so as to make their participation effective. Therefore, it is critical to strengthen the capacity of people living in poverty to engage in participatory processes, by promoting their critical thinking and ability to analyse and confront structures of oppression and power relations. They should be empowered to identify the root causes of their marginalization and to take action (individually or collectively) to make claims and realize their rights. This requires, *inter alia*, human rights education and other capacity-building activities,³⁰¹ which should be built into each participatory process and begun before the process starts. This may include public speaking training, human rights education, workshops and information provision.
75. To the extent possible, people living in poverty should be able to set the terms of the debate and choose topics for discussion. Facilitators should enable involvement, in particular with regard to the most disadvantaged and excluded, but should not dominate or excessively “manage” the discussion.
76. Meaningful decisions must be on the table for consideration and discussion,³⁰² including budgets and resource allocation. Research shows that lively participation is more likely where control over resources is located close to local people; this proximity is also critically important to whether participation can make a difference to people’s lives.³⁰³ People living in poverty must be given space to criticize all elements of a programme or project, as well as the agenda or rationale behind it. For example, service delivery may take place primarily at the local level, but key decisions relating to resource allocation, service delivery structure, etc. may be taken centrally. Therefore, real participation necessitates that the public is able to discuss and criticize both elements of the equation.
77. While NGOs, especially grass-roots organizations, have an important role to play in supporting and facilitating the participation of people living in poverty, they are not a proxy. Staff or volunteers of NGOs or civil society organizations should not automatically be seen as “representatives” or “spokespersons” for people living in poverty, but rather serve as facilitators and advocates, with the ultimate goal of allowing them to express themselves and influence decision-making on their own terms. They can also play a role in helping the community organize and empowering people living in poverty with skills and knowledge that facilitate their more active participation and free expression.
78. Rather than just using meetings to extract information, facilitators and organizers should seek to actively build the capacity of the participants and foster their better enjoyment of rights such as education and freedom of expression. The opportunity to provide workshops or courses relevant to the needs of the participants, for example literacy or leadership training, should be taken. It may be helpful to involve local organizations in building local organizing capacity. Facilitators can also help participants forge useful links – both horizontal links with other communities or community-based groups, and vertical links with decision-makers and relevant officials, for example in the local government.
79. Evaluation and follow-up should be collaborative. Monitoring should be undertaken by the participants themselves, based on indicators set by them according to their priorities and analysis of change. As working with people living in poverty requires a long-term process, not a one-off intervention,³⁰⁴ a

³⁰⁰ Institute of Development Studies, *What Do We Know About How to Bring the Perspectives of People Living in Poverty into Global Policy-making?*, IDS, 2012, p. 3.

³⁰¹ OHCHR, “Principles and guidelines for a human rights approach to poverty reduction strategies”, p. 15.

³⁰² Development Research Centre on Citizenship, Participation and Accountability, *Blurring the Boundaries: Citizen Action Across States and Societies*, 2011, p. 45.

³⁰³ R. McGee, *Legal Frameworks for Citizen Participation: Synthesis Report*, Logolink, 2003, p. 54.

³⁰⁴ X. Godinot and Q. Wodon (eds.), *Participatory Approaches to Attacking Extreme Poverty*, World Bank Working Paper No. 77, 2006, p. 8.

“consultation” should never be an objective in itself, but rather should be part of an ongoing process where persons living in poverty have various possibilities to exercise their right to participation, and decision-makers should be required to seriously consider the opinions expressed. Resources should be devoted to make the participatory mechanisms long-term and self-sustaining, for instance by training and investing in grass-roots facilitators. Regular forums for dialogue between policymakers and people living in poverty should be created and promoted.

VI. Recommendations to States: an operational framework to ensure meaningful participation of people living in poverty

- 80.** People living in poverty are entitled to participate in the design, implementation and monitoring of poverty interventions and other policies, programmes and interventions that affect their lives, and to hold duty bearers accountable. Looking at participation through the prism of human rights norms and principles, it is possible to elucidate the approach and actions necessary to ensure the effective and meaningful participation of people living in poverty.
- 81.** Building on the human rights framework above, this section will give practical guidance to States on how to operationalise the right to participation of people living in poverty. It is neither possible nor desirable to formulate detailed universal guidelines, as participation is always embedded in a specific sociocultural context and set of power dynamics. The appropriate formats and design are thus context-dependent and moreover should emerge from the ground up, in consultation with communities. However, it is important to move towards a common understanding of what an acceptably participatory mechanism or process looks like and the appropriate minimum standards by which to measure the adequacy and quality of participation with regard to people living in poverty. Human rights provide a way to do so.
- 82.** While the recommendations below are primarily addressed to States, many are also relevant for participatory processes established by other actors such as international financial institutions and donor agencies. Recommendations to national human rights institutions are also included due to their potentially crucial role.
- 83.** States have three levels of obligations with regard to human rights: to respect; to protect; and to fulfil (E/C.12/GC/21, para. 48). In terms of the right to participation, the obligation to respect requires States to refrain from interfering, directly or indirectly, with the enjoyment of the right. For example, States must not close down participatory spaces, impose censorship, repress public deliberation or retaliate against those who speak out (e.g. through violence, confiscation of property or incarceration). The obligation to protect requires States to take steps to prevent third parties (including business enterprises or private individuals) from interfering in the right to participation. This would include safeguarding participatory spaces, protecting freedom of expression through law and policy, and protecting individuals from reprisal from non-State actors. It also requires States to protect social movements, community organizers and human rights defenders. Lastly, the obligation to fulfil requires States to facilitate, promote and provide for the full realization of the right to participation, through appropriate legislative, administrative, judicial, budgetary and other measures. This includes strengthening skills and capacity of the public and officials, presenting meaningful decisions for public deliberation and devoting resources to long-term, sustainable participatory mechanisms to influence national priorities, programmes and decisions.
- 84.** Government agencies and policymakers must be prepared to give value to the findings of participatory processes, critically examine their own practices and attitudes, and allow the necessary resources and time to enable people living in poverty to participate effectively. Instituting meaningful participation will require the State to relinquish unilateral control over some areas of policy traditionally seen as government prerogative, for example budgets. Similarly, while successful participation is frequently dependent on some form of State engagement, States should not seek to “own” all spaces of participation, and must protect and promote the role of NGOs and civil society.
- 85.** Promising participatory practices have been implemented in a wide variety of contexts by actors including States, bilateral development agencies, United Nations agencies, civil society organizations

and others. Prominent examples include participatory budgeting, environmental decision-making, slum surveys, citizen juries, social monitors and community scorecards. Much can be learned from such practices. Meaningful participation requires resources, time and planning, and should be seen as a process rather than an event, with multiple entry points through which members of the public can engage. However, evidence shows that it is possible, even in the most challenging of situations.

- 86.** In order to comply with their human rights obligations regarding the right to participation, the Special Rapporteur recommends States undertake the following actions.

a. Legal and institutional framework:

- (i)** Adopt a legal framework that includes the explicit right of individuals and groups to participate in the design, implementation and evaluation of any policy, programme or strategy that affects their rights, at the local, national and international levels. This should include:
 - (a)** Putting in place operational guidelines, policies and capacity-strengthening measures to enable public officials to apply these laws, and ensuring that these are adaptable to different contexts and allow innovation based on feedback from the ground.
 - (b)** Requiring the establishment of inclusive participatory mechanisms at the local and national levels.
 - (c)** Explicitly including the duty of policymakers and public officials to actively seek and support the meaningful participation of people living in poverty.
 - (d)** Setting and enforcing minimum standards for participatory processes, including thresholds for participation of people living in poverty and disadvantaged groups such as women, minorities and persons with disabilities.
- (ii)** Strengthen decentralization of power, responsibilities and resources from central to local governments, with adequate accountability mechanisms.
- (iii)** Promulgate and enforce legislation to prohibit discrimination of any kind, including on the basis of economic and social status.
- (iv)** Create meaningful opportunities for active public participation in budget formulation and monitoring, including by:
 - a)** Prioritizing areas of national or local budgets that most affect people living in poverty.
 - b)** Requiring the supreme audit institution to maintain mechanisms for public participation in auditing budgets.
- (v)** Incorporate participatory mechanisms in national development plans, including people living in poverty from the start of the planning process.
- (vi)** Respect the right to participation in the implementation of any international assistance and cooperation programme.
- (vii)** Strengthen laws relating to freedoms of association, assembly and speech; media freedom; anti-corruption; access to information; and whistleblower protection.
- (viii)** Strengthen protection of individuals and non-governmental organizations that work with and advocate for those living in poverty; recognizing the right to act collectively; and prevent and punish any reprisal against those who exercise their right to participation.
- (ix)** Regulate the involvement of powerful non-State actors (such as business enterprises) in participatory processes; ensure that they cannot exert undue influence; and provide mechanisms for redress in cases of abuses.
- (x)** Create an independent national council on poverty and social exclusion, including people living in poverty, to represent this group to political decision makers.

b. Resources:

- (i) Allocate sufficient resources to support the participation of people living in poverty in any decision-making process that affects their rights, including earmarked funds to compensate participants for opportunity costs such as travel and to provide on-site childcare.
- (ii) Improve official capacity to facilitate public participation and access to information, including through adequate staff, equipment and training.
- (iii) Provide long-term funding for capacity-building in disadvantaged communities, including by granting resources to community-based organizations.
- (iv) Grant the national human rights institution adequate resources to promote the right to participation and pursue accountability and remedies.

c. Equality and non-discrimination:

- (i) Undertake an audit of barriers to participation and identify those communities and groups who face the most obstacles in enjoying their right to participation.
- (ii) Set up a task force of people with experience of living in poverty to make recommendations on how people living in poverty can effectively participate in decision-making.
- (iii) Use these recommendations and audits to issue guidance to all relevant government departments on how to ensure non-discrimination and equality regarding the right to participation.
- (iv) Design participatory mechanisms, taking into account the inequalities and asymmetries of power in a given context, and take all necessary measures to counteract them, including through affirmative action.
- (v) Ensure that conditions for participation do not unfairly exclude certain categories of people, for example those without identity documents or with mobility restrictions.
- (vi) Take positive action to promote the inclusion of disadvantaged groups including ethnic minorities and persons with disabilities in decision-making bodies, including by allocating resources and designing mechanisms tailored for their use.
- (vii) Undertake an analysis of barriers to women's participation, particularly in poor communities, and take proactive measures to tackle these barriers, for example implementing women-only participatory spaces or providing childcare facilities.

d. Access to information:

- (i) Enact a comprehensive right to information law, ensuring that the department designated to deal with requests is properly resourced, Promote effective and widespread use of the law including by:
 - a) Adopting policies, programmes and proactive measures that promote its use by people living in poverty.
 - b) Training public officials on the importance of access to information and the need to protect information solicitors.
- (ii) Take specific measures to provide State data to the public, in accessible formats and via appropriate channels for people living in poverty, in particular by:
 - a) Publishing and disseminating regular information related to budgets (at local and national levels) and the quality of public services, including disaggregated data, in a non-technical and simplified form.
 - b) Proactively disseminating legal information and other key documents for decision-making (e.g. environmental impact assessments), in all relevant languages.

- (iii) Communicate information through accessible channels and in appropriate forms, taking into account the technical understanding, literacy levels and languages of people living in poverty.
- (iv) Improve communications infrastructure and the accessibility and affordability of information and communication technologies in rural areas and poor communities, including by providing training to people living in poverty, in particular women.
- (v) Require prompt public notification of decisions following participatory processes, including the reasons and considerations on which it is based.

e. Accountability:

- (i) Ensure that participatory mechanisms have built-in complaint and grievance procedures, which establish clear lines of responsibility at the national, regional and local levels. Mechanisms must be confidential, accessible even in remote rural areas and provide diverse and cost-free means of access in all relevant languages.
- (ii) Provide an accessible way for the public to hold public officials accountable for violation of the right to participation, as well as for any abuse during participatory processes.
- (iii) Institute effective systems of monitoring and evaluation of participatory processes ensuring the involvement of people living in poverty.
- (iv) Require public officials to publicly justify their eventual decisions or actions in light of public participation.
- (v) Train judges, lawyers and law enforcement officials to enhance judicial oversight and to prosecute any infringement of the right to participation.

f. Empowerment:

- (i) Involve people living in poverty in setting the agenda and goals for participatory processes.
- (ii) Take all appropriate steps to enhance the capacity of people living in poverty to participate in public life, including by:
 - a. Improving the accessibility and quality of education services provided to the poorest sectors of the population.
 - b. Ensuring educational programmes transmit the necessary knowledge, including human rights education, to enable everyone to participate fully and on an equal footing at the local and national levels.
 - c. Launching public education campaigns on issues that affect people living in poverty, such as the environment, human rights, development and budgeting processes.
- (iii) Include capacity-building activities in participatory processes.
- (iv) Respond to demands for participation emanating from communities living in poverty, and enable participatory processes to be promoted from below.

g. Supporting the role of civil society:

- (i) Recognize the rights of civil society organizations to participate in the design, implementation and evaluation of public policy.
- (ii) Grant financial and logistical assistance to civil society groups, giving preference to those that have long-term partnerships with people living in poverty, to facilitate participation and build capacity of public officials.
- (iii) Protect organizations that promote participation from retaliation or interference by State agents or non-State actors.

h. Recommendations to national human rights institutions:

- (i) Undertake educational and information programmes on the right to participation, both within the general population and among particular groups such as public service providers and the private sector.
- (ii) Scrutinize existing laws, administrative acts, draft bills and other proposals to ensure consistency with obligations related to the right to participation under international and national human rights instruments.
- (iii) Conduct research to ascertain the extent to which the right to participation is being realized within the State as a whole and in relation to communities particularly vulnerable to poverty and social exclusion.
- (iv) Monitor compliance with the right to participation and provide reports thereon to public authorities, civil society and United Nations human rights mechanisms.

Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, The rights to freedom of peaceful assembly and of association natural resource exploitation, A/HRC/29/25, 28 April 2015

[...]

9. Citizen engagement in the natural resources sector is notoriously difficult, with some sectors, such as oil, gas and mining, presenting heightened risks of human rights abuses because they are especially lucrative. The State plays a significant role in regulating access to exploitation opportunities. Secrecy cloaks decision-making processes and outcomes; there is a lack of mechanisms through which interested parties may express their concerns; discussions are often highly technical; and, above all, the financial stakes are often massive. This opaque and lucrative environment presents ideal conditions for corruption to thrive, a challenge with which many resource-rich countries have to contend.
10. The Special Rapporteur believes that the rights to freedom of peaceful assembly and of association play a key role in opening up spaces and opportunities for genuine and effective engagement by civil society in decision-making processes across the spectrum of natural resource exploitation activities. These rights help foster increased transparency and accountability in the exploitation of resources and are basic prerequisites for the ultimate goal of securing substantive rights. Peaceful assembly and association rights can facilitate constructive dialogue, which is necessary given the shared interests and sometimes competing priorities that are intrinsic to exploiting natural resources.
11. When the rights to freedom of peaceful assembly and of association are restricted contrary to international human rights law standards, questions automatically arise as to how genuine consultation processes or decisions are and how valid is the expression of free, prior and informed consent of affected parties. While restricting these rights in order to streamline resource exploitation may seem tempting to States and corporations³⁰⁵ in the short term, it can be costly in the long run and cause irrevocable damage. As the Special Rapporteur has previously noted (see A/HRC/26/29, para. 26), the failure to provide any outlet for excluded groups to air their grievances can be counterproductive and carry severe consequences. He believes that social conflicts experienced in the context of natural resource exploitation are a stark demonstration of the truth of this statement.
12. The overall political environment in a State can also have a profound impact on the exercise of peaceful assembly and association rights. States that generally do not respect or facilitate those

³⁰⁵ The terms "corporation", "company", "business enterprises" and "private sector" are used generically to refer to for-profit enterprises involved in exploitation operations, even if they are State-owned, unless otherwise indicated.

rights are unlikely to be any more accommodating in the context of natural resource exploitation. In fact, the Special Rapporteur believes that the space to exercise peaceful assembly and association rights is often more limited in relation to natural resource exploitation because of the significant impact this sector has on the economies of resource-rich countries, the bottom lines of the enterprises involved and the potential for corruption. Having citizen engagement is, therefore, imperative throughout the decision chain right from the initial stages of the process when exploration potential is determined, through to exploitation activities and investment of revenue.³⁰⁶ The rights to freedom of peaceful assembly and of association provide the necessary avenues for this engagement.

[...]

14. States are obligated to protect and facilitate the rights to freedom of peaceful assembly and of association in the context of natural resource exploitation, including by ensuring that business interests do not violate these rights. To discharge their duties in that respect, States should, among other things, enact robust national laws that stipulate the rights and responsibilities of all, create independent and effective enforcement, oversight and adjudicatory mechanisms, ensure effective remedies for violations of rights and promote awareness of, and access to information about, relevant policies and practices related to natural resource exploitation.
15. States also have an obligation to prevent conflict before it starts, including by creating a legal environment that promotes transparency and fairness. The area of land rights, for example, is often key. The absence of legal frameworks that clearly spell out land rights creates opportunities for arbitrary expropriation or land grabbing, which in turn can lead to conflict. Opaque procedures for granting exploitation licences and concessions aggravate the situation and often fuel social protests.

[...]

51. The freedom to assemble peacefully is required in order for consultations among stakeholders to be convened. The ability to peacefully assemble is impeded in environments where insecurity and conflict prevails. The neutrality of the consultations needs to be maintained throughout the process. For consent to be free, prior and informed, consultations should be conducted in an environment free of intimidation or fear, meaning that meetings should be free from infiltration by security organs, surveillance and attendance by uniformed or armed law enforcement agents. A level playing field should be ensured for all stakeholders to have free access to relevant information and assurances that their grievances will be heard.

[...]

IV. Conclusions and recommendations

[...]

A. States

72. The Special Rapporteur recommends that States:

[...]

- b) Create an enabling environment in which civil society can access relevant information, participate in decision-making and express opinions freely, including through peaceful assemblies, without threats of prosecution or other harm for legitimate opposition; ensure that cases of violations of human rights, including peaceful assembly and association rights, are promptly and impartially investigated and those responsible for the violations are held to account;

[...]

- e) Subscribe to and increase the quality of implementation of existing multi-stakeholder initiatives, such as the Extractive Industries Transparency Initiative and the Open Government Partnership,

³⁰⁶ See, e.g., the Natural Resource Charter.

which encourage civil society participation in the governance of natural resources; participating States should strengthen the role of the rights to freedom of peaceful assembly and of association in these initiatives;

[...]

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013

[...]

E. Fair and adequate consultation and negotiating procedures

58. In affirming the general rule of consent for extractive activities within indigenous territories, the United Nations Declaration on the Rights of Indigenous Peoples emphasizes that, in order to obtain consent, “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representatives” (art. 32, para. 2). The Declaration thus emphasizes that good faith consultations and cooperation are a precondition for agreements with indigenous peoples concerning extractive activities. As stated above (para. 25), indigenous peoples may decline to enter consultations about extractive industries, just as they may choose to withhold consent to them. But if consent or agreement on extractive activities is to happen, it must be on the basis of adequate, good faith consultations or negotiations.
59. Consultation procedures regarding proposed extractive operations are channels through which indigenous peoples can actively contribute to the prior assessment of all potential impacts of the proposed activity, including the extent to which their substantive rights and interests may be affected. Additionally, consultation procedures are key to the search for less harmful alternatives or in the definition of mitigation measures. Consultations should also be mechanisms by which indigenous peoples can reach agreements that are in keeping with their own priorities and strategies for development, bring them tangible benefits and, moreover, advance the enjoyment of their human rights.
60. While the Special Rapporteur has addressed the elements of good faith consultations in previous reports (see, in particular, A/HRC/12/34, paras. 46-49), he would like to emphasize a few points related to problematic aspects of consultations that he has observed with regard to extractive industries.

Negotiations directly between extractive companies and indigenous peoples

61. The Special Rapporteur has observed that in many instances companies negotiate directly with indigenous peoples about proposed extractive activities that may affect them, with States in effect delegating to companies the execution of the State’s duty to consult with indigenous peoples prior to authorizing the extractive activities. By virtue of their right to self-determination, indigenous peoples are free to enter into negotiations directly with companies if they so wish. Indeed, direct negotiations between companies and indigenous peoples may be the most efficient and desirable way of arriving at agreed-upon arrangements for extraction of natural resources within indigenous territories that are fully respectful of indigenous peoples’ rights, and they may provide indigenous peoples opportunities to pursue their own development priorities.
62. In accordance with the responsibility of business enterprises to respect human rights, direct negotiations between companies and indigenous peoples must meet essentially the same international standards governing State consultations with indigenous peoples, including —but not limited to – those having to do with timing, information gathering and sharing about impacts and potential benefits, and indigenous participation. Further, while companies must themselves exercise due diligence to ensure such compliance, the State remains ultimately responsible for any

inadequacy in the consultation or negotiation procedures and therefore should employ measures to oversee and evaluate the procedures and their outcomes, and especially to mitigate against power imbalances between the companies and the indigenous peoples with which they negotiate.

Mitigation of power imbalances

63. Almost invariably, when State agencies or business enterprises that promote extractive projects enter into consultations or negotiations with indigenous peoples, there are significant imbalances of power, owing to usually wide gaps in technical and financial A/HRC/24/41 17 capacity, access to information and political influence. The Special Rapporteur regrets to observe that, overall, there seems to be little systematic attention by States or industry actors to address these power imbalances. He believes that, as a precondition to reaching sustainable and just agreements with indigenous peoples over the taking of resources from their territories, the imbalances of power must be identified as a matter of course and deliberate steps should be taken to address them.
64. The protective role of States is especially important in this context, while companies should exercise due diligence and develop policies and practices to ensure that they do not unfairly benefit from such power imbalances. Practical measures to address power imbalances could include, inter alia, employing independent facilitators for consultations or negotiations, establishing funding mechanisms that would allow indigenous peoples to have access to independent technical assistance and advice, and developing standardized procedures for the flow of information to indigenous peoples regarding both the risks and potential benefits of extractive projects.

Information gathering and sharing

65. As is now generally understood, environmental and human rights impact assessments are important preconditions for the implementation of extractive operations. Indigenous peoples should have full access to the information gathered in impact assessments that are done by State agencies or extractive companies, and they should have the opportunity to participate in the impact assessments in the course of consultations or otherwise. States should ensure the objectivity of impact assessments, either by subjecting them to independent review or by requiring that the assessments are performed free from the control of the promoters of the extractive projects.
66. Indigenous peoples should also have full access to information about the technical and financial viability of proposed projects, and about potential financial benefits. The Special Rapporteur understands that companies usually consider much of this information to be proprietary and thus are reluctant to divulge it. He recommends, nonetheless, that information that otherwise might be considered proprietary be shared with the indigenous peoples concerned, as a necessary measure to mitigate power imbalances and build confidence on the part of indigenous peoples in the negotiations over projects, and because of equitable considerations relating to indigenous peoples' historical disadvantages and connections to project areas. Such sharing of proprietary information could be done on a confidential basis.

Timing

67. In accordance with the principle of free, prior and informed consent, consultations and agreement with indigenous peoples over an extractive project should happen before the State authorizes or a company undertakes, or commits to undertake, any activity related to the project within an indigenous territory, including within areas of both exclusive and nonexclusive indigenous use. As a practical matter, consultation and consent may have to occur at the various stages of an extractive project, from exploration to production to project closure.
68. The Special Rapporteur has observed that, in many cases, exploration activities for eventual extraction take place within indigenous territories, with companies and States taking the position that consultations are not required for the exploration phase and that consent need not be obtained, if at all, until a license for resource extraction is given. This position, in the view of the Special Rapporteur, is simply not compatible with the principle of free, prior and informed consent or with respect for the property, cultural and other rights of indigenous peoples, given the actual or potential effects on

those rights when extractive activities occur. Experience shows that exploration and other activities without prior consultations or consent will often serve to breed distrust on the part of indigenous peoples, making any eventual agreement difficult to achieve.

69. Also in terms of time, consultations should not be bound to temporal constraints imposed by the State, as is done under some regulatory regimes. In order for indigenous peoples to be able to freely enter into agreements, on an informed basis, about activities that could have profound effects on their lives, they should not feel pressured by time demands of others, and their own temporal rhythms should be respected.

Indigenous participation through representative institutions

70. A defining characteristic of indigenous peoples is the existence of their own institutions of representation and decision-making, and it must be understood that this feature makes consultations with indigenous peoples very different from consultations with the general public or from ordinary processes of State or corporate community engagement. The Special Rapporteur notes cases in which companies and States have bypassed indigenous peoples' own leadership and decision-making structures out of misguided attempts to ensure broad community support. Where indigenous peoples are concerned, however, international standards require engagement with them through the representatives determined by them and with due regard for their own decision-making processes. Doing so is the best way of ensuring broad community support. Indigenous peoples should be encouraged to include appropriate gender balance within their representative and decision-making institutions. However, such gender balance should not be dictated or imposed upon indigenous peoples by States or companies, anymore than indigenous peoples should impose gender balance on them.
71. It may be that in some circumstances ambiguity exists about which indigenous representatives are to be engaged, in the light of the multiple spheres of indigenous community and organization that may be affected by particular extractive projects, and also that in some instances indigenous representative institutions may be weakened by historical factors. In such cases indigenous peoples should be given the opportunity and time, with appropriate support from the State if they so desire it, to organize themselves to define the representative institutions by which they will engage in consultations over extractive projects.

[...]

Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas, on the participation of persons with disabilities in public decision-making, A/HRC/31/62, 12 January 2016

[...]

III. Participation of persons with disabilities in political and public life

A. Principle of participation

[...]

15. The Convention on the Rights of Persons with Disabilities addresses participation as a cross-cutting issue. Participation is embodied in its preamble and in its purpose (art. 1), and it is recognized as a general principle (art. 3) and as a fundamental political right (art. 29). Participation is expressly mentioned in relation to the rights to independent living and being included in the community (art. 19), inclusive education (art. 24), habilitation and rehabilitation (art. 26) and participation in cultural life, recreation, leisure and sport (art. 30). The concept is also present in the article on children with disabilities (art. 7), and in the articles that prescribe prerequisites for enabling participation such as those on accessibility (art. 9) and on freedom of expression and opinion and access to information (art. 21). The Convention on the Rights of Persons with Disabilities further highlights the importance of participation in its articles on implementation and monitoring mechanisms (arts. 4, 33, 34 and 35) and on international cooperation (art. 32).

16. Effective and meaningful participation is at the core of the Convention on the Rights of Persons with Disabilities. This was demonstrated by the unprecedented involvement of civil society, particularly persons with disabilities and their representative organizations, in the processes of drafting and negotiating the Convention. [...]
17. Such participatory processes had a positive impact on the quality of the treaty and its relevance for persons with disabilities. Furthermore, the importance given in the Convention on the Rights of Persons with Disabilities to full and effective participation by all persons with disabilities represents a profound paradigm shift in international human rights law whereby persons with disabilities are not “objects” to be cared for but rather “subjects” enjoying human rights and fundamental freedoms on an equal basis with others. While the core international human rights instruments already considered persons with disabilities on an equal basis with others, before the adoption of the Convention on the Rights of Persons with Disabilities those legal obligations were rarely used to advance the rights of persons with disabilities. Moreover, persons with disabilities faced significant barriers to participation in public life and often had their views disregarded in favour of those of representatives of “organizations for persons with disabilities” and other groups of “experts”.

[...]

IV. Participation of persons with disabilities in public decision-making

A. Importance of effective and meaningful participation

Participation for enhanced decisions: diverse perspectives for better outcomes

25. Diversity is a fundamental aspect of human existence. Human beings experience life from different perspectives in accordance with their multiple human traits or identities: sex, race, colour, ethnicity, sexual orientation, language, religion, origin, age, disability or any other status. This diversity is reflected in the way in which people take decisions, exercise agency and participate in society. Persons with disabilities are part of this human diversity and, arguably, embody one of the most heterogeneous population groups. Notwithstanding, despite decades of efforts, in practice persons with disabilities continue to face barriers to their participation as equal members of society, all over the world. They rarely occupy positions in governments, their opinions are seldom considered, and they are usually not consulted in policymaking, including on matters directly affecting them.
26. As was evident in the process leading to the adoption of the Convention on the Rights of Persons with Disabilities, the participation of persons with disabilities in public decision-making can have an enormous impact on government actions affecting them and can lead to better decisions, since persons with disabilities are best positioned to identify their own needs and the most suitable policies for meeting them. Their participation ensures that States’ policies and programmes are devised on the basis of their needs and preferences. Therefore, the inclusion of persons with disabilities in public decision-making will result in greater efficiency and a more equitable use of resources, leading to improved outcomes for persons with disabilities and their communities.
27. An inclusive society is one that values and celebrates diversity and recognizes that individuals with different experiences, talents and viewpoints bring new ideas and solutions. By bringing complementary and diverse perspectives, persons with disabilities can make a significant contribution to policymaking and decision-making, foster opportunities for innovation and efficiency, and better reflect the diverse demands of citizens. States that encourage the active participation of all their citizens, including persons with disabilities, are more likely to reduce tensions and thus increase social cohesion.

Participation for agency and empowerment

28. Participation in itself can be a transformative tool for social change. Efforts to actively involve persons with disabilities in decision-making processes are important not only because they result in better decisions and more efficient outcomes, but also because they promote agency and empowerment.

Through participation, citizens become more involved in public decisions and more informed about how policymaking works and how they can contribute to it. When persons with disabilities get involved in public decisionmaking, they develop advocacy and negotiation skills that enable them to better express their views and realize their aspirations. The more that persons with disabilities participate in such processes, the stronger their voices become. Indeed, an increase in social capital is strongly linked to an increase in participation.

29. The effective and meaningful participation of persons with disabilities can also promote a sense of ownership. Ownership among citizens should not be interpreted narrowly or underestimated, as it reinforces public acceptance and the successful implementation of public policy. Effective participation of persons with disabilities in all stages of policymaking will develop their sense of ownership and responsibility vis-à-vis public decisions and can reinforce the interest of administrations in decision-making driven by public preference. Accordingly, such participation may contribute to enhanced public trust and reduced opposition to governments' decisions. Disability groups would also have the opportunity to develop a closer relationship with decision makers and policymakers and to influence the advocacy of other groups.
30. The participation of persons with disabilities can further enhance their sense of pride, as traditionally they have been either excluded from decision-making processes or included in a way that has not enabled their effective and meaningful engagement. The invisibility of persons with disabilities in public decision-making reinforces misperceptions towards them and, ultimately, contributes to a lack of awareness of their capabilities and rights as equal members of democratic societies. Their meaningful participation fosters respect and support for diversity in society, breaking down stereotypes and strengthening their identity as a group.
31. As persons with disabilities constitute at least 15 per cent of the global population, which equates to 1 billion people, their participation in the implementation of policies and programmes can have a profound effect on societies. Their ability to actively participate in the labour market, education, family life, leisure, culture and sport on an equal basis with others requires the breaking down of multiple cross-cutting attitudinal, structural and physical barriers. The inclusion of persons with disabilities in all matters, including but not limited to disability-specific processes, directly tackles these barriers and avoids the creation of new ones. Their active inclusion sends a clear message to decision makers and the society at large that persons with disabilities are rights holders capable of participating and engaging meaningfully at all levels of society.

Participation as a component of good governance

32. There is increasing recognition that participation is a critical component of good governance and democracy. Civil society is an important vehicle for channelling the interests and expectations of its members and groups who may be experiencing barriers in participation. CSOs are strategic actors that can encourage States' transparency and accountability and can encourage States to fight inequality and exclusion. Organizations of persons with disabilities can play an important role in promoting effective governance, holding authorities accountable and making them responsive to their needs, and in improving public management and human rights protection. Responses to the questionnaire highlighted numerous good practices regarding the participation of persons with disabilities in public decision-making, which demonstrate their role and added value in policy design and in the subsequent implementation and monitoring processes.
33. State authorities would also benefit from regular engagement with persons with disabilities, to learn not only about their specific needs but also about the policies required to address them. This would also provide State officials with an opportunity to understand the valuable contribution that persons with disabilities can make in societies, and avoid perpetuating outdated approaches to disability that de facto exclude a particular segment of the population.

[...]

Inter-American System

American Declaration of the Rights and Duties of Man (1948)

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

American Convention on Human Rights (1969)

Article 23. Political Rights

1. Every citizen shall enjoy the following rights and opportunities:
 - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 [...]

Inter-American Democratic Charter (2001)

Article 6

It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.

Social Charter of the Americas (2012)

Article 6

The individual is at the center, as principal participant and beneficiary, of an inclusive, just, and equitable economic development process.

[...]

Article 10

Member states, in partnership with the private sector and civil society, will promote sustainable development by means of economic growth, social development, and conservation and sustainable use of natural resources.

[...]

Article 21

Fighting poverty, reducing inequities, promoting social inclusion, and conservation and sustainable use of natural resources are fundamental and interrelated challenges facing the Hemisphere, and overcoming these challenges is essential to achieving sustainable development.

Member states will adopt and execute, with the participation of the private sector and civil society organizations, strategies, plans, and policies to meet these challenges as part of their development efforts and for the benefit and enjoyment of all persons and all generations.

Inter-American Strategy for the Promotion of Public Participation in Decision-Making of Sustainable Development (2001)

[...]

Principles

1. *Proactivity.* Public participation requires that governments and civil society take initiatives, in accordance with their respective roles, to develop their maximum potential and enrich the process of decision-making for sustainable development.
2. *Inclusiveness.* Full participation by all those interested in and/or affected by sustainable development issues is essential to achievement of durable solutions. Special efforts should be made to include the participation of the private sector, and to create equal opportunities for women and vulnerable groups such as indigenous populations, youth, disadvantaged racial and ethnic minorities (including disadvantaged populations of African descent), and other traditionally marginalized groups.
3. *Shared Responsibility.* Governments and civil society must share equitably the commitments, burdens, and benefits of development.
4. *Openness Throughout the Process.* Inclusive and continuous participation throughout the process of design, implementation, and evaluation of projects, policies, or programs inspires new ideas and expertise, legitimizes decisions, and enriches outcomes. A decision-making process that is open to input at all phases can benefit from adjustments wherever they are needed to respond to new information or circumstances.
5. *Access.* The involvement of civil society in development decisions is essential for lasting solutions. In order to participate effectively, citizens must have timely access, at the various levels of government, to information, to the political process, and to the justice system.
6. *Transparency.* Productive relationships between civil society and government require that both be more accountable and transparent. Transparency on the part of all concerned parties in a decision-making process facilitates more meaningful participation by ensuring that all motivations and objectives are explicit and that all information vital to the decision is reliable and available in a timely manner.
7. *Respect for public input.* Citizen participation will only be effective and efficient if there is assurance that, in the process of decision-making, contributions deriving from the implementation of various mechanisms for participation are evaluated, analyzed, and given proper consideration in a timely manner.

[...]

Political recommendations

1. Information and Communication Recommendation:

Recommendation: Create and/or strengthen existing formal and informal communication mechanisms to encourage information sharing, collaboration, and cooperation within and among civil society groups, within and between levels of government, and between all levels of government and civil society.

[...]

2. Legal framework

Recommendation: Create, expand, and implement legal and regulatory frameworks that ensure the participation of civil society in sustainable development decision.

[...]

3. Institutional procedures and structure

Recommendation: Develop and support institutional structures, policies, and procedures that promote and facilitate, within all levels of government and civil society, interaction in sustainable development decisions, and encourage change within existing institutions to pursue a basis for long-term direct dialogue and innovative solution.

[...]

4. Education and training

Recommendation: Procure and expand financial resources to initiate, strengthen, and/or continue participatory practices in decision-making for sustainable development.

[...]

5. Funding for participation

Recommendation: Develop and strengthen the capacity of individuals to participate in sustainable development decision-making with an increased base of knowledge (local, traditional and technical) of sustainable development issues and public participation practices.

[...]

6. Opportunities and Mechanisms for Public Participation

Recommendation: Create, strengthen, and support formal and informal opportunities and mechanisms for public participation in which sustainable development activities are discussed and decided upon.

[...]

D) Right of Access to justice

Universal system

Universal Declaration of Human Rights

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

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.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

International Covenant on Civil and Political Rights (1966)

Article 2

[...]

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Human Rights Committee, General Comment no. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13

[...]

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes 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. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.
16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.
17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.
18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by

the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.
20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

Human Rights Committee, General Comment no. 32, Article 14 (Right to equality before courts and tribunals and to a fair trial, 2007, CCPR/C/GC/32

I. General remarks

1. This general comment replaces general comment No. 13 (twenty-first session).
2. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.
3. Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1. Paragraphs 2 – 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. States parties to the Covenant, in their reports, should clearly distinguish between these different aspects of the right to a fair trial.
4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.
5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.³⁰⁷

³⁰⁷ General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.

6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.³⁰⁸ Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,³⁰⁹ except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.³¹⁰ Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.³¹¹

II. Equality before courts and tribunals

7. The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.³¹²
8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.
9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence.³¹³ This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³¹⁴
10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to

³⁰⁸ General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 15.

³⁰⁹ *Ibid.*, paras. 7 and 15.

³¹⁰ Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15.

³¹¹ General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 11.

³¹² Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary proceedings against a civil servant); Communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition).

³¹³ Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

³¹⁴ Communication No. 202/1986, *Ato del Avellanal v. Peru*, para. 10.2 (limitation of the right to represent matrimonial property before courts to the husband, thus excluding married women from suing in court). See also general comment No. 18 (1989) on non-discrimination, para. 7.

provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.³¹⁵

11. Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.³¹⁶ In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.³¹⁷
12. The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.³¹⁸
13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.³¹⁹ There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.³²⁰ The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.³²¹ In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.
14. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases,³²² objective and reasonable grounds must be provided to justify the distinction.

III. Fair and public hearing by a competent, independent and impartial tribunal

15. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.³²³
16. The concept of determination of rights and obligations “in a suit at law” (*de caractère civil/de carácter civil*) is more complex. It is formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, are equally authentic, and the *travaux préparatoires* do not resolve the discrepancies in the various language texts. The Committee notes that the concept of a “suit at law” or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.³²⁴ The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in

³¹⁵ Communications No. 377/1989, *Currie v. Jamaica*, para. 13.4; No. 704/1996, *Shaw v. Jamaica*, para. 7.6; No. 707/1996, *Taylor v. Jamaica*, para. 8.2; No. 752/1997, *Henry v. Trinidad and Tobago*, para. 7.6; No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.10.

³¹⁶ Communication No. 646/1995, *Lindon v. Australia*, para. 6.4.

³¹⁷ Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.2.

³¹⁸ Communication No. 450/1991, *I.P. v. Finland*, para. 6.2.

³¹⁹ Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4.

³²⁰ Communication No. 1086/2002, *Weiss v. Austria*, para. 9.6. For another example of a violation of the principle of equality of arms see Communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4 (adjournment of hearing).

³²¹ Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

³²² E.g. if jury trials are excluded for certain categories of offenders (see concluding observations, United Kingdom of Great Britain and Northern Ireland, CCPR/CO/73/UK (2001), para. 18) or offences.

³²³ Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2.

³²⁴ Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2.

the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons,³²⁵ the determination of social security benefits³²⁶ or the pension rights of soldiers,³²⁷ or procedures regarding the use of public land³²⁸ or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. For this reason, the Committee held this provision to be inapplicable in cases where domestic law did not confer any right to be promoted to a higher position in the civil service,³²⁹ to be appointed as a judge³³⁰ or to have a death sentence commuted by an executive body.³³¹ Furthermore, there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, such as disciplinary measures not amounting to penal sanctions being taken against a civil servant,³³² a member of the armed forces, or a prisoner. This guarantee furthermore does not apply to extradition, expulsion and deportation procedures.³³³ Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in these and similar cases, other procedural guarantees may still apply.³³⁴
18. The notion of a “tribunal” in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.
19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.³³⁵ The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of

³²⁵ Communication No. 441/1990, *Casanovas v. France*, para. 5.2.

³²⁶ Communication No. 454/1991, *Garcia Pons v. Spain*, para. 9.3.

³²⁷ Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.

³²⁸ Communication No. 779/1997, *Äärelä and Näkkäläjätvi v. Finland*, paras. 7.2 – 7.4.

³²⁹ Communication No. 837/1998, *Kolanowski v. Poland*, para. 6.4.

³³⁰ Communications No. 972/2001, *Kazantzis v. Cyprus*, para. 6.5; No. 943/2000, *Jacobs v. Belgium*, para. 8.7, and No. 1396/2005, *Rivera Fernández v. Spain*, para. 6.3.

³³¹ Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.4.

³³² Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary dismissal).

³³³ Communications No. 1341/2005, *Zundel v. Canada*, para. 6.8, No. 1359/2005, *Esposito v. Spain*, para. 7.6.

³³⁴ See para. 62 below.

³³⁵ Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

the judiciary and disciplinary sanctions taken against them.³³⁶ A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.³³⁷ It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.³³⁸ The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.³³⁹
21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.³⁴⁰ Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.³⁴¹
22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,³⁴² i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.³⁴³
23. Some countries have resorted to special tribunals of “faceless judges” composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives³⁴⁴ from the proceedings,³⁴⁵ restrictions of the right to a lawyer of their own choice;³⁴⁶ severe restrictions

³³⁶ Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.

³³⁷ Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

³³⁸ Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

³³⁹ Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo*, para. 5.2.

³⁴⁰ Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.

³⁴¹ *Idem*.

³⁴² Also see Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64 and general comment No. 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 11.

³⁴³ See communication No. 1172/2003, *Madani v. Algeria*, para. 8.7.

³⁴⁴ Communication No. 1298/2004, *Becerra Barney v. Colombia*, para.7.2.

³⁴⁵ Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.

³⁴⁶ Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.

or denial of the right to communicate with their lawyers, particularly when held incommunicado;³⁴⁷ threats to the lawyers;³⁴⁸ inadequate time for preparation of the case;³⁴⁹ or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant.³⁵⁰ Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.³⁵¹

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.
25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,³⁵² or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury³⁵³ that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.
26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.³⁵⁴ It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.³⁵⁵ The same standard applies to specific instructions to the jury by the judge in a trial by jury.³⁵⁶
27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision.³⁵⁷ Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.³⁵⁸

³⁴⁷ Communication No.577/1994, Polay Campos v. Peru, para. 8.8; Communication No. 1126/2002, Carranza Alegre v. Peru, para.7.5.

³⁴⁸ Communication No. 1058/2002, Vargas Mas v. Peru, para. 6.4.

³⁴⁹ Communication No. 1125/2002, Quispe Roque v. Peru, para. 7.3.

³⁵⁰ Communication No. 678/1996, Gutiérrez Vivanco v. Peru, para. 7.1; Communication No. 1126/2002, Carranza Alegre v. Peru, para.7.5; Communication No. 1125/2002, Quispe Roque v. Peru, para. 7.3; Communication No. 1058/2002, Vargas Mas v. Peru, para. 6.4.

³⁵¹ Communications No. 577/1994, Polay Campos v. Peru, para. 8.8 ; No. 678/1996, Gutiérrez Vivanco v. Peru, para. 7.1.

³⁵² Communication No. 770/1997, Gridin v. Russian Federation, para. 8.2.

³⁵³ See Committee on the Elimination of Racial Discrimination, communication No. 3/1991, Narrainen v. Norway, para. 9.3.

³⁵⁴ Communications No. 273/1988, B.d.B. v. The Netherlands, para. 6.3; No. 1097/2002, Martínez Mercader et al v. Spain, para. 6.3.

³⁵⁵ Communication No. 1188/2003, Riedl-Riedenstien et al. v. Germany, para. 7.3; No. 886/1999, Bondarenko v. Belarus, para. 9.3; No. 1138/2002, Arenz et al. v. Germany, admissibility decision, para. 8.6.

³⁵⁶ Communication No. 253/1987, Kelly v. Jamaica, para. 5.13; No. 349/1989, Wright v. Jamaica, para. 8.3.

³⁵⁷ Communication No. 203/1986, Muñoz Hermoza v. Peru, para. 11.3 ; No. 514/1992, Fei v. Colombia, para. 8.4 .

³⁵⁸ See e.g. Concluding observations, Democratic Republic of Congo, CCPR/C/COD/CO/3 (2006), para. 21, Central African Republic, CCPR/C/CAF/CO/2 (2006), para. 16.

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, *inter alia*, the potential interest in the case and the duration of the oral hearing.³⁵⁹ The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations,³⁶⁰ or to pre-trial decisions made by prosecutors and other public authorities.³⁶¹
29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

IV. Presumption of innocence

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.³⁶² Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.³⁶³ The denial of bail³⁶⁴ or findings of liability in civil proceedings³⁶⁵ do not affect the presumption of innocence.

V. Rights of persons charged with a criminal offence

31. The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.³⁶⁶ Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant.³⁶⁷ The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,³⁶⁸ or the individual is publicly named as such. The

³⁵⁹ Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2.

³⁶⁰ Communication No. 301/1988, *R.M. v. Finland*, para. 6.4.

³⁶¹ Communication No. 819/1998, *Kavanagh v. Ireland*, para. 10.4.

³⁶² Communication No. 770/1997, *Gridin v. Russian Federation*, paras. 3.5 and 8.3.

³⁶³ On the relationship between article 14, paragraph 2 and article 9 of the Covenant (pre-trial detention) see, e.g. concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/70/ARG (2000), para. 10.

³⁶⁴ Communication No. 788/1997, *Cagas, Butin and Astillero v. Philippines*, para. 7.3.

³⁶⁵ Communication No. 207/1986, *Moraël v. France*, para. 9.5; No. 408/1990, *W.J.H. v. The Netherlands*, para. 6.2; No. 432/1990, *W.B.E. v. The Netherlands*, para. 6.6.

³⁶⁶ Communication No. 1056/2002, *Khachatryan v. Armenia*, para. 6.4.

³⁶⁷ Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.8.

³⁶⁸ Communications No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4 and 253/1987, *Kelly v. Jamaica*, para. 5.8.

specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.³⁶⁹

32. Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.³⁷⁰ In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.³⁷¹ What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial.³⁷² A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.³⁷³ There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.³⁷⁴
33. “Adequate facilities” must include access to documents and other evidence; this access must include all materials³⁷⁵ that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim. If the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with the language, it may be sufficient that the relevant documents in the case file are made available to counsel.³⁷⁶
34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.³⁷⁷ Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.
35. The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case,³⁷⁸ taking into

³⁶⁹ Communication No. 16/1977, *Mbenge v. Zaire*, para. 14.1.

³⁷⁰ Communications No. 282/1988, *Smith v. Jamaica*, para. 10.4; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.

³⁷¹ See communication No. 451/1991, *Harward v. Norway*, para. 9.5.

³⁷² Communication No. 1128/2002, *Morais v. Angola*, para. 5.6. Similarly Communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica*, para. 11.4; No. 230/87, *Henry v. Jamaica*, para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.

³⁷³ Communication No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4.

³⁷⁴ Communications No. 913/2000, *Chan v. Guyana*, para. 6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para. 7.2.

³⁷⁵ See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

³⁷⁶ Communication No. 451/1991, *Harward v. Norway*, para. 9.5.

³⁷⁷ Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.

³⁷⁸ See e.g. communication No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay. In communication No. 537/1993, *Kelly v. Jamaica*, para. 5.11, an 18 months delay between charges and beginning of the trial did not violate art. 14, para. 3 (c). See also communication No. 676/1996, *Yasseen and Thomas v. Guyana*, para. 7.11 (delay of two years between a decision by the Court of Appeal and the beginning of a retrial) and communication No. 938/2000, *Siewpersaud, Sukhrum, and Persaud v. Trinidad v. Tobago*, para. 6.2 (total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay).

account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.³⁷⁹ This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.³⁸⁰ All stages, whether in first instance or on appeal must take place “without undue delay.”

36. Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.³⁸¹
37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person “or” with legal assistance of one’s own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.³⁸²
38. Third, article 14, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned “in the interest of justice”³⁸³ as is the existence of some objective chance of success at the appeals stage.³⁸⁴ In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.³⁸⁵ Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers,³⁸⁶ blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case,³⁸⁷ or absence during the hearing of a witness in such cases³⁸⁸ may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.³⁸⁹ There is also

³⁷⁹ Communication No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2.

³⁸⁰ Communications No. 1089/2002, *Rouse v. Philippines*, para.7.4; No. 1085/2002, *Taright, Touadi, Remli and Yousfi v. Algeria*, para. 8.5.

³⁸¹ Communications No. 16/1977, *Mbenge v. Zaire*, para. 14.1; No. 699/1996, *Maleki v. Italy*, para. 9.3.

³⁸² Communication No. 1123/2002, *Correia de Matos v. Portugal*, paras. 7.4 and 7.5.

³⁸³ Communication No. 646/1995, *Lindon v. Australia*, para. 6.5.

³⁸⁴ Communication No. 341/1988, *Z.P. v. Canada*, para. 5.4.

³⁸⁵ Communications No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.4; No. 964/2001, *Saidova v. Tajikistan*, para. 6.8; No. 781/1997, *Aliev v. Ukraine*, para. 7.3; No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 58.

³⁸⁶ Communication No. 383/1989, *H.C. v. Jamaica*, para. 6.3.

³⁸⁷ Communication No. 253/1987, *Kelly v. Jamaica*, para. 9.5.

³⁸⁸ Communication No. 838/1998, *Hendricks v. Guyana*, para. 6.4. For the case of an absence of an author’s legal representative during the hearing of a witness in a preliminary hearing see Communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.

³⁸⁹ Communications No. 705/1996, *Taylor v. Jamaica*, para. 6.2 ; No. 913/2000, *Chan v. Guyana*, para. 6.2; No. 980/2001, *Hussain v. Mauritius*, para. 6.3.

a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.³⁹⁰

39. Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7,³⁹¹ it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.
40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.³⁹² This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.³⁹³
41. Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.³⁹⁴ Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred,³⁹⁵ and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.³⁹⁶

VI. Juvenile persons

42. Article 14, paragraph 4, provides that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection. In criminal proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation. Detention before and during the trial should be avoided to the extent possible.³⁹⁷

³⁹⁰ Communication No. 917/2000, *Arutyunyan v. Uzbekistan*, para. 6.3.

³⁹¹ See para. 6 above.

³⁹² Communication No. 219/1986, *Guesdon v. France*, para. 10.2.

³⁹³ *Idem*.

³⁹⁴ Communications No. 1208/2003, *Kurbonov v. Tajikistan*, paras. 6.2 – 6.4; No. 1044/2002, *Shukurova v. Tajikistan*, paras. 8.2 – 8.3; No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; ; No. 912/2000, *Deolall v. Guyana*, para. 5.1; No. 253/1987, *Kelly v. Jamaica*, para. 5.5.

³⁹⁵ Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15. On the use of other evidence obtained in violation of article 7 of the Covenant, see paragraph 6 above.

³⁹⁶ Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 253/1987, *Kelly v. Jamaica*, para. 7.4.

³⁹⁷ See general comment No. 17 (1989) on article 24 (Rights of the child), para. 4.

43. States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age. It is important to establish a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity.
44. Whenever appropriate, in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, counselling or community service or educational programmes, should be considered, provided they are compatible with the requirements of this Covenant and other relevant human rights standards.

VII. Review by a higher tribunal

45. Article 14, paragraph 5 of the Covenant provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As the different language versions (crime, *infraction*, *delito*) show, the guarantee is not confined to the most serious offences. The expression “according to law” in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognised by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out,³⁹⁸ as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal.³⁹⁹ However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.⁴⁰⁰
46. Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law⁴⁰¹ or any other procedure not being part of a criminal appeal process, such as constitutional motions.⁴⁰²
47. Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court⁴⁰³ or a court of final instance,⁴⁰⁴ following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.⁴⁰⁵
48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.⁴⁰⁶ A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.⁴⁰⁷ However, article 14, paragraph 5 does not require a full retrial or a “hearing”,⁴⁰⁸ as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus,

³⁹⁸ Communications No. 1095/2002, Gomariz Valera v. Spain, para. 7.1; No. 64/1979, Salgar de Montejo v. Colombia, para.10.4.

³⁹⁹ Communication No. 1089/2002, Rouse v. Philippines, para. 7.6.

⁴⁰⁰ Communication No. 230/1987, Henry v. Jamaica, para. 8.4.

⁴⁰¹ Communication No. 450/1991, I.P. v. Finland, para. 6.2.

⁴⁰² Communication No. 352/1989, Douglas, Gentles, Kerr v. Jamaica, para. 11.2.

⁴⁰³ Communication No. 1095/2002, Gomariz Valera v. Spain, para. 7.1.

⁴⁰⁴ Communication No. 1073/2002, Terrón v Spain, para. 7.4.

⁴⁰⁵ *Idem*.

⁴⁰⁶ Communications No. 1100/2002, Bandajevsky v. Belarus, para. 10.13; No. 985/2001, Aliboeva v. Tajikistan, para. 6.5; No. 973/2001, Khalilova v. Tajikistan, para. 7.5; No. 623-627/1995, Domukovsky et al. v. Georgia, para.18.11; No. 964/2001, Saidova v. Tajikistan, para. 6.5; No. 802/1998, Rogerson v. Australia, para. 7.5; No. 662/1995, Lumley v. Jamaica, para. 7.3.

⁴⁰⁷ Communication No. 701/1996, Gómez Vázquez v. Spain, para. 11.1.

⁴⁰⁸ Communication No. 1110/2002, Rolando v. Philippines, para. 4.5; No. 984/2001, Juma v. Australia, para. 7.5; No. 536/1993, Perera v. Australia, para. 6.4.

for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.⁴⁰⁹

49. The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal,⁴¹⁰ also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.⁴¹¹ The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.⁴¹²
50. A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor.⁴¹³
51. The right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d), but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.⁴¹⁴ The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.⁴¹⁵

VIII. Compensation in cases of miscarriage of justice

52. According to paragraph 6 of article 14 of the Covenant, compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.⁴¹⁶ It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.
53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgement becomes final,⁴¹⁷ or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.⁴¹⁸

⁴⁰⁹ E.g. communications No. 1156/2003, Pérez Escobar v. Spain, para. 3; No. 1389/2005, Bertelli Gálvez v. Spain, para. 4.5.

⁴¹⁰ Communications No. 903/1999, Van Hulst v. Netherlands, para. 6.4; No. 709/1996, Bailey v. Jamaica, para. 7.2; No. 663/1995, Morrison v. Jamaica, para. 8.5.

⁴¹¹ Communication No. 662/1995, Lumley v. Jamaica, para. 7.5.

⁴¹² Communications No. 845/1998, Kennedy v. Trinidad and Tobago, para. 7.5; No. 818/1998, Sextus v. Trinidad and Tobago, para. 7.3; No. 750/1997, Daley v. Jamaica, para. 7.4; No. 665/1995, Brown and Parish v. Jamaica, para. 9.5; No. 614/1995, Thomas v. Jamaica, para. 9.5; No. 590/1994, Bennet v. Jamaica, para. 10.5.

⁴¹³ Communications No. 1100/2002, Bandajevsky v. Belarus, para. 10.13; No. 836/1998, Gelazauskas v. Lithuania, para. 7.2.

⁴¹⁴ Communication No. 554/1993, LaVende v. Trinidad and Tobago, para. 5.8.

⁴¹⁵ See communications No. 750/1997, Daley v. Jamaica, para. 7.5; No. 680/1996, Gallimore v. Jamaica, para. 7.4; No. 668/1995, Smith and Stewart v. Jamaica, para. 7.3. See also Communication No. 928/2000, Sooklal v. Trinidad and Tobago, para. 4.10.

⁴¹⁶ Communications No. 963/2001, Uebergang v. Australia, para. 4.2; No. 880/1999, Irving v. Australia, para. 8.3; No. 408/1990, W.J.H. v. Netherlands, para. 6.3.

⁴¹⁷ Communications No. 880/1999, Irving v. Australia, para. 8.4; No. 868/1999, Wilson v. Philippines, para. 6.6.

⁴¹⁸ Communication No. 89/1981, Muhonen v. Finland, para. 11.2.

IX. *Ne bis in idem*

54. Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.
55. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.⁴¹⁹
56. The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial.⁴²⁰ Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.
57. This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.⁴²¹ Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States.⁴²² This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.⁴²³

X. Relationship of article 14 with other provisions of the Covenant

58. As a set of procedural guarantees, article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law. In procedural terms, the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 has been violated.⁴²⁴ However, as regards the right to have one's conviction and sentence reviewed by a higher tribunal, article 14, paragraph 5 of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 when invoking the right to access a tribunal at the appeals level.⁴²⁵
59. In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).⁴²⁶
60. To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.⁴²⁷

⁴¹⁹ See United Nations Working Group on Arbitrary Detention, Opinion No. 36/1999 (Turkey), E/CN.4/2001/14/Add. 1, para. 9 and Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add. 1, para. 30.

⁴²⁰ Communication No. 277/1988, Terán Jijón v. Ecuador, para. 5.4.

⁴²¹ Communication No. 1001/2001, Gerardus Strik v. The Netherlands, para. 7.3.

⁴²² Communications No. 692/1996, A.R.J. v. Australia, para. 6.4; No. 204/1986, A.P. v. Italy, para. 7.3.

⁴²³ See, e.g. Rome Statute of the International Criminal Court, article 20, para. 3.

⁴²⁴ E.g. Communications No. 1033/2001, Singarasa v. Sri Lanka, para. 7.4; No. 823/1998, Czernin v. Czech Republic, para. 7.5.

⁴²⁵ Communication No. 1073/2002, Terrón v. Spain, para. 6.6.

⁴²⁶ E.g. communications No. 1044/2002, Shakurova v. Tajikistan, para. 8.5 (violation of art. 14 para. 1 and 3 (b), (d) and (g)); No. 915/2000, Ruzmetov v. Uzbekistan, para. 7.6 (violation of art. 14, para. 1, 2 and 3 (b), (d), (e) and (g)); No. 913/2000, Chan v. Guyana, para. 5.4 (violation of art. 14 para. 3 (b) and (d)); No. 1167/2003, Rayos v. Philippines, para. 7.3 (violation of art. 14 para. 3(b)).

⁴²⁷ Communications No. 1044/2002, Shakurova v. Tajikistan, para. 8.2; No. 915/2000, Ruzmetov v. Uzbekistan, paras. 7.2 and 7.3; No. 1042/2001, Boimurodov v. Tajikistan, para. 7.2, and many others. On the prohibition to admit evidence in violation of article 7, see paragraphs 6 and 41 above.

61. If someone suspected of a crime and detained on the basis of article 9 of the Covenant is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as provided for by articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant may be violated at the same time.⁴²⁸
62. The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14⁴²⁹ and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.⁴³⁰ All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.
63. The way criminal proceedings are handled may affect the exercise and enjoyment of rights and guarantees of the Covenant unrelated to article 14. Thus, for instance, to keep pending, for several years, indictments for the criminal offence of defamation brought against a journalist for having published certain articles, in violation of article 14, paragraph 3 (c), may leave the accused in a situation of uncertainty and intimidation and thus have a chilling effect which unduly restricts the exercise of his right to freedom of expression (article 19 of the Covenant).⁴³¹ Similarly, delays of criminal proceedings for several years in contravention of article 14, paragraph 3 (c), may violate the right of a person to leave one's own country as guaranteed in article 12, paragraph 2 of the Covenant, if the accused has to remain in that country as long as proceedings are pending.⁴³²
64. As regards the right to have access to public service on general terms of equality as provided for in article 25 (c) of the Covenant, a dismissal of judges in violation of this provision may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary.⁴³³
65. Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26, or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that "all persons shall be equal before the courts and tribunals," but may also amount to discrimination.⁴³⁴

Committee on Economic, Social and Cultural Rights, General Comment no. 15, The right to water (Article 11 and 12 of the International Covenant of Economic, Social and Cultural Rights), 2002, E/C.12/2002/11

[...]

49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.

⁴²⁸ Communications No. 908/2000, *Evans v. Trinidad and Tobago*, para. 6.2; No. 838/1998, *Hendricks v. Guayana*, para. 6.3, and many more.

⁴²⁹ Communication No. 1051/2002 *Ahani v. Canada*, para. 10.9. See also communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition), 1438/2005, *Taghi Khadje v. Netherlands*, para. 6.3.

⁴³⁰ See communication No. 961/2000, *Everett v. Spain*, para. 6.4.

⁴³¹ Communication No. 909/2000, *Mujwana Kankanamge v. Sri Lanka*, para. 9.4.

⁴³² Communication No. 263/1987, *Gonzales del Rio v. Peru*, paras. 5.2 and 5.3.

⁴³³ Communications No. 933/2000, *Mundy Busyo et al. v. Democratic Republic of Congo*, para. 5.2.; No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

⁴³⁴ Communication No. 202/1986, *Ato del Avellanal v. Peru*, paras. 10.1 and 10.2.

50. States parties may find it advantageous to adopt framework legislation to operationalise their right to water strategy. Such legislation should include: (a) targets or goals to be attained and the timeframe for their achievement; (b) the means by which the purpose could be achieved; (c) the intended collaboration with civil society, private sector and international organizations; (d) institutional responsibility for the process; (e) national mechanisms for its monitoring; and (f) remedies and recourse procedure.

[...]

Remedies and accountability

55. Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels (See General Comment No. 9 (1998)(, para. 4) and Principle 10, of the Rio Declaration on Environment and Development. The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.
56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.
57. The incorporation in the domestic legal order of international instruments recognizing the right to water can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant.
58. Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions.
59. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to water.

[...]

Committee of Economic, Social and Cultural Rights, General Comment no. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, E/C.12/2000/4

[...]

56. States should consider adopting a framework law to operationalise their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring

progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

[...]

Remedies and accountability

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.
60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.⁴³⁵ Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.
61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.
62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

[...]

Committee of Economic, Social and Cultural Rights, General Comment no. 12, The right to adequate food (Article 11 of the International Covenant on Economic, Social and Cultural Rights), 1999, E/C.12/1999/5

[...]

23. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, E/C.12/1999/5 page 7 transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

[...]

29. In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.

[...]

⁴³⁵ See General Comment No. 2, para. 9.

Committee of Economic, Social and Cultural Rights, General Comment no. 10, The role of national human rights institutions in the protection of economic, social and cultural rights, 1998, E/C.12/1998/25

[...]

3. The Committee notes that national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions. The following list is indicative of the types of activities that can be, and in some instances already have been, undertaken by national institutions in relation to these rights:

[...]

- f) Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and
- g) Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.

[...]

Committee of Economic, Social and Cultural Rights, General Comment no. 4, The right to adequate housing (Article 11 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights), 1991, E/1992/23

[...]

17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

[...]

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights :

- (a) The right to equal treatment before the tribunals and all other organs administering justice.

[...]

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Committee on the Elimination of Racial Discrimination, General recommendation no. 34, Racial discrimination against people of African descent, 2011, CERD/C/GC/34

[...]

VIII. Administration of justice

34. In assessing the impact of a country's system of administration of justice, take into consideration its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, and pay particular attention to the measures below where they pertain to people of African descent.

35. Take all the necessary steps to secure equal access to the justice system for all people of African descent including by providing legal aid, facilitating individual or group claims, and encouraging non-governmental organizations to defend their right.

[...]

41. Ensure that authorities at all levels in the State respect the right of members of communities of people of African descent to participate in decisions that affect them.

[...]

Committee on the Elimination of Racial Discrimination, General Comment no. 31, On the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005, A/60/18

[...]

B. Strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system

5. States parties should pursue national strategies the objectives of which include the following:

[...]

- e)** To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;

[...]

II. Steps to be taken to prevent racial discrimination with regard to victims of racism

A. Access to the law and to justice

6. In accordance with article 6 of the Convention, States parties are obliged to guarantee the right of every person within their jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination, without discrimination of any kind, whether such acts are committed by private individuals or State officials, as well as the right to seek just and adequate reparation for the damage suffered.

7. In order to facilitate access to justice for the victims of racism, States parties should strive to supply the requisite legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights.

8. In that regard, States parties should promote, in the areas where such persons live, institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation.
9. States parties should also expand their cooperation with associations of lawyers, university institutions, legal advice centres and non-governmental organizations specializing in protecting the rights of marginalized communities and in the prevention of discrimination.

[...]

D. Functioning of the system of justice

19. States parties should ensure that the system of justice:
 - a) Grants a proper place to victims and their families, as well as witnesses, throughout the proceedings, by enabling complainants to be heard by the judges during the examination proceedings and the court hearing, to have access to information, to confront hostile witnesses, to challenge evidence and to be informed of the progress of proceedings;
 - b) Treats the victims of racial discrimination without discrimination or prejudice, while respecting their dignity, through ensuring in particular that hearings, questioning or confrontations are carried out with the necessary sensitivity as far as racism is concerned;
 - c) Guarantees the victim a court judgement within a reasonable period;
 - d) Guarantees victims just and adequate reparation for the material and moral harm suffered as a result of racial discrimination.

[...]

C. The trial and the court judgement

27. Prior to the trial, States parties may, where appropriate, give preference to non-judicial or parajudicial procedures for dealing with the offence, taking into account the cultural or customary background of the perpetrator, especially in the case of persons belonging to indigenous peoples.
28. In general, States parties must ensure that persons belonging to the groups referred to in the last paragraph of the preamble, like all other persons, enjoy all the guarantees of a fair trial and equality before the law, as enshrined in the relevant international human rights instruments, and specifically.

[...]

2. The right to the assistance of counsel and the right to an interpreter

30. Effectively guaranteeing these rights implies that States parties must set up a system under which counsel and interpreters will be assigned free of charge, together with legal help or advice and interpretation services for persons belonging to the groups referred to in the last paragraph of the preamble.

3. The right to an independent and impartial tribunal

31. States parties should strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel.
32. They should prevent all direct influence by pressure groups, ideologies, religions and churches on the functioning of the system of justice and on the decisions of judges, which may have a discriminatory effect on certain groups.
33. States parties may, in this regard, take into account the Bangalore Principles of Judicial Conduct adopted in 2002 (E/CN.4/2003/65, annex), which recommend in particular that: – Judges should be aware of the diversity of society and differences linked with background, in particular racial origins; – They should not, by words or conduct, manifest any bias towards persons or groups on the grounds of their racial or other origin; 10 – They should carry out their duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and – They should oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

D. Guarantee of fair punishment

34. In this regard, States should ensure that the courts do not apply harsher punishments solely because of an accused person's membership of a specific racial or ethnic group.
35. Special attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences and to capital punishment in countries which have not abolished it, bearing in mind reports that this punishment is imposed and carried out more frequently against persons belonging to specific racial or ethnic groups.
36. In the case of persons belonging to indigenous peoples, States parties should give preference to alternatives to imprisonment and to other forms of punishment that are better adapted to their legal system, bearing in mind in particular International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.
37. Punishments targeted exclusively at non-nationals that are additional to punishments under ordinary law, such as deportation, expulsion or banning from the country concerned, should be imposed only in exceptional circumstances and in a proportionate manner, for serious reasons related to public order which are stipulated in the law, and should take into account the need to respect the private family life of those concerned and the international protection to which they are entitled.

[...]

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

[...]

Committee on the Elimination of Discrimination Against Women, General Comment no. 33, Women's access to justice, 2015, CEDAW/C/GC/33

I. Introduction and scope

1. The right to access to justice for women is essential to the realization of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women. It is a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law implementation mechanisms. The right to access to justice is multidimensional. It encompasses justiciability, availability, accessibility, good quality, the provision of remedies for victims and the accountability of justice systems. For the purposes of the present general recommendation, all references to "women" should be understood to include women and girls, unless otherwise specifically noted.
2. In the present general recommendation, the Committee examines the obligations of States parties to ensure that women have access to justice. These obligations encompass the protection of women's rights against all forms of discrimination with a view to empowering them as individuals and as rights holders. Effective access to justice optimizes the emancipatory and transformative potential of the law.

3. In practice, the Committee has observed a number of obstacles and restrictions that impede women from realizing their right to access to justice on a basis of equality, including a lack of effective jurisdictional protection offered by States parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality owing to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All these obstacles constitute persistent violations of women's human rights.
4. The scope of the present general recommendation includes the procedures and quality of justice for women at all levels of justice systems, including specialized and quasi-judicial mechanisms. Quasi-judicial mechanisms encompass all actions of public administrative agencies or bodies, similar to those carried out by the judiciary, which have legal effects and may affect legal rights, duties and privileges.
5. The scope of the right to access to justice also includes plural justice systems. The term "plural justice systems" refers to the coexistence within a State party of State laws, regulations, procedures and decisions on the one hand, and religious, customary, indigenous or community laws and practices on the other. Therefore, plural justice systems include multiple sources of law, whether formal or informal, whether State, non-State or mixed, that women may encounter when seeking to exercise their right to access to justice. Religious, customary, indigenous and community justice systems—referred to as traditional justice systems in the present general recommendation—may be formally recognized by the State, operate with the acquiescence of the State, with or without any explicit status, or function outside of the State's regulatory framework.
6. International and regional human rights treaties and declarations and most national constitutions contain guarantees relating to sex and/or gender equality before the law and obligations to ensure that everyone benefits from the equal protection of the law.⁴³⁶ Article 15 of the Convention provides that women and men must have equality before the law and benefit from equal protection of the law. Article 2 stipulates that States parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including through the establishment of competent national tribunals and other public institutions, to ensure the effective protection of women against any act of discrimination. The content and scope of that provision are further detailed in the Committee's general recommendation No. 28 on the core obligations of States parties under article 2 of the Convention. Article 3 mentions the need for appropriate measures to ensure that women can exercise and enjoy their human rights and fundamental freedoms on a basis of equality with men.
7. Discrimination may be directed against women on the basis of their sex and gender. Gender refers to socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society on to biological differences, which are consistently reflected within the justice system and its institutions. Under article 5 (a) of the Convention, States parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotypes, that prevent women from exercising and claiming their rights and impede their access to effective remedies.
8. Discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms and gender-based violence, which affects women in particular, has an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition, discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or

⁴³⁶ See, for example, articles 7 and 8 of the Universal Declaration of Human Rights, articles 2 and 14 of the International Covenant on Civil and Political Rights and articles 2 (2) and 3 of the International Covenant on Economic, Social and Cultural Rights. At the regional level, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights all contain relevant provisions.

maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person. These intersecting factors make it more difficult for women from those groups to gain access to justice.⁴³⁷

9. Other factors that make it more difficult for women to gain access to justice include illiteracy, trafficking, armed conflict, status as an asylum seeker, internal displacement, statelessness, migration, being a female head of household, widowhood, living with HIV, deprivation of liberty, criminalization of prostitution, geographical remoteness and stigmatization of women fighting for their rights. That human rights defenders and organizations are frequently targeted because of their work must be emphasized and their own right to access to justice protected.
10. The Committee has documented many examples of the negative impact of intersecting forms of discrimination on access to justice, including ineffective remedies, for specific groups of women. Women belonging to such groups often do not report violations of their rights to the authorities for fear that they will be humiliated, stigmatized, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials. The Committee has also noted that, when women from those groups lodge complaints, the authorities frequently fail to act with due diligence to investigate, prosecute and punish perpetrators and/or provide remedies.⁴³⁸
11. In addition to articles 2 (c), 3, 5 (a) and 15 of the Convention, States parties have further treaty-based obligations to ensure that all women have access to education and information about their rights and the remedies that are available and how to gain access to them, and access to competent, gender-sensitive dispute resolution systems, as well as equal access to effective and timely remedies.⁴³⁹
12. The Committee's views and recommendations concerning the steps that need to be taken to overcome obstacles encountered by women in gaining access to justice are informed by its experience in considering the reports of States parties, its analysis of individual communications and its conduct of inquiries under the Optional Protocol to the Convention. In addition, reference is made to work on access to justice by other United Nations human rights mechanisms, national human rights institutions, civil society organizations, including community-based women's associations, and academic researchers.

II. General issues and recommendations on women's access to justice

A. Justiciability, availability, accessibility, good quality, provision of remedies and accountability of justice systems

13. The Committee has observed that the concentration of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to gain access to them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to high-quality, gender-competent legal advice, including legal aid, as well as the often-noted deficiencies in the quality of justice systems (e.g., gender-insensitive judgements or decisions owing to a lack of training, delays and excessive length of proceedings, corruption) all prevent women from gaining access to justice.
14. Six interrelated and essential components —justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems— are therefore necessary to ensure access to justice. While differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in each State party, the basic elements of the approach are universally relevant and immediately applicable. Accordingly:
 - (a) Justiciability requires the unhindered access by women to justice and their ability and empowerment to claim their rights as legal entitlements under the Convention;

⁴³⁷ See paragraph 18 of general recommendation No. 28.

⁴³⁸ See, for example, the concluding observations on the Bahamas (CEDAW/C/BHS/CO/1-5, para. 25 (d)), Costa Rica (CEDAW/C/CRI/CO/5-6, paras. 40-41), Fiji (CEDAW/C/FJI/CO/4, paras. 2425), Kyrgyzstan (A/54/38/Rev.1, part one, paras. 127-128), the Republic of Korea (CEDAW/C/KOR/CO/6, paras. 19-20, and CEDAW/C/KOR/CO/7, para. 23 (d)) and Uganda (CEDAW/C/UGA/CO/7, paras. 43-44).

⁴³⁹ See, in particular, general recommendations Nos. 19, 21, 23, 24, 26, 27, 29 and 30.

- (b) Availability requires the establishment of courts, quasi-judicial bodies or other bodies throughout the State party in urban, rural and remote areas, as well as their maintenance and funding;
 - (c) Accessibility requires that all justice systems, both formal and quasi-judicial, be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women, including those who face intersecting or compounded forms of discrimination;
 - (d) Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality⁴⁴⁰ and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. It also requires that justice systems be contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive and take account of the increasing demands by women for justice;
 - (e) Provision of remedies requires that justice systems provide women with viable protection and meaningful redress for any harm that they may suffer (see art. 2); and
 - (f) Accountability of justice systems is ensured through monitoring to guarantee that they function in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring of the actions of justice system professionals and of their legal responsibility when they violate the law.
15. With regard to justiciability, the Committee recommends that States parties:
- (a) Ensure that rights and correlative legal protections are recognized and incorporated into the law, improving the gender responsiveness of the justice system;
 - (b) Improve women's unhindered access to justice systems and thereby empower them to achieve de jure and de facto equality;
 - (c) Ensure that justice system professionals handle cases in a gender-sensitive manner;
 - (d) Ensure the independence, impartiality, integrity and credibility of the judiciary and the fight against impunity;
 - (e) Tackle corruption in justice systems as an important element of eliminating discrimination against women in gaining access to justice;
 - (f) Confront and remove barriers to women's participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers of justice-related services, and take steps, including temporary special measures, to ensure that women are equally represented in the judiciary and other law implementation mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal officials and expert practitioners, as well as in other professional capacities;
 - (g) Revise the rules on the burden of proof in order to ensure equality between the parties in all fields where power relationships deprive women of fair treatment of their cases by the judiciary;
 - (h) Cooperate with civil society and community-based organizations to develop sustainable mechanisms to support women's access to justice and encourage non-governmental organizations and civil society entities to take part in litigation relating to women's rights;
 - (i) Ensure that women human rights defenders are able to gain access to justice and receive protection from harassment, threats, retaliation and violence.
16. With regard to the availability of justice systems, the Committee recommends that States parties:
- (a) Ensure the creation, maintenance and development of courts, tribunals and other entities, as needed, that guarantee women's right to access to justice without discrimination throughout the entire territory of the State party, including in remote, rural and isolated areas, giving

⁴⁴⁰ See the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in its resolution 40/32.

consideration to the establishment of mobile courts, especially to serve women living in remote, rural and isolated areas, and to the creative use of modern information technology solutions, when feasible;

- (b) In cases of violence against women, ensure access to financial aid, crisis centres, shelters, hotlines and medical, psychosocial and counselling services;
- (c) Ensure that rules on standing allow groups and civil society organizations with an interest in a given case to lodge petitions and participate in the proceedings;
- (d) Establish an oversight mechanism by independent inspectors to ensure the proper functioning of the justice system and address any discrimination against women committed by justice system professionals.

17. With regard to accessibility of justice systems, the Committee recommends that States parties:

- (a) Remove economic barriers to justice by providing legal aid and ensure that fees for issuing and filing documents, as well as court costs, are reduced for women with low incomes and waived for women living in poverty;
- (b) Remove linguistic barriers by providing independent and professional translation and interpretation services, when needed, and provide individualized assistance for illiterate women in order to guarantee their full understanding of judicial and quasi-judicial processes;
- (c) Develop targeted outreach activities and distribute through, for example, specific units or desks dedicated to women, information about the justice mechanisms, procedures and remedies that are available, in various formats and also in community languages. Such activities and information should be appropriate for all ethnic and minority groups in the population and designed in close cooperation with women from those groups and, especially, from women's and other relevant organizations;
- (d) Ensure access to the Internet and other information and communications technology (ICT) to improve women's access to justice systems at all levels, and give consideration to the development of Internet infrastructure, including videoconferencing, to facilitate the holding of court hearings and the sharing, collection and support of data and information among stakeholders;
- (e) Ensure that the physical environment and location of judicial and quasi-judicial institutions and other services are welcoming, secure and accessible to all women, with consideration given to the creation of gender units as components of justice institutions and special attention given to covering the costs of transportation to judicial and quasi-judicial institutions and other services for women without sufficient means;
- (f) Establish justice access centres, such as "one-stop centres", which include a range of legal and social services, in order to reduce the number of steps that a woman has to take to gain access to justice. Such centres could provide legal advice and aid, begin the legal proceedings and coordinate support services for women in areas such as violence against women, family matters, health, social security, employment, property and immigration. Such centres must be accessible to all women, including those living in poverty and/or in rural and remote areas;
- (g) Pay special attention to access to justice systems for women with disabilities.

18. With regard to the good quality of justice systems, the Committee recommends that States parties:

- (a) Ensure that justice systems are of good quality and adhere to international standards of competence, efficiency, independence and impartiality, as well as to international jurisprudence;
- (b) Adopt indicators to measure women's access to justice;⁴⁴¹

⁴⁴¹ See, for example, the United Nations indicators on violence against women (see E/CN.3/2009/13) and the progress indicators for measuring the implementation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted on 21 May 2013.

- (c) Ensure an innovative and transformative justice approach and framework, including, when necessary, investing in broader institutional reforms;
 - (d) Provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women;
 - (e) Implement mechanisms to ensure that evidentiary rules, investigations and other legal and quasi-judicial procedures are impartial and not influenced by gender stereotypes or prejudice;
 - (f) When necessary to protect women's privacy, safety and other human rights, ensure that, in a manner consistent with due process and fair proceedings, legal proceedings can be held privately in whole or in part or that testimony can be given remotely or using communications equipment, such that only the parties concerned are able to gain access to their content. The use of pseudonyms or other measures to protect the identities of such women during all stages of the judicial process should be permitted. States parties should guarantee the possibility of taking measures to protect the privacy and image of victims through the prohibition of image capturing and broadcasting in cases where doing so may violate the dignity, emotional condition and security of girls and women;
 - (g) Protect women complainants, witnesses, defendants and prisoners from threats, harassment and other forms of harm before, during and after legal proceedings and provide the budgets, resources, guidelines and monitoring and legislative frameworks necessary to ensure that protective measures function effectively.⁴⁴²
19. With regard to the provision of remedies, the Committee recommends that States parties:
- (a) Provide and enforce appropriate and timely remedies for discrimination against women and ensure that women have access to all available judicial and non-judicial remedies;
 - (b) Ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement), compensation (whether provided in the form of money, goods or services) and rehabilitation (medical and psychological care and other social services).⁴⁴³ Remedies for civil damages and criminal sanctions should not be mutually exclusive;
 - (c) Take full account of the unremunerated domestic and care-giving activities of women in assessments of damages for the purposes of determining appropriate compensation for harm in all civil, criminal, administrative or other proceedings;
 - (d) Create women-specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation;
 - (e) In cases of sexual violence in conflict or post-conflict situations, mandate institutional reforms, repeal discriminatory legislation and enact legislation providing for adequate sanctions, in accordance with international human rights standards, and determine reparation measures, in close cooperation with women's organizations and civil society, to help to overcome the discrimination that preceded the conflict;⁴⁴⁴
 - (f) Ensure that non-judicial remedies, such as public apologies, public memorials and guarantees of non-repetition granted by truth, justice and reconciliation commissions, are not used as substitutes for investigations and prosecutions of perpetrators when human rights violations occur in conflict or post-conflict contexts; reject amnesties for gender-based human rights violations,

⁴⁴² International guidance and best practices in the protection of victims and their families from intimidation, retaliation and repeat victimization should be followed. See, for example, article 56 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

⁴⁴³ See paragraph 32 of general recommendation No. 28 which indicates that "such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women".

⁴⁴⁴ See the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

such as sexual violence against women, and reject statutory limitations for the prosecution of such violations (see general recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations);

- (g) Provide effective and timely remedies and ensure that they respond to the different types of violations experienced by women, as well as adequate reparation, and ensure women's participation in the design of all reparation programmes, as indicated in general recommendation No. 30.⁴⁴⁵

20. With regard to the accountability of justice systems, the Committee recommends that States parties:

- (a) Develop effective and independent mechanisms to observe and monitor women's access to justice in order to ensure that justice systems are in accordance with the principles of justiciability, availability, accessibility, good quality and effectiveness of remedies, including the periodic auditing/review of the autonomy, efficiency and transparency of the judicial, quasi-judicial and administrative bodies that take decisions affecting women's rights;
- (b) Ensure that cases of identified discriminatory practices and acts by justice professionals are effectively addressed through disciplinary and other measures;
- (c) Create a specific entity to receive complaints, petitions and suggestions with regard to all personnel supporting the work of the justice system, including social, welfare and health workers as well as technical experts;
- (d) Data should include but need not be limited to:
 - (i) The number and geographical distribution of judicial and quasi-judicial bodies;
 - (ii) The number of men and women working in law enforcement bodies and judicial and quasi-judicial institutions at all levels;
 - (iii) The number and geographical distribution of men and women lawyers, including legal-aid lawyers;
 - (iv) The nature and number of cases and complaints lodged with judicial, quasi-judicial and administrative bodies, disaggregated by the sex of the complainant;
 - (v) The nature and number of cases dealt with by the formal and informal justice systems, disaggregated by the sex of the complainant;
 - (vi) The nature and number of cases in which legal aid and/or public defence were required, accepted and provided, disaggregated by the sex of the complainant;
 - (vii) The length of the procedures and their outcomes, disaggregated by the sex of the complainant;
- (e) Conduct and facilitate qualitative studies and critical gender analyses of all justice systems, in collaboration with civil society organizations and academic institutions, in order to highlight practices, procedures and jurisprudence that promote or limit women's full access to justice;
- (f) Systematically apply the findings of those analyses in order to develop priorities, policies, legislation and procedures to ensure that all components of the justice system are gender-sensitive, user-friendly and accountable.

B. Discriminatory laws, procedures and practices

21. Frequently, States parties have constitutional provisions, laws, regulations, procedures, customs and practices that are based on traditional gender stereotypes and norms and are, therefore, discriminatory and deny women full enjoyment of their rights under the Convention. The Committee, therefore, consistently calls upon States parties, in its concluding observations, to review their legislative frameworks and to amend and/or repeal provisions that discriminate against women. This is consistent with article 2 of the Convention, which enshrines obligations for States parties to

⁴⁴⁵ See also A/HRC/14/22.

adopt appropriate legal and other measures to eliminate all forms of discrimination against women by public authorities and non-State actors, be they individuals, organizations or enterprises.

22. Women, nonetheless, face many difficulties in gaining access to justice as a result of direct and indirect discrimination, as defined in paragraph 16 of general recommendation No. 28. Such inequality is apparent not only in the discriminatory content and/or impact of laws, regulations, procedures, customs and practices, but also in the lack of capacity and awareness on the part of judicial and quasi-judicial institutions to adequately address violations of women's human rights. In its general recommendation No. 28, the Committee, therefore, notes that judicial institutions must apply the principle of substantive or de facto equality, as embodied in the Convention, and interpret laws, including national, religious and customary laws, in line with that obligation. Article 15 encompasses obligations for States parties to ensure that women enjoy substantive equality with men in all areas of the law.
23. Many of the Committee's concluding observations and views under the Optional Protocol, however, demonstrate that discriminatory procedural and evidentiary rules and a lack of due diligence in the prevention, investigation, prosecution, punishment and provision of remedies for violations of women's rights result in contempt of obligations to ensure that women have equal access to justice.
24. Special consideration is to be given to girls (including the girl child and adolescent girls, where appropriate) because they face specific barriers to gaining access to justice. They often lack the social or legal capacity to make significant decisions about their lives in areas relating to education, health and sexual and reproductive rights. They may be forced into marriage or subjected to other harmful practices and various forms of violence.
25. The Committee recommends that States parties:
 - (a) Ensure that the principle of equality before the law is given effect by taking steps to abolish any existing laws, procedures, regulations, jurisprudence, customs and practices that directly or indirectly discriminate against women, especially with regard to their access to justice, and to abolish discriminatory barriers to access to justice, including:
 - (i) The obligation or need for women to seek permission from family or community members before beginning legal action;
 - (ii) Stigmatization of women who are fighting for their rights by active participants in the justice system;
 - (iii) Corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or seek a remedy;
 - (iv) Procedures that exclude or accord inferior status to the testimony of women;
 - (v) Lack of measures to ensure equal conditions between women and men during the preparation, conduct and aftermath of cases;
 - (vi) Inadequate case management and evidence collection in cases brought by women, resulting in systematic failures in the investigation of cases;
 - (vii) Obstacles faced in the collection of evidence relating to emerging violations of women's rights occurring online and through the use of ICT and new social media;
 - (b) Ensure that independent, safe, effective, accessible and child-sensitive complaint and reporting mechanisms are available to girls. Such mechanisms should be established in conformity with international norms, especially the Convention on the Rights of the Child, and staffed by appropriately trained officials, working in an effective and gender-sensitive manner, in accordance with general comment No. 14 of the Committee on the Rights of the Child, so that the best interests of the girls concerned is taken as a primary consideration;
 - (c) Take measures to avoid the marginalization of girls owing to conflicts and disempowerment within their families and the resulting lack of support for their rights, and abolish rules and practices that require parental or spousal authorization for access to services such as

education and health, including sexual and reproductive health, as well as to legal services and justice systems;

- (d) Protect women and girls from interpretations of religious texts and traditional norms that create barriers to their access to justice and result in discrimination against them.

C. Stereotyping and gender bias in the justice system and the importance of capacity-building

26. Stereotyping and gender bias in the justice system have far-reaching consequences for women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may have a particularly negative impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far-reaching consequences, for example, in criminal law, where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimisation of complainants.
27. Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims of the victim/survivor and simultaneously supporting the defence advanced by the alleged perpetrator. Stereotyping can, therefore, permeate both the investigation and trial phases and shape the final judgement.
28. Women should be able to rely on a justice system free of myths and stereotypes, and on a judiciary whose impartiality is not compromised by those biased assumptions. Eliminating stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors.
29. The Committee recommends that States parties:
 - (a) Take measures, including awareness-raising and capacity-building programmes for all justice system personnel and law students, to eliminate gender stereotyping and incorporate a gender perspective into all aspects of the justice system;
 - (b) Include other professionals, in particular health-care providers and social workers, who potentially play an important role in cases of violence against women and in family matters, in the awareness-raising and capacity-building programmes;
 - (c) Ensure that capacity-building programmes address, in particular:
 - (i) The issue of the credibility and weight given to women's voices, arguments and testimony, as parties and witnesses;
 - (ii) The inflexible standards often developed by judges and prosecutors for what they consider to be appropriate behaviour for women;
 - (d) Consider promoting a dialogue on the negative impact of stereotyping and gender bias in the justice system and the need for improved justice outcomes for women who are victims and survivors of violence;
 - (e) Raise awareness of the negative impact of stereotyping and gender bias and encourage advocacy to address stereotyping and gender bias in justice systems, especially in gender-based violence cases;
 - (f) Provide capacity-building programmes for judges, prosecutors, lawyers and law enforcement officials on the application of international legal instruments relating to human rights, including the Convention and the jurisprudence of the Committee, and on the application of legislation prohibiting discrimination against women.

D. Education and raising awareness of the impact of stereotypes

- 30.** The provision of education from a gender perspective and raising public awareness through civil society, the media and the use of ICT are essential to overcoming the multiple forms of discrimination and stereotyping that have an impact on access to justice and to ensuring the effectiveness and efficiency of justice for all women.
- 31.** Article 5 (a) of the Convention provides that States parties must take all appropriate measures to modify social and cultural patterns of conduct, with a view to eliminating prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either sex. In its general recommendation No. 28, the Committee emphasized that all provisions of the Convention must be read jointly in order to ensure that all forms of gender-based discrimination are condemned and eliminated.⁴⁴⁶

1. Education from a gender perspective

- 32.** Women who are unaware of their human rights are unable to make claims for the fulfilment of those rights. The Committee has observed, especially during its consideration of periodic reports submitted by States parties, that they often fail to guarantee that women have equal access to education, information and legal literacy programmes. Furthermore, awareness on the part of men of women's human rights is also indispensable to guaranteeing non-discrimination and equality, and to guaranteeing women's access to justice in particular.
- 33.** The Committee recommends that States parties:
- (a)** Develop gender expertise, including by increasing the number of gender advisers, with the participation of civil society organizations, academic institutions and the media;
 - (b)** Disseminate multi-format materials to inform women of their human rights and the availability of mechanisms for access to justice, and inform women of their eligibility for support, legal aid and social services that interface with justice systems;
 - (c)** Integrate, into curricula at all levels of education, educational programmes on women's rights and gender equality, including legal literacy programmes, that emphasize the crucial role of women's access to justice and the role of men and boys as advocates and stakeholders.

2. Raising awareness through civil society, the media and information and communications technology

- 34.** Civil society, the media and ICT play an important role in both reinforcing and reproducing gender stereotypes as well as in overcoming them.
- 35.** The Committee recommends that States parties:
- (a)** Emphasize the role that the media and ICT can play in dismantling cultural stereotypes about women in connection with their right to access to justice, paying particular attention to challenging cultural stereotypes concerning gender-based discrimination and violence, including domestic violence, rape and other forms of sexual violence;
 - (b)** Develop and implement measures to raise awareness among the media and the population, in close collaboration with communities and civil society organizations, of the right of women to have access to justice. Such measures should be multidimensional and directed at girls and women, as well as boys and men, and should take account of the relevance and potential of ICT to transform cultural and social stereotypes;
 - (c)** Support and involve media bodies and people working with ICT in a continuing public dialogue about women's human rights in general and within the context of access to justice in particular;
 - (d)** Take steps to promote a culture and a social environment in which justice-seeking by women is viewed as both legitimate and acceptable rather than as cause for additional discrimination and/or stigmatization.

⁴⁴⁶ In paragraph 7, it was stated that article 2 of the Convention should be read in conjunction with articles 3, 4, 5 and 24 and in the light of the definition of discrimination contained in article 1.

E. Legal aid and public defence

- 36.** A crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law.
- 37.** The Committee recommends that States parties:
- (a)** Institutionalize systems of legal aid and public defence that are accessible, sustainable and responsive to the needs of women, ensure that such services are provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes, and ensure the unhindered access of legal aid and public defence providers to all relevant documentation and other information, including witness statements;
 - (b)** Ensure that legal aid and public defence providers are competent and gender-sensitive, respect confidentiality and are granted adequate time to defend their clients;
 - (c)** Conduct information and awareness-raising programmes for women about the existence of legal aid and public defence services and the conditions for obtaining them using ICT effectively to facilitate such programmes;
 - (d)** Develop partnerships with competent non-governmental providers of legal aid and/or train paralegals to provide women with information and assistance in navigating judicial and quasi-judicial processes and traditional justice systems;
 - (e)** In cases of family conflict or when a woman lacks equal access to family income, the use of means testing to determine eligibility for legal aid and public defence services should be based on the real income or disposable assets of the woman.⁴⁴⁷

F. Resources

- 38.** Highly qualified human resources, combined with adequate technical and financial resources, are essential to ensure the justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems.
- 39.** The Committee recommends that States parties:
- (a)** Provide adequate budgetary and technical assistance and allocate highly qualified human resources to all parts of justice systems, including specialized judicial, quasi-judicial and administrative bodies, alternative dispute resolution mechanisms, national human rights institutions and ombudsperson offices;
 - (b)** Seek support from external sources, such as the specialized agencies of the United Nations system, the international community and civil society, when national resources are limited, while ensuring that, in the medium and long term, adequate State resources are allocated to justice systems to ensure their sustainability.

III. Recommendations for specific areas of law

- 40.** Given the diversity of institutions and judicial arrangements around the world, some elements placed under one field of law in one country may be placed elsewhere in another. For example, the definition of discrimination may or may not be included in the Constitution; protection orders may appear under family law and/or under criminal law; and asylum and refugee issues may be dealt with by administrative courts or by quasi-judicial bodies. States parties are asked to consider the paragraphs below in that light.

⁴⁴⁷ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, guideline 1 (f): "If the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test."

A. Constitutional law

41. The Committee has observed that, in practice, States parties that have adopted constitutional guarantees relating to substantive equality between men and women and incorporated international human rights law, including the Convention, into their national legal orders are better equipped to secure gender equality in access to justice. Under articles 2 (a) and 15 of the Convention, States parties are to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation, including through the establishment of competent national tribunals and other public institutions, and to take measures to ensure the realization of that principle in all areas of public and private life as well as in all fields of law.
42. The Committee recommends that States parties:
- (a) Provide explicit constitutional protection for formal and substantive equality and for non-discrimination in the public and private spheres, including with regard to all matters of personal status, family, marriage and inheritance law, and across all areas of law;
 - (b) When provisions of international law do not directly apply, fully incorporate international human rights law into their constitutional and legislative frameworks in order to effectively guarantee women's access to justice;
 - (c) Create the structures necessary to ensure the availability and accessibility of judicial review and monitoring mechanisms to oversee the implementation of all fundamental rights, including the right to substantive gender equality.

B. Civil law

43. In some communities, women are unable to approach justice systems without the assistance of a male relative, and social norms hinder their ability to exercise autonomy outside the household. Article 15 of the Convention provides that women and men are to be equal before the law and that States parties must accord to women a legal capacity in civil matters identical to that of men and the same opportunities to exercise that capacity. The civil law procedures and remedies to which women are to have access include those in the fields of contracts, private employment, personal injury, consumer protection, inheritance, land and property rights.
44. The Committee recommends that States parties:
- (a) Eliminate all gender-based barriers to access to civil law procedures, such as requiring that women obtain permission from judicial or administrative authorities or family members before beginning legal action, or that they furnish documents relating to identity or title to property;
 - (b) Enforce the provisions set out in article 15 (3) of the Convention that all contracts and all other private instruments of any kind with a legal effect directed at restricting the legal capacity of women shall be deemed null and void;
 - (c) Adopt positive measures to ensure that the freedom of women to enter into contracts and other private law agreements is enforced.

[...]

D. Criminal law

47. Criminal laws are particularly important in ensuring that women are able to exercise their human rights, including their right to access to justice, on the basis of equality. States parties are obliged, under articles 2 and 15 of the Convention, to ensure that women have access to the protection and remedies offered through criminal law, and that they are not exposed to discrimination within the context of those mechanisms, either as victims or as perpetrators of criminal acts. Some criminal codes or acts and/or criminal procedure codes discriminate against women by:
- (a) Criminalizing forms of behaviour that are not criminalized or punished as harshly if they are performed by men;

- (b) Criminalizing forms of behaviour that can be performed only by women, such as abortion;
 - (c) Failing to criminalize or to act with due diligence to prevent and provide redress for crimes that disproportionately or solely affect women;
 - (d) Jailing women for petty offences and/or inability to pay bail in such cases.
48. The Committee has also highlighted the fact that women suffer from discrimination in criminal cases owing to a lack of gender-sensitive, non-custodial alternatives to detention, a failure to meet the specific needs of women in detention and an absence of gender-sensitive monitoring and independent review mechanisms.⁴⁴⁸ The secondary victimization of women by the criminal justice system has an impact on their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and detention.
49. Women are also disproportionately criminalized owing to their situation or status, such as being involved in prostitution, being a migrant, having been accused of adultery, identity as a lesbian, bisexual or transgender woman or intersex person, having undergone an abortion or belonging to other groups that face discrimination.
50. The Committee notes that many countries have critical shortages of trained police and legal and forensic staff capable of dealing with the requirements of criminal investigations.
51. The Committee recommends that States parties:
- (a) Exercise due diligence to prevent, investigate, punish and provide reparation for all crimes committed against women, whether by State or non-State actors;
 - (b) Ensure that statutory limitations are in conformity with the interests of the victims;
 - (c) Take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities, and consider establishing specialized gender units within law enforcement, penal and prosecution systems;
 - (d) Take appropriate measures to create supportive environments that encourage women to claim their rights, report crimes committed against them and actively participate in criminal justice processes, and take measures to prevent retaliation against women seeking recourse in the justice system. Consultations with women's groups and civil society organizations should be sought to develop legislation, policies and programmes in those areas;
 - (e) Take measures, including the adoption of legislation, to protect women from Internet crimes and misdemeanours;
 - (f) Refrain from conditioning the provision of support and assistance to women, including the granting of residency permits, upon cooperation with judicial authorities in cases of trafficking in human beings and organized crime;⁴⁴⁹
 - (g) Use a confidential and gender-sensitive approach to avoid stigmatization, including secondary victimization in cases of violence, during all legal proceedings, including during questioning, evidence collection and other procedures relating to the investigation;
 - (h) Review rules of evidence and their implementation, especially in cases of violence against women, and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes;
 - (i) Improve the criminal justice response to domestic violence, including through recording of emergency calls taking photographic evidence of destruction of property and signs of violence and considering reports from doctors or social workers, which can show how violence, even if committed without witnesses, has material effects on the physical, mental and social wellbeing of victims;

⁴⁴⁸ Communication No. 23/2009, *Abramova v. Belarus*, views adopted on 25 July 2011; see also the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly in its resolution 65/229.

⁴⁴⁹ See Recommended Principles and Guidelines on Human Rights and Human Trafficking (United Nations publication, Sales No. E.10.XIV.1).

- (j) Take steps to guarantee that women are not subjected to undue delays in applications for protection orders and that all cases of gender-based discrimination subject to criminal law, including cases involving violence, are heard in a timely and impartial manner;
- (k) Develop protocols for police and health-care providers for the collection and preservation of forensic evidence in cases of violence against women, and train sufficient numbers of police and legal and forensic staff to competently conduct criminal investigations;
- (l) Abolish discriminatory criminalization and review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women; decriminalize forms of behaviour that are not criminalized or punished as harshly if they are performed by men; decriminalize forms of behaviour that can be performed only by women, such as abortion; and act with due diligence to prevent and provide redress for crimes that disproportionately or solely affect women, whether perpetrated by State or non-State actors;
- (m) Closely monitor sentencing procedures and eliminate any discrimination against women in the penalties provided for particular crimes and misdemeanours and in determining eligibility for parole or early release from detention;
- (n) Ensure that mechanisms are in place to monitor places of detention, pay special attention to the situation of women prisoners and apply international guidance and standards on the treatment of women in detention;⁴⁵⁰
- (o) Keep accurate data and statistics regarding the number of women in each place of detention, the reasons for and duration of their detention, whether they are pregnant or accompanied by a baby or child, their access to legal, health and social services and their eligibility for and use of available case review processes, non-custodial alternatives and training possibilities;
- (p) Use preventive detention as a last resort and for as short a time as possible, and avoid preventive or post-trial detention for petty offences and for the inability to pay bail in such cases.

E. Administrative, social and labour law

- 52. In accordance with articles 2 and 15 of the Convention, the availability and accessibility of judicial and quasi-judicial mechanisms and remedies under administrative, social and labour law should be guaranteed to women on a basis of equality. The subject areas that tend to fall within the ambit of administrative, social and labour law, and are of particular importance for women, include health services, social security entitlements, labour relations, including equal remuneration, equality of opportunities to be hired and promoted, equality of remuneration for civil servants, housing and land zoning, grants, subsidies and scholarships, compensation funds, governance of Internet resources and policy and migration and asylum.⁴⁵¹
- 53. The Committee recommends that States parties:
 - (a) Ensure that independent review, carried out in accordance with international standards, is available for all decisions by administrative bodies;
 - (b) Ensure that a decision rejecting an application is reasoned and that the claimant is able to appeal to a competent body against the decision, and that the implementation of any prior administrative decisions is suspended pending further judicial review. This is of particular importance in the area of asylum and migration law, where appellants may be deported before having the chance to have their cases heard;
 - (c) Use administrative detention only exceptionally, as a last resort, for a limited time, when necessary and reasonable in the individual case, proportionate to a legitimate purpose and in accordance with national law and international standards; ensure that all appropriate measures, including effective legal aid and procedures, are in place to enable women to challenge the legality of their detention; ensure regular reviews of such detention in the presence of the

⁴⁵⁰ See the Bangkok Rules and also the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, adopted by the Economic and Social Council in its resolution 2005/20.

⁴⁵¹ See general recommendation No. 32 on gender-related dimensions of refugee status, asylum, nationality and statelessness of women.

detainee; and ensure that the conditions of administrative detention comply with relevant international standards for the protection of the rights of women deprived of their liberty.

IV. Recommendations for specific mechanisms

A. Specialized judicial/quasi-judicial systems and international/ regional justice systems

54. Other specialized judicial and quasi-judicial mechanisms,⁴⁵² including labour,⁴⁵³ land claims, electoral and military courts, inspectorates and administrative bodies,⁴⁵⁴ also have obligations to comply with international standards of independence, impartiality and efficiency and the provisions of international human rights law, including articles 2, 5 (a) and 15 of the Convention.
55. Transitional and post-conflict situations may result in increased challenges for women seeking to assert their right to access to justice. In its general recommendation No. 30, the Committee highlighted the specific obligations of States parties in connection with access to justice for women in such situations.
56. The Committee recommends that States parties:
 - (a) Take all appropriate steps to ensure that all specialized judicial and quasi-judicial mechanisms are available and accessible to women and exercise their mandates under the same requirements as the regular courts;
 - (b) Provide for independent monitoring and review of the decisions of specialized judicial and quasi-judicial mechanisms;
 - (c) Put in place programmes, policies and strategies to facilitate and guarantee the equal participation of women at all levels in those specialized judicial and quasi-judicial mechanisms;
 - (d) Implement the recommendations on women's access to justice in transitional and post-conflict situations that are set out in paragraph 81 of general recommendation No. 30, taking a comprehensive, inclusive and participatory approach to transitional justice mechanisms;
 - (e) Ensure the national implementation of international instruments and decisions of international and regional justice systems relating to women's rights, and establish monitoring mechanisms for the implementation of international law.

B. Alternative dispute resolution processes

57. Many jurisdictions have adopted mandatory or optional systems for mediation, conciliation, arbitration and collaborative resolutions of disputes, as well as for facilitation and interest-based negotiations. This applies, in particular, in the areas of family law, domestic violence, juvenile justice and labour law. Alternative dispute resolution processes are sometimes referred to as informal justice, which are linked to, but function outside of, formal court litigation processes. Informal alternative dispute resolution processes also include non-formal indigenous courts and chieftancy-based alternative dispute resolution, where chiefs and other community leaders resolve interpersonal disputes, including divorce, child custody and land disputes. While such processes may provide greater flexibility and reduce costs and delays for women seeking justice, they may also lead to further violations of their rights and impunity for perpetrators because they often operate on the basis of patriarchal values, thereby having a negative impact on women's access to judicial review and remedies.
58. The Committee recommends that States parties:
 - (a) inform women of their rights to use mediation, conciliation, arbitration and collaborative dispute resolution;

⁴⁵² Depending on the country, the fields are covered by general or specialized justice systems.

⁴⁵³ With regard to women's access to justice, relevant conventions of the International Labour Organization include the Labour Inspection Convention, 1947 (No. 81), the Migration for Employment Convention (Revised), 1949 (No. 97), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the Domestic Workers Convention, 2011 (No. 189).

⁴⁵⁴ See the draft principles governing the administration of justice through military tribunals (see E/CN.4/2006/58).

- (b) Guarantee that alternative dispute settlement procedures do not restrict access by women to judicial or other remedies in any area of the law and do not lead to further violations of their rights;
- (c) Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedure.

C. National human rights institutions and ombudsperson offices

- 59. The development of national human rights institutions and ombudsperson offices may open up further possibilities for women to gain access to justice.
- 60. The Committee recommends that States parties:
 - (a) Take steps:
 - (i) To provide adequate resources for the creation and sustainable operation of independent national human rights institutions, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles);
 - (ii) To ensure that the composition and activities of those institutions are gender-sensitive;
 - (b) Provide national human rights institutions with a broad mandate and the authority to consider complaints regarding women's human rights;
 - (c) Facilitate women's access to individual petition processes within ombudsperson offices and national human rights institutions on a basis of equality and provide the possibility for women to lodge claims involving multiple and intersecting forms of discrimination; and
 - (d) Provide national human rights institutions and ombudsperson offices with adequate resources and support to conduct research.

D. Plural justice systems

- 61. The Committee notes that State laws, regulations, procedures and decisions can sometimes coexist, within a given State party, with religious, customary, indigenous or community laws and practices. This results in the existence of plural justice systems. There are, therefore, multiple sources of law that may be formally recognized as part of the national legal order or operate without an explicit legal basis. States parties have obligations under articles 2, 5 (a) and 15 of the Convention and under other international human rights instruments to ensure that women's rights are equally respected and that women are protected against violations of their human rights by all components of plural justice systems.⁴⁵⁵
- 62. The presence of plural justice systems can, in itself, limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to effectively exercise a choice of forum. The Committee has observed that, in some States parties in which systems of family and/or personal law based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems or at liberty to decide which regime applies to them.

[...]

Committee on the Elimination of Discrimination Against Women, General Comment no. 27, Older Women and protection of their human rights, 2010, CEDAW/C/GC/27

[...]

- 33. States parties should provide older women with information on their rights and how to access legal services. They should train the police, judiciary as well as legal aid and paralegal services on the

⁴⁵⁵ See, in particular, general recommendation No. 29.

rights of older women, and sensitize and train public authorities and institutions on age- and gender-related issues that affect older women. Information, legal services, effective remedies and reparation must be made equally available and accessible to older women with disabilities.

34. States parties should enable older women to seek redress for and resolve infringements of their rights, including the right to administer property, and ensure that older women are not deprived of their legal capacity on arbitrary or discriminatory ground.

[...]

Committee on the Elimination of Discrimination Against Women, General Comment no. 24, Women and health, 1999, A/54/38/Rev.1, cap. I.

[...]

13. The duty of States parties to ensure, on a basis of equality of men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12.

[...]

Convention on the Rights of the Child (1989)

Article 12

[...]

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Committee on the Rights of the Child, General Comment no. 16, State obligations regarding the impact of the business sector on children's rights, 2013, CRC/C/GC/16

[...]

4. It is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations. In this regard, States should take into account that:

[...]

- (c) It is generally challenging for children to obtain remedy – whether in the courts or through other mechanisms – when their rights are infringed upon, even more so by business enterprises. Children often lack legal standing, knowledge of remedy mechanisms, financial resources and adequate legal representation. Furthermore, there are particular difficulties for children in obtaining remedy for abuses that occur in the context of businesses' global operations.

5. Given the broad range of children's rights that can be affected by business activities and operations, the present general comment does not examine every pertinent article of the Convention and its protocols. Instead it seeks to provide States with a framework for implementing the Convention as a whole with regard to the business sector whilst focusing on specific contexts where the impact of business activities on children's rights can be most significant. The present general comment aims to provide States with guidance on how they should:

[...]

- (c) Ensure access to effective remedy for children whose rights have been infringed by a business enterprise acting as a private party or as a State agent.

[...]

III. General principles of the Convention as they relate to business activities

[...]

D. The right of the child to be heard (article 12)

[...]

22. Children have a specific right “to be heard in any judicial and administrative proceedings affecting the child” (art. 12, para. 3, of the Convention). This includes judicial proceedings and mechanisms of conciliation and arbitration that concern abuses of children’s rights caused or contributed to by business enterprises. As set out in general comment No. 12, children should be allowed to voluntarily participate in such proceedings and be provided the opportunity to be heard directly or indirectly through the assistance of a representative or appropriate body that has sufficient knowledge and understanding of the various aspects of the decision-making process as well as experience in working with children.

[...]

IV. Nature and scope of State obligations

[...]

B. The obligation to respect, protect and fulfil

1. The obligation of respect

26. The obligation to respect means that States should not directly or indirectly facilitate, aid and abet any infringement of children’s rights. Furthermore, States have the obligation to ensure that all actors respect children’s rights, including in the context of business activities and operations. To achieve this, all business-related policy, legislation or administrative acts and decision-making should be transparent, informed and include full and continuous consideration of the impact on the rights of the child.

[...]

2. The obligation to protect

28. States have an obligation to protect against infringements of rights guaranteed under the Convention and the Optional Protocols thereto by third parties. This duty is of primary importance when considering States’ obligations with regards to the business sector. It means that States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children’s rights. Such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children’s rights. States must investigate, adjudicate and redress violations of children’s rights caused or contributed to by a business enterprise. A State is therefore responsible for infringements of children’s rights caused or contributed to by business enterprises where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements.

3. The obligation to fulfil

29. The obligation to fulfil requires States to take positive action to facilitate, promote and provide for the enjoyment of children’s rights. This means that States must implement legislative, administrative, budgetary, judicial, promotional and other measures in conformity with article 4 relating to business activities that impact on children’s rights. Such measures should ensure the best environment for full realization of the Convention and the Optional Protocols thereto. To meet this obligation, States should provide stable and predictable legal and regulatory environments which enable business enterprises to respect children’s rights. This includes clear and well-enforced law and standards on labour, employment, health and safety, environment, anti-corruption, land use and taxation that comply with the Convention and the Optional Protocols thereto. It also includes law and policies designed to create equality of opportunity and treatment in employment; measures to promote vocational training and decent work, and to raise living standards; and policies conducive to the promotion of small and

medium enterprises. States should put in place measures to promote knowledge and understanding of the Convention and the Optional Protocols thereto within government departments, agencies and other State-based institutions that shape business practices, and foster a culture in business that is respectful of children's rights.

4. Remedies and reparations

- 30.** States have an obligation to provide effective remedies and reparations for violations of the rights of the child, including by third parties such as business enterprises. The Committee states in its general comment No. 5 that for rights to have meaning, effective remedies must be available to redress violations.⁴⁵⁶ Several provisions in the Convention call for penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties.⁴⁵⁷ Meeting this obligation entails having in place child-sensitive mechanisms – criminal, civil or administrative – that are known by children and their representatives, that are prompt, genuinely available and accessible and that provide adequate reparation for harm suffered. Agencies with oversight powers relevant to children's rights, including labour, education and health and safety inspectorates, environmental tribunals, taxation authorities, national human rights institutions and bodies focusing on equality in the business sector can also play a role in the provision of remedies. These agencies can proactively investigate and monitor abuses and may also have regulatory powers allowing them to impose administrative sanctions on businesses which infringe on children's rights. In all cases, children should have recourse to independent and impartial justice, or judicial review of administrative proceedings.
- 31.** When determining the level or form of reparation, mechanisms should take into account that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage. They should also take into account the evolving nature of children's development and capacities and reparation should be timely to limit ongoing and future damage to the child or children affected; for example, if children are identified as victims of environmental pollution, immediate steps should be taken by all relevant parties to prevent further damage to the health and development of children and repair any damage done. States should provide medical and psychological assistance, legal support and measures of rehabilitation to children who are victims of abuse and violence caused or contributed to by business actors. They should also guarantee non-recurrence of abuse through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned.

[...]

VI. Framework for implementation

A. Legislative, regulatory and enforcement measures

[...]

2. Legislation and regulation

- 61.** Generally, it is the lack of implementation or the poor enforcement of laws regulating business that pose the most critical problems for children. There are a number of measures States should employ to ensure effective implementation and enforcement, including:
- (a)** Strengthening regulatory agencies responsible for the oversight of standards relevant to children's rights such as health and safety, consumer rights, education, environment, labour and advertising and marketing so that they have sufficient powers and resources to monitor and to investigate complaints and to provide and enforce remedies for abuses of children's rights;
 - (b)** Disseminating laws and regulations regarding children's rights and business to stakeholders, including children and business enterprises;

⁴⁵⁶ General comment No. 5 (2003), para. 24. States should also take into account the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by General Assembly resolution 60/147 of 2005.

⁴⁵⁷ For example, see Convention on the Rights of the Child, arts. 32, para. 2; 19; and 39.

- (c) Training judges and other administrative officials as well as lawyers and legal aid providers to ensure the correct application of the Convention and its protocols on business and children's rights, international human rights standards and relevant national legislation and to promote the development of national jurisprudence; and
- (d) Providing effective remedy through judicial or non-judicial mechanisms and effective access to justice.

[...]

B. Remedial measures

66. Children often find it difficult to access the justice system to seek effective remedies for abuse or violations of their rights when business enterprises are involved. Children may lack legal standing, which prevents them from pursuing a claim; children and their families often lack knowledge about their rights and the mechanisms and procedures available to them to seek redress or may lack confidence in the justice system. States may not always investigate breaches of criminal, civil or administrative laws committed by business enterprises. There are vast power imbalances between children and business and, often, prohibitive costs involved in litigation against companies as well as difficulties in securing legal representation. Cases involving business are frequently settled out of court and in the absence of a body of developed case law; children and their families in jurisdictions where judicial precedent is persuasive may be more likely to abandon undertaking litigation given uncertainty surrounding the outcome.
67. There are particular difficulties in obtaining remedy for abuses that occur in the context of businesses' global operations. Subsidiaries or others may lack insurance or have limited liability; the way in which transnational corporations are structured in separate entities can make identification and attribution of legal responsibility to each unit challenging; access to information and evidence located in different countries can be problematic when building and defending a claim; legal aid may be difficult to obtain in foreign jurisdictions and various legal and procedural hurdles can be used to defeat extraterritorial claims.
68. States should focus their attention on removing social, economic and juridical barriers so that children can in practice have access to effective judicial mechanisms without discrimination of any kind. Children and their representatives should be provided with information about remedies through, for example, the school curriculum, youth centres or community-based programmes. They should be allowed to initiate proceedings in their own right and have access to legal aid and the support of lawyers and legal aid providers in bringing cases against business enterprises to ensure equality of arms. States that do not already have provision for collective complaints, such as class actions and public interest litigation, should introduce these as a means of increasing accessibility to the courts for large numbers of children similarly affected by business actions. States may have to provide special assistance to children who face obstacles to accessing justice, for example, because of language or disability or because they are very young.
69. Age should not be a barrier to a child's right to participate fully in the justice process. Likewise, special arrangements should be developed for child victims and witnesses in both civil and criminal proceedings, in line with the Committee's general comment No. 12. Furthermore, States should implement the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.⁴⁵⁸ Confidentiality and privacy must be respected and children should be kept informed of progress at all stages of the process, giving due weight to the child's maturity and any speech, language or communication difficulties they might have.

[...]

71. Non-judicial mechanisms, such as mediation, conciliation and arbitration, can be useful alternatives for resolving disputes concerning children and enterprises. They must be available without prejudice to the right to judicial remedy. Such mechanisms can play an important role alongside judicial processes, provided they are in conformity with the Convention and the Optional Protocols thereto and with

⁴⁵⁸ Adopted by the Economic and Social Council in its resolution 2005/20.

international principles and standards of effectiveness, promptness and due process and fairness. Grievance mechanisms established by business enterprises can provide flexible and timely solutions and at times it may be in a child's best interests for concerns raised about a company's conduct to be resolved through them. These mechanisms should follow criteria that include: accessibility, legitimacy, predictability, equitability, rights compatibility, transparency, continuous learning and dialogue.⁴⁵⁹

- 72.** In all cases, access to courts or judicial review of administrative remedies and other procedures should be available. States should make every effort to facilitate access to international and regional human rights mechanisms, including the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, so that an individual child or a group of children, or others acting on his/her/their behalf, are able to obtain remedy for State failure to adequately respect, protect and fulfil children's rights in relation to business activities and operations.

[...]

D. Coordination and monitoring measures

[...]

2. Monitoring

- 76.** States have an obligation to monitor violations of the Convention and the Optional Protocols thereto committed or contributed to by business enterprises, including in their global operations. This can be achieved, for instance, through: gathering data that can be used to identify problems and inform policy; investigating abuses; collaborating with civil society and national human rights institutions; and making business accountable publicly by using business reporting on their impact on children's rights to assess their performance. In particular, national human rights institutions can be involved, for example in receiving, investigating and mediating complaints of violations; conducting public inquiries into large-scale abuses, mediating in conflict situations and undertaking legislative reviews to ensure compliance with the Convention. Where necessary, States should broaden the legislative mandate of national human rights institutions to accommodate children's rights and business.

[...]

Committee on the Rights of the Child, General Comment no. 14, The right of the child to have his or her best interests taken as a primary consideration (article 3, paragraph 1), 2013, CRC/C/GC/14

I. Introduction

A. The best interests of the child: a right, a principle and a rule of procedure

[...]

- 6.** The Committee underlines that the child's best interests is a threefold concept:

- (a)** A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

[...]

- (c)** A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children

⁴⁵⁹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, guiding principle 31.

concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

[...]

II. Objectives

10. The present general comment seeks to ensure the application of and respect for the best interests of the child by the States parties to the Convention. It defines the requirements for due consideration, especially in judicial and administrative decisions as well as in other actions concerning the child as an individual, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines – that is, all implementation measures – concerning children in general or as a specific group. The Committee expects that this general comment will guide decisions by all those concerned with children, including parents and caregivers.

[...]

12. The main objective of this general comment is to strengthen the understanding and application of the right of children to have their best interests assessed and taken as a primary consideration or, in some cases, the paramount consideration (see paragraph 38 below). Its overall objective is to promote a real change in attitudes leading to the full respect of children as rights holders. More specifically, this has implications for:

- (a) The elaboration of all implementation measures taken by governments;
- (b) Individual decisions made by judicial or administrative authorities or public entities through their agents that concern one or more identified children;

[...]

III. Nature and scope of the obligations of States parties

[...]

14. Article 3, paragraph 1, establishes a framework with three different types of obligations for States parties:
- (a) The obligation to ensure that the child's best interests are *appropriately integrated and consistently applied* in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;
 - (b) The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.

[...]

15. To ensure compliance, States parties should undertake a number of implementation measures in accordance with articles 4, 42 and 44, paragraph 6, of the Convention, and ensure that the best interests of the child are a primary consideration in all actions, including:

[...]

- (c) Establishing mechanisms and procedures for complaints, remedy or redress in order to fully realize the right of the child to have his or her best interests appropriately integrated and consistently applied in all implementation measures, administrative and judicial proceedings relevant to and with an impact on him or her;

[...]

- (g) Providing appropriate information to children in a language they can understand, and to their families and caregivers, so that they understand the scope of the right protected under article 3, paragraph 1, as well as creating the necessary conditions for children to express their point of view and ensuring that their opinions are given due weight;

IV. Legal analysis and links with the general principles of the Convention

A. Legal analysis of article 3, paragraph 1

[...]

2. ***“By public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”***

- 25. The obligation of the States to duly consider the child's best interests is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children. Although parents are not explicitly mentioned in article 3, paragraph 1, the best interests of the child “will be their basic concern” (art. 18, para. 1).

[...]

(b) *“ courts of law “*

- 27. The Committee underlines that “courts” refer to all judicial proceedings, in all instances – whether staffed by professional judges or lay persons – and all relevant procedures concerning children, without restriction. This includes conciliation, mediation and arbitration processes.
- 28. In criminal cases, the best interests principle applies to children in conflict (i.e. alleged, accused or recognized as having infringed) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee⁴⁶⁰ underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.
- 29. In civil cases, the child may be defending his or her interests directly or through a representative, in the case of paternity, child abuse or neglect, family reunification, accommodation, etc. The child may be affected by the trial, for example in procedures concerning adoption or divorce, decisions regarding custody, residence, contact or other issues which have an important impact on the life and development of the child, as well as child abuse or neglect proceedings. The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so.

c) *“ administrative authorities “*

- 30. The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others. Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures.

[...]

B. The best interests of the child and links with other general principles of the Convention

[...]

3. ***The child's best interests and the right to be heard (art. 12)***

- 43. Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee's general comment No. 12 which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the

⁴⁶⁰ General comment No. 10 (2007) on children's rights in juvenile justice, para. 10.

assessment of his or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives⁴⁶¹.

44. The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing.⁴⁶² Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.
45. The Committee recalls that article 12, paragraph 2, of the Convention provides for the right of the child to be heard, either directly or through a representative, in any judicial or administrative proceeding affecting him or her (see further chapter V.B below).

[...]

V. Implementation: assessing and determining the child's best interests

[...]

A. Best interests assessment and determination

[...]

1. Elements to be taken into account when assessing the child's best interests

52. Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child's best interests, as relevant to the situation in question, are as follows.

a) The child's views

53. Article 12 of the Convention provides for the right of children to express their views in every decision that affects them. Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.
54. The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in the decision-making process, and the provision of reasonable accommodation⁴⁶³ and support, where necessary, to ensure their full participation in the assessment of their best interests.

[...]

B. Procedural safeguards to guarantee the implementation of the child's best interests

85. To ensure the correct implementation of the child's right to have his or her best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed. As such, the concept of the child's best interests is a rule of procedure (see para. 6 (b) above).

⁴⁶¹ General comment No. 12, paras. 70-74.

⁴⁶² Ibid., para. 84.

⁴⁶³ See Convention on the Rights of Persons with Disabilities, art. 2: "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure [...] the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

86. While public authorities and organizations making decisions that concern children must act in conformity with the obligation to assess and determine the child's best interests, people who make decisions concerning children on a daily basis (e.g. parents, guardians, teachers, etc.) are not expected to follow strictly this two-step procedure, even though decisions made in everyday life must also respect and reflect the child's best interests.
87. States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child's best interests for decisions affecting the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children.
88. The Committee invites States and all persons who are in a position to assess and determine the child's best interests to pay special attention to the following safeguards and guarantees:
 - a) **Right of the child to express his or her own views**
 89. A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.
 90. Where the child wishes to express his or her views and where this right is fulfilled through a representative, the latter's obligation is to communicate accurately the views of the child. In situations where the child's views are in conflict with those of his or her representative, a procedure should be established to allow the child to approach an authority to establish a separate representation for the child (e.g. a guardian ad litem), if necessary.
 91. The procedure for assessing and determining the best interests of children as a group is, to some extent, different from that regarding an individual child. When the interests of a large number of children are at stake, Government institutions must find ways to hear the views of a representative sample of children and give due consideration to their opinions when planning measures or making legislative decisions which directly or indirectly concern the group, in order to ensure that all categories of children are covered. There are many examples of how to do this, including children's hearings, children's parliaments, children-led organizations, children's unions or other representative bodies, discussions at school, social networking websites, etc.
 - b) **Establishment of facts**
 92. Facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment. This could involve interviewing persons close to the child, other people who are in contact with the child on a daily basis, witnesses to certain incidents, among others. Information and data gathered must be verified and analysed prior to being used in the child's or children's best-interests assessment.
 - c) **Time perception**
 93. The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible. The timing of the decision should, as far as possible, correspond to the child's perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves. All decisions on care, treatment, placement and other measures concerning the child must be reviewed periodically in terms of his or her perception of time, and his or her evolving capacities and development (art. 25).
 - d) **Qualified professionals**
 94. Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other

relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.

95. The assessment of the consequences of alternative solutions must be based on general knowledge (i.e. in the areas of law, sociology, education, social work, psychology, health, etc.) of the likely consequences of each possible solution for the child, given his or her individual characteristics and past experience.

e) Legal representation

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

f) Legal reasoning

97. In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to be outweighed by the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration (see paragraph 38 above).

g) Mechanisms to review or revise decisions

98. States should establish mechanisms within their legal systems to appeal or revise decisions concerning children when a decision seems not to be in accordance with the appropriate procedure of assessing and determining the child's or children's best interests. There should always be the possibility to request a review or to appeal such a decision at the national level. Mechanisms should be made known to the child and be accessible by him or her directly or by his or her legal representative, if it is considered that the procedural safeguards had not been respected, the facts are wrong, the best-interests assessment had not been adequately carried out or that competing considerations had been given too much weight. The reviewing body must look into all these aspects.

h) Child-rights impact assessment (CRIA)

99. As mentioned above, the adoption of all measures of implementation should also follow a procedure that ensures that the child's best interests are a primary consideration. The child-rights impact assessment (CRIA) can predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of measures on children's rights.⁴⁶⁴ CRIA needs to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good governance for children's rights. Different methodologies and practices may be developed when undertaking CRIA. At a minimum, they must use the Convention and its Optional Protocols as a framework, in particular ensuring that the assessments are underpinned by the general principles and have special regard for the differentiated impact of the measure(s) under consideration on children. The impact assessment itself

⁴⁶⁴ General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, paras. 78-81.

could be based on input from children, civil society and experts, as well as from relevant Government departments, academic research and experiences.⁴⁶⁵ The analysis should result in recommendations for amendments, alternatives and improvements and be made publicly available.

[...]

Committee on the Rights of the Child, General Comment no. 12, The right of the child to be heard, 2009, CRC/C/GC/12

[...]

III. The right of the child to be heard: a right of the individual child and a right of groups of children

[...]

A. Legal analysis

[...]

1. Literal analysis of article 12

[...]

e) Complaints, remedies and redress

46. Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.⁴⁶⁶ Children should have the possibility of addressing an ombudsman or a person of a comparable role in all children's institutions, inter alia, in schools and day-care centres, in order to voice their complaints. Children should know who these persons are and how to access them. In the case of family conflicts about consideration of children's views, a child should be able to turn to a person in the youth services of the community.

47. If the right of the child to be heard is breached with regard to judicial and administrative proceedings (art. 12, para. 2), the child must have access to appeals and complaints procedures which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment.

3. Obligations of States parties

a) Core obligations of States parties

48. The child's right to be heard imposes the obligation on States parties to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.

49. In order to fulfil these obligations, States parties should adopt the following strategies:

[...]

- Establish independent human rights institutions, such as children's ombudsmen or commissioners with a broad children's rights mandate;

[...]

- Ensure appropriate conditions for supporting and encouraging children to express their views, and make sure that these views are given due weight, by regulations and arrangements which are firmly anchored in laws and institutional codes and are regularly evaluated with regard to their effectiveness;

[...]

⁴⁶⁵ States may draw guidance from the Report of the Special Rapporteur on the right to food on Guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5).

⁴⁶⁶ See the Committee's general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para. 24.

b) *Specific obligations with regard to judicial and administrative proceedings*

i. The child's right to be heard in civil judicial proceedings

[...]

ii. The child's right to be heard in penal judicial proceedings

57. In penal proceedings, the right of child to express her or his views freely in all matters affecting the child has to be fully respected and implemented throughout every stage of the process of juvenile justice.

The child offender

58. Article 12, paragraph 2, of the Convention requires that a child alleged to have, accused of, or recognized as having, infringed the penal law, has the right to be heard. This right has to be fully observed during all stages of the judicial process, from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge.
59. It also applies through the stages of adjudication and disposition, as well as implementation of the imposed measures. In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed.
60. In order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court. The proceedings should be conducted in an atmosphere enabling the child to participate and to express her/himself freely.
61. The court and other hearings of a child in conflict with the law should be conducted behind closed doors. Exceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child.

The child victim and child witness

62. The child victim and child witness of a crime must be given an opportunity to fully exercise her or his right to freely express her or his view in accordance with United Nations Economic and Social Council resolution 2005/20, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime".⁴⁶⁷
63. In particular, this means that every effort has to be made to ensure that a child victim or/and witness is consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process.
64. The right of the child victim and witness is also linked to the right to be informed about issues such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which "questioning" is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal.
- iii. The child's right to be heard in administrative proceedings
65. All States parties should develop administrative procedures in legislation which reflect the requirements of article 12 and ensure the child's right to be heard along with other procedural rights, including the rights to disclosure of pertinent records, notice of hearing, and representation by parents or others.
66. Children are more likely to be involved with administrative proceedings than court proceedings, because administrative proceedings are less formal, more flexible and relatively easy to establish through law and regulation. The proceedings have to be child-friendly and accessible.

⁴⁶⁷ United Nations Economic and Social Council resolution 2005/20, in particular arts. 8, 19 and 20. Available at: www.un.org/ecosoc/docs/2005/Resolution%202005-20.pdf.

67. examples of administrative proceedings relevant for children include mechanisms to address discipline issues in schools (e.g. suspensions and expulsions), refusals to grant school certificates and performance-related issues, disciplinary measures and refusals to grant privileges in juvenile detention centres, asylum requests from unaccompanied children, and applications for driver's licences. In these matters a child should have the right to be heard and enjoy the other rights "consistent with the procedural rules of national law".

[...]

The Committee on the Right's of the Child, General Comment no. 10, Children's rights in juvenile justice, 2007, CRC/C/GC/10

[...]

III. Juvenile justice: the leading principles of a comprehensive policy

[...]

Non-discrimination (article 2)

6. States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). In this regard, training of all professionals involved in the administration of juvenile justice is important (see paragraph 97 below), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation.

[...]

Best interests of the child (art. 3)

10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

[...]

The right to be heard (art. 12)

12. The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile 1 Note that the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions. The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights.

[...]

IV. Juvenile justice: the core elements of a comprehensive policy

[...]

D. The guarantees for a fair trial

40. Article 40 (2) of CRC contains an important list of rights and guarantees that are all meant to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and

trial. Most of these guarantees can also be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee elaborated and commented on in its general comment No. 13 (1984) (Administration of justice) which is CRC/C/GC/10 page 13 currently in the process of being reviewed. However, the implementation of these guarantees for children does have some specific aspects which will be presented in this section. Before doing so, the Committee wishes to emphasize that a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities (see paragraphs 6-9 above). Since girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be paid to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs. Professionals and staff should act under all circumstances in a manner consistent with the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which promotes the child's reintegration and his/her assuming a constructive role in society (art. 40 (1)). All the guarantees recognized in article 40 (2), which will be dealt with hereafter, are minimum standards, meaning that States parties can and should try to establish and observe higher standards, e.g. in the areas of legal assistance and the involvement of the child and her/his parents in the judicial process.

[...]

The right to be heard (art. 12)

43. Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.
44. It is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. This right must be fully observed at all stages of the process, starting with pre-trial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge. But it also applies to the stages of adjudication and of implementation of the imposed measures. In other words, the child must be given the opportunity to express his/her views freely, and those views should be given due weight in accordance with the age and maturity of the child (art. 12 (1)), throughout the juvenile justice process. This means that the child, in order to effectively participate in the proceedings, must be informed not only of the charges (see paragraphs 47-48 below), but also of the juvenile justice process as such and of the possible measures.
45. The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law (see paragraph 46 below). It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.

The right to effective participation in the proceedings (art 40 (2) (b) (iv))

46. A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.

Prompt and direct information of the charge(s) (art. 40 (2) (b) (ii))

47. Every child alleged as or accused of having infringed the penal law has the right to be informed promptly and directly of the charges brought against him/her. Prompt and direct means as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. But also when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charge(s) that may justify this approach. This is part of the requirement of article 40 (3) (b) of CRC that legal safeguards should be fully respected. The child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a "translation" of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand.
48. Providing the child with an official document is not enough and an oral explanation may often be necessary. The authorities should not leave this to the parents or legal guardians or the child's legal or other assistance. It is the responsibility of the authorities (e.g. police, prosecutor, judge) to make sure that the child understands each charge brought against him/her. The Committee is of the opinion that the provision of this information to the parents or legal guardians should not be an alternative to communicating this information to the child. It is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences.

Legal or other appropriate assistance (art. 40 (2) (b) (ii))

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.
50. As required by article 14 (3) (b) of ICCPR, the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

Decisions without delay and with involvement of parents (art. 40 (2) (b) (iii))

51. Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as CRC/C/GC/10 page 16 possible. The longer this period, the more likely it is that the response loses its desired positive,

pedagogical impact, and the more the child will be stigmatized. In this regard, the Committee also refers to article 37 (d) of CRC, where the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. The term “prompt” is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term “without delay” (art. 40 (2) (b) (iii) of CRC), which is stronger than the term “without undue delay” of article 14 (3) (c) of ICCPR.

52. The Committee recommends that the States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police.
53. Parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. The presence of parents does not mean that parents can act in defence of the child or be involved in the decision-making process. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings.
54. The Committee recommends that States parties explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child's infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.
55. At the same time, the Committee regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children. Civil liability for the damage caused by the child's act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age). But criminalizing parents of children in conflict with the law will most likely not contribute to their becoming active partners in the social reintegration of their child.

[...]

The right to appeal (art. 40 (2) (b) (v))

60. The child has the right to appeal against the decision by which he is found guilty of the charge(s) brought against him/her and against the measures imposed as a consequence of this guilty verdict. This appeal should be decided by a higher, competent, independent and impartial authority or judicial body, in other words, a body that meets the same standards and requirements as the one that dealt with the case in the first instance. This guarantee is similar to the one expressed in article 14 (5) of ICCPR. This right of appeal is not limited to the most serious offences.
61. This seems to be the reason why quite a few States parties have made reservations regarding this provision in order to limit this right of appeal by the child to the more serious offences and/or imprisonment sentences. The Committee reminds States parties to the ICCPR that a similar provision is made in article 14 (5) of the Covenant. In the light of article 41 of CRC, it means that this article should provide every adjudicated child with the right to appeal. The Committee recommends that the States parties withdraw their reservations to the provision in article 40 (2) (b) (v).

Free assistance of an interpreter (art. 40 (2) (vi))

62. If a child cannot understand or speak the language used by the juvenile justice system, he/she has the right to get free assistance of an interpreter. This assistance should not be limited to the court trial but should also be available at all stages of the juvenile justice process. It is also important that the interpreter has been trained to work with children, because the use and understanding of their mother tongue might be different from that of adults. Lack of knowledge and/or experience in

that regard may impede the child's full understanding of the questions raised, and interfere with the right to a fair trial and to effective participation. The condition starting with "if", "if the child cannot understand or speak the language used", means that a child of a foreign or ethnic origin for example, who - besides his/her mother tongue - understands and speaks the official language, does not have to be provided with the free assistance of an interpreter.

63. The Committee also wishes to draw the attention of States parties to children with speech impairment or other disabilities. In line with the spirit of article 40 (2) (vi), and in accordance with the special protection measures provided to children with disabilities in article 23, the Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals, e.g. in sign language, in case they are subject to the juvenile justice process (see also in this regard general comment No. 9 (The rights of children with disabilities) of the Committee on the Rights of the Child.

[...]

E. Measures (see also chapter IV, section B, above)

[...]

Dispositions by the juvenile court/judge

70. After a fair and just trial in full compliance with article 40 of CRC (see chapter IV, section D, above), a decision is made regarding the measures which should be imposed on the child found guilty of the alleged offence(s). The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time (art. 37 (b) of CRC).
71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC (see paragraphs 5-14 above). The Committee reiterates that corporal punishment as a sanction is a violation of these principles as well as of article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment)). In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.
72. The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt (see also paragraphs 35 and 39 above).
73. As far as alternatives to deprivation of liberty/institutional care are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop and implement these alternatives by adjusting them to their own culture and tradition. It goes without saying that measures amounting to forced labour or to torture or inhuman and degrading treatment must be explicitly prohibited, and those responsible for such illegal practices should be brought to justice.
74. After these general remarks, the Committee wishes to draw attention to the measures prohibited under article 37 (a) of CRC, and to deprivation of liberty.

[...]

Committee on the Rights of the Child, General Comment no. 9, The rights of children with disabilities, 2006, CRC/C/GC/9

[...]

9. In general, States parties in their efforts to prevent and eliminate all forms of discrimination against children with disabilities should take the following measures:

[...]

- b) Provide for effective remedies in case of violations of the rights of children with disabilities, and ensure that those remedies are easily accessible to children with disabilities and their parents and/or others caring for the child.

[...]

G. Independent monitoring

24. Both the Convention and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities recognize the importance of the establishment of an appropriate monitoring system⁴⁶⁸. The Committee has very often referred to “the Paris Principles” (A/RES/48/134) as the guidelines which national human rights institutions should follow (see the Committee’s general comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child). National human rights institutions can take many shapes or forms such as an Ombudsman or a Commissioner and may be broad-based or specific. Whatever mechanism is chosen, it must be:

- a) Independent and provided with adequate human and financial resources;
- b) Well known to children with disabilities and their caregivers;
- c) Accessible not only in the physical sense but also in a way that allows children with disabilities to send in their complaints or issues easily and confidentially; and
- d) It must have the appropriate legal authority to receive, investigate and address the complaints of children with disabilities in a manner sensitive to both their childhood and to their disabilities.

[...]

Convention on the Rights of Persons with Disabilities (2006)

Article 12. Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

⁴⁶⁸ See also the general comment No. 5 (1994) of the Committee on Economic, Social and Cultural Rights regarding persons with disabilities.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13. Access to Justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Committee on the Rights of Persons with Disabilities, General Comment no. 2, Article 9 (accessibility), 2014, CRPD/C/GC/2

[...]

IV. Relationship with other articles of the Convention

34. The duty of States parties to ensure access to the physical environment, transportation, information and communication, and services open to the public for persons with disabilities should be seen from the perspective of equality and non-discrimination. Denial of access to the physical environment, transportation, information and communication, and services open to the public constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention. Ensuring accessibility pro futuro should be viewed in the context of implementing the general obligation to develop universally designed goods, services, equipment and facilities (art. 4, para. 1 (f)).

[...]

37. There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities (art. 13). Safe houses, support services and procedures must all be accessible in order to provide effective and meaningful protection from violence, abuse and exploitation to persons with disabilities, especially women and children (art. 16). Accessible environment, transportation, information and communication, and services are a precondition for the inclusion of persons with disabilities in their respective local communities and for them to have an independent life (art. 19).

[...]

Committee on the Rights of Persons with Disabilities, General Comment no. 1, Article 12 (equal recognition before the law), 2014, CRPD/C/GC/1

I. Introduction

1. Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights specifically guarantee the right to equality before the law. Article 12 of the Convention on the Rights of Persons with Disabilities further describes the content of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right. Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

2. Given the importance of this article, the Committee facilitated interactive forums for discussions on legal capacity. From the very useful exchange on the provisions of article 12 by experts, States parties, disabled persons' organizations, non-governmental organizations, treaty monitoring bodies, national human rights institutions and United Nations agencies, the Committee found it imperative to provide further guidance in a general comment.
3. On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making. The aim of the present general comment is to explore the general obligations deriving from the various components of article 12.
4. The present general comment reflects an interpretation of article 12 which is premised on the general principles of the Convention, as outlined in article 3, namely, respect for the inherent dignity, individual autonomy — including the freedom to make one's own choices —, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
5. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities each specify that the right to equal recognition before the law is operative "everywhere". In other words, there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited. This is reinforced by article 4, paragraph 2, of the International Covenant on Civil and Political Rights, which allows no derogation from this right, even in times of public emergency. Although an equivalent prohibition on derogation from the right to equal recognition before the law is not specified in the Convention on the Rights of Persons with Disabilities, the provision in the International Covenant covers such protection by virtue of article 4, paragraph 4, of the Convention, which establishes that the provisions of the Convention on the Rights of Persons with Disabilities do not derogate from existing international law.
6. The right to equality before the law is also reflected in other core international and regional human rights treaties. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women guarantees women's equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system. Article 3 of the African Charter on Human and Peoples' Rights provides for the right of every person to be equal before the law and to enjoy equal protection of the law. Article 3 of the American Convention on Human Rights enshrines the right to juridical personality and the right of every person to recognition as a person before the law.
7. States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.
8. Article 12 of the Convention affirms that all persons with disabilities have full legal capacity. Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental

decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.

9. All persons with disabilities, including those with physical, mental, intellectual or sensory impairments, can be affected by denial of legal capacity and substitute decisionmaking. However, persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.
10. This general comment focuses primarily on the normative content of article 12 and the State obligations that emerge therefrom. The Committee will continue to carry out work in this area so as to provide further in-depth guidance on the rights and obligations deriving from article 12 in future concluding observations, general comments and other documents.

II. Normative content of article 12

Article 12, paragraph 1

11. Article 12, paragraph 1, reaffirms the right of persons with disabilities to be recognized as persons before the law. This guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of a person's legal capacity.

Article 12, paragraph 2

12. Article 12, paragraph 2, recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships. The right to recognition as a legal agent is provided for in article 12, paragraph 5, of the Convention, which outlines the duty of States parties to "take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and ensure that persons with disabilities are not arbitrarily deprived of their property".
13. Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Legal instruments such as the Universal Declaration of Human Rights (art. 6), the International Covenant on Civil and Political Rights (art. 16) and the Convention on the Elimination of All Forms of Discrimination Against Women (art. 15) do not specify the distinction between mental and legal capacity. Article 12 of the Convention on the Rights of Persons with Disabilities, however, makes it clear that "unsoundness of mind" and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.
14. Legal capacity is an inherent right accorded to all people, including persons with disabilities. As noted above, it consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law. This may include, for example, having a birth certificate, seeking medical assistance, registering to be on the electoral role or applying for a passport. The second is legal agency to act on those rights and to have those actions recognized by the law. It is this component that is frequently denied or diminished for persons with disabilities. For example, laws may allow persons with disabilities to own property, but may not always respect the actions taken

by them in terms of buying and selling property. Legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both strands of legal capacity must be recognized for the right to legal capacity to be fulfilled; they cannot be separated. The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.

15. In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.

Article 12, paragraph 3

16. Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.
17. Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12, paragraph 3, does not specify what form the support should take. "Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility — for example, requiring private and public actors, such as banks and financial institutions, to provide information in an understandable format or to provide professional sign language interpretation — in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others. All persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others. States parties can provide various forms of advance planning mechanisms to accommodate various preferences, but all the options should be non-discriminatory. Support should be provided to a person, where desired, to complete an advance planning process. The point at which an advance directive enters into force (and ceases to have effect) should be decided by the person and included in the text of the directive; it should not be based on an assessment that the person lacks mental capacity.

18. The type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities. This is in accordance with article 3 (d), which sets out “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” as a general principle of the Convention. At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.
19. Some persons with disabilities only seek recognition of their right to legal capacity on an equal basis with others, as provided for in article 12, paragraph 2, of the Convention, and may not wish to exercise their right to support, as provided for in article 12, paragraph 3.

Article 12, paragraph 4

20. Article 12, paragraph 4, outlines the safeguards that must be present in a system of support in the exercise of legal capacity. Article 12, paragraph 4, must be read in conjunction with the rest of article 12 and the whole Convention. It requires States parties to create appropriate and effective safeguards for the exercise of legal capacity. The primary purpose of these safeguards must be to ensure the respect of the person's rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.
21. Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.
22. All people risk being subject to “undue influence”, yet this may be exacerbated for those who rely on the support of others to make decisions. Undue influence is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence; however, the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes.

Article 12, paragraph 5

23. Article 12, paragraph 5, requires States parties to take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others. Access to finance and property has traditionally been denied to persons with disabilities based on the medical model of disability. That approach of denying persons with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with article 12, paragraph 3. In the same way as gender may not be used as the basis for discrimination in the areas of finance and property,⁴⁶⁹ neither may disability.

III. States obligations

24. States parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law. In this regard, States parties should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law. States parties should take action to prevent non-State actors and private persons from interfering with the ability of persons with disabilities to realize and enjoy their human rights, including the right to legal capacity. One of the aims of support in the exercise of legal capacity is to build the confidence and skills of persons with disabilities so that they can exercise their legal capacity with less support in the future, if they so wish. States parties have an obligation to provide training for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity.

⁴⁶⁹ See the Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (b).

25. In order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.⁴⁷⁰
26. In its concluding observations on States parties’ initial reports, in relation to article 12, the Committee on the Rights of Persons with Disabilities has repeatedly stated that States parties must “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences”.
27. Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.
28. States parties’ obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.
29. A supported decision-making regime comprises various support options which give primacy to a person’s will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy (right to capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, etc.). Furthermore, systems of supported decision-making should not overregulate the lives of persons with disabilities. While supported decision-making regimes can take many forms, they should all incorporate certain key provisions to ensure compliance with article 12 of the Convention, including the following:
 - (a) Supported decision-making must be available to all. A person’s level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making;
 - (b) All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;
 - (c) A person’s mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;
 - (d) Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned;
 - (e) In order to comply with the requirement, set out in article 12, paragraph 3, of the Convention, for States parties to take measures to “provide access” to the support required, States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;

⁴⁷⁰ See the Convention on the Rights of Persons with Disabilities, art. 2, in conjunction with art. 5.

- (f) Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;
 - (g) The person must have the right to refuse support and terminate or change the support relationship at any time;
 - (h) Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected.
 - (i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.
30. The right to equality before the law has long been recognized as a civil and political right, with roots in the International Covenant on Civil and Political Rights. Civil and political rights attach at the moment of ratification and States parties are required to take steps to immediately realize those rights. As such, the rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization. The State obligation, provided for in article 12, paragraph 3, to provide access to support in the exercise of legal capacity is an obligation for the fulfilment of the civil and political right to equal recognition before the law. "Progressive realization" (art. 4, para. 2) does not apply to the provisions of article 12. Upon ratifying the Convention, States parties must immediately begin taking steps towards the realization of the rights provided for in article 12. Those steps must be deliberate, well-planned and include consultation with and meaningful participation of people with disabilities and their organizations.

IV. Relationship with other provisions of the Convention

31. Recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention on the Rights of Persons with Disabilities, including, but not limited to, the right to access justice (art. 13); the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment (art. 14); the right to respect for one's physical and mental integrity (art. 17); the right to liberty of movement and nationality (art. 18); the right to choose where and with whom to live (art. 19); the right to freedom of expression (art. 21); the right to marry and found a family (art. 23); the right to consent to medical treatment (art. 25); and the right to vote and stand for election (art. 29). Without recognition of the person as a person before the law, the ability to assert, exercise and enforce those rights, and many other rights provided for in the Convention, is significantly compromised.

Article 5: Equality and non-discrimination

32. To achieve equal recognition before the law, legal capacity must not be denied discriminatorily. Article 5 of the Convention guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability. Discrimination on the basis of disability is defined in article 2 of the Convention as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms". Denial of legal capacity having the purpose or effect of interfering with the right of persons with disabilities to equal recognition before the law is a violation of articles 5 and 12 of the Convention. States have the ability to restrict the legal capacity of a person based on certain circumstances, such as bankruptcy or criminal conviction. However, the right to equal recognition before the law and freedom from discrimination requires that when the State denies legal capacity, it must be on the same basis for all persons. Denial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating the person differently.

33. Freedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person in accordance with the principles enshrined in article 3 (a) of the Convention. Freedom to make one's own choices most often requires legal capacity. Independence and autonomy include the power to have one's decisions legally respected. The need for support and reasonable accommodation in making decisions shall not be used to question a person's legal capacity. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity (art. 3 (d)) is incompatible with granting legal capacity on an assimilationist basis.
34. Non-discrimination includes the right to reasonable accommodation in the exercise of legal capacity (art. 5, para. 3). Reasonable accommodation is defined in article 2 of the Convention as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". The right to reasonable accommodation in the exercise of legal capacity is separate from, and complementary to, the right to support in the exercise of legal capacity. States parties are required to make any necessary modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless it is a disproportionate or undue burden. Such modifications or adjustments may include, but are not limited to, access to essential buildings such as courts, banks, social benefit offices and voting venues; accessible information regarding decisions which have legal effect; and personal assistance. The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.

Article 6: Women with disabilities

35. Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women provides for women's legal capacity on an equal basis with men, thereby acknowledging that recognition of legal capacity is integral to equal recognition before the law: "States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals" (para. 2). This provision applies to all women, including women with disabilities. The Convention on the Rights of Persons with Disabilities recognizes that women with disabilities may be subject to multiple and intersectional forms of discrimination based on gender and disability. For example, women with disabilities are subjected to high rates of forced sterilization, and are often denied control of their reproductive health and decision-making, the assumption being that they are not capable of consenting to sex. Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than on men. Therefore, it is particularly important to reaffirm that the legal capacity of women with disabilities should be recognized on an equal basis with others.

Article 7: Children with disabilities.

36. While article 12 of the Convention protects equality before the law for all persons, regardless of age, article 7 of the Convention recognizes the developing capacities of children and requires that "in all actions concerning children with disabilities, the best interests of the child ... be a primary consideration" (para. 2) and that "their views [be] given due weight in accordance with their age and maturity" (para. 3). To comply with article 12, States parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children.

Article 9: Accessibility

37. The rights provided for in article 12 are closely tied to State obligations relating to accessibility (art. 9) because the right to equal recognition before the law is necessary to enable persons with disabilities to live independently and participate fully in all aspects of life. Article 9 requires the identification and elimination of barriers to facilities or services open or provided to the public. Lack of accessibility to information and communication and inaccessible services may constitute barriers to the realization of legal capacity for some persons with disabilities, in practice. Therefore, States parties must make all procedures for the exercise of legal capacity, and all information and communication pertaining

to it, fully accessible. States parties must review their laws and practices to ensure that the right to legal capacity and accessibility are being realized.

Article 13: Access to justice

38. States parties have an obligation to ensure that persons with disabilities have access to justice on an equal basis with others. The recognition of the right to legal capacity is essential for access to justice in many respects. In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals. States parties must also ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be remedied, including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference—on their own behalf or with legal representation—and to defend their rights in court. Persons with disabilities have often been excluded from key roles in the justice system as lawyers, judges, witnesses or members of a jury.
39. Police officers, social workers and other first responders must be trained to recognize persons with disabilities as full persons before the law and to give the same weight to complaints and statements from persons with disabilities as they would to nondisabled persons. This entails training and awareness-raising in these important professions. Persons with disabilities must also be granted legal capacity to testify on an equal basis with others. Article 12 of the Convention guarantees support in the exercise of legal capacity, including the capacity to testify in judicial, administrative and other legal proceedings. Such support could take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods. The judiciary must also be trained and made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing.

[...]

Article 19: Living independently and being included in the community

44. To fully realize the rights provided for in article 12, it is imperative that persons with disabilities have opportunities to develop and express their will and preferences, in order to exercise their legal capacity on an equal basis with others. This means that persons with disabilities must have the opportunity to live independently in the community and to make choices and to have control over their everyday lives, on an equal basis with others, as provided for in article 19.
45. Interpreting article 12, paragraph 3, in the light of the right to live in the community (art. 19) means that support in the exercise of legal capacity should be provided through a community-based approach. States parties must recognize that communities are assets and partners in the process of learning what types of support are needed in the exercise of legal capacity, including raising awareness about different support options. States parties must recognize the social networks and naturally occurring community support (including friends, family and schools) of persons with disabilities as key to supported decisionmaking. This is consistent with the Convention's emphasis on the full inclusion and participation of persons with disabilities in the community.
46. The segregation of persons with disabilities in institutions continues to be a pervasive and insidious problem that violates a number of the rights guaranteed under the Convention. The problem is exacerbated by the widespread denial of legal capacity to persons with disabilities, which allows others to consent to their placement in institutional settings. The directors of institutions are also commonly vested with the legal capacity of the persons residing therein. This places all power and control over the person in the hands of the institution. In order to comply with the Convention and respect the human rights of persons with disabilities, deinstitutionalization must be achieved and legal capacity must be restored to all persons with disabilities, who must be able to choose where and with whom to live (art. 19). A person's choice of where and with whom to live should not affect his or her right to access support in the exercise of his or her legal capacity.

[...]

Article 29: Political participation

48. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.
49. States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity.

V. Implementation at the national level

50. In the light of the normative content and obligations outlined above, States parties should take the following steps to ensure the full implementation of article 12 of the Convention on the Rights of Persons with Disabilities:
- a) Recognize persons with disabilities as persons before the law, having legal personality and legal capacity in all aspects of life, on an equal basis with others. This requires the abolition of substitute decision-making regimes and mechanisms that deny legal capacity and which discriminate in purpose or effect against persons with disabilities. It is recommended that States parties create statutory language protecting the right to legal capacity on an equal basis for all;
 - b) Establish, recognize and provide persons with disabilities with access to a broad range of support in the exercise of their legal capacity. Safeguards for such support must be premised on respect for the rights, will and preferences of persons with disabilities. The support should meet the criteria set out in paragraph 29 above on the obligations of States parties to comply with article 12, paragraph 3, of the Convention;
 - c) Closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations, in the development and implementation of legislation, policies and other decision-making processes that give effect to article 12.
51. The Committee encourages States parties to undertake or devote resources to the research and development of best practices respecting the right to equal recognition of the legal capacity of persons with disabilities and support in the exercise of legal capacity.
52. States parties are encouraged to develop effective mechanisms to combat both formal and informal substitute decision-making. To this end, the Committee urges States parties to ensure that persons with disabilities have the opportunity to make meaningful choices in their lives and develop their personalities, to support the exercise of their legal capacity. This includes, but is not limited to, opportunities to build social networks; opportunities to work and earn a living on an equal basis with others; multiple choices for place of residence in the community; and inclusion in education at all levels.

International Labour Organisation Indigenous and Tribal Peoples Convention (nº 169) (1989)

[...]

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison

[...]

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

[...]

United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)

[...]

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

[...]

Article 32

[...]

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

[...]

Basic Principles on the Independence of the Judiciary (1985)

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[...]

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings

Guidelines on the Role of Prosecutors (1990)

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[...]

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
 - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

- (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

[...]

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall:
 - (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
 - (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
 - (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.
19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147, 16 December 2005

[...]

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:
 - (a) Treaties to which a State is a party;
 - (b) Customary international law;
 - (c) The domestic law of each State.
2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:
 - (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
 - (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
 - (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;
 - (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
 - (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
 - (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
 - (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
 - (d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.
7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
 - (a) Equal and effective access to justice;
 - (b) Adequate, effective and prompt reparation for harm suffered;
 - (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other

bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
 - (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
 - (c) Provide proper assistance to victims seeking access to justice;
 - (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.
13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.
 14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.
17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.
18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
 - (a) Physical or mental harm;
 - (b) Lost opportunities, including employment, education and social benefits;
 - (c) Material damages and loss of earnings, including loss of earning potential;
 - (d) Moral damage;
 - (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
21. *Rehabilitation* should include medical and psychological care as well as legal and social services.
22. *Satisfaction* should include, where applicable, any or all of the following:
 - (a) Effective measures aimed at the cessation of continuing violations;
 - (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
 - (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
 - (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
 - (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
 - (f) Judicial and administrative sanctions against persons liable for the violations;
 - (g) Commemorations and tributes to the victims;
 - (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.
23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:
 - (a) Ensuring effective civilian control of military and security forces;
 - (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
 - (c) Strengthening the independence of the judiciary;
 - (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
 - (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
 - (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
 - (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
 - (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by the General Assembly, 40/34, 29 November 1985

A. Victims of crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or 303 *General Assembly resolution 40/34, annex. informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
 - (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
11. Where public officials or other agents acting in an official or quas-iofficial capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
 - (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.
17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. Victims of abuse of power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.
19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.
20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.
21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013

[...]

IV. Human rights obligations relating to the environment

[...]

3. Duty to provide access to legal remedies

41. From the Universal Declaration of Human Rights onward, human rights agreements have established the principle that States should provide for an "effective remedy" for violations of their protected rights. Human rights bodies have applied that principle to human rights infringed by environmental harm. For example, the Committee on Economic, Social and Cultural Rights has urged States to

provide for “adequate compensation and/or alternative accommodation and land for cultivation” to indigenous communities and local farmers whose land is flooded by large infrastructure projects, and “just compensation [to] and resettlement” of indigenous peoples displaced by forestation.⁴⁷¹ The Special Rapporteur on the situation of human rights defenders has stated that States must implement mechanisms that allow defenders to communicate their grievances, claim responsibilities, and obtain effective redress for violations, without fear of intimidation (A/68/262, paras. 70–73). Other special rapporteurs, including those for housing, education, and hazardous substances and wastes, have also emphasized the importance of access to remedies within the scope of their mandates.⁴⁷²

42. At the regional level, the European Court has stated that individuals must “be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.”⁴⁷³ More generally, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have stated that the American Convention on Human Rights requires States to provide access to judicial recourse for claims alleging the violation of their rights as a result of environmental harm.⁴⁷⁴ The Court of Justice of the Economic Community of West African States has stressed the need for the State to hold accountable actors who infringe human rights through oil pollution, and to ensure adequate reparation for victims.⁴⁷⁵
43. International environmental instruments support an obligation to provide for effective remedies. Principle 10 of the Rio Declaration states: “Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Many environmental treaties establish obligations for States to provide for remedies in specific areas. For instance, the United Nations Convention on the Law of the Sea requires States to ensure that recourse is available within their legal systems to natural or juridical persons for prompt and adequate compensation or other relief for damage caused by pollution of the marine environment (art. 235). Some agreements establish detailed liability regimes; a leading example is the International Convention on Civil Liability for Oil Pollution Damage.⁴⁷⁶

[...]

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015

[...]

III. Good practices in the use of human rights obligations relating to the environment

22. The following description of good practices in the use of human rights obligations in relation to environmental protection is organized into nine categories: (a) procedural obligations generally; (b) the obligation to make environmental information public; (c) the obligation to facilitate public participation in environmental decision-making; (d) the obligation to protect the rights of expression and association; (e) the obligation to provide access to legal remedies; (f) substantive obligations; (g) obligations relating to non-State actors; (h) obligations relating to transboundary harm; and (i) obligations relating to those in vulnerable situations. Practices that fall into more than one category were placed in the category that seemed most relevant.

⁴⁷¹ ICESCR report, sect. III.A.3.

⁴⁷² Report on special procedures, sect. III.A.3.

⁴⁷³ *Taşkın v. Turkey*, para. 119.

⁴⁷⁴ Inter-American report, sect. III.A.3.

⁴⁷⁵ *SERAP v. Nigeria*, para. 97.

⁴⁷⁶ See generally MEA report, sect. III.A.3.

23. Because of space limitations, this report describes the practices only briefly. A fuller description of each practice is available at the websites noted above.
24. The Independent Expert is well aware that there are many more good practices in this field than those that this project has identified. The practices included here should be taken as illustrative, rather than exhaustive, of the many innovative and exemplary efforts being made to bring a human rights perspective to environmental protection.

A. Procedural obligations

25. Human rights law imposes procedural obligations on States in relation to environmental protection, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm (A/HRC/25/53, para. 29). These obligations also have support in international environmental instruments, particularly Principle 10 of the Rio Declaration, which provides that “each individual shall have appropriate access to information concerning the environment that is held by public authorities” and “the opportunity to participate in decision-making processes”, and that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
26. The following sections of this report describe good practices in the use of each of these procedural obligations. This section describes several practices that are relevant to the full range of procedural obligations.
27. One such practice was the adoption in 2010 by the UNEP Governing Council of the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 26 voluntary guidelines that assist States to implement their commitments to Principle 10.⁴⁷⁷ UNEP is preparing a comprehensive guide for the implementation of the Bali Guidelines, which will be published in 2015.
28. Another good practice is the implementation of these procedural obligations through regional agreements. In 1998, the States members of the United Nations Economic Commission for Europe adopted the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which states that:

to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with provisions of this Convention (art. 1).

The Convention sets out detailed requirements for the implementation of each of these access rights. As of January 2015, the Convention has 47 Parties, which include virtually all of the States in Europe as well as a number of States in Central Asia.

29. To facilitate the implementation of the Convention, the Organization for Security and Co-operation in Europe maintains a network of Aarhus Centres, including in Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Montenegro, Serbia and Tajikistan. The Centres disseminate environmental information, carry out educational and training projects, and provide venues where the public can discuss environmental concerns. For example, the Khujand Aarhus Centre in northern Tajikistan conducted a campaign in the town of Taboshar to raise its residents’ awareness of the health risks associated with a nearby abandoned uranium mine.
30. Nineteen States in Latin America and the Caribbean, with the assistance of the Economic Commission for Latin America and the Caribbean, decided in November 2014 to begin negotiation of a new regional agreement that would implement the access rights set out in Principle 10, with a view to completing the negotiation by December 2016. Together with the Aarhus Convention, this initiative will provide invaluable models to other regions considering similar agreements.

⁴⁷⁷ UNEP Governing Council Dec. SS.XI/5 (26 February 2010).

31. Civil society organizations have also engaged in exemplary practices designed to facilitate the exercise of procedural rights to information, participation and remedy. One of the most notable is The Access Initiative (TAI), a global network of more than 150 civil society organizations that work together to promote procedural rights. TAI has developed a toolkit that helps civil society to assess environmental governance in their countries and to identify opportunities to make positive changes. Together with the World Resources Institute, TAI is also developing an Environmental Democracy Index, which will measure country-specific realization of the three procedural rights according to indicators based on the Bali Guidelines. The Index should be available in 2015.

[...]

E. Obligation to provide access to legal remedies

55. Human rights agreements have established that States have an obligation to provide for an effective remedy for violations of protected rights, and human rights bodies have applied that principle to human rights whose enjoyment is infringed by environmental harm (A/HRC/25/53, para. 41).
56. States have adopted a wide range of good practices in the provision of access to effective remedies for environmental harm, from dedicated environmental tribunals, to procedural rules that facilitate access to courts by environmental plaintiffs, to the increasingly important roles of national human rights institutions, ombudspersons and regional tribunals.
57. A number of States have found that one way to ensure that environmental claims are heard by courts with relevant expertise is to establish dedicated environmental courts. The Land and Environment Court of New South Wales, Australia, which was created in 1980, can claim to be the first specialist environmental superior court in the world. The court has jurisdiction over a wide variety of issues, including appeals from environmental permits, Aboriginal land claim cases, criminal proceedings for offences against planning or environmental laws, and mining issues. Other examples of dedicated tribunals with jurisdiction to hear a broad spectrum of environmental claims include Costa Rica's Environmental Administrative Tribunal, established in 1995, and India's National Green Tribunals, established in 2011.
58. In most States, environmental cases continue to be heard by courts with general jurisdiction. There are too many instances of such courts deciding environmental disputes through the application of human rights norms to cite them all, but some examples are provided in the next section, on good practices in the use of substantive obligations.
59. However, it is important to note here some good practices taken by States to facilitate access to courts by environmental plaintiffs. The Land and Environment Court of New South Wales, for instance, which is located in Sydney, has assisted individuals who live in rural areas within its jurisdiction by allowing cases to be filed in more than 150 local courthouses or through the Internet, and by conducting preliminary hearings by telephone and final hearings at the site of the dispute. It also has a comprehensive website that provides information on how individuals can represent themselves before the court. In the Philippines, the Supreme Court has adopted rules of procedure for environmental cases that allow plaintiffs to bring cases on behalf of others, including minors and future generations. Similarly, the Constitutional Chamber of the Supreme Court of Costa Rica has broadened standing by allowing individuals to bring actions on behalf of the public interest, including in the interest of environmental protection. Moreover, any person may file a case regarding a constitutional right in Costa Rica without an attorney, with no filing fees, in any language, at any time, and in any form, including handwritten filings.
60. The Philippine rules of procedure also address "strategic lawsuits against public participation" (SLAPP) suits – that is, countersuits by defendants against environmental plaintiffs, which are designed to discourage them from seeking legal remedies. The Philippine rules allow affected plaintiffs to call possible SLAPP suits to the attention of the court, which may then shift the burden to the defendant to demonstrate that the suit is not a SLAPP suit. If the court dismisses the SLAPP suit, it may award damages and attorneys' fees to the environmental plaintiff.
61. Ireland has facilitated access to environmental remedies by departing from its normal rule, according to which the winning party is entitled to recover its legal costs from the losing party. This rule can have a chilling effect on environmental plaintiffs that have few resources. Under an act adopted in 2011,

plaintiffs bear only their own costs in actions to ensure compliance with environmental requirements, but they may be entitled to recover their costs from defendants if they win.

62. In the United States of America, many national environmental statutes allow members of the public to initiate lawsuits against alleged violators. Although the cases are often called “citizen suits”, the plaintiffs need not be citizens. The statutes authorize courts to order compliance with the law on the basis of citizen suits, and although the plaintiffs are not authorized to recover damages, they may receive attorneys’ fees.
63. Another good practice in connection with the obligation to provide effective remedies for environmental harm is building the relevant expertise of the judiciary. An example in this respect is the series of judicial symposiums on environmental decision-making, the rule of law and environmental justice that have been hosted by the Asian Development Bank since 2010. A key outcome of these meetings has been the creation of the Asian Judges Network on Environment, which facilitates the sharing of information and experience among senior judges in countries belonging to ASEAN and the South Asian Association for Regional Cooperation. The Network has its own website (www.asianjudges.org), which provides a database of national environmental laws as well as information on upcoming events.
64. The Organization of American States programme on judicial facilitators, which it has developed in cooperation with various States (including Argentina, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Paraguay), is another good practice in the provision of effective remedies. Judicial facilitators are nominated by local communities and appointed by judges under whose supervision they work. After they have received training, they can undertake a number of functions, including providing technical assistance to individuals in the preparation of claims, providing mediation between parties, and assisting in the assessment of damages.
65. Yet another good practice in this area is the use of national human rights institutions to address environmental issues. For example, the Kenyan national commission on human rights has increasingly focused on environmental concerns, including by investigating forced evictions in a protected area, and human rights violations and environmental degradation occurring at salt manufacturing companies. In Mexico, the national human rights commission made a number of recommendations concerning environmental protection even before the Mexican Constitution was amended in 2012 to include a right to a healthy environment. In Thailand, the subcommittee on civil and political rights of the national human rights commission found in 2012 that the commission had jurisdiction to examine alleged human rights violations in a sugar cane plantation in Cambodia owned indirectly by a Thai company.
66. The Malaysian national human rights commission (SUHAKAM) has used “national inquiries” to examine systemic human rights issues. An important recent example of its use of the national inquiry process in the environmental context was the National Inquiry into the Land Rights of Indigenous Peoples, undertaken to investigate violations related to the land rights of indigenous peoples in Malaysia. Between 2002 and 2010, SUHAKAM received numerous complaints from indigenous peoples, including allegations of encroachment and/or dispossession of land, and of delays in processing requests for indigenous titles. SUHAKAM decided to address the root causes of the issues comprehensively by taking cognizance of the experiences of indigenous peoples throughout the country. Its National Inquiry resulted in a final report published in April 2013, with detailed findings and 18 recommendations.
67. Some States have officials dedicated to protecting constitutional rights, which provide another avenue for ensuring access to remedies for environmental harm. For example, Brazil’s *Ministerio Público*, or public prosecutor, has broad powers to enforce constitutional rights, including the constitutional right to an ecologically balanced environment. The *Ministerio Público* has been very active in promoting environmental protection, bringing more than 4,000 environmental cases in the state of Sao Paulo alone.
68. A number of States have ombudspersons who have taken an active role in environmental protection. For example, much of the work of the Costa Rican ombudsperson in recent years has concerned environmental issues. In 2011, about 10 per cent of the more than 3,000 cases received by the office of the ombudsperson concerned the right to a healthy environment. Similarly, since 2013, the Croatian ombudsperson has received 20 complaints relating to environmental protection and

another 19 relating to noise pollution. In Portugal, the office of the ombudsperson has also acted on complaints relating to environmental protection, as well as acting on its own initiative, including with respect to illegal construction in a national park.

69. A pathbreaking development was the establishment in 2007 of Hungary's ombudsperson for future generations. The ombudsperson has the authority to initiate or participate in investigations upon receiving complaints, to submit petitions to the constitutional court, and to initiate intervention in public administrative court cases regarding environmental protection.
70. At the regional level, human rights commissions and courts have been in the forefront of bringing human rights norms to bear on environmental issues. The African Commission on Human and Peoples' Rights, the Court of Justice of the Economic Community of West African States, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have all considered complaints of human rights violations involving environmental harm, and together are developing a detailed jurisprudence on environmental human rights law.
71. Another good practice is the inclusion in regional environmental agreements of procedures that allow members of the public to raise claims for independent investigation and reporting. For example, the Submissions on Enforcement Matters process established by the North American Agreement on Environmental Cooperation allows a resident of any of the three North American countries to file a claim that one of the States is failing to enforce its domestic environmental law. Although the Commission cannot issue binding decisions, its secretariat can investigate the claim and issue a public report. This practice has also been adopted in some bilateral and regional trade agreements between the United States of America and other countries. Similarly, the Aarhus Convention establishes a Compliance Committee with the authority to review the compliance of parties with their obligations under the Convention, including on the basis of communications by members of the public. The Committee can issue reports and make non-binding recommendations.

[...]

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on climate change and human rights, A/HRC/31/52, 1 February 2016

[...]

IV. Human rights obligations relating to climate change

[...]

B. Procedural obligations

50. As the mapping report explains, human rights bodies agree that to protect against environmental harm that impairs the enjoyment of human rights, States have several procedural obligations, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm (see A/HRC/25/53, paras. 29-43). They are also supported by provisions in international environmental instruments, including principle 10 of the 1992 Rio Declaration on Environment and Development.

[...]

3. Providing for effective remedies

62. From the Universal Declaration of Human Rights onward, human rights agreements have reflected the principle that States should provide for an effective remedy for violations of their protected rights.

Human rights bodies have applied that principle to human rights infringed by environmental harm, and there is no reason to doubt that the requirement to provide for an effective remedy applies to violations of human rights relating to climate change.

63. Every State should ensure that its legal system provides for effective remedies for all human rights violations, including those arising from climate-related actions. For example, States should provide for remedies, which might include monetary compensation and injunctive relief, for violations of the right of free expression in connection with climate related projects. At the international level, States should work together to support the establishment and implementation of procedures to provide such remedies, particularly with respect to measures supported by international finance mechanisms.
64. As explained above, the Special Rapporteur recognizes the complications inherent in determining whether contributions to climate change may constitute violations of human rights obligations. At the same time, he emphasizes that finding a human rights violation is not a prerequisite for addressing the damage suffered by those most vulnerable to climate change. He applauds the decision taken at the nineteenth session of the Conference of the Parties to establish the Warsaw International Mechanism for Loss and Damage, and he notes that article 8 of the Paris Agreement provides that the parties should enhance understanding, action and support with respect to loss and damage from climate change. Article 8 identifies areas of potential cooperation and facilitation, including early warning systems, emergency preparedness, risk insurance and resilience of communities, livelihoods and ecosystems. As the parties implement article 8, the Special Rapporteur urges them to incorporate a human rights perspective in identifying the types of loss and damage to be addressed.

[...]

Report of the Special Rapporteur on the independence of judges and lawyers, Access to justice, Leandro Despouy, A/HRC/8/4, 13 May 2008

[...]

III. Access to justice

A. Introduction

15. States have an obligation to guarantee the exercise of the rights required under domestic law and in international treaties to which they are parties. This means that they must unreservedly respect the rights established therein and set up institutional mechanisms to prevent or remedy acts that violate those rights. All States governed by the rule of law have a positive obligation to eliminate obstacles that impair or restrict access to justice.
16. In successive reports, the Special Rapporteur has noted the adverse effects of some structural factors on the effective enjoyment of human rights, and in particular factors directly or indirectly preventing, hindering or impeding access to justice. In the present report, he proposes to consider this issue by looking at its two most important aspects: (a) as a fundamental human right, and (b) the conditions required for its effective realization. The first concerns the complex fabric of rights related to access to justice. The second concerns the institutional and material conditions in which the justice administration system operates, and the factors affecting that operation and access to justice, and follows the direction taken in European case law⁴⁷⁸ and the modern tendency to broaden the definition of access to justice to mean “the effective availability of institutional channels for the protection of rights and the resolution of various types of conflict in a timely manner and in accordance with the legal order”.⁴⁷⁹ By referring to both institutional and judicial channels, this definition also covers alternative dispute resolution mechanisms, which are increasingly important in certain contexts, and in regard to certain rights and specific social groups.

⁴⁷⁸ Para el Tribunal Europeo de Derechos Humanos el acceso a los tribunales comprende diversos derechos en favor de las partes y que se relacionan tanto con la organización y composición de las instituciones judiciales, como con la substanciación de los procesos. ECHR, Case Brualda de la Torre, v. Spain, 19/12/1997, 155/1996/774/975.

⁴⁷⁹ J.M. Casal et al., *Derechos humanos y acceso a la justicia*, Caracas: Instituto Latinoamericano de Investigaciones Sociales, 2005, p.11.

B. Content and scope of the right of access to justice

17. The legal complexity and richness of the concept of access to justice lies in the fact that it is both a right in itself and the means of restoring the exercise of rights that have been disregarded or violated. As an indispensable component of specific rights such as the right to liberty and to personal safety, it is closely linked to the right to effective judicial protection (fair trial or due process), the right to an effective remedy⁴⁸⁰ and the right to equality.⁴⁸¹

Right to a fair trial

18. This right is recognized in article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights and treaties of the various regional systems for human rights protection⁴⁸², and implies access to a predetermined, independent and impartial court, the decisions of which are based on law, following proceedings that observe procedural guarantees. As the Human Rights Committee states in its general comment No. 32, article 14 is of a particularly complex nature, combining various guarantees with different scopes of application: (a) equality before the courts; (b) right to a fair and public hearing by a competent, independent and impartial tribunal established by law; (c) procedural guarantees; (d) right to compensation in cases of miscarriage of justice in criminal cases; and (e) right not to be tried or punished again for an offence that has already been tried (*ne bis in idem*). In the context of access to justice the first three guarantees are of particular relevance.

Right to an effective remedy

19. This right strengthens the conditions of access to justice insofar as it includes effective procedural guarantees such as *amparo* or *habeas corpus* in the demands and requirements of a fair trial or the right to protection of the courts. Judicial protection applies in disputes in respect of any rights, whereas effective remedy protects certain specific rights acknowledged as fundamental and identified as such in the Constitution, the law or international treaties. For example, article 2, paragraph 3, of the International Covenant on Civil and Political Rights recognizes the right to an effective remedy, but only with respect to the rights enshrined in the Covenant. Article 25 of the American Convention on Human Rights provides for the "right to simple and prompt recourse" in the event of violation of rights "recognized by the constitution or laws of the state concerned or by this Convention". Thus there is always a reference to explicit recognition. However, case law has in practice interpreted the two rights as complementary, establishing that the proceedings in an effective remedy must observe the general guarantees of due process and that the available remedy must be simple and prompt. The monitoring bodies, when considering the admissibility of communications and deciding whether domestic remedies have been exhausted or not, have determined that a remedy must be real, not merely theoretical; be available to the person concerned; be capable of restoring the enjoyment of the impaired right; and ensure the effectiveness of the judgement. In the Inter-American system there is considerable case law relating to the protection of procedural guarantees in respect of non-derogable rights during states of emergency. Similarly, the Human Rights Committee has extended non-derogability to cover the guarantees of due process set out in article 14 of the Covenant. Thus the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.

Right to equality before the courts

20. This right is enshrined in generic terms in article 14, paragraph 1, of the Covenant. Access should be guaranteed to all individuals, regardless of nationality or administrative status, in order to ensure their right to claim justice. This guarantee also prohibits any distinctions regarding access to courts

⁴⁸⁰ Artículo 2.3 del Pacto Internacional de Derechos Civiles y Políticos.

⁴⁸¹ "En la medida en que la legitimidad del estado de derecho se apoya en una implementación efectiva del principio de igualdad ante la ley, las desigualdades para acceder a la justicia comprometen esa legitimidad que el Estado democrático tiene la necesidad de preservar y nutrir constantemente. La falta de igualdad de posibilidades de los ciudadanos en la defensa de sus derechos socava la legitimidad del Estado y las instituciones democráticas." A. M. Garro, "El acceso a la justicia y el "derecho de interés público", Justicia y Sociedad, vol. 2, 1999, pág. 52.

⁴⁸² Artículo 8 de la Convención Americana sobre Derechos Humanos y el artículo 6 de la Convención Europea de Derechos Humanos.

and tribunals that are not based on law and cannot be justified on objective and reasonable grounds, thus excluding any restriction on the grounds of race, sex, language, religion, opinion, national or social origin, economic situation, birth or other condition, such as civil status⁴⁸³. Access to justice should be unrestricted and effective. The first of these criteria refers to the prohibition of discrimination and coercion, and to conditions that favour admissibility of the action. Being effective means that the procedural channels should be such that the necessary legal assistance is provided and the remedies available are genuinely capable of meeting the desired objective. It is not just a matter of guaranteeing entry to the judicial process: equality of access must determine the entire conduct of that process. The Human Rights Committee has established that a situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence.⁴⁸⁴

Equality of arms⁴⁸⁵

21. Equality also extends to the procedural rights and instruments available to parties throughout the proceedings, unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.⁴⁸⁶ This right is abundantly confirmed in international case law. In the Committee's view, there is no equality of arms if only the prosecutor, but not the defendant, is allowed to appeal a certain decision.⁴⁸⁷

Legal assistance

22. This is a fundamental component of access to justice. In the Committee's view¹¹ legal assistance must meet a number of requirements: among other things, it must be prompt; it should be obtained privately; it should be confidential; and it should be free of charge when the person does not have sufficient means to pay for it. Other financial aspects have been repeatedly raised by the Committee⁴⁸⁸ such as the imposition of litigation costs and how this can impair the effective exercise of this right.⁴⁸⁹

Positive obligations of the State

23. The State should refrain from any action that hinders access to justice or makes it impossible for those working in the judicial system - judges, lawyers and prosecutors - to carry out their task.⁴⁹⁰ Access to justice requires the establishment of a judicial system that guarantees rights, and of parallel measures such as mechanisms and programmes to facilitate free legal assistance, in both criminal and civil cases.⁴⁹¹ This positive aspect of the State's obligations, likewise firmly established in both the European⁴⁹² must be considered in relation to socio-economic factors and others such as age, sexual orientation, and people's physical and psychological condition, which have a major bearing on effective access to justice.

⁴⁸³ Comité de Derechos Humanos, comunicación N° 202/1986, Alto del Avellanal c. el Perú, párr. 10.2 (otorgando al marido el derecho a representar el patrimonio conyugal ante los tribunales, excluyendo así a la mujer casada del derecho de legitimación activa). Vid. También Comité de Derechos Humanos, Observación general N° 18. No discriminación, párr. 7.

⁴⁸⁴ Comité de Derechos Humanos, comunicación N° 468/1991, Oló Bahamonde c. Guinea Ecuatorial, párr. 9.4.

⁴⁸⁵ *Ibid.*, párr. 8.

⁴⁸⁶ Consejo de Derechos Humanos, comunicación N° 1347/2005, Dudko c. Australia, párr. 7.4; comunicación N° 846/1999, Jansen-Gielen c. los Países Bajos, párr. 8.2; comunicación N° 779/1997, Äärelä y Näkkäläjärvi c. Finlandia, párr. 7.4.

⁴⁸⁷ Consejo de Derechos Humanos, comunicación N° 1086/2002, Weiss c. Austria, párr. 9.6. También comunicación N° 223/1987, Robinson c. Jamaica, párr. 10.4 (suspensión de audiencia).

⁴⁸⁸ Consejo de Derechos Humanos, comunicación N° 377/1989, Currie c. Jamaica, párr. 13.4; comunicación N° 704/1996, Shaw c. Jamaica, párr. 7.6; comunicación N° 707/1996, Taylor c. Jamaica, párr. 8.2; comunicación N° 752/1997, Henry c. Trinidad y Tabago, párr. 7.6; comunicación N° 845/1998, Kennedy c. Trinidad y Tabago, párr. 7.10.

⁴⁸⁹ Consejo de Derechos Humanos, comunicación N° 646/1995, Lindon c. Australia, párr. 6.4; comunicación N° 779/1997, Äärelä y Näkkäläjärvi c. Finlandia, párr. 7.2.

⁴⁹⁰ Esta dimensión negativa es la que aborda más específicamente la legislación británica. Vid., M. Penfold Schoenborn, "The Access to justice Bill and Human Rights Act of 1998: Britain's legislative overhaul leaves the system scrambling to mend the safety net", *Buffalo Human Rights Law Review*, vol. 6, p. 201.

⁴⁹¹ Vid. TEDH, Airey c. Irlanda, sentencia del 9 de octubre de 1979.

⁴⁹² Del razonamiento del tribunal en ese asunto se deduce que el Estado no sólo tiene la obligación de abstenerse de interferir el ejercicio del derecho al acceso a la justicia, sino también la obligación de adoptar acciones positivas y remover los obstáculos materiales que impiden su ejercicio efectivo. TEDH, Airey c. Irlanda, sentencia del 9 de octubre de 1979.

C. Barriers to access to justice

Financial barriers

24. Financial factors usually have a huge impact on access to justice. In structural terms, they are reflected in scarcity of funds allocated to ministries of justice; lack of training for those working in the justice system; buildings in poor repair; delays in proceedings; outdated equipment for expert appraisals and technical analyses; inadequacy of funds to ensure free legal aid; and so forth. These are issues that directly or indirectly affect access to justice, and the Special Rapporteur makes a point of raising them in his country visits.
25. At the individual level, court proceedings can represent a heavy financial burden. Costs include initiating and pursuing the proceedings, and possible delays. In addition there are lawyers' fees and other costs such as travel and loss of working time as a result of a court case. Various studies show that costs can be as high as 30, 50 or even 60 per cent of the value of property disputes where the amounts claimed are low.⁴⁹³ They have a proportionally greater effect on low-income social sectors, and the impossibility of paying for legal aid or meeting the costs associated with a case has come to be seen in case law and doctrine as constituting real discrimination,⁴⁹⁴ if a person's financial situation places them in a position of inequality before the law. International instruments and case law reflect this reality and establish a number of requirements directly related to access to justice. Thus, in addition to free legal aid for criminal proceedings, the Basic Principles on the Role of Lawyers require Governments to ensure the provision of sufficient funding and other resources (for example legal services) to the poor and other disadvantaged persons.⁴⁹⁵ Article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights guarantees that anyone charged with a criminal offence shall be entitled to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment if they do not have sufficient means to pay for it. The Inter-American Court of Human Rights has found that proceedings must recognize and resolve factors of real inequality in respect of anyone brought before the courts. Furthermore, the presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests⁴⁹⁶. In addition, the Court has found that any person whose economic status means that they cannot afford either the necessary legal counsel or the costs of the proceedings "is being discriminated against by reason of ... economic status and, hence, is not receiving equal protection before the law".⁴⁹⁷
26. Financial factors take on even more importance when they compound other social, cultural or employment factors and lead to marginalization and social exclusion. At this point the issue of access to justice is global in nature, since it extends to the effective exercise of human rights as a whole. In reality, nothing mirrors the indivisibility and interdependence of human rights better than extreme poverty, since anyone living in extreme poverty is adversely affected in every aspect of life,⁴⁹⁸ including appalling living conditions, unhealthy housing, homelessness, failure to appear on civil registers, unemployment, ill-health, inadequate education and marginalization. Each one of these deprivations exacerbates the others to form a vicious circle of abject poverty, which is compounded by a strong tendency for poverty to perpetuate itself, thus forming an infernal mill that prevents people from exercising any of their human rights. The Special Rapporteur considered this issue in his former capacity as Special

⁴⁹³ A. M. Garro, "Acceso a la justicia y el "derecho de interés público", revista Justicia y Sociedad, vol. 2, 1999, pág. 50.

⁴⁹⁴ H. Birgin, B. Kohen, "El acceso a la justicia como derecho", H. Birgin, B. Kohen, (Comp.), Acceso a la justicia como garantía de igualdad, Buenos Aires: Biblos, p. 17

⁴⁹⁵ Principios básicos sobre la función de los abogados, aprobados por el Octavo Congreso de las Naciones Unidas sobre Prevención del Delito y Tratamiento del Delincuente, La Habana, 27 de agosto a 7 de septiembre de 1990, Ppo. 3.

⁴⁹⁶ Corte Interamericana de Derechos Humanos, Opinión consultiva N° 16/99 de 1° de octubre de 1999, Derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal, párr. 119.

⁴⁹⁷ Corte Interamericana de Derechos Humanos, Opinión consultiva N° 11/90, de 10 de agosto de 1998, Excepciones al agotamiento de los recursos internos, párr. 22.

⁴⁹⁸ Leandro Despouy, Relator Especial sobre la extrema pobreza, Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Informe final sobre los derechos humanos y la extrema pobreza, E/CN.4/Sub.2/1996/13, 28 de junio de 1996, párrs. 3, 4, 5, 7 y 8, aprobado por la Comisión de Derechos Humanos, <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3b8458e534d255b58025669e0050ce6e?Opendocument>.

Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1996/13). The most serious obstacles barring access to justice for the very poor include: (a) their indigent condition; (b) illiteracy or lack of education and information; (c) the complexity of procedures; (d) mistrust, not to say fear, stemming from their experience of the justice system, either because they frequently find themselves in the position of accused, or because their own complaints are turned against them; (e) the slow pace of justice, despite the fact that their petitions often relate to very sensitive aspects of life (such as return of children) which need to be dealt with rapidly; and (f) in many countries, the fact that they are not allowed to be accompanied or represented by support organizations which could also bring criminal indemnification proceedings. It should be stressed that, while this issue and its implications for human rights have been addressed essentially in relation to guarantees protecting the right to a defence (designation of a court-appointed lawyer or officially appointed defence counsel, free legal advice and representation) and safeguarding the principle of equality before the law, they are in fact much more complex, as has been pointed out by the Committee on the Elimination of Racial Discrimination. We need only add to the long list of human rights affected by the total impunity with which they can be violated, as illustrated by the unpunished killings of street children and vagrants by death squads. When the authorities attempt to identify them, they say that many are not listed on official registers; in other words, legally, they do not exist.

Barriers relating to information

27. Access to justice can also be hampered by clients' ignorance of their rights and all matters relating to their case. As a minimum, they need to know all the details of the charges and of the case: evidence, time periods and other parties involved. The right to be informed of the nature and cause of the charges made should be realized in a detailed, prompt and comprehensible manner. The Human Rights Committee has found that the right to be informed of the charge promptly requires that information be given as soon as the person is formally charged with a criminal offence under domestic law⁴⁹⁹, or the individual is publicly named as such. The principle of equality of arms requires that each party should have the information concerning the case and adequate facilities to participate in the proceedings, which means access to documents and other evidence, including materials⁵⁰⁰ that the prosecution plans to offer in court against the accused or that are exculpatory.
28. In addition, both the International Covenant on Civil and Political Rights and regional instruments provide that everyone has the right to a public hearing. This guarantee is related to access to justice, and contributes to transparency and to the independence and impartiality of tribunals. In this regard, the Committee has stated that courts must make information regarding the time and venue of the hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits considering, inter alia, the potential interest in the case. Access by the media and media accounts of the progress of the trial can help strengthen commitment to the proper conduct of proceedings and to protection of the rights of the participants.

Cultural barriers

29. Language difficulties can lead to a lack of understanding of what is at stake, the rights of participants, the institutional channels for claiming those rights, and the course of the proceedings. For this reason international instruments establish the right to have the free assistance of an interpreter if the accused cannot understand the language used in court.⁵⁰¹ This has to do with the principles of fairness and equality of arms in criminal proceedings.⁵⁰² Cases involving immigrants, asylum-seekers and ethnic minorities are revelatory, since cultural and language barriers compound the already precarious situation in which they find themselves in regard to the effective exercise of their rights

⁴⁹⁹ Comité de Derechos Humanos, comunicación N° 1128/2002, Márques de Morais c. Angola, párr. 5.4 y comunicación N° 253/1987, Kelly c. Jamaica, párr. 5.8.

⁵⁰⁰ Vid. observaciones finales del Comité de Derechos Humanos al informe del Canadá, CCPR/C/CAN/CO/5, párr. 13.

⁵⁰¹ Vid. Consejo de Derechos Humanos, comunicación N° 451/1991, Harward c. Noruega, párr. 9.5; comunicación N° 219/1986, Guesdon c. Francia, párr. 10.2; Corte Interamericana de Derechos Humanos, Opinión consultiva N° 16/99 de 1° de octubre de 1999, Derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal, párr. 120.

⁵⁰² Consejo de Derechos Humanos, comunicación N° 219/1986, Guesdon c. Francia, párr. 10.2.

before the courts. In addition, it usually transpires that the worse the situation, the more serious the consequences of lack of access to justice, as demonstrated by cases involving illegal workers, or foreign women who are sexually exploited.⁵⁰³

30. The administration of justice is not automatic, and may be influenced by the differences between the cultural and economic backgrounds of those involved. This is particularly relevant when a case involves ethnic and racial minorities, who may be at a disadvantage because they do not belong to the culture of the judicial official.⁵⁰⁴

Physical barriers

31. The physical distance between client and court restricts the effective exercise of access to justice. This problem is common in island or archipelago States and in very large countries, where the concentration of legal services in urban areas works against the rural or island population far from the city. Some initiatives are trying to solve this problem by means of mobile courts,⁵⁰⁵ as the Special Rapporteur found.⁵⁰⁶ The problem does not only affect developing countries: the European Court of Human Rights has found that, if the strict application of a procedural rule deprives a party of the right of access to a court, in requiring them to travel at short notice to a city where they do not live in order to lodge an appeal within the prescribed time, such a requirement is unreasonable and violates the right of access to justice.⁵⁰⁷
32. The effective exercise of the right of access to justice can also be violated where the architectural layout of judicial buildings ignores the special needs of particular groups such as people with disabilities⁵⁰⁸ and older people.⁵⁰⁹ Some States have adopted measures to mitigate this problem, but restricted access to public buildings such as courts remains a serious problem worldwide.

[...]

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Free legal assistance, A/HRC/23/43, 15 March 2013

[...]

20. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.

[...]

27. The Special Rapporteur considers that the aim of legal aid is to contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to people otherwise unable to afford legal representation and access to the court system. Accordingly, the

⁵⁰³ N. K. D. Lemon, "Access to justice: can domestic violence courts better address the needs of non-English speaking victims of domestic violence?", *Berkeley Journal of Gender, Law and Justice*, vol. 21, 2006, p. 38.

⁵⁰⁴ Cfr. C. Branson, "What is access to justice? Identifying the unmet legal needs of the poor", Symposium, Eleventh Annual Philip D. Reed Memorial Issue. Partnerships across borders: A Global Forum On Access to Justice, *Fordham International Law Journal*, vol. 24, 2000, p. 196.

⁵⁰⁵ En Guatemala los juzgados comunitarios pretenden llegar a zonas donde no hay administración de justicia y donde la mayoría de la población es indígena, en idiomas indígenas. A. Ordóñez, *Investigación sobre acceso a la justicia en la República de Guatemala, Acceso a la justicia y equidad*, San José: Instituto Interamericano de Derechos Humanos, 2000, págs. 189 a 193.

⁵⁰⁶ L. Despouy, *Misión a Brasil*, E/CN.4/2005/60/Add.3, párr. 90.

⁵⁰⁷ ECHR, caso Pérez de Rada Cavanilles, 18/10/1998, 116/1997/900/1112.

⁵⁰⁸ Por ejemplo, en España se aprobó una ley sobre igualdad de oportunidades y accesibilidad de las personas con discapacidad (Ley 51/2003) y luego dos decretos (Real Decreto 366/2007 y Real Decreto 366/2007) que regulan tales previsiones en relación con, entre otras cuestiones, la administración de justicia.

⁵⁰⁹ Vid., R. C. Morgan, "From the elder-friendly law office to the elder-friendly courtroom: providing the same access and justice for all", *National Academy of Elder Law Attorneys Journal*, vol. 2, 2006, p. 325.

definition of legal aid should be as broad as possible. It should include not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations.

28. The Special Rapporteur is of the view that the right to legal aid can be construed as both a right and an essential procedural guarantee for the effective exercise of other human rights, including the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial. Owing to its importance and considering its potential scope, the right to legal aid should be recognized, guaranteed and promoted in both criminal and non-criminal cases.

[...]

32. In its general recommendation XXXI (2005), the Committee on the Elimination of Racial Discrimination recommended that States parties to the Convention should (a) supply legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights; (b) promote, in the areas where such persons live, institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation; and (c) expand their cooperation with associations of lawyers, university institutions, legal advice centres and non-governmental organizations specializing in protecting the rights of marginalized communities and in the prevention of discrimination.⁵¹⁰ In its general recommendation XXIX (2002), the Committee also recommended that States take the necessary steps to secure equal access to the justice system for all members of descent-based communities, “including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights”.⁵¹¹

[...]

D. States obligations

[...]

43. According to international human rights law, the State bears the primary responsibility to adopt all appropriate legislative, judicial, administrative, budgetary, educative and other measures towards the full realization of the right to legal aid for any individual within its territory and subject to its jurisdiction who does not have sufficient financial means to pay for legal aid or to meet the costs associated with judicial proceedings. The Special Rapporteur wishes to emphasize that access to legal aid must be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.⁵¹²
44. States have an obligation to take the steps necessary to give effect to the right to legal aid in their domestic order. If this right is not already guaranteed by national legislation or practices, States are required to make such changes to their legislation and practices as necessary to ensure their conformity with the international legal obligations that they have undertaken. Where there are inconsistencies between domestic law and international obligations stemming from an international human rights treaty to which they are a party, domestic law or practice should be changed to meet those human rights standards.

[...]

47. At the individual level, court proceedings may represent a heavy financial burden. Costs include initiating and pursuing legal proceedings, lawyers' fees and other costs such as travel and loss of working time as a result of a court case. These costs have proportionally greater effects on low-income sectors, and the impossibility of paying for legal aid or of meeting the costs associated with a court case has been regarded as constituting a form of discrimination in cases where a person's financial situation places him or her in a position of inequality before the law.⁵¹³

⁵¹⁰ Official Records of the General Assembly, Sixtieth Session, Supplement No. 18 (A/60/18), general recommendation XXXI, paras. 7-9

⁵¹¹ Ibid., Fifty-seventh Session, Supplement No. 18 (A/HRC/57/18), general recommendation XXIX.

⁵¹² See Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), general comment No. 15, paras. 1-2.

⁵¹³ Ibid., para. 25.

48. In order to implement the right to legal aid at the domestic level, States are required to develop and implement an effective and sustainable legal aid system that draws from international human rights standards and recognized good practices. The Special Rapporteur notes that the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide guidance on the fundamental principles on which legal aid systems should be based, and outline the specific elements required to strengthen access to legal aid for those without the necessary financial resources. Although the Principles and Guidelines only refer to legal assistance in criminal proceedings, the Special Rapporteur is of the view that they may also be applied, *mutatis mutandis*, in civil and administrative law cases where free legal assistance is indispensable for effective access to the courts and a fair hearing, as well as for access to legal information and counsel and to mechanisms of alternative dispute resolution.

[...]

Inter-American System

American Declaration on the Duties of Man (1948)

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

American Convention on Human Rights (1969)

Article 8. Right to a fair trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - (b) prior notification in detail to the accused of the charges against him;
 - (c) adequate time and means for the preparation of his defense;
 - (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - (f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - (g) the right not to be compelled to be a witness against himself or to plead guilty; and
 - (h) the right to appeal the judgment to a higher court.

[...]

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 24. Right to equal protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to judicial protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - (b) to develop the possibilities of judicial remedy; and
 - (c) to ensure that the competent authorities shall enforce such remedies when granted

Inter-American Democratic Charter (2001)

Article 4

Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.

E) Cross-cutting Themes

a) Equality and non-discrimination

Universal system

United Nations Declaration of Human Rights (1948)

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

International Covenant on Civil and Political Rights (1966)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[...]

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Human Rights Committee, General Comment n° 28, The equality of rights between men and women, 2000, HRI/GEN/1/Rev.9 (Vol. I)

[...]

2. Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.
3. The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. States parties must provide information regarding the actual role of women in society so that the Committee may ascertain what measures, in addition to legislative provisions, have been or should be taken to give effect to these obligations, what progress has been made, what difficulties are encountered and what steps are being taken to overcome them.
4. States parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.

[...]

6. In order to fulfil the obligation set forth in article 3, States parties should take account of the factors which impede the equal enjoyment by women and men of each right specified in the Covenant. To enable the Committee to obtain a complete picture of the situation of women in each State party as regards the implementation of the rights in the Covenant, this generalcomment identifies some of the factors affecting the equal enjoyment by women of the rights under the Covenant and spells out the type of information that is required with regard to these rights.

[...]

Human Rights Committee, General Comment no. 18, Non-discrimination, 1989, HRI/GEN/1/Rev.1

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.
3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article.
4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.
5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.
6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has

the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

[...]

International Covenant on Economic, Social and Cultural Rights (1966)

Article 2

[...]

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[...]

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Committee on Economic, Social and Cultural Rights, General Comment no. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009, E/C.12/GC/20

I. Introduction and basic premises

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socioeconomic inequality, often because of entrenched historical and contemporary forms of discrimination.
2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.
3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the “equal and inalienable rights of all” and the Covenant expressly recognizes the rights of “everyone” to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

[...]

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,⁵¹⁴ while other treaties require the elimination of discrimination in specific fields, such as employment and education.⁵¹⁵ In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.⁵¹⁶
6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors' rights, work and social security.⁵¹⁷ Moreover, general comment No. 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.⁵¹⁸ The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

II. Scope of state obligations

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁵¹⁹ Discrimination also includes incitement to discriminate and harassment.
8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:⁵²⁰
 - (a) **Formal discrimination:** Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

⁵¹⁴ See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

⁵¹⁵ ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

⁵¹⁶ See general comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

⁵¹⁷ The Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 4 (1991): The right to adequate housing; general comment No. 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment No. 12 (1999): The right to adequate food; general comment No. 13 (1999): The right to education (art. 13); general comment No. 14 (2000): The right to the highest attainable standard of health (art. 12); general comment No. 15 (2002): The right to water (arts. 11 and 12); general comment No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c)); general comment No. 18 (2005): The right to work (art. 6); and general comment No. 19 (2008): The right to social security.

⁵¹⁸ CESCR, general comment No. 5 (1994): Persons with disabilities; and general comment No. 6 (1995): The economic, social and cultural rights of older persons.

⁵¹⁹ For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment No. 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

⁵²⁰ CESCR, general comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

- (b) **Substantive discrimination:** Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.⁵²¹ The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.
9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.
10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:
- (a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);
- (b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

[...]

Systemic discrimination

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

Permissible scope of differential treatment

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

⁵²¹ See also CESCR general comment No. 16.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. Prohibited grounds of discrimination

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The inclusion of “other status” indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under “other status” are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

Membership of a group

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

Multiple discrimination⁵²²

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

“Race and colour”

19. Discrimination on the basis of “race and colour”, which includes an individual’s ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term “race” in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.⁵²³

Sex

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.⁵²⁴ Since the adoption of the Covenant, the notion of the prohibited ground “sex” has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or parttime jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

⁵²² See para. 27 of the present general comment on intersectional discrimination.

⁵²³ See the outcome document of the Durban Review Conference, para. 6: “Reaffirms that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races.”

⁵²⁴ See art. 3 of the Covenant, and CESCR general comment No. 16.

Language

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion

22. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.⁵²⁵ For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

Political or other opinion

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".⁵²⁶

Property

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.⁵²⁷

Birth

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status.⁵²⁸ States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status⁵²⁹

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly

⁵²⁵ See also the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

⁵²⁶ See paras. 25, 26 and 35, of the present general comment.

⁵²⁷ See CESCR general comments Nos. 15 and 4 respectively.

⁵²⁸ For a comprehensive overview of State obligations in this regard, see general comment No. 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

⁵²⁹ See para. 15 of the present general comment.

recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

Disability

- 28.** In its general comment No. 5, the Committee defined discrimination against persons with disabilities⁵³⁰ as "any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights".⁵³¹ The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.⁵³² States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,⁵³³ as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

Age

- 29.** Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.⁵³⁴ In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

Nationality

- 30.** The ground of nationality should not bar access to Covenant rights,⁵³⁵ e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.⁵³⁶

Marital and family status

- 31.** Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

⁵³⁰ For a definition, see CRPD, art. 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

⁵³¹ See CESCR general comment No. 5, para. 15.

⁵³² See CRPD, art. 2: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

⁵³³ See CESCR general comment No. 5, para. 22.

⁵³⁴ See, further, CESCR general comment No. 6.

⁵³⁵ This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

⁵³⁶ See also general comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

Sexual orientation and gender identity

- 32.** “Other status” as recognized in article 2, paragraph 2, includes sexual orientation.⁵³⁷ States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.⁵³⁸

Health status

- 33.** Health status refers to a person’s physical or mental health.⁵³⁹ States parties should ensure that a person’s actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person’s health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.⁵⁴⁰ States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence

- 34.** The exercise of Covenant rights should not be conditional on, or determined by, a person’s current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.

Economic and social situation

- 35.** Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

IV. National implementation

- 36.** In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

Legislation

- 37.** Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

⁵³⁷ See CESCR general comments Nos. 14 and 15.

⁵³⁸ For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

⁵³⁹ See CESCR general comment No. 14, paras. 12(b), 18, 28 and 29.

⁵⁴⁰ See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), “International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version”. Available online at: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

Policies, plans and strategies

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and nondiscrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

Committee of Economic, Social and Cultural Rights, General Comment no. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), 2005, E/C.12/2005/4

Introduction

1. The equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects human rights that are fundamental to the dignity of every person. In particular, article 3 of this Covenant provides for the equal right of men and women to the enjoyment of the rights it articulates. This provision is founded on Article 1, paragraph 3, of the United Nations Charter and article 2 of the Universal Declaration of Human Rights. Except for the reference to ICESCR, it is identical to article 3 of the International Covenant on Civil and Political Rights (ICCPR), which was drafted at the same time.
2. The *travaux préparatoires* state that article 3 was included in the Covenant, as well as in ICCPR, to indicate that beyond a prohibition of discrimination, “the same rights should be expressly recognized for men and women on an equal footing and suitable measures should be taken to ensure that women had the opportunity to exercise their rights.... Moreover, even if article 3 overlapped with article 2, paragraph 2, it was still necessary to reaffirm the equality rights between men and women. That fundamental principle, which was enshrined in the Charter of the United Nations, must be constantly emphasized, especially as there were still many prejudices preventing its full application”. Unlike article 26 of ICCPR, articles 3 and 2, paragraph 2, of ICESCR are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed under part III of the Covenant.
3. Article 2, paragraph 2, of ICESCR provides for a guarantee of non-discrimination on the basis of sex among other grounds. This provision, and the guarantee of equal enjoyment of rights by men and women in article 3, are integrally related and mutually reinforcing. Moreover, the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.
4. The Committee on Economic, Social and Cultural Rights (CESCR) has taken particular note of factors negatively affecting the equal right of men and women to the enjoyment of economic, social and cultural rights in many of its general comments, including those on the right to adequate housing, the right to adequate food, the right to education, the right to the highest attainable standard of health, and the right to water. The Committee also routinely requests information on the equal enjoyment by men and women of the rights guaranteed under the Covenant in its list of issues in relation to States parties’ reports and during its dialogue with States parties.

5. Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.

I. Conceptual Framework

A. Equality

6. The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.
7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.
8. Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, prima facie, gender-neutral. In implementing article 3, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.
9. According to article 3, States parties must respect the principle of equality in and before the law. The principle of equality in the law must be respected by the legislature when adopting laws, by ensuring that those laws further equal enjoyment of economic, social and cultural rights by men and women. The principle of equality before the law must be respected by administrative agencies, and courts and tribunals, and implies that those authorities must apply the law equally to men and women.

B. Non-discrimination

10. The principle of non-discrimination is the corollary of the principle of equality. Subject to what is stated in paragraph 15 below on temporary special measures, it prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status.
11. Discrimination against women is "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". Discrimination on the basis of sex may be based on the differential treatment of women because of their biology, such as refusal to hire women because they could become pregnant; or stereotypical assumptions, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men.
12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.
13. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity

or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.

14. Gender affects the equal right of men and women to the enjoyment of their rights. Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic, social and political development, and to make decisions concerning their circumstances and conditions. Genderbased assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.

C. Temporary special measures

15. The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others. Temporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate.

II. States Parties' Obligations

A. General legal obligations

16. The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.
17. The equal right of men and women to the enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties - the obligation to respect, to protect and to fulfil. The obligation to fulfil further contains duties to provide, promote and facilitate. Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR.

B. Specific legal obligations

1. Obligation to respect

18. The obligation to respect requires States parties to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of economic, social and cultural rights. Respecting the right obliges States parties not to adopt, and to repeal laws and rescind, policies, administrative measures and programmes that do not conform with the right protected by article 3. In particular, it is incumbent upon States parties to take into account the effect of apparently gender-neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.

2. Obligation to protect

19. The obligation to protect requires States parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women. States parties' obligation to protect under article 3 of ICESCR includes, inter alia, the respect and adoption of constitutional and legislative provisions on the equal right of men and women to enjoy all human rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination and to prevent third parties from interfering directly or indirectly with the enjoyment of this right; the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.

20. States parties have an obligation to monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatized.

3. *Obligation to fulfil*

21. The obligation to fulfil requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include:
- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes;
 - To establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women;
 - To develop monitoring mechanisms to ensure that the implementation of laws and policies aimed at promoting the equal enjoyment of economic, social and cultural rights by men and women do not have unintended adverse effects on disadvantaged or marginalized individuals or groups, particularly women and girls;
 - To design and implement policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits, and gender-specific allocation of resources;
 - To conduct human rights education and training programmes for judges and public officials;
 - To conduct awareness-raising and training programmes on equality for workers involved in the realization of economic, social and cultural rights at the grass-roots level;
 - To integrate, in formal and non-formal education, the principle of the equal right of men and women to the enjoyment of economic, social and cultural rights, and to promote equal participation of men and women, boys and girls, in schools and other education programmes;
 - To promote equal representation of men and women in public office and decision-making bodies;
 - To promote equal participation of men and women in development planning, decision-making and in the benefits of development and all programmes related to the realization of economic, social and cultural rights.

C. Specific examples of States parties' obligations

[...]

28. Article 11 of the Covenant requires States parties to recognize the right of everyone to an adequate standard of living for him/herself and his/her family, including adequate housing (para. 1) and adequate food (para. 2). Implementing article 3, in relation to article 11, paragraph 1, requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so. Implementing article 3, in relation to article 11, paragraph 2, also requires States parties, inter alia, to ensure that women have access to or control over means of food production, and actively to address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food.
29. Article 12 of the Covenant requires States parties to undertake steps towards the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The implementation of article 3, in relation to article 12, requires at a minimum the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality. This includes, inter alia, addressing the ways in which gender roles affect access

to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; the prohibition of female genital mutilation; and the provision of adequate training for health-care workers to deal with women's health issues.

[...]

III. Implementation at the national level

A. Policies and strategies

32. The most appropriate ways and means of implementing the right under article 3 of the Covenant will vary from one State party to another. Every State party has a margin of discretion in adopting appropriate measures in complying with its primary and immediate obligation to ensure the equal right of men and women to the enjoyment of all their economic, social and cultural rights. Among other things, States parties must, integrate into national plans of action for human rights appropriate strategies to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.
33. These strategies should be based on the systematic identification of policies, programmes and activities relevant to the situation and context within the State, as derived from the normative content of article 3 of the Covenant and spelled out in relation to the levels and nature of States parties' obligations referred to in paragraphs 16 to 21 above. The strategies should give particular attention to the elimination of discrimination in the enjoyment of economic, social and cultural rights.
34. States parties should periodically review existing legislation, policies, strategies and programmes in relation to economic, social and cultural rights, and adopt any necessary changes to ensure that they are consonant with their obligations under article 3 of the Covenant.
35. The adoption of temporary special measures may be necessary to accelerate the equal enjoyment by women of all economic, social and cultural rights and to improve the de facto position of women. Temporary special measures should be distinguished from permanent policies and strategies undertaken to achieve equality of men and women.
36. States parties are encouraged to adopt temporary special measures to accelerate the achievement of equality between men and women in the enjoyment of the rights under the Covenant. Such measures are not to be considered discriminatory in themselves as they are grounded in the State's obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices. The nature, duration and application of such measures should be designed with reference to the specific issue and context, and should be adjusted as circumstances require. The results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved.
37. The right of individuals and groups of individuals to participate in decision-making processes that may affect their development must be an integral component of any policy, programme or activity developed to discharge governmental obligations under article 3 of the Covenant.

B. Remedies and accountability

38. National policies and strategies should provide for the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudsmen and other national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 3 and provide remedies for such violations. States parties, for their part, should ensure that such remedies are effectively implemented.

C. Indicators and benchmarks

39. National policies and strategies should identify appropriate indicators and benchmarks on the right to equal enjoyment by men and women of economic, social and cultural rights in order to effectively monitor the implementation by the State party of its obligations under the Covenant in this regard. Disaggregated statistics, provided within specific time frames, are necessary to measure the progressive realization of economic, social and cultural rights by men and women, where appropriate.

IV. Violations

40. States parties must fulfil their immediate and primary obligation to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.
41. The principle of equality between men and women is fundamental to the enjoyment of each of the specific rights enumerated in the Covenant. Failure to ensure formal and substantive equality in the enjoyment of any of these rights constitutes a violation of that right. Elimination of de jure as well as de facto discrimination is required for the equal enjoyment of economic, social and cultural rights. Failure to adopt, implement and monitor effects of laws, policies and programmes to eliminate de jure and de facto discrimination with respect to each of the rights enumerated in articles 6 to 15 of the Covenant constitutes a violation of those rights.
42. Violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels. The adoption and undertaking of any retrogressive measures that affect the equal right of men and women to the enjoyment of the all the rights set forth in the Covenant constitutes a violation of article 3.

International Convention on the Elimination of All Forms of Discrimination (1965)

Article 1

1. In this Convention, the term «racial discrimination» shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

[...]

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Article I

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Convention on the Rights of the Child (1989)

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[...]

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Article 7

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Convention on the Rights of Persons with Disabilities (2006)

Article 2. Definitions

[...]

Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

[...]

Article 3. General principles

The principles of the present Convention shall be:

[...]

(b) Non-discrimination;

[...]

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) Equality of opportunity;

(f) Accessibility;

(g) Equality between men and women;

[...]

Article 5. Equality and discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 61/295 (2007)

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Inter-American System

American Convention on Human Rights (1969)

Article 1. Obligation to respect rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[...]

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988)

Article 3. Obligation of non-discrimination

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Inter-American Democratic Charter (2001)

Article 9

The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.

Inter-American Convention Against All Forms of Discrimination and Intolerance (2013)

Article 1

For purposes of this Convention:

1. Discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties.

Discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.

2. Indirect discrimination shall be taken to occur, in any realm of public and private life, when a seemingly neutral provision, criterion, or practice has the capacity to entail a particular disadvantage for persons belonging to a specific group, or puts them at a disadvantage, unless said provision, criterion, or practice has some reasonable and legitimate objective or justification under international human rights law.
3. Multiple or aggravated discrimination is any preference, distinction, exclusion, or restriction based simultaneously on two or more of the criteria set forth in Article 1.1, or others recognized in international instruments, the objective or result of which is to nullify or curtail, the equal recognition, enjoyment,

or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties, in any area of public or private life.

4. Special measures or affirmative action adopted for the purpose of ensuring equal enjoyment or exercise of one or more human rights and fundamental freedoms of groups requiring such protection shall not be deemed discrimination provided that such measures do not lead to the maintenance of separate rights for different groups and are not continued once their objectives have been achieved.
5. Intolerance is an action or set of actions or expressions that denote disrespect, rejection, or contempt for the dignity, characteristics, convictions, or opinions of persons for being different or contrary. It may manifest itself as marginalization and exclusion of groups in conditions of vulnerability from participation in any sphere of public or private life or violence against them.

Article 2

Every human being is equal under the law and has a right to equal protection against any form of discrimination and intolerance in any sphere of life, public or private.

Article 3

Every human being has the right to the equal recognition, enjoyment, exercise, and protection, at both the individual and collective levels, of all human rights and fundamental freedoms enshrined in their domestic law and in the international instruments applicable to the States Parties.

b) Persons and specific groups (human rights and environment)

Universal system

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, 30 December 2013

[...]

IV. Human rights obligations relating to the environment

[...]

C. Obligations relating to members of groups in vulnerable situations

69. The human rights obligations relating to the environment include a general obligation of non-discrimination in their application. In particular, the right to equal protection under the law, which is protected by the Universal Declaration of Human Rights (art. 7) and many human rights agreements, includes equal protection under environmental law.⁵⁴¹ States have additional obligations with respect to groups particularly vulnerable to environmental harm. The following sections describe obligations specific to three groups in particular: women, children and indigenous peoples.⁵⁴²

I. Women

70. In construing the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women has emphasized that States should ensure that public participation in environmental decision-making, including with respect to climate

⁵⁴¹ See Inter-American Commission on Human Rights, *Mossville Action Now v. United States*, No. 43/10, 17 March 2010 (construing article II of the American Declaration).

⁵⁴² This should not be taken as an exhaustive list of groups in vulnerable situations; on the contrary, other such groups could include minorities, those in extreme poverty and displaced persons. However, these groups have been the subject of the most detailed attention from the sources reviewed.

policy, includes the concerns and participation of women.⁵⁴³ Similarly, the Special Rapporteur on the right to health has stated that “even though women bear a disproportionate burden in the collection of water and disposal of family wastewater, they are often excluded from relevant decision-making processes. States should therefore take measures to ensure that women are not excluded from decision-making processes concerning water and sanitation management” (A/62/214, para. 84).

71. With respect to substantive obligations to develop and implement policies to protect human rights from environmental harm, the Committee has called on States to ensure that the policies are aimed at protecting the rights of women to health, to property and to development. Moreover, it has urged States to conduct research on the adverse effects of environmental contamination of women, and to provide sex-disaggregated data on the effects.⁵⁴⁴ Where environmental harm has disproportionate effects on women, States are obliged to adopt and implement programmes accordingly. The Special Rapporteur on hazardous substances and wastes, for example, has stated that “due to the harmful effects of mercury on the female reproduction function, international human rights law requires States parties to put in place preventive measures and programmes to protect women of childbearing age from mercury exposure” (A/HRC/21/48, para. 33, citing the Convention, art. 11, para. 1 (f)).
72. Some groups of women are particularly vulnerable for various reasons, including because they are poor, older, disabled and/or of minority status, which may give rise to the need for additional protection. For example, in its general recommendation No. 27 (2010) on older women and protection of their human rights, the Committee found that they are particularly vulnerable to natural disasters and climate change (para. 25), and stated that therefore “States parties should ensure that climate change and disaster risk-reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women. States parties should also facilitate the participation of older women in decision-making for climate change mitigation and adaptation” (para. 35).

II. Children

73. The Convention on the Rights of the Child provides that in all actions concerning children, including those taken by administrative authorities and legislative bodies, “the best interests of the child shall be a primary consideration” (art. 3, para. 1). In its general comment No. 14 (2013), the Committee on the Rights of the Child has made it clear that this provision applies to actions, such as environmental regulation, that affect children as well as other population groups, and it has stated that where decisions “will have a major impact” on children, “a greater level of protection and detailed procedures to consider their best interests is appropriate” (paras. 19, 20).
74. More specifically, article 24.2(c) of the Convention provides that States Parties shall pursue full implementation of the right of the child to the enjoyment of the highest attainable standard of health and, in particular, shall take appropriate measures “to combat disease and malnutrition... through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.” In its general comment No. 15 (2013), the Committee stated that under article 24.2(c), “States should take measures to address the dangers and risks that local environmental pollution poses to children’s health,” should “regulate and monitor the environmental impact of business activities that may compromise children’s right to health, food security and access to safe drinking water and to sanitation,” and should “put children’s health concerns at the centre of their climate change adaptation and mitigation strategies” (paras. 49, 50). The Committee has emphasized elsewhere as well the importance of regulation of business in order to protect children’s rights, including from the effects of environmental harm (e.g. general comment No. 16 (2013), para. 31).
75. In its general comment No. 9 (2006) on the rights of children with disabilities, the Committee stated that “countries should establish and implement policies to prevent dumping of hazardous materials and other means of polluting the environment. Furthermore, strict guidelines and safeguards should also be established to prevent radiation accidents” (para. 54). The Committee has also urged States

⁵⁴³ CEDAW report, sect. III.A.1.

⁵⁴⁴ CEDAW report, sect. III.A.2 and III.B.

to collect and submit information on the possible effects of environmental pollution on children's health, and to address particular environmental problems, in its concluding observations on country reports.⁵⁴⁵ Finally, the Convention states that the States Parties agree that the education of the child shall be directed, inter alia, to "the development of respect for the natural environment" (art. 29, para. 1(e)).

III. Indigenous peoples

76. Because of their close relationship with the environment, indigenous peoples are particularly vulnerable to impairment of their rights through environmental harm. As the Special Rapporteur on the rights of indigenous peoples has stated, "the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights" (A/HRC/18/35, para. 57).
77. International Labour Organization convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples are designed to protect the rights of indigenous peoples, but human rights bodies have also interpreted other human rights agreements to protect those rights. The interpretations have reached generally congruent conclusions about the obligations of States to protect against environmental harm to the rights of indigenous peoples. In his reports, the Special Rapporteur on the rights of indigenous peoples has described in detail the duties of States to protect those rights.⁵⁴⁶ This section therefore only outlines certain main points.⁵⁴⁷
78. Firstly, States have a duty to recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely. Secondly, States are obliged to facilitate the participation of indigenous peoples in decisions that concern them. The Special Rapporteur has stated that the general rule is that "extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent," subject only to narrowly defined exceptions (A/HRC/24/41, para. 27). Thirdly, before development activities on indigenous lands are allowed to proceed, States must provide for an assessment of the activities' environmental impacts. Fourthly, States must guarantee that the indigenous community affected receives a reasonable benefit from any such development. Finally, States must provide access to remedies, including compensation, for harm caused by the activities.

[...]

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/28/61, 3 February 2015

[...]

IV. Good practices in the use of human rights obligations relating to the environment

[...]

Obligations relating to members of groups in vulnerable situations

93. The human rights obligations relating to the environment include a general obligation of non-discrimination in the application of environmental law and policy. As described by the Independent Expert in his mapping report, States have additional obligations with respect to those who may be

⁵⁴⁵ The Committee has also based such recommendations on other rights under the Convention on the Rights of the Child, including the rights to an adequate standard of living (art. 27) and to rest, leisure and play (art. 31). See CRC report, sect. III.

⁵⁴⁶ See Report on indigenous peoples.

⁵⁴⁷ In addition to the reports of the Special Rapporteur, this summary draws on the ICESCR report, sect. III.C; ICCPR report, sect. III.A; ICERD report, sect. III.B; and Inter-American report, sect. III.C.

particularly vulnerable to environmental harm, including women, children, minorities and those living in poverty, as well as indigenous peoples (A/HRC/25/53, paras. 69-78).

94. For example, the Committee on the Elimination of Discrimination against Women has emphasized that States should ensure that public participation in environmental decision-making, including with respect to climate policy, includes the concerns and participation of women. The Feminist Participatory Action Research programme of the Asia Pacific Forum on Women, Law and Development is a good practice in empowering women to participate in policy debates over climate change. Together with local partner organizations, the Asia Pacific Forum helps women in rural, indigenous and urban poor communities to document their own experiences by setting their own research agenda, conducting the research themselves and advocating for change as a result. For example, after conducting its own research, a community in the Philippines passed a resolution to prevent the use of destructive fishing practices and now requires individuals to adhere to strict fishing and hunting schedules.
95. The rights of children are often overlooked in setting environmental policies. The United Nations Children's Fund (UNICEF) is partnering with countries to try to reduce the effects of climate change and environmental degradation on children's rights, and to "identify and enhance opportunities to advance the rights of children which arise from global and local attention on climate change and environmental degradation." In Burundi, for example, UNICEF is implementing Project Lumière, which enables community groups to purchase bicycle pedal-powered generators and LED lights that can provide light for a household for up to 10 days. Access to energy protects child health and safety by reducing harmful emissions from the burning of kerosene and firewood in homes, and by providing light at night for children to study.
96. In the United States of America, an Executive Order issued in 1994 by the President provides a basis for continuing attention to the environmental and human health effects of actions by the national Government on members of minority and low-income groups, as well as on indigenous peoples, with the goal of achieving "environmental justice" for all communities. The Executive Order requires agencies of the Government to address any potentially adverse human health or environmental effects of their activities on members of minority or low-income populations. Each major agency has a working group on environmental justice, which provides guidance for that agency and coordination with other agencies. In addition, the Environmental Protection Agency has developed Environmental Justice Access Plans that set out measurable commitments. By engaging with environmental justice advocates and communities through community research and open dialogue, the Agency strives to ensure public participation in integrating environmental justice into day-to-day work and decision-making.
97. A number of international instruments and human rights bodies have detailed the obligations of States with respect to indigenous peoples, whose rights are particularly vulnerable to environmental harm. Among other duties, States should recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely, facilitate the participation of indigenous peoples in decisions that concern them, guarantee that the indigenous community affected receives a reasonable benefit from any such development, and provide access to remedies, including compensation, for harm caused by the activities (A/HRC/25/53, para. 78).
98. Many good practices were presented in relation to indigenous rights. At the regional level, the Inter-American Court of Human Rights has done a great deal to clarify the obligations of States relating to indigenous and tribal peoples' rights in the territory that they have traditionally occupied.⁵⁴⁸ At the national level, a number of courts have also issued decisions clarifying the rights of tribal peoples. For example, the Supreme Court of Mexico decided in 2013 that the Government had not adequately consulted with the Yaqui tribe with respect to construction of an aqueduct, and that the authorization of the project must wait until after consultation takes place. Also in 2013, the Supreme Court of India requested the state of Odisha to consult with tribal assemblies in accordance with the Indian Forest Rights Act, which recognizes a broad range of customary forest rights of tribal

⁵⁴⁸ See, for example, *Mayagna (Sumo) Agwas Tingni Community v. Nicaragua*, 31 August 2001, and *Saramaka People v. Suriname*, 28 November 2007.

peoples and traditional forest dwellers, in connection with an application to clear a forest area to mine for bauxite. After the tribal assemblies rejected the proposal, the Minister for the Environment and Forests turned down the application.

99. Another type of good practice is legislative action that recognizes the legal rights of indigenous representatives in natural resources. After many years of legal uncertainty about the management and use of natural resources in the county of Finnmark, the ancestral land and home of the Sami people, in 2005 the Norwegian Parliament adopted the Finnmark Act through a process of consultation with the Sami Parliament. The Act transferred ownership of the land to a new entity governed by a board half of whose members are appointed by the Sami Parliament, and created a special court to decide disputes concerning land rights.
100. Indigenous organizations have engaged in good practices to protect indigenous rights and promote the sustainable use of resources, including in connection with protected areas. For example, the Commission on Environmental, Economic and Social Policy of the International Union for Conservation of Nature, the Forest Peoples Programme and other indigenous peoples' organizations help local communities to assess and redress situations where they believe that they have been negatively affected by the designation or management of a protected area.
101. An example of a good practice in the management of protected areas is provided by the Sarstoon Temash Institute for Indigenous Management (SATIIM), a community-based indigenous environmental organization that co-manages, together with the Forest Department of Belize, the Sarstoon Temash National Park on lands traditionally used by indigenous Garifuna and Maya communities. With the assistance of SATIIM, in 2008 the communities of Conejo and Santa Teresa prepared forest sustainable management plans, which identify the timber and other resources that each community can harvest based on ecological surveys, and which include mitigation measures for any possible adverse effects on the environment.
102. Another good practice is raising the awareness of indigenous communities of their rights. Natural Justice, a civil society organization based in South Africa, assists local communities and indigenous groups to prepare "community protocols" that set out their understanding of their customary, national and international rights relating to their land and natural resources. Each community develops its own protocols in a format that is most meaningful to that community. Protocols can be written documents, and can also take the form of visual art, theatre or music.

[...]

c) Human rights defenders

Universal system

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the General Assembly, 53/144, 1999

[...]

Article 1

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Article 2

1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees

required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.

2. Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.

Article 3

Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted.

Article 4

Nothing in the present Declaration shall be construed as impairing or contradicting the purposes and principles of the Charter of the United Nations or as restricting or derogating from the provisions of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other 2 3 international instruments and commitments applicable in this field.

Article 5

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

- (a) To meet or assemble peacefully;
- (b) To form, join and participate in non-governmental organizations, associations or groups;
- (c) To communicate with non-governmental or intergovernmental organizations.

Article 6

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
- (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

Article 7

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.

Article 8

1. Everyone has the right, individually and in association with others, to have effective access, on a nondiscriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.
2. This includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.
2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.
3. To the same end, everyone has the right, individually and in association with others, *inter alia*:
 - (a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay;
 - (b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;
 - (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.
4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.
5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

Article 10

No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.

Article 11

Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

Article 12

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.
2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.
3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities

and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

Article 13

Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.

Article 14

1. The State has the responsibility to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights.
2. Such measures shall include, inter alia:
 - (a) The publication and widespread availability of national laws and regulations and of applicable basic international human rights instruments;
 - (b) Full and equal access to international documents in the field of human rights, including the periodic reports by the State to the bodies established by the international human rights treaties to which it is a party, as well as the summary records of discussions and the official reports of these bodies.
3. The State shall ensure and support, where appropriate, the creation and development of further independent national institutions for the promotion and protection of human rights and fundamental freedoms in all territory under its jurisdiction, whether they be ombudsmen, human rights commissions or any other form of national institution.

Article 15

The State has the responsibility to promote and facilitate the teaching of human rights and fundamental freedoms at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teaching in their training programme.

Article 16

Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, inter alia, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities.

Article 17

In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 18

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.

2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.
3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.

Article 19

Nothing in the present Declaration shall be interpreted as implying for any individual, group or organ of society or any State the right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms referred to in the present Declaration.

Article 20

Nothing in the present Declaration shall be interpreted as permitting States to support and promote activities of individuals, groups of individuals, institutions or non-governmental organizations contrary to the provisions of the Charter of the United Nations.

Guidelines against Intimidation or Reprisals ("San José Guidelines"), 2015, HRI/MC/2015/6

[...]

I. Purpose and scope

1. The present Guidelines are aimed at providing practical guidance to enhance the efficiency and effectiveness with which protection is provided by treaty bodies to individuals and groups at risk of or facing intimidation or reprisals for seeking to cooperate or cooperating with United Nations human rights treaty bodies.
2. The treaty bodies strongly condemn such acts of intimidation or reprisals. By becoming party to an international human rights treaty, a State undertakes to cooperate with the treaty body in good faith and to exercise due diligence in doing so.
3. States have a duty to protect individuals and groups and to exercise due diligence in doing so. Intimidation or reprisals may be the result of acts or omission by both State and non-State actors and all such acts fall within the scope of these Guidelines. Acts or omissions are attributable to the State when they are carried out with the consent or acquiescence of an official or other person acting in an official capacity against any individuals or groups who are seeking to cooperate, who are cooperating or who have cooperated with a treaty body.
4. The Guidelines are formulated as a common basic approach that may be adapted and developed further by each treaty body in order to best reflect its particular context, mandate and experience in order to fully realize the purposes of these Guidelines.

II. General principles

5. The principles underlying the present Guidelines are the following:
 - (a) The right for everyone to have unhindered access to and to communicate with the treaty bodies and their members for the effective implementation of the treaty body mandates;
 - (b) The freedom for everyone from any form of intimidation or reprisals, or fear of intimidation or reprisals, when seeking to cooperate or cooperating with the treaty bodies;
 - (c) The responsibility of States to avoid acts constituting intimidation or reprisals and to prevent, protect against, investigate and ensure accountability and to provide effective remedies to victims of such acts or omissions;

- (d) Equality and non-discrimination;
- (e) The need to respect the “do-no-harm” principle, participation, confidentiality, safety, security, and free and informed consent;
- (f) The mainstreaming of a gender perspective in the work of the treaty bodies.

III. Operational practice

6. The treaty bodies possess a range of means to assist and protect individuals and groups alleging that they have been the object of intimidation or reprisals for seeking to cooperate or cooperating with them. Such responses may be taken by the treaty bodies concerned or in cooperation with others, including States, the Secretary-General, the United Nations High Commissioner for Human Rights, the special procedures mandate holders of the Human Rights Council, international and regional organizations, resident coordinators and United Nations country teams, the diplomatic community, national human rights institutions and civil society.
7. The approaches and actions set out below, not all of which are applicable in all contexts, may be applied separately or cumulatively.

A. Role of the rapporteurs or focal points on intimidation or reprisals

8. Each treaty body should consider appointing at least one member as rapporteur or focal point on intimidation or reprisals, for a term to be determined by the treaty body concerned.

Consistency across the treaty bodies

9. The rapporteurs or focal points should, if appropriate, make proposals to their respective committees that reflect these Guidelines and help to align the approaches taken to prevent and protect individuals and groups against intimidation or reprisals, in order to enhance consistency across the treaty body system.

Receiving allegations of intimidation or reprisals

10. The rapporteurs or focal points should be notified as soon as possible of all allegations of intimidation or reprisals against individuals or groups seeking to cooperate or cooperating with the treaty bodies that are submitted to the committee. They should be provided with all relevant information relating to those allegations. The Chair of the relevant committee should be notified of the allegation by the rapporteur or focal point through the secretariat as soon as possible.
11. Such information may be submitted orally or in writing and may be submitted in confidence. A detailed record of all allegations of intimidation or reprisals that have been submitted should be maintained.

Assessment of the allegation

12. The rapporteurs or focal points should make an assessment of the allegation as soon as possible and, in so doing, should make use of a wide variety of sources of information. These sources might include, but are not limited to, the State party, concerned individuals, the secretariat, the Office of the United Nations High Commissioner for Human Rights (OHCHR), including its field presences, other United Nations entities, national human rights institutions, national preventive mechanisms and civil society. Pending the initial assessment, all incidents should be referred to as allegations of intimidation or reprisals. The rapporteurs or focal points should consult and liaise with any relevant committee country rapporteurs during the process of initial assessment. Any issues of confidentiality must be respected throughout the assessment and subsequent processes.

Determining the appropriate course of action

13. The rapporteurs or focal points should maintain contact with the individuals or groups alleging intimidation or reprisals, or their representatives, and determine the most appropriate course of action in each case. When doing so, they should consider the possible consequences for the individuals or the groups alleging intimidation or reprisals of seeking to cooperate or cooperating with the treaty bodies, or for others who may be affected by that action.

14. The rapporteur or focal point should inform the Chair of their conclusions. If it appears that intimidation or reprisals have or might have taken place, the rapporteur or focal points should inform the Chair of the committee concerned and advise the Chair of a potential course of action. If there is a country rapporteur, he or she should also be notified and his or her views sought. A decision should then be taken in accordance with the rules of procedure of the committee concerned.

Standing agenda item to be considered by each treaty body on an annual basis

15. Treaty bodies should have as a standing agenda item, to be considered on an annual basis, an update by the rapporteurs or focal points on intimidation or reprisals.

Network of rapporteurs and focal points on intimidation or reprisals

16. Collectively, the rapporteurs and focal points on intimidation or reprisals serve as a network for sharing information, facilitating supportive action by other treaty bodies when appropriate, and aligning approaches on the most effective means of addressing intimidation or reprisals across the treaty body system. The advice of this network may be sought by the treaty body Chairs. In addition, the network could be consulted in the development of additional strategies to further strengthen the protection of individuals and groups against intimidation or reprisals resulting from their seeking to cooperate or cooperating with the treaty bodies.

Compiling good practices

17. The rapporteurs or focal points on intimidation or reprisals should compile information on good practices relating to protective approaches of which they may become aware through the work of the committees or other bodies.

B. Preventive measures

Specific measures

18. Where possible, treaty bodies should take steps to prevent intimidation and reprisals. Preventive measures could include permitting requests from individuals or groups to provide information to the relevant treaty body in a confidential manner and reminding States parties of their primary obligation to prevent and refrain from all acts of intimidation or reprisals against individuals and groups seeking to cooperate or cooperating with the treaty bodies.

Protection measures

19. When it is alleged that an individual or group is at risk of intimidation or reprisals for seeking to communicate or for having communicated with a treaty body, including as a result of filing or of considering or attempting to file a formal complaint to a treaty body in the framework of the individual communications procedures, the committee concerned can request the relevant State party to adopt protection measures for the individual or group concerned. Such measures can include requests to refrain from any acts of intimidation or reprisals and to adopt all measures necessary to protect those at risk. The State party may be requested to provide the committee, within a specific deadline, with information on measures taken to comply with the request.

Awareness-raising

20. Treaty bodies should take initiatives that affirm the crucial importance of cooperation with all stakeholders in addressing intimidation or reprisals. Such initiatives may include making the protection of members of civil society and others a regular item on the agenda of informal meetings with States parties, broadly disseminating the present Guidelines and adopting public statements, possibly jointly with other human rights mechanisms.

C. Further measures

Raising concerns confidentially with State party authorities

21. When allegations of intimidation or reprisals are received, and with the consent of the individual or group concerned when appropriate, the relevant treaty body should, as appropriate, contact the State party to request information, express its concern and request an investigation and the immediate

cessation of any such acts. The treaty bodies may also interact with State authorities in a discrete manner, through confidential correspondence or a meeting with a representative of the permanent mission of the State party, or any other appropriate means.

Security measures during treaty body sessions

22. In the case of an imminent threat or danger of violence during a treaty body session, the United Nations Department of Safety and Security should be approached to take appropriate security measures.

Contacting regional and national mechanisms

23. In addressing allegations of intimidation or reprisals, the treaty bodies may, when appropriate, seek the cooperation of regional and national mechanisms that may be able to be of assistance.

Concluding observations, decisions, views, reports and follow-up requests

24. When appropriate, the treaty bodies should require States parties, in their concluding observations, decisions, views, reports and follow-up requests, to take the measures necessary to protect individuals and groups from intimidation or reprisal.

Reporting by treaty bodies to the General Assembly and the Economic and Social Council

25. The treaty bodies should, as appropriate, include information on cases of intimidation or reprisals in their annual or biennial reports.

Posting on the Internet

26. The treaty bodies may, as appropriate, make information regarding allegations of reprisals, including relevant communication with States parties, public by posting it on the treaty body web page of the OHCHR website.

Use of the media

27. The treaty bodies may, when appropriate, issue a public statement on specific incidents or generalized practices of intimidation or reprisal and circulate it to international and national media outlets, or make comments to the media and on social media.

Requesting assistance from the United Nations High Commissioner for Human Rights

28. The treaty bodies may request the assistance of the United Nations High Commissioner for Human Rights with a view to obtaining the cessation of alleged acts of intimidation or reprisals, which may include an investigation in accordance with international human rights standards.

Coordination with other procedures

29. When allegations of intimidation or reprisals are received, in addition to the action taken by the treaty body itself, the secretariat also may inform individuals or groups making such allegations that they may submit an urgent communication to the special procedures mandate holders of the Human Rights Council, including the Special Rapporteur on the situation of human rights defenders. The treaty bodies can also refer such allegations to other mechanisms and procedures, when appropriate, in order to encourage an efficient, effective and coordinated response.

Follow-up

30. The treaty bodies may, as appropriate, request the United Nations resident coordinator, the United Nations country team, United Nations agencies, peacekeeping operations or any other appropriate agency or representation to take steps in support of individuals or groups who have been intimidated or are at risk of reprisal for seeking to cooperate or cooperating with the treaty bodies.

Reference to political organs of the United Nations

31. When appropriate, the treaty bodies may seek to raise issues relating to intimidation or reprisals before the Human Rights Council and other political organs of the United Nations.

IV. Monitoring the implementation of the Guidelines

32. Rapporteurs or focal points on intimidation or reprisals should be responsible for reporting to their committees on action taken in relation to fear or allegations of intimidation or reprisals.
33. The annual meeting of the Chairs of the human rights treaty bodies should have a standing agenda item on reprisals, under which each Chair should inform the meeting of recent developments and practice relating to intimidation or reprisals within their respective committees and exchange views. Chairs may also establish links and consult between themselves between sessions, when appropriate, in cases of necessity.

V. Dissemination of the Guidelines

34. The Guidelines against Intimidation or Reprisals should be posted on the web pages of all treaty bodies and on the web page dedicated to the annual meetings of the Chairs of the human rights treaty bodies on the OHCHR website, in accessible formats.
35. The Chairs call for the widest possible dissemination of these Guidelines by the United Nations and other actors among the executive, judicial and legislative authorities of States, national human rights institutions, national preventive mechanisms, civil society and non-governmental organizations operating in each country and among the general public, in accessible formats.

Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, on the situation of environmental human rights defenders, A/71/281, 3 August 2016

[...]

3. It is the duty of the State to respect the right of everyone to promote and protect a safe, clean, healthy and sustainable environment, necessary for the enjoyment of a vast range of human rights. The State has a parallel duty to protect environmental human rights defenders from violations committed by both State and non-State actors. Nevertheless, international human rights law makes it clear that business enterprises, the media and other non-State actors are obliged to respect human rights obligations and refrain from contributing to or committing violations. The Special Rapporteur is therefore seriously concerned about the worrying numbers of killings and violence that, without doubt, underestimate the true extent of threats and risks facing environmental human rights defenders.
4. Protecting environmental human rights defenders is crucial to the protection of the environment and the human rights that depend on it. In 2015, the international community reached a consensus on the 2030 Agenda for Sustainable Development, with a set of new goals as a road map for a more sustainable, prosperous and equitable future. A number of those goals are directly or indirectly related to the environment and land use. Such a future, and those goals, are doomed to failure if the individuals and groups on the frontline of defending sustainable development are not protected at the national, regional and international levels.
5. The Special Rapporteur stresses that it is the responsibility of the international community and of States to empower and protect environmental human rights defenders, especially as the 2030 Agenda has engendered high hopes among civil society. He hopes that his report will guide all stakeholders in their future efforts to implement these and other important objectives, while remembering that empowering environmental human rights defenders is crucial to the protection of our environment and all other related human rights.

[...]

10. The mandate has consistently held that the protection accorded to defenders by the Declaration is not dependant on whether the focus of their work is on civil and political or economic, social and cultural rights (see, for example, A/HRC/4/37, paras. 27-30, and A/HRC/19/55, paras. 61-63). As recently as March 2016, the Human Rights Council adopted resolution 31/32 on protecting defenders

addressing economic, social and cultural rights, reaffirming the urgent need to respect, protect, promote and facilitate the work of those defending economic, social and cultural rights as a vital factor contributing towards the realization of those rights, including as they relate to environmental and land issues and development.

[...]

22. The Special Rapporteur notes with satisfaction the ongoing negotiations in Latin America and the Caribbean on the application of principle 10 of the Rio Declaration on Environment and Development, and urges the parties to expedite the conclusion of the agreement in the light of the urgency of the situation, described in the following section. He urges the Economic Commission for Africa (ECA) and the Economic and Social Commission for Asia and the Pacific (ESCAP) to develop similar legally binding instruments on access to information, public participation and justice in environmental matters, including measures to protect environmental human rights defenders. Such multilateral instruments would be an effective tool to achieve sustainable development goals and respond to many challenges facing our planet, from climate change, biodiversity loss and environmental pollution to poverty eradication. They would also ensure that both States and corporations are held accountable for any violations against environmental human rights defenders and establish effective safeguards to ensure that community interests are fully considered in environmental decisions.

[...]

34. Latin American and Asia have been the most hostile regions for environmental human rights defenders. In the last five years, of the 137 communications, 48 per cent concerned the Americas, the most dangerous area. Those promoting rights in relation to the extractive and mining industries, palm oil cultivation and deforestation proved to be most at risk (27 communications). The largest number of communications concerned Honduras (11), Mexico (10), Brazil (9) and Peru (8). In the vast majority of the fatal cases, the victims had previously reported threats and intimidation, but they received no adequate protection despite a prominent decision by the Inter-American Court of Human Rights 21 affirming the State duty to respect, protect and fulfil the rights of defenders, as well as to conduct serious and effective investigations of any violations against them, thus preventing impunity.

[...]

96. In order to reverse the tide of the worsening situation of environmental human rights defenders, the Special Rapporteur wishes to put forward a set of recommendations to the attention of various stakeholders. He calls on all stakeholders to urgently and publicly adopt a zero-tolerance approach to the killings of and violent acts against environmental human rights defenders, and to immediately launch policies and mechanisms to empower and protect them. He further appeals to all actors to document more systematically information on the situation of environmental human rights defenders at risk, especially in countries of concern, with a view to advocating more actionable and effective measures for their protection.

[...]

Report of the Special Rapporteur on the situation of human rights defender, Michel Forst, A/70/217, 30 July 2015

[...]

C. Global trends pointing to a threatening environment for defenders

35. For the Special Rapporteur, the evidence is oppressive. Everywhere in today's world, the situations defenders find themselves in give rise to multiple concerns. In very many countries, the situation is getting worse by the day. While the Special Rapporteur is happy about the emergence of a more prominent and better organized civil society, the fact is: there are still too many and, increasingly, multiple hurdles put in the way of those women and men who strive peacefully to promote and protect human rights and fundamental freedoms.

36. The threats faced by defenders come in many guises (physical, psychological, economic, and social); reflect the interaction of multiple factors (poor governance or the absence of the rule of law, the surge in religious intolerance and fundamentalisms, and tensions over development issues); and are triggered by a variety of (political, economic, religious, State or private) actors. This finding is all the more striking when a growing number of defenders point to backtracking in countries in which the law seems designed to criminalize them and to thwart what they do.

[...]

38. Finally, exacerbating these difficulties is the fact that the attacks and threats against defenders are perpetrated not just by States, but by non-State actors as well. This applies particularly to countries in which one notes a surge in religious fundamentalism (especially in North America, Latin America, Africa and the Middle East) or the presence of armed or low intensity conflicts (in the Middle East, Africa and certain countries in Asia); or even to development projects in which certain economic actors attempt to impose their interests — sometimes with explicit support from governments — to the detriment of observance of human rights. The defenders point to numerous pressures from these different actors in respect of actions to promote economic, social and cultural rights (sexual and reproductive rights, labour rights, the rights of indigenous peoples, and the right to natural resources and the environment).
39. The Special Rapporteur was struck by the interconnectedness of the multiple threats encountered by defenders: a reminder of the need to address all those threats in a holistic and integrated manner.
40. Given these trends, certain factors afford sum up the vulnerability of so many defenders: ignorance of their role; attacks on individual defenders; the implementation of new intimidation and repressive measures, especially the use of laws to circumscribe and delegitimize the work of defenders; and, finally, the numerous institutional weaknesses of certain States.

Human rights defender: A little known, poorly understood and often denigrated occupation

41. Numerous defenders report an attitude of mistrust and even hostility toward them on the part of not just the authorities, but the media and the rest of society as well. This hostility stems partly from ignorance of the role played by defenders, but may also be due in part to the way their work is used by certain, social, economic and political actors. Defenders are not depicted as agents of change, making a direct or indirect contribution to the sustainable development and good governance of their countries. On the contrary, they are often described as foreign agents, touting values that run counter to those of their society or culture, or else as mainly politically motivated actors. Defenders have reported regular campaigns to discredit their work by relegating them to the status of political opponents bent on destroying the general interest, indeed as traitors. Sometimes the media depict them as being soft on terrorists or as a threat to the sovereignty of States.
42. These difficulties are exacerbated by ignorance among defenders themselves of the mechanisms they can resort to and levers they can pull to boost their visibility and strengthen protection, as well as by occasional communication failings between those various mechanisms.

Attacks targeting individual defenders and their next of kin

43. Being a human rights defender involves personally exposing oneself to multiple dangers, including risking one's life or liberty. With the exception of defenders from a few countries, that is the conclusion reached by numerous defenders when they describe the threats and challenges they face. The defenders first testified straightforwardly, but with considerable feeling, regarding the frequent attacks they are subjected to physical, be it in the form of attempted murder, abduction or even acts of sexual violence, which sometimes force them to go into exile, leaving their next of kin behind and devoid of protection. The Special Reporter was struck by the number of instances cited by the defenders, in which they were remanded in custody for no reason, or suffered torture, clandestine arrests or trials by military tribunals. Often enough, when defenders attempt to alert the media to their situation, seek justice and obtain reparation, they encounter a fair amount of indifference. Generally speaking, attacks on them are not investigated and the perpetrators lose no sleep, all of which clearly encourages a culture of impunity. In addition, defenders face obstacles to their freedom of

movement both within their countries and, for example, when they seek authorization to leave them to take part in international meetings. Another very worrisome fact is that those attacks do only directly target the defenders; they are also often accompanied by threats and attack on their family members, increasing the pressure they are under.

44. Some defenders also mentioned the numerous reprisals against them since they began cooperation with the United Nations or with international and regional organizations for the promotion and defence of human rights. Such reprisals may take different forms, varying from harassment or defamation campaigns to physical assault, but they all have in common is intent to intimidate and silence defenders.

New forms of repression to restrict the work done by defenders

45. The Special Rapporteur was struck by the sophistication of the new techniques and forms of repression, especially via the media, mentioned by the defenders interviewed. According to accounts from defenders in several dozen countries, defamation campaigns in the written press or on the radio are routinely conducted by governments or radical groups in numerous countries with a view to stigmatizing defenders.
46. In addition, digital communications are also now being used to hamper the work of defenders. The Internet and, more broadly, new technology, which until recently provided a formidable tool for voicing opinions, accessing information, and forging networks of individuals and organizations, are today being used by States to monitor and curb the work of defenders. That is particularly worrying, given that numerous defenders use the Internet on a daily basis to promote and protect human rights, thereby exposing themselves to multiple threats. Defenders in Africa, Latin America, the Middle East and Asia have reported instances of harassment and defamation campaigns against social networks and blogs. E-mails are also intercepted and telephone calls recorded. Several women defenders have described how pirated pornographic images purporting to depict them have been disseminated on certain social media, in a serious attack on their dignity.
47. Defenders also underscored the growing use of laws to punish and discredit their work. A recurrent concern emerging during the consultations was the use of the law by certain States today to restrict or even criminalize the activities of defenders: a development already highlighted by the previous Special Rapporteur on the situation of human rights defenders in 2012.
48. The defenders confirmed these trends at the various consultations and the Special Rapporteur is especially perturbed at seeing governments copying the methods of the most repressive governments in this respect. In certain countries, there has been a resurgence of the misuse of laws to improperly restrict actions by defenders, particularly journalists, bloggers and lawyers. Some defenders also pointed to frequent hurdles designed to hamper the operations of the organizations they work for, including obstacles to their obtaining financing (especially from abroad) or to their registration or the renewal of their accreditation, or permission to organize some peaceful demonstrations.
49. Finally, defenders cited numerous cases of judicial harassment, arrests, arbitrary detentions and convictions accompanied by often disproportionately harsh penalties. Certain States attempt to silence defenders by handing down long prison sentences after fake trials on charges of tax evasion or illegal possession of weapons or drugs.

Profound institutional weaknesses

50. The defenders repeatedly stressed that the various threats and attacks they endure were made possible by an institutional context in which the basic tenets of the rule of law and democratic principles were either not — or less and less — respected. Time and again the defenders highlighted the impunity and corruption prevailing in numerous countries characterized by the absence of an independent judiciary.
51. Furthermore, the defenders mentioned failure to train and sensitize certain State representatives, be they officials (policemen, prison wardens) or members of the judiciary, with respect to human rights issues in general and human rights defenders in particular. That lack of training and awareness-

raising could partly explain the persistence of human rights violations by certain law enforcement officers, particularly during demonstrations, where excessive force is deployed.

52. The consultations also revealed the sense that national human rights laws were enacted and implemented without prior consultation with civil society or even the National Human Rights Institution of the country, if such an institution existed.
53. The defenders also point to a lack of “intersectionality”, that is to say, the awareness that different types and sources of discrimination intersect with, and reinforce, one another. Few studies address the problems faced by defenders when they are the target of several forms of discrimination (take, for instance, the case of a woman defender who has the status of a woman living in exile or that of a homosexual defender of ethnic minority origin). The international human rights system has not yet systematically incorporated an intersectional approach and, as a result, different sources of discrimination tend to be treated compartmentally. Thus, solutions do not permit a comprehensive grasp of the whole set of discriminations and vulnerabilities to which such defenders are exposed. Taking these different parameters into account would doubtless ensure a more integrated and crosscutting approach in the solutions to be found for these categories of defenders. This is one of the topics the Special Rapporteur intends to revisit in his next reports.
54. The role of national human rights institutions also cropped up several times during the consultations. However, the defenders often pointed to difficulties they had experienced in dealing with these institutions. In some cases, fraught relations between these two types of actor may be due to the latter’s failure to abide by the Paris Principles, their ineffectiveness, timidity, or ignorance of the situation of the defenders. Finally, according to the defenders, major budget cuts or political attacks have also affected several of these institutions in a number of countries in recent months, whereby it is worth recalling that national human rights institutions are sometimes themselves defenders and, as such, threatened by the government of their country. The Special Rapporteur issued several communications along those lines during the period under review.
55. Finally, the defenders stressed the recurrent failure to implement the recommendations of the United Nations mechanisms or regional organizations and voiced their regret that so few countries have put inter-ministerial monitoring mechanisms in place.

C. Threats faced by the most at-risk groups of defenders

Common threats faced by these groups of defenders

56. During each regional consultation, discussions were held about the threats and challenges faced by certain specific groups of defenders. As requested on several occasions by the Human Rights Council (in its resolutions 13/3, 22/6 and 24/24), strategies and actions for providing them with better protection were also examined. Some defenders face threats purely because of their identity (for example, women, lesbian, gay, bisexual, transgender or intersex persons, members of indigenous peoples, or defenders of persons suffering from albinism), others because of the issues they address (combating corruption, protecting the environment), or due to a particularly sensitive context (defenders working in conflict or post-conflict areas).
57. The groups of defenders singled out in this report are naturally not the only groups at risk. Others have been identified, but the Special Rapporteur has chosen to highlight those mentioned in the majority of the consultations. Broadly speaking, several findings stand out and concern all these groups.
58. To start with, one can discern an increase in the lack of legal protection for the most at-risk groups, the absence of specific legislation regarding them and sometimes even the effects of discriminatory laws. The defenders pointed out the high level of impunity for perpetrators of the attacks carried out, which is an insidious way of legitimizing acts of violence against them.
59. The defenders also describe their sense that they are often on their own, with the media showing little interest in reporting acts of aggression against them and with little support from political figures or even the community of defenders. Here, it should be stressed that these groups of defenders often

question the power structures or systems embedded in the societies they work in, and do therefore run the risk of being stigmatized or depicted as persons opposing traditions, the established order or the national interest.

60. The exchanges of views with defenders threw light on the structural, system causes of the violations committed against these groups, be they the persistence of male-female stereotypes, social and economic inequalities, or the culture of impunity and corruption pervading certain countries. Protecting these groups will therefore only be effective if a holistic and crosscutting approach is taken to their situation.

Women human rights defenders

61. At each of the consultations, women defenders reminded participants that being a woman human rights defender meant being exposed to threats both because of their status as women and because they strove to defend and promote human rights. While they are attacked just like other defenders, those acts of violence are often gender-based. The threat or use of sexual violence is commonplace in numerous countries. Women defenders very often work in countries in which the dominant discourse still confines women to the private sphere and it is often in that regard that they come under attack. They are the object of particularly virulent harassment, defamation and stigmatization campaigns on the Internet, in which their respectability and credibility as a woman defender, woman, mother, or citizen are derided.
62. Women defenders explained that those violations could not be understood without an in-depth analysis of the social, cultural, economic or political context, in which a patriarchal culture persists along with deeply-rooted stereotypes. They said they were the victims of attacks because they questioned that culture and challenged traditionally assigned roles. During the consultations numerous defenders described the insults hurled at women defenders, who are often depicted as prostitutes, or as immoral, sinful individuals undermining respect for traditional values. According to the women defenders, that makes them the preferred targets of religious groups, especially when they strive for the observance and promotion of sexual and reproductive rights.
63. In addition, women defenders complained of gaps in the responses of the various mechanisms and organizations that do not take men-women issues sufficiently into account (for instance, in resettlement programmes, from which families are often excluded). Women defenders likewise mentioned the need for them to be included from the outset in the preparation of programmes to protect them, in order to get away from a sometime paternalistic approach that plays down the challenges they face.

[...]

Defenders of rights relating to land, defence of the environment and corporate responsibility

68. One category of defenders regularly participating in regional consultations is the group promoting and defending rights relating to land, the environment and corporate responsibility. These defenders endure various kinds of surveillance, attacks, forced disappearances or campaigns to discredit them as opponents of progress and the development of their countries. They spoke of the excessive use of force against demonstrators and activists working on corporate responsibility matters or labour rights. They are the targets of actions taken by both State and non-State actors (enterprises, private groups guarding sites, individuals linked to organized crime, and so on). In this connection, they mention systematic collusion among these different kinds of actors designed to block reports by the defenders that throw light on acts of corruption and human rights violations. The various kinds of violations and threats are encouraged by a weak institutional environment, in which States have failed to put in place any effective mechanism for penalizing human rights violations committed by enterprises. Defenders also complain of the lack of transparency and accountability of enterprises, especially in extractive industries.

[...]

Lawyers working to promote and protect human rights

75. Lawyers are attacked and threatened both in their capacity as defenders and for the part they play in defending defenders. Their offices are ransacked, their communications are intercepted by the authorities or third parties, and they are sometimes victims of intimidation campaigns that may even include the withdrawal of their license to operate. These lawyers, and in some cases their families, also pointed out that they were regularly the object of attacks, harassment campaigns, arbitrary detention, or acts of torture. Lawyers working for defenders have been slandered and accused of treason or of having ties to terrorism. Their work is continually obstructed and there, too, defenders have to contend with the lack of an independent judiciary.

[...]

IV. Conclusions and Recommendations

A. Conclusions

90. The few observations presented in the present report show that we are dealing with attacks designed to weaken the women and men who are combating injustice and putting themselves in harm's way in order to defend the rights of those who cannot defend themselves. When these defenders are attacked, it is not just them but human rights that are threatened. The defenders we met at these seven consultations run countless risks that leave them distraught and often on their own. The Special Rapporteur is extremely worried about the trends alluded to in this report, especially with regard to the most exposed groups of defenders. He intends to continue exchanging views on certain points that emerged during these consultations in order to exhaust every possible opportunity to provide them with better protection. Positive developments were, nevertheless, reported in the course of these consultations, be it the enactment of domestic laws to protect defenders, certain projects such as the "shelter cities" or the preparation of defenders' kits. The Special Rapporteur will address such initiatives and sound practices in upcoming reports.
91. Nevertheless, in very many countries, defending and promoting human rights remain an extraordinarily dangerous activity. Nevertheless, that activity is a universally recognized right that all actors are duty-bound to protect as a routine fact of life. The consultations showed the importance of a human rights education for ensuring that society as a whole recognizes the role and contribution of actions undertaken by teachers, lawyers, journalists, employees of nongovernmental organizations, and ordinary citizens. We need not just to recall the commitment of all the actors involved, but also ensure that such decisions are followed by concrete steps to enable defenders, with peace of mind, to go about promoting and protecting the human rights and freedoms that every society needs.

B. Recommendations

92. Given the large number of recommendations regarding certain specific groups of defenders, the Special Rapporteur intends to address some of them in greater detail in future reports.
93. The Special Rapporteur recommends that States adopt the following measures:
- (a) Do more to disseminate the work of defenders and to support their work through campaigns and specific communication and information activities that pay tribute, in particular, to the contributions made by certain categories of defender, such as women; defenders of the rights of lesbian, homosexual, bisexual, transgender and intersex persons; defenders working in the area of corporate social responsibility and land-related rights; defenders of the rights of minorities and indigenous peoples; and defenders who combat impunity and corruption;
 - (b) Make sure that defenders can go about their work in a national framework buttressed by appropriate laws and regulations;
 - (c) Remove the obstacles that some domestic laws may place on the legitimate activities to promote and protect human rights conducted by defenders, including respect for the right to peaceful assembly and freedom of association;
 - (d) Abolish laws that discriminate against certain categories of defenders, as well as those relating to blasphemy or apostasy, so as to guarantee the right to freedom of expression, including in it the right to criticise the State, its representatives and religious authorities;

- (e) Conduct impartial investigations and ensure that the perpetrators of violations against the rights of defenders are brought to justice;
 - (f) Invite the Special Rapporteur to visit the countries and to conduct such visits without restrictions on their duration or scope;
 - (g) Reply to the Special Rapporteur's communications and provide him with all the information requested to enable him to assess the situations that gave rise to the communication;
 - (h) Establish a national human rights institution pursuant to the Paris Principles or reform an existing one to bring it into line with those Principles and grant it a mandate covering the protection and promotion of defenders;
 - (i) Provide State agents, especially those who are in direct contact with communities of defenders, with the necessary training regarding the role and rights of defenders and regarding the Declaration on human rights defenders;
 - (j) Undertake to translate the Declaration on human rights defenders into their national language and local languages so that all defenders can have access to it;
 - (k) Develop, with the support of United Nations country teams, national programmes for implementing General Assembly resolution 68/181 on protecting women human rights defenders/defenders of women's rights;
 - (l) Consult defenders and have them actively participate in development projects, studies of the impact of such projects on human rights, and efforts to draw attention to the duty to take precautions, including during the preparation of national plans dealing with corporations and human rights.
94. The Special Rapporteur encourages defenders and civil society to:
- (a) Facilitate the establishment of national and regional networks for the support and protection of defenders;
 - (b) Play an active part in promoting gender equality and combating all forms of discrimination against women defenders, including within their own organizations;
 - (c) Prepare special tools and materials for providing better protection to most at-risk categories of defenders and run awareness campaigns against the prejudices they sometimes face.
95. The Special Rapporteur encourages international donors and creditors and intergovernmental organizations to:
- (a) Strengthen aid programmes for defenders, particularly as regards physical and digital security and to step up aid programmes, particularly those relocating defenders and legal and medical assistance programmes;
 - (b) Examine ways of providing pro bono legal aid to defenders, by instituting an international network of lawyers and legal experts willing to help defenders, especially in emergencies;
 - (c) Identify focal points responsible for defender issues in the diplomatic missions and offices of intergovernmental organizations;
 - (d) Encourage the translation of certain instruments such as the European Union Guidelines on Human Rights Defenders and their dissemination in all countries.
96. The Special Rapporteur encourages the United Nations to:
- (a) Step up promotion of the Declaration on human rights defenders;
 - (b) Continue to document, and to alert the international community to, reprisals against defenders cooperating with United Nations mechanisms;
 - (c) Strengthen knowledge of, and attention to, defender issues in United Nations bureaux and regional and country offices. Provide training to officials in those entities regarding the mechanisms

for the protection of defenders and the needs of certain specific groups of defenders; Ensure that resident coordinators systematically provide assistance and protection to human rights defenders who are threatened;

- (d) Improve the dissemination of information about the situation of defenders to other regional bodies (such as regional economic partnerships or development communities);
 - (e) Develop new ways of interacting with defenders unable to travel to Geneva, such as distance consultations and webinar types of meetings with defenders in geographically remote areas;
 - (f) Ensure better access to United Nations organs for most at-risk categories of defender;
 - (g) Develop alternative methods to ensure access to United Nations human rights mechanisms for defenders from countries that restrict the right of association.
97. The Special Rapporteur encourages national human rights institutions to:
- (a) Strengthen awareness-raising activities directed at representatives of their government and other branches of State regarding the situation of defenders in their country;
 - (b) Raise awareness of members and their personnel regarding the Declaration on human rights defenders and their role;
 - (c) Conduct regular exchanges of views with defenders and civil society and involve them in the planning and implementation of activities;
 - (d) Post public assurances of their support for the part played by defenders, especially those in the most exposed groups and actively collaborate with other stakeholders in cases in which defenders are in danger;
 - (e) Establish a point of contact or an entity dedicated to defenders, paying particular heed to groups of defenders exposed to special risks;
 - (f) Encourage the active participation of defenders in the preparation, implementation and evaluation of programmes and policies for their protection;
 - (g) Ensure that the mechanisms to protect defenders have sufficient resources and the requisite capacity to follow up on complaints received and investigate them promptly and impartially;
 - (h) Ensure that defenders can file complaints using various channels, including the institution's website, a hotline and instant messaging;
 - (i) Include in their reports a section specifically devoted to the situation of defenders.
98. The Special Rapporteur encourages enterprises to:
- (a) Promote the work of defenders in their sector;
 - (b) Avoid any action aimed at hampering the work of defenders, recognizing, in particular, the right to freedom of expression, association, meeting, and demonstration.

Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, On elements of a safe and enabling environment for human rights defenders, A/HRC/25/55, 23 December 2013

[...]

IV. Elements of a safe and enabling environment for human rights defenders

54. In line with the Declaration on Human Rights Defenders, the primary duty and responsibility to promote and protect human rights and fundamental freedoms lies with the State. This includes guaranteeing the right of everyone, individually and in association with others, to promote and strive

for the protection and realization of human rights and fundamental freedoms at the national and international levels (art. 1). Thus, States have the obligation to undertake the required steps to create all conditions necessary, including in the political and legal domains, to ensure that everyone under their jurisdiction can enjoy all those rights and freedoms in practice (art. 2), including the right to promote and defend human rights.

55. The State has a duty to protect those who work for the promotion and protection of human rights defenders under their jurisdiction, regardless of the status of the alleged perpetrators, from any violence threats, or any other arbitrary action as a consequence of the legitimate exercise of their work (art. 12). The State's duty to protect the rights of defenders from violations committed by States and non-State actors is derived from each State's primary responsibility and duty to protect all human rights.
56. From the Declaration, the Special Rapporteur believes that the main responsibility for ensuring that defenders can enjoy a safe and enabling environment lies with the State as the main duty-bearer. However, she considers that the role, responsibilities and behaviour of relevant stakeholders need to be taken into account.
57. The mandate has repeatedly addressed the great risks and challenges that defenders face due to their work. The Special Rapporteur regrets to say that defending rights and speaking up against violations and abuses still remains a dangerous activity.
58. Defenders and their families are intimidated, harassed, subject to surveillance, threatened, attacked, arbitrarily arrested, criminalized, tortured and ill-treated in detention, subject to enforced disappearances, and sometimes killed. State and non-State actors are involved in the commission of these acts and impunity tends to prevail when it comes to attacks and violations against defenders. Investigations are excessively protracted, due process is not always guaranteed and perpetrators are often not held accountable.
59. During her tenure, the Special Rapporteur has seen the space for civil society and defenders visibly shrink in certain regions of the world. She has also observed the consolidation of more sophisticated forms of silencing their voices and impeding their work, including the application of legal and administrative provisions or the misuse of the judicial system to criminalize and stigmatise their activities. These patterns not only endanger the physical integrity and undermine the work of human rights defenders, but also impose a climate of fear and send an intimidating message to society at large.
60. The defence and promotion of human rights is a legitimate and courageous activity which is necessary to ensure that communities can fully enjoy their entitlements and realize their potential. Defenders can play a key role in safeguarding democracy and ensuring that it remains open, pluralistic and participatory and in line with the principles of rule of law and good governance. Defenders should be able to carry out their activities in an environment that empowers them to defend all human rights for all.
61. The Special Rapporteur has repeatedly underlined the need to create and consolidate a safe and enabling environment for defenders and has elaborated on some of the basic elements that she believes are necessary in this regard. These elements include a conducive legal, institutional and administrative framework; access to justice and an end to impunity for violations against defenders; strong and independent national human rights institutions; effective protection policies and mechanisms paying attention to groups at risk; specific attention to women defenders; non-State actors that respect and support the work of defenders; safe and open access to international human rights bodies; and a strong and dynamic community of defenders.

A. Conducive legal, institutional and administrative framework

62. One of the key elements of a safe and enabling environment for defenders is the existence of laws and provisions at all levels, including administrative provisions, that protect, support and empower defenders, and are in compliance with international human rights law and standards. Moreover, institutional frameworks should be shaped in such a way that they are receptive and supportive of defenders' work.

63. The Special Rapporteur concurs with the view that, in countries where human rights are specifically recognized and protected in domestic law, those rights are more likely to be respected and realized in practice. Beyond their normative value, she further believes that human rights laws can have an important educational role in that such laws signal the values for which a particular society stands. The adoption of laws that explicitly guarantee the rights contained in the Declaration on Human Rights Defenders is crucial in that it could contribute to building an enabling environment and give these rights legitimacy. Furthermore, such laws could contribute to building wider societal support for the demand of fulfilling these rights.
64. The Special Rapporteur has provided guidance on how various types of domestic legislation could contribute to a conducive environment for human rights defenders (A/67/292). She regrets that legislation is used in a number of countries to restrain the activities of human rights defenders and criminalize them, which is in breach of international human rights law, principles and standards. Anti-terrorism and public security legislation has risen to prominence in the last decade and, in many countries, such legislation is used to harass and prosecute defenders in the name of public security.
- [...]
66. The exercise of public freedoms is essential in any democratic society but even more so when it comes to claiming and defending rights. This is why the Special Rapporteur has repeatedly underlined the importance of defenders being able to exercise their rights to freedom of opinion and expression, freedom of association and peaceful assembly without undue restrictions in law or practice.
67. The Special Rapporteur has noted that there is a number of worrying developments with regard to legislation regulating associations, including their establishment, functioning and funding. During her tenure, she has also seen the introduction of restrictions on the types of activities that associations can engage in, such as political rights advocacy.
68. The Special Rapporteur has observed a disturbing trend towards the criminalization of activities carried out by unregistered groups. She believes that denial of registration is an extreme measure curtailing the right to freedom of association; especially where activities carried out by unregistered organizations carry criminal sanctions.
69. The Special Rapporteur has also warned about restrictions on funding from abroad, which have been introduced in a number of States. This leads to associations risking treason charges, having to declare themselves “foreign agents” or having to seek prior approval to fundraise. The Special Rapporteur is concerned that justifications for this, including the prevention of money-laundering and terrorist-financing, are often merely rhetorical and that the aim is restricting the activities of defenders.
70. The Special Rapporteur continues to note with concern the prevalence of defamation legislation, access to information laws and legislation on classification of information and official secrets, which hinder the work of defenders. She warmly welcomes the initiatives by a number of States to pass legislation that guarantees the right of access to information held by public authorities, and protects those who disclose public interest information that is relevant for the promotion and protection of human rights and those who report on corruption by public officials.
71. In this context, the Special Rapporteur welcomes the landmark resolution 22/6 adopted by the Council which provides significant guidance on creating a safe and enabling environment for human rights defenders. In the resolution, States are urged to ensure that reporting requirements placed upon organizations do not obstruct their autonomy and that restrictions are not discriminatorily imposed on potential sources of funding other than those laid down to ensure transparency and accountability, and according to the Special Rapporteur, this should be done regardless of the geographic origin of funding. Furthermore, States are called upon to combat terrorism and preserve national security by adopting measures that are in compliance with international law and do not hinder the work and safety of defenders. It further urges States to ensure that all legal provisions and their application are clearly defined, determinable and non-retroactive so that the defence and promotion of human rights is not criminalized.

72. In addition to, and as a complement to, ensuring a conducive normative and administrative framework, States should disseminate the Declaration widely. In line with article 13 of the Declaration, human rights educational programmes, especially those addressed to law enforcement and public officials, should include modules based on the text that reaffirm the basic right to defend human rights and the role that human rights defenders play in society. Enabling human rights defenders' work also involves periodically recognizing and informing populations about the rights and responsibilities of all individuals to promote and protect human rights.

B. Fight against impunity and access to justice for violations against defenders

73. During her mandate, one of the major and systematic concerns raised by the Special Rapporteur in relation to violations against defenders is the question of impunity. In many cases, complaints by defenders about alleged violations of their rights are not investigated or are dismissed without justification. A State's lack of investigation into violations could be seen as condoning attacks against defenders and could nurture an environment where further attacks are perceived as tolerated. The Special Rapporteur has repeatedly reiterated that ending impunity is an essential condition for ensuring the protection and safety of defenders.
74. States should ensure prompt and independent investigation of all violations against defenders, and the prosecution of alleged perpetrators regardless of their status. They should also ensure for victims of violations access to just and effective remedies, including appropriate compensation. The provision of an effective remedy should be understood as access to judicial and administrative or quasi-judicial mechanisms. Investigation and prosecution should rest on an effective and independent judiciary.
75. States should also implement the interim measures of protection granted by international and regional human rights mechanisms to defenders.
76. Unfortunately, in many instances, weaknesses in the judicial system and flaws in the legal framework have deprived defenders of adequate tools for seeking and obtaining justice. Therefore, strengthening the judiciary and making sure that it can operate independently and effectively should be a priority for States.

C. Strong, independent and effective national human rights institutions

77. As part of the institutional architecture of the State, the Special Rapporteur has underlined the key role that national human rights institutions can play in ensuring a safe and conducive environment for defenders (A/HRC/22/47). National human rights institutions that comply with the Paris Principles are in a unique position to guide and advise Governments on their human rights obligations, and ensure that international principles and standards are adequately incorporated into domestic law and mainstreamed into public policies.
78. During her mandate, the Special Rapporteur has on numerous occasions addressed violations against national institutions, their members and staff, ranging from attacks, threats and intimidation, to harassment and stigmatization in connection to their human rights work. She has expressed grave concern that such constraints and challenges can seriously undermine the independence, efficiency, credibility and impact of these institutions. She has also urged States to protect by law and publicly support national institutions, and their members and staff when necessary.
79. The Special Rapporteur has also emphasized that national human rights institutions can play a crucial role in the protection of human rights defenders. Evidence shows that when the mandate of national institutions includes competence to investigate complaints and provide effective protection, they can play a leading role in cases where States' judicial systems are unable or unwilling to adjudicate on alleged violations against defenders.
80. The Special Rapporteur has also strongly recommended that national institutions have a designated focal point for human rights defenders with responsibility to monitor their situation, including risks to their security, and legal and other impediments to a safe and conducive environment for defenders.
81. The role of national institutions in monitoring legal and administrative frameworks which regulate the work of defenders was highlighted in Council resolution 22/6, adopted in March 2013. This landmark

resolution underlines the important role of these institutions in monitoring existing and draft legislation, and informing States about the impact or potential impact of legislation on the work of defenders.

82. In addition, national institutions could play an important role in disseminating information about protection programmes for defenders, where they exist, and ensuring that defenders are closely involved in the design, implementation and evaluation thereof.
83. The Special Rapporteur believes that, in order to ensure the credibility of the work of national institutions, Governments must be responsive and ensure adequate follow-up and implementation of their recommendations. This is particularly important given that most of these institutions have advisory functions. Governments should therefore work proactively to implement these recommendations, and follow-up should be tracked and evaluated.

D. Effective protection policies and mechanisms, including public support for the work of defenders

84. Special Rapporteur has advocated for the use of public policies and specific institutional mechanisms to provide protection when it is considered necessary to guarantee a safe and enabling environment for defenders.
85. During her tenure, the Special Rapporteur has focused extensively on the security challenges faced by human rights defenders in the conduct of their activities and has issued recommendations regarding the development of protection programmes (A/HRC/13/22). She has repeatedly underlined that the State has an obligation to protect human rights defenders, investigate violations and prosecute the perpetrators. This obligation extends to acts and omissions of non-State actors.
86. In an attempt to delegitimize their work and activities, defenders are often branded enemies of the State or terrorists. This stigmatization makes defenders even more vulnerable to attacks, especially by non-State actors. Therefore, as part of protection policy, it is of crucial importance that the work and role of defenders be publicly acknowledged by State officials at the highest level. The Special Rapporteur believes that a public acknowledgment of defenders' work could contribute to providing their work with due recognition and legitimacy.
87. The Special Rapporteur is very pleased to note that, in Council resolution 22/6, States are urged to create a safe and enabling environment where human rights defenders can operate free from hindrance and insecurity. States are also urged therein to publicly acknowledge the legitimate role of human rights defenders and the importance of their work.
88. The Special Rapporteur has presented a set of guidelines that she believes are essential for the development of protection programmes. Firstly, human rights defenders should be consulted throughout the setting up or review of protection programmes and the structure of such programmes should be defined by law. Protection programmes should include an early warning system in order to anticipate and trigger the launch of protective measures. It should also assess the safety of the defenders' family members and relatives. Security and law enforcement officials involved in protection programmes should receive specific training on human rights and gender issues. The physical protection of defenders should not be outsourced to third parties unless these have received specific training. Furthermore, adequate financial resources should be allocated to protection programmes.
89. As an example of a good practice, the Special Rapporteur commends the adoption of a law and creation of a protection mechanism for defenders and journalists in Mexico in 2012. The law provides a legal basis for the coordination between the government agencies responsible for the protection of defenders and journalists. It defines an extraordinary process for emergency response in less than 12 hours. It also includes collaboration agreements with state-level governments in order to ensure their participation in the mechanism. Furthermore, it establishes a complaints procedure and ensures that public officials who do not implement the measures ordered by the mechanism will be legally sanctioned. The new mechanism also ensures the participation of civil society organizations in its decision-making processes and guarantees the right of the beneficiary to participate in the analysis of his/her risk and the definition of his/her protective measures.

Specific challenges of groups at risk

90. Throughout her mandate, the Special Rapporteur has highlighted the need to pay particular attention to addressing the needs of human rights defenders who face extraordinary risks due to the work that they do and the contexts in which they operate. In this connection, the Special Rapporteur has focused on the situation of selected groups of human rights defenders who are at particular risk of violations, including judges and lawyers; journalists and media workers; trade unionists; youth and student defenders, those working on sexual orientation and gender identity; and defenders working on environment and land issues (A/HRC/19/55).
91. The Special Rapporteur is appalled that journalists and media workers are targeted because of their reports on human rights violations or because they have been witness to human rights violations. They are particularly exposed to violations in contexts such as armed conflicts, post-conflict situations and situations of unrest in connection with a coup d'état or contested elections. In many countries, legal frameworks are used to restrict journalists' and media workers' activities. The Special Rapporteur is concerned that restrictions on media and press freedom and impunity could foster a climate of intimidation, stigmatization, violence and self-censorship.
92. With regard to youth and student defenders, the Special Rapporteur is concerned about how youth is perceived in society. Often, their young age and alleged lack of maturity are used as grounds for not giving them a say in public affairs. The Special Rapporteur regrets that there is a trend in many countries of passing legislation that prohibits young people from participating in public assemblies. Other legislative moves pertain to the Internet, social media and instant messaging, which are increasingly subject to control by Governments.
93. Another group that also faces a high risk of violations are defenders working on land and environmental issues in connection with extractive industries and construction and development projects. Violations in this regard generally occur in the context of land disputes, where the perpetrators are both State and non-State actors. As a response to these trends, the Special Rapporteur argues that a rights-based approach to large-scale development projects could contribute to creating and consolidating a safe and enabling environment for defenders who operate in this context. She has also stressed the need: for transparency and access to information; for protection, which should be provided to affected communities and those defending their rights in this context; and to ensure accountability of duty-bearers and access to appropriate remedy. The Special Rapporteur considers that the Guiding Principles on Business and Human Rights, based on the due diligence framework, are an essential reference and tool for States and other stakeholders involved in the context of business operations and the respect for basic rights and freedoms.
94. Communities and those defending their rights should be able to participate actively, freely and meaningfully in assessment and analysis, project design and planning, implementation, monitoring and evaluation of development projects. Defenders working with local communities can play a crucial role in facilitating communication between the communities and those responsible for the policy or project. Defenders can be instrumental in advancing development, and can ensure that dialogue is used to reinforce social cohesion and pre-empt conflict and the radicalization of positions. This can contribute significantly to defusing tensions between duty-bearers and local communities, which in turn would and could be a first step towards enhancing the protection of rights holders.
95. Defenders can also play a crucial role as members of teams conducting human rights impact assessments, taking part in formal multi-stakeholder oversight mechanisms and mediation and grievance mechanisms, and as independent watchdogs monitoring the implementation of large-scale development projects. The Special Rapporteur remains deeply concerned about reports detailing harassment of, persecution of and retaliation against human rights defenders seeking judicial remedy for business-related violations. It is essential that those who wish to report human rights concerns and violations can safely access accountability and grievance mechanisms.
96. In this context, the Special Rapporteur is concerned about the increased criminalization of social protest often in connection with the peaceful expression of opposition to public or private development

projects. Authorities should grant defenders, especially journalists and media workers, access to public assemblies to especially facilitate independent coverage and human rights monitoring.

- 97.** The Special Rapporteur considers that foreign and development policy can be used to contribute to the protection and enhanced security of human rights defenders on the ground. In this regard, she welcomes the initiative by the European Union to adopt the revised European Union Guidelines on Human Rights Defenders in 2008. These guidelines list a number of practical measures that member States could take to support and protect defenders at risk, such as issuing temporary visas and facilitating temporary shelter in member States.

[...]

F. Non-State actors' respect and support for the work of defenders

- 102.** Non-State actors, including private companies, can also play a key role in the promotion and protection of the rights and activities of defenders, and therefore in the consolidation of a safe and enabling environment for defenders to conduct their work. As the Special Rapporteur has repeatedly highlighted, it is paramount that non-State actors acknowledge and respect the important role of defenders in ensuring the full enjoyment of human rights by all (A/65/223).
- 103.** The Special Rapporteur continues to receive credible reports and allegations indicating that non-State actors, including private corporations, are involved in violations against defenders, including stigmatization, threats, harassment, attacks, death threats and killings. Attacks are sometimes committed by groups which are directly or indirectly set off by States, either by providing logistical support or by condoning their actions, explicitly or implicitly.

[...]

- 105.** As stated above, the Special Rapporteur has condemned security guards employed by large-scale development corporations who have threatened to kill, harass and attack defenders working on issues related to access to land and natural resources during peaceful protests. She has also raised cases where local authorities have allegedly colluded with the private sector, and cases in which private companies had aided and abetted the commission of violations against human rights defenders.

[...]

V. Conclusions and Recommendations

A. Conclusions

- 127.** The Special Rapporteur is grateful to have been given the opportunity to examine and analyse the situation of defenders worldwide. With her voice and her mandate, she has strived to raise awareness and visibility about the challenges and risks that defenders face. She has also tried to highlight good practices and provide guidance on how to widen the space in which they conduct their work, making the environment safer and more conducive.
- 128.** Defending human rights is not only a legitimate and honourable activity, but a right in itself. However, defending and claiming rights continues to be a dangerous activity in many parts of the world.
- 129.** States have the primary responsibility to ensure that defenders work in a safe and enabling environment. Such an environment should include a conducive legal, institutional and administrative framework; access to justice and an end to impunity for violations against defenders; a strong and independent national human rights institution; policies and programmes with specific attention to women defenders; effective protection policies and mechanisms paying attention to groups at risk; non-State actors that respect and support the work of defenders; safe and open access to international human rights bodies; and a strong, dynamic and diverse community of defenders.
- 130.** The Special Rapporteur would like to put forward the recommendations below addressed mainly to States but also to other relevant stakeholders.

B. Recommendations

131. Member States should:

- (a) Ensure that defenders can conduct their work in a conducive legal, institutional and administrative framework. In this vein, refrain from criminalizing defenders' peaceful and legitimate activities, abolish all administrative and legislative provisions that restrict the rights of defenders, and ensure that domestic legislation respects basic principles relating to international human rights law and standards;
- (b) Combat impunity for violations against defenders by ensuring that investigations are promptly and impartially conducted, perpetrators are held accountable, and victims obtain appropriate remedy. In this context, pay particular attention to violations committed by non-State actors;
- (c) Raise awareness about the legitimate and vital work of human rights defenders and publicly support their work. In this respect, widely disseminate the Declaration on Human Rights Defenders and make sure that human rights educational programmes, especially those addressed to law enforcement and public officials, include modules that recognize the role played by human rights defenders in society;
- (d) Provide national institutions with broad and solid mandates, and make sure that they are adequately resourced to be able to operate independently and to be credible and effective. Publicly acknowledge and support the important role of these institutions, including in providing protection to defenders and fighting impunity;
- (e) Ensure that violations by State and non-State actors against defenders, particularly women defenders, are promptly and impartially investigated, and ensure that perpetrators are brought to justice. Furthermore, provide material resources to ensure the physical and psychological protection of defenders, including through gender-sensitive policies and mechanisms;
- (f) Publicly acknowledge the particular and significant role played by women human rights defenders, and those working on women's rights or gender issues, and make sure that they are able to work in an environment free from violence and discrimination of any sort;
- (g) Provide the necessary training to public officials on the role and rights of defenders and the Declaration on Human Rights Defenders, particularly to those who are in direct contact with communities of defenders;
- (h) Ensure that public policies, including development policies and projects, are developed and implemented in an open and participatory manner, and that defenders and communities affected are able to actively, freely and meaningfully participate;
- (i) Make sure that defenders can actively participate in the universal periodic review process, including by raising awareness about the process, organizing open and meaningful consultations, including a section about the situation of defenders in the national report, and making concrete recommendations towards the improvement of the environment in which they operate;
- (j) Ensure that acts of intimidation and reprisals against defenders who engage with the United Nations, its representatives and mechanisms in the field of human rights, and international human rights bodies are firmly and unequivocally condemned. Ensure that these acts are promptly investigated, perpetrators brought to justice and that any legislation criminalizing activities in defence of human rights through cooperation with international mechanisms is repealed.

132. The international community should:

- (a) Acknowledge and support the legitimate work of human rights defenders, both through the public recognition of their role and the provision of technical and financial assistance to increase their capabilities or enhance their security if needed;
- (b) Ensure safe and open access to international human rights bodies, in particular the United Nations, its representatives and mechanisms in the field of human rights.

133. Non-State actors should:

- (a) Respect and recognize the work of defenders in accordance with the Declaration on Human Rights Defenders, and refrain from violating their rights or hindering their activities;
- (b) Involve and consult with human rights defenders when carrying out country assessments and develop national human rights policies in cooperation with defenders, including monitoring and accountability mechanisms for violations of the rights of defenders;
- (c) Familiarize themselves with the Guiding Principles on Business and Human Rights, and with human rights impact assessment of business operations;

134. Human rights defenders should:

- (a) Actively participate in constructive dialogue with the State to encourage it to consolidate a safe and enabling environment for defenders, including by providing inputs on the potential implications of draft legislation;
- (b) Familiarize themselves with the Declaration on Human Rights Defenders and disseminate it widely at the local level;
- (c) Continue supporting the work of national human rights institutions by cooperating with them, and advocating for their strengthening;
- (d) Continue working together through networks including by strengthening support networks outside capital cities to reach out to defenders working in rural areas;
- (e) Strive for high standards of professionalism and ethical behaviour when carrying out human rights activities;
- (f) Continue to make full use of existing international and regional human rights mechanisms, including the United Nations, its mechanisms and representatives in the field of human rights.

Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, On the relationship between large-scale development projects and the activities of human rights defenders, A/68/262, 5 August 2013

[...]

III. Relationship between large-scale development projects and the activities of human rights defenders

- 14.** For the purposes of the present report, the term “large-scale development projects” refers to the acquisition, lease or transfer of land or natural resources for commercial investment purposes. The Special Rapporteur does not identify a specific threshold for what should constitute “large-scale” but considers the impact of a project on its surroundings, specifically with regard to the human rights of affected communities and those defending the rights of those communities, to be a key factor.
- 15.** Both the Special Rapporteur and the Special Representative of the Secretary-General on Human Rights Defenders have repeatedly reported on the extraordinary risks faced by those defending the rights of local communities, including indigenous peoples, minorities and people living in poverty. These human rights defenders commonly face threats, harassment, intimidation, criminalization and physical attacks. The Special Rapporteur and the Special Representative have observed that human rights defenders are commonly branded as being against development if their actions oppose the implementation of development projects that have a direct impact on natural resources, the land and the environment. Examples of such projects include the construction of hydroelectric power stations, electric pylons, dams, highways and cement factories, and the operations of various extractive industries. Human rights defenders also speak out against forced evictions that occur in connection to development programmes and projects.

16. Rather than demonstrating opposition to development, such actions should be seen as legitimate attempts to defend the rights of those affected directly and indirectly by development projects and policies, as long as they are pursued through peaceful means. Resistance evokes a number of human rights issues, including with regard to the right to freely pursue one's economic, social and cultural development and the right not to be discriminated. Moreover, resistance can be viewed in connection with the rights to participate in the conduct of public affairs and to access information. It can also be framed as a legitimate effort to pursue the highest attainable standard of living and adequate housing and to defend one's privacy. The Special Rapporteur is of the opinion that human rights defenders and the communities whose rights they defend are free to oppose development projects through the exercise of their fundamental rights and that restrictions on those rights have to be applied in accordance with national legislation and the State's international human rights obligations. The Special Rapporteur provided observations on national legislation in her 2012 report to the General Assembly (A/67/292).

A. Background

17. The Special Representative of the Secretary-General on Human Rights Defenders addressed the risks and challenges faced by defenders working on economic, social and cultural rights in her 2007 report to the Human Rights Council. In the report, she underlined the heightened risks faced by defenders working on land rights, natural resources and environmental issues, and those campaigning against illegal or forced evictions. She also noted that defenders working on land rights and natural resources comprised the second group of defenders most at risk of being killed (A/HRC/4/37).
18. Since 2007, the situation with regard to that group of defenders seems to have worsened. In 2010, the Special Rapporteur reported on the violations committed by private corporations and businesses, which were among the non-State actors she identified as committing violations against human rights defenders. She pointed to instances in which security guards employed by oil and mining companies had allegedly threatened to kill, harassed and attacked human rights defenders protesting against the perceived negative impact of corporate activities on the enjoyment of human rights by local communities. She also highlighted cases in which local authorities had allegedly colluded with the private sector and cases in which private companies had aided and abetted the commission of violations against human rights defenders (A/65/223, paras. 10 and 11).
19. In her 2012 report to the Human Rights Council, which was devoted to groups at risk, the Special Rapporteur highlighted the dangers and challenges faced by defenders working on land and environmental issues, including in connection with the activities of extractive industries and construction and development projects (A/HRC/19/55, para. 64). She pointed out that the main context in which violations against such defenders generally occurred was that of ongoing land disputes with both State and non-State actors, including multinational corporations and private security companies. The Special Rapporteur expressed serious concern about the risks faced by this group of defenders and noted that those defenders were highly exposed to attacks to their physical integrity and that many of them were killed. She highlighted that the stigmatization they suffered from State and non-State actors was a factor that might encourage rejection of or even violence against defenders (A/HRC/19/55, paras. 65 and 66, 117, 123 and 125).
20. The Special Rapporteur notes that the Working Group on the issue of human rights and transnational corporations and other business enterprises reported to the Human Rights Council that it had received an especially large number of cases involving conflicts between local communities and businesses over land and resources, noting that in many reports conflicts had led to the harassment and persecution of human rights defenders investigating, protesting and seeking accountability and access to remedies for victims of alleged abuses linked to business activities (A/HRC/23/32, para. 13).

B. Reasoning and approach of the Special Rapporteur regarding the relationship between large-scale development projects and the activities of human rights defenders

21. Development policy should contribute to increased respect for the human rights of those targeted and affected and strengthen their capacity to lead their lives in a dignified manner. It should be

an instrument for doing more than just promote economic growth and meet basic needs: it should aim to expand people's choices, focusing especially on disadvantaged and vulnerable people. Its ultimate aim should be to empower people, especially those most marginalized, to participate in policy formulation and hold accountable those who have a duty and a responsibility to act.

22. The human rights-based approach to development is built on the explicit identification of rights holders, and their entitlements, and of duty bearers, and their obligations. It grounds the development analysis in the realm of enforceable obligations and respect for internationally agreed norms, principles and standards. In order for policies and projects to effectively attain their desired results in a sustainable manner, consideration needs to be given to the human rights aspect.
23. It is during the policymaking phase that human rights standards are operationalized and State obligations materialize for local communities. For this to happen, those affected must effectively take part in the policymaking process. Human rights defenders are among the best placed to make the connections between human rights and development programming, as they are often at the heart of social dialogue and interactions between citizens and the Government at the local and community levels. It is therefore vital that Governments and other relevant actors facilitate the participation of human rights defenders in the development of policies or projects, as well as in their implementation and evaluation.
24. The severe risks and violations that human rights defenders face when they become involved in large-scale development projects, however, make it very difficult for them to assume such a role. It is for that reason that the Special Rapporteur has chosen to focus on the relationship between large-scale development projects and the activities of human rights defenders in the present report. She believes that applying a human rights-based approach to development policy and projects contributes to creating the conditions necessary for human rights defenders to safely and effectively participate in the design of development policies and projects, as well as in their implementation, monitoring and evaluation, and to ensure the sustainability of such initiatives and their compliance with human rights.
25. The Special Rapporteur also believes that this topic is timely given the current deliberations on the post-2015 development agenda. Adopting a human rights-based approach in this context can make it easier for human rights defenders to participate in and make important contributions to the development of a sustainable and peoplecentred development framework, including by ensuring accountability of duty bearers.

C. Normative framework

26. The main elements of the human rights-based approach, in particular when applied to development policy and projects, are enshrined in different international instruments and standards. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, in their article 1, both state: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
27. On the issue of participation, article 25 (a) of the International Covenant on Civil and Political Rights enshrines the right of citizens to participate, directly or indirectly and without unreasonable restrictions, in the conduct of public affairs. Article 8 of the Declaration on Human Rights Defenders provides that everyone has the right, individually or in association with others and on a non-discriminatory basis, to participate in the conduct of public affairs. That right is said to include the right to submit to governmental bodies and agencies concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.
28. Instruments protecting the rights of specific populations also guarantee to those concerned the right to participation. The obligation of consulting with the objective of obtaining the free, prior and informed

consent of indigenous peoples through their own representative institutions whenever consideration is being given to legislative or administrative measures that may affect them directly is established in the United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295, annex, articles 18 and 27) and in the Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) of the International Labour Organization. Furthermore, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides for the right of minorities to participate in decision-making and the obligation of States to ensure such participation, including in economic progress and development (Assembly resolution 47/135, annex, articles 2 and 4).

29. The issues of transparency and access to information are directly linked to the right to seek, obtain and impart information, which is enshrined in article 19 of the International Covenant on Civil and Political Rights. Specifically, paragraph 2 of that article establishes that everyone should be free to seek, receive and impart information and ideas of all kinds. Article 6 of the Declaration on Human Rights Defenders elaborates on this right, establishing that everyone has the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems.⁴ Article 14 of the Declaration stipulates that States have the responsibility to take legislative, judicial and administrative measures to promote the understanding by all persons under their jurisdiction of their human rights, including through the publication and widespread availability of laws and regulations.
30. With regard to the State's responsibility to protect, the right to life, liberty and security of person is enshrined in article 3 of the Universal Declaration of Human Rights and in articles 6 (1) and 9 (1) of the International Covenant on Civil and Political Rights. This obligation is further emphasized in the Declaration on Human Rights Defenders, in particular in its articles 2, 9 and 12, which elaborate on the State's primary responsibility and duty to protect all human rights, which is established in article 2 of the Covenant. Both negative and positive aspects are included: on the one hand, States must refrain from violating the rights of human rights defenders; on the other hand, they should act with due diligence to prevent, investigate and bring to justice the perpetrators of any violation of the rights enshrined in the Declaration on Human Rights Defenders. Moreover, States bear the primary responsibility for protecting individuals, including human rights defenders, under their jurisdiction, regardless of the status of the alleged perpetrators (A/HRC/13/22, para. 42).
31. The State's obligation to provide an effective remedy for human rights violations is enshrined in article 2 (3) (a) of the International Covenant on Civil and Political Rights. Article 9 of the Declaration on Human Rights Defenders further underscores that everyone performing activities in defence of human rights has the right to benefit from an effective remedy and to be protected in the event of violations (see also A/65/223, para. 44). Both the Special Rapporteur and the Special Representative on the situation of human rights defenders have emphasized that prompt and impartial investigations into alleged violations, prosecution of the perpetrators regardless of their status, provision of redress, including appropriate compensation to victims, and enforcement of the decisions or judgments are fundamental actions that must be taken in order to protect the right to an effective remedy. They have observed that failure to take these actions leads to further attacks against human rights defenders and further violations of their rights (see A/58/380, para. 73, and A/65/223, para. 44).
32. Transnational corporations and other business enterprises are required to respect human rights, as set out in the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex), which were endorsed by the Human Rights Council in its resolution 17/4. The Guiding Principles aim to implement the United Nations "Protect, Respect and Remedy" Framework, which rests on three pillars: the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for access to effective remedy for victims of business-related human rights abuses (see A/HRC/17/31, para. 6).

IV. Rights-based approach to development programming and its implications for the safe and effective participation of human rights defenders

33. The human rights-based approach to development policy and programming is based on the normative framework of international human rights standards and seeks to analyse inequalities that lie at the heart of the development process. It aims to redress discriminatory practices and the unfair distribution of power, which hamper sustainable human development.
34. If applied in a meaningful way, the human rights-based approach to development programming establishes the mechanisms and conditions for rights holders affected by development projects to be able to safely and effectively claim their rights. At the same time, it ensures that duty bearers, notably the State, meet their international obligations and are held accountable.
35. Human rights obligations place binding limits on State powers and actions and make Governments responsible for complying with international commitments. States must exercise due diligence by respecting, protecting and fulfilling human rights. In the development context, States should take steps towards the progressive realization of human rights within the maximum available resources while refraining from committing human rights abuses and while protecting individuals within their jurisdiction against violations, including by third parties. The Committee on Economic, Social and Cultural Rights recognized that while it might be necessary to sometimes take retrogressive measures, namely measures that do not contribute to the progressive realization of human rights, doing so would need to be justified by reference to the totality of the rights provided for in the International Covenant on Economic, Social and Cultural Rights and in the context of the full use of the maximum available resources (see general comment No. 3, on article 2 (1) of the Covenant).
36. The human-rights based approach is guided by the principles of equality and non-discrimination, participation, transparency and accountability in all stages of policymaking, from assessment, project design and planning to implementation, monitoring and evaluation. In order to adequately incorporate the needs of human rights defenders in this approach, special emphasis should be placed on ensuring the safety and protection of those involved and on the availability and effectiveness of accountability and grievance mechanisms.
37. Rather than being perceived as demonstrating an opposition to development, the positions advocated and the activities undertaken by defenders and leaders of local communities affected by large-scale development projects should be seen as expressions of support for a sustainable model of development that is people-centred, non-discriminatory, participatory and transparent and that requires public authorities and others responsible for implementation to be held accountable for their actions.

A. Equality and non-discrimination

38. The principles of equality and non-discrimination are the foundations of international human rights and, as such, are enshrined in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. In line with both, all States parties have an obligation to guarantee that all rights are exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
39. Equality and non-discrimination imply that the human rights of communities and population groups affected by large-scale development projects should not be violated at any stage of the process. For the Special Rapporteur, this means that defenders working on behalf of or as part of populations affected by such projects should be fully and meaningfully involved in their design, implementation and evaluation. Particular attention has to be paid to those who traditionally have been marginalized and excluded from decision-making processes to ensure that their concerns are heard and that the impacts of such projects do not violate their rights.
40. Those responsible for large-scale development projects should pay particular attention to multiple grounds of discrimination, as the intersection of such grounds could lead to different and even more

adverse effects among those affected by the projects (see general comment No. 20, on article 2 (2) of the International Covenant on Economic, Social and Cultural Rights). For example, women in a rural community are likely to experience the effects of such projects differently from men, and their economic and social status could aggravate this situation. Those defending women's rights face particular challenges and additional risks linked to the work that they do and the issues they face are challenging, which is why it is important that they be able to do their work without incurring retaliation of any sort.

41. Furthermore, those responsible for the project should make sure that those traditionally marginalized and excluded from decision-making are able to voice their opinion and participate on their own terms in the process. At the outset, data collected during the assessment stage needs to be collected in such a way as to allow for it to be disaggregated by gender, income, social or other status, and other relevant factors.
42. The Special Rapporteur observes that Member States have adopted different approaches to ensure that the rights of those affected by large-scale development projects are respected. In Colombia, the National Hydrocarbons Agency is required by law to spell out in any contract it issues the methodology it will use to assess the impact of a project on affected populations and the way in which the project will benefit them (see decree No. 1760 of 26 June 2003). Prior consultation is also a right of marginalized populations in Colombia (see presidential decree No. 1 of 26 March 2010), but the Special Rapporteur notes that there appear to be different interpretations of what this right implies, which lead to discrepancies in the way in which it is applied. The Special Rapporteur is concerned about reports received from a number of countries alleging that community members and defenders of their rights who have made efforts to express their concerns about development projects affecting them have been met with excessive use of force and the issuance of states of emergency rather than dialogue.
43. The Special Rapporteur believes that the best way of ensuring that the principles of equality and non-discrimination are respected in the context of large-scale development projects is through the use of human rights impact assessments. Such assessments should be designed and conducted, on a regular basis, with due consideration being given to human rights and should ensure that the potential impacts of a project are investigated keeping in mind the potential existence of different grounds for discrimination. A human rights impact assessment would be based on an analysis of human rights obligations, not just of the impact of the project on trade or sustainability. The Special Rapporteur strongly encourages the systematic use of human rights impact assessments, in line with the principles elaborated upon in the present report.
44. In this context, the Special Rapporteur notes that the Guiding Principles on Business and Human Rights require that companies identify and assess any actual or potential adverse human rights impacts through meaningful consultation with potentially affected groups, as an integral part of their responsibility to respect human rights. Such impact assessments should be carried out not only at the start of a new project or business relationship, but also periodically throughout the life cycle of the project, prior to any planned significant changes or if there is a significant shift in the operating context (for example, in the event of rising social tensions) (see Guiding Principle No. 18).

B. Participation

45. As already mentioned, participation in public affairs is a right recognized in various human rights instruments, including the Declaration on Human Rights Defenders. The Special Rapporteur emphasizes that besides being a right in itself, participation is an obvious means of ensuring respect for other human rights, including the right to be treated equally and without discrimination. The principle of participation affords genuine ownership and a sense of control over the development process to those affected by the project or policy in question. It is important to ensure involvement at all phases (assessment and analysis, project design and planning, implementation, monitoring and evaluation).
46. Communities and those defending their rights should participate actively, freely and meaningfully in the process and be protected from retaliation and other violations at all stages. Ensuring such participation and protection is a responsibility of both State and non-State actors involved in

large-scale development projects. Participation goes beyond mere consultation; it implies active involvement and empowerment of defenders and building their capacity to interact effectively with other stakeholders.

47. When it comes to ensuring that local communities affected by projects and those defending their rights have an opportunity to participate effectively from the early stages of the project, it is essential that those implementing projects acknowledge the existence of rights at the local level and the importance of protecting them. The use of “community protocols”, by which communities outline their expectations to stakeholders, could be useful to this end.
48. As mentioned above, in order to respect the principles of equality and non-discrimination, it is important to ensure that those affected are able to participate in the process on their own terms. Information conveyed about the project must be in the language or languages of the affected communities, and participation should be facilitated to allow the views of the affected communities to be effectively communicated, in a manner that takes into consideration the level of literacy and is culturally sensitive. In this context, human rights defenders working with local communities can play a crucial role in facilitating communication between them and those responsible for the policy or project and in conveying information in ways that are understandable to those affected. The Special Rapporteur is also aware of situations where national human rights institutions have assumed a similar role and strongly encourages their engagement in such processes where appropriate (see A/HRC/22/47, paras. 106-108).
49. The Special Rapporteur emphasizes the need to ensure the participation of those traditionally marginalized or excluded from decision-making processes. A central aspect in this regard is the need to build the capacity of such people to analyse issues affecting them and voice their opinion on those issues during the process. State and non-State actors responsible for the development and implementation of projects or policies should facilitate such involvement as a matter of priority. To this end, it could be useful to collaborate with non-governmental organizations and human rights defenders.
50. Those responsible for the implementation of large-scale development projects should be attentive to expressions of concern or discontent regarding participation and other related issues by local communities and human rights defenders. Such expressions might take the form of protests, including in public spaces, which should be respected by non-State and, in particular, State actors responsible for law enforcement and protection during public assemblies.
51. In addition, the free, prior and informed consent of indigenous peoples must be obtained for any negotiation or consultation process on large-scale development projects to take place.⁸ The concept of free, prior and informed consent has come about as a result of the recognition that indigenous peoples have strong cultural attachments to the territories they inhabit. The Special Rapporteur on the rights of indigenous peoples has emphasized the need for Governments to engage in consultations with indigenous peoples in good faith, with the objective of achieving consent (A/HRC/12/34, paras. 46-49). The Special Rapporteur on the situation of human rights defenders is concerned about cases reported to her in which free, prior and informed consent has not been sought, has been sought only to a limited extent or has been sought at the same time as coercion has been exerted on communities.
52. The Special Rapporteur is encouraged by the various initiatives that have come to her attention during the preparation of the present report to enhance the participation of stakeholders in large-scale development projects, notably those designed to benefit local communities. She has observed that more needs to be done, however, in terms of implementation and urges State and non-State actors to strengthen their efforts in this area. Moreover, she notes that the right of indigenous people to free, prior and informed consent is in many cases not respected because, despite being protected by law, it is not incorporated in the regulatory framework of business enterprises, which limits implementation considerably.

C. Protection

53. The Special Rapporteur has observed that when human rights defenders are involved in the implementation and monitoring of large-scale development projects they are exposed to serious risks,

including to their physical integrity. Since 2007, the Special Rapporteur has considered about 100 cases dealing with defenders involved in monitoring the implementation of large-scale development projects, mostly related to the operations of extractive industries but also to land disputes. The operations of hydroelectric and energy-related industries have also created situations that have led to an intervention by the Special Rapporteur.

54. Brazil, Cambodia, Guatemala, Mexico, Peru and the Philippines have received the largest number of communications from the Special Rapporteur in this regard. Almost one third of the communications sent during the period under review relate to allegations of killings and attempted killings. In the opinion of the Special Rapporteur, this shows that the risks faced by human rights defenders working in the context of development projects are extremely serious. Very often, defenders receive threats, including death threats that are then followed by attacks. Moreover, defenders working on these issues are arrested and detained and their activities are criminalized, including when they are carried out in accordance with the exercise of fundamental rights, notably the right to freedom of peaceful assembly and the right to freedom of expression.
55. Country visits undertaken by the Special Rapporteur since 2007 have shed light on the high risks faced by human rights defenders involved in large-scale development projects. When she visited Honduras in 2012, the Special Rapporteur expressed concern about the reports and testimonies she had received of violations and abuses committed against defenders working for the rights of indigenous and other local communities by law enforcement authorities, often in collusion with private security firms hired by the corporate sector. While recognizing the legitimate right of the Government to promote private investment, the Special Rapporteur expressed concern about the “state of fear” affecting defenders working on environment-related issues and opposing projects by private companies or the State, in particular in the construction of dams and in the mining and tourism sectors.
56. When the Special Rapporteur visited India in 2011, she pointed to the vulnerability of defenders engaged in denouncing development projects that threatened or destroyed the land, natural resources and the livelihoods of affected communities. Those defenders had been stigmatized and branded as being “anti-Government” or “sympathizers of Naxalites”; they had been arrested and ill-treated and, in some instances, killed. She specifically highlighted the killings of at least 10 individuals who had filed petitions under the Right to Information Act, denouncing violations connected to scams, illegal mining and illegal hydroelectric power operations.
57. The Special Rapporteur on the rights of indigenous peoples has dedicated three reports (A/HRC/18/35, A/HRC/21/47 and A/HRC/24/41) to the impact of extractive industries on indigenous territories where mining, forestry, oil and natural gas extraction and hydroelectric projects have affected the lives of indigenous communities. The Special Rapporteur underlined reports of an escalation of violence by Governments and private security forces as a consequence of extractive operations in indigenous territories, especially against indigenous leaders, and of a general repression of human rights in situations where entire communities had voiced their opposition to extractive operations (A/HRC/18/35, para. 38). He pointed to a lack of operative consensus about the extent and means of realization of the State’s duties with regard to resource extraction and development projects and a lack of a minimum common ground for understanding the key issues by all actors concerned (A/HRC/18/35, paras. 62 and 66).
58. Against this background, the Special Rapporteur on the situation of human rights defenders wishes to emphasize the obligation of States to provide protection to those claiming their legitimate right to participate in decision-making processes and voicing their opposition to large-scale development projects, as well as those defending the rights of local communities in this context. Article 3 of the Universal Declaration of Human Rights, articles 6 (1) and 9 (1) of the International Covenant on Civil and Political Rights and article 12 (2) of the Declaration on Human Rights Defenders enshrine the right to be protected, which places duties on the State that are relevant to the scope of this report. It is of utmost importance that those who participate in processes relating to large-scale development projects, including assessments, project design, implementation, monitoring and evaluation, can do so without fear of retaliation or persecution from State and non-State actors alike. Furthermore,

if those affected by large-scale development projects choose to express themselves outside of the process organized by those responsible for such a project, for example through public assemblies, print publications or social media, such A/68/262 16/24 13-41811 activities should be facilitated and those involved should be protected from threats or retaliation.

59. As the Special Rapporteur has argued in her 2011 and 2012 reports, law enforcement officials need to be properly trained in order to apply a proportionate use of force and provide protection to peaceful protesters during assemblies (A/66/203, paras. 21-27, and A/67/292, para. 22). In cases of threats made against human rights defenders, the State is required under articles 2 and 12 (2) of the Declaration on Human Rights Defenders to implement protection measures. The Special Rapporteur has also emphasized on previous occasions that such measures need to be designed and implemented in close cooperation with those they are intended to protect, whether they are organized on an ad hoc basis or form part of a broader protection programme (A/HRC/13/22, paras. 68-91). In the context of largescale development projects, the Special Rapporteur recommends making the protection of those affected by such projects and those acting on their behalf an integral part of an overall strategy, in order to ensure that those affected can effectively participate in the process without fear of retaliation. The Special Rapporteur notes that ensuring the effective participation of rights holders in projects can contribute significantly to defusing tensions among duty bearers and that defusing tensions would constitute a first step towards enhancing the protection of rights holders.
60. Private companies that are involved in large-scale development projects and that employ private security forces, as is often the case in the context of large-scale infrastructure and extractives projects, should assess, in consultation with the affected communities, the potential risks of employing such forces. Furthermore, they should ensure that private security forces receive adequate training on human rights, including with respect to the role and rights of defenders, and have in place mechanisms for reporting and investigating any allegations of abuse. Companies employing private security forces should consider abiding by initiatives such as the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Service Providers. They may also need to assess potential risks from security provided by State security forces. Some companies have conducted human rights training with State security forces in order to reduce the risk of resorting to the disproportionate use of force.

D. Transparency and access to information

61. The principle of transparency relates to the availability and accessibility of relevant information. Access to information is a right enshrined in article 19 (2) of the International Covenant on Civil and Political Rights. It is essential for the ability of rights holders to understand how their rights will be affected, how to claim rights that could be undermined by a large-scale development project and how to ensure the accountability of stakeholders and duty bearers. Human rights defenders are directly affected by this dimension of development projects and play a key role in communicating the relevant aims of the projects and in building trust among affected communities. In order to carry out these functions effectively, they need to be able to access relevant information about the project.
62. Article 6 (a) of the Declaration on Human Rights Defenders recognizes the right to actively seek information and obtain access to it, which places certain obligations on States to make relevant information available. The Special Rapporteur has previously indicated what standards should be applied in this regard (see A/67/292, paras. 51-55). Article 6 (a) of the Declaration also enshrines the right of defenders to receive and hold information, which is essential to their monitoring and documentation activities. Information relating to large-scale development projects should be publically available and accessible. In order for such information to be available to those affected by a given project, it needs to be provided in the appropriate languages and through the appropriate media.
63. With regard to private enterprises, the Guiding Principles on Business and Human Rights provide that in order to account for how they address their human rights impacts, companies should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of stakeholders. Such communications should be of a form and frequency that reflect the impacts and is accessible to the intended audience and should provide sufficient information to evaluate the adequacy of the company's response to the particular impact involved (see Guiding Principle No. 21).

64. When there is information about the project that needs to be kept confidential, the decision not to disclose such information should be based on established criteria spelled out in the project concept or, in the case of a Government, in law. The Special Rapporteur finds the principle of maximum disclosure to correspond most closely with international standards and that that principle should apply to any access-to-information regime, including in connection to large-scale development projects that could have an impact on matters of public interest. Exceptions to this principle should be applied only when disclosing information would harm the interests of the State, as provided for in legislation compliant with international human rights law (A/67/292, paras. 51-55, and Human Rights Council resolution 22/6, para. 11 (e)).
65. In the context of large-scale development projects, timely disclosure of information about project conceptualization and preparation, including contracts and subcontracts, documents with information about parties involved, financing frameworks, terms and conditions, impact assessments and mitigation strategies should be made available to the extent possible. The Extractive Industries Transparency Initiative, a multi-stakeholder voluntary mechanism that aims to increase the transparency of natural resource revenues by developing standardized reporting requirements for companies and Governments, has made a significant, positive contribution to increasing transparency in this sector. The initiative also offers relevant lessons learned regarding the difficulties and, at times, the unwillingness of Governments and private companies to disclose such information.
66. In this connection, anyone who in good faith discloses information on largescale development projects that they think is of public interest should be protected against retaliation. The necessary legal, institutional and administrative framework needs to be in place to ensure the integrity and protection of whistle-blowers in connection to development projects in order to guarantee their right to seek and disseminate information and also the right of the public to receive relevant information about the human rights situation in a particular context or country.
67. The principle of transparency should not be applied only to the technical aspects of accessibility and availability. It should be recognized that the process of requesting access to information can be very complex, and that both local communities and those working to defend their rights might have difficulties in obtaining such information if they lack the technical knowledge about the issues at stake. States and other actors involved should do their utmost to assist stakeholders in obtaining such information. This is an area where the assistance of national and international non-governmental organizations with expertise in the issues at stake could also provide much-needed support to local communities. Capacity-building for defenders and those affected by development projects is therefore a crucial aspect of every project and should be provided for when planning and implementing such projects and when monitoring their impact.
68. Lack of information and transparency and opaque decision-making are not only major flaws in the implementation of large-scale development projects. They can also lead to the disempowerment and vulnerability of defenders and affected communities, and seriously undermine the credibility and legitimacy of both State and non-State actors involved in the projects.
69. The Special Rapporteur is dismayed by the reports she has received during the preparation of the present report indicating that relevant information is seldom made available to human rights defenders and local communities who request it. The Special Rapporteur observes that defenders and those affected respond by approaching private companies directly, because they find the assistance of the State inadequate or non-existent.

E. Accountability mechanisms and redress

70. The principle of accountability requires all stakeholders, especially those considered to be duty bearers, to be responsible for specific outcomes and actions, in accordance with their obligations under the standards, laws, rules and regulations that govern their work. To this end, mechanisms must be in place for rights-holders to communicate their grievances, claim responsibilities and obtain effective redress if violations occur, without fear of intimidation of any sort. In this context, the Special Rapporteur notes with dismay that the Working Group on the issue of human rights and transnational corporations and other business enterprises, in its 2013 report to the Human Rights Council, reported

having received grave allegations of harassment, persecution and retaliation against human rights defenders seeking judicial remedy for business-related violations (A/HRC/23/32, para. 47).

71. Traditional ways of ensuring accountability are channelled through the justice system. However, in some instances, State-based judicial structures do not operate in a timely or effective manner and therefore are not ideal avenues for upholding the rights of communities affected by large-scale development projects and those defending such rights. This situation can arise from the considerable time it takes for a case to pass through the courts and from the expense that such a process implies for those affected, to name but two reasons. Such constraints can create important accountability deficits and contribute to a climate of impunity that can expose affected communities and those defending their rights to acts of intimidation, even attacks. The existence of other accountability mechanisms, whether State-based administrative institutions (e.g. national human rights institutions and ombudspersons), grievance mechanisms attached to multi-stakeholder initiatives or independent oversight mechanisms, is therefore crucial in the context of large-scale development projects. The role of national human rights institutions as non-judicial, independent mechanisms can be very important in ensuring appropriate accountability and redress for human rights violations linked to the implementation of large-scale development projects.
72. Private enterprises, as well as State donors and private donors, can also contribute to accountability, for example by establishing mechanisms, either by themselves or in cooperation with other stakeholders. All non-judicial grievance mechanisms, whether State- or non-State-based, should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and, in the case of company- or project-level mechanisms, based on dialogue and engagement (see Guiding Principle No. 31 of the Guiding Principles on Business and Human Rights).
73. Affected communities and defenders of their rights should have information about how and to whom to submit a complaint, as well as on the established timeline and stages for processing their complaint. Locally, village-level forums can make it easier to register questions and concerns and immediately obtain answers to questions regarding a large-scale project. It is particularly important to ensure that such mechanisms are available to those most at risk of violations, as in many cases they are also among the most marginalized of those affected and hence have few means of accessing such mechanisms. Human rights defenders can play a crucial role in facilitating access to accountability mechanisms for affected communities, including those most marginalized.
74. The option of integrating human rights safeguard policies supported by accessible and effective accountability mechanisms into development projects can complement and even reinforce existing formal structures. These mechanisms, which can be administered by the business sector, alone or with stakeholders, by an industry association or by a multi-stakeholder group, should comply with the criteria for effectiveness and responsiveness set out in the Guiding Principles on Business and Human Rights (see, in particular, Guiding Principle No. 31). These mechanisms should never be used to preclude access to judicial remedy. However, when implemented effectively, they can enable the early identification and resolution of issues that have an adverse impact on human rights, and can enable project actors to address systemic issues that contribute to human rights violations.
75. Grievance mechanisms can also be implemented in the home countries of international corporations and in donor countries. The example of the national contact points for the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development was highlighted to the Special Rapporteur by various stakeholders during the preparation of the present report as being an important mechanism in a number of countries. The Inspection Panel of the World Bank was also mentioned as a viable mechanism for individuals who believe that their rights have been infringed upon as a result of the implementation of World Bank-funded projects. Mention was also made of the Compliance Advisor/Ombudsman, the grievance mechanism for those affected by projects financed by the International Finance Corporation and the Multilateral Investment Guarantee Agency.
76. It should be safe for those who wish to report human rights concerns and violations to access existing accountability and grievance mechanisms; these people should not suffer any acts of violence or retaliation for having engaged with these mechanisms. The necessary confidentiality procedures,

early-warning systems, risk assessment protocols and protection measures should be built into the accountability mechanisms so that they can react promptly and offer effective protection to alleged victims of human rights violations or those reporting on their behalf.

V. Conclusions and recommendations

A. Conclusions

77. Communities and those defending their rights play a crucial role in shaping development policies and projects that are people-centred and non-discriminatory by impeding economic and political elites to monopolize the development of such policies and projects. Human rights defenders are key for ensuring the effective implementation of a human rights-based approach to development, as outlined above, which is why they should be able to carry out their activities without fear of intimidation or harassment of any sort. This is particularly relevant in the context of the discussion on the post-2015 development agenda. Civil society is calling for meaningful participation, higher levels of accountability from Governments and international institutions and the protection of human rights under the rule of law.
78. Human rights defenders are at the heart of the development process and can be key actors in ensuring that development is inclusive, fair and beneficial for all and that dialogue is used to reinforce social cohesion and pre-empt conflict and the radicalization of positions. Defenders can play a crucial role as members of teams conducting human rights impact assessments, formal multistakeholders oversight mechanisms and mediation and grievance mechanisms and as independent watchdogs monitoring the implementation of large-scale development projects.
79. In order for defenders to play such a role, State and non-State actors responsible for large-scale development projects need to engage with stakeholders, including affected communities and those defending their human rights, in good faith. A human rights-based approach to development requires this; if stakeholders are not engaged in good faith, the process remains a formality and an opportunity will be lost in terms of improving relations and defusing tensions among stakeholders and ensuring sustainable and peoplecentred development, as well as in terms of the sustainability of the project itself.

B. Recommendations

80. In the light of the conclusions set out above, the Special Rapporteur wishes to make the following recommendations to the various stakeholders.
81. States should:
 - (a) Enshrine a human rights-based approach to development in relevant legislation and administrative regulations, ensuring that contracts, permits, certificates and other documentation required for large-scale development projects to go ahead, to include the elements mentioned in section IV above, most notably participation of affected communities and those defending their rights in decision-making related to such projects;
 - (b) Oblige those responsible for large-scale development projects to carry out human rights impact assessments and human rights due diligence on an ongoing basis;
 - (c) Consider the substantive incorporation of a human rights-based approach in national development plans and the effective implementation of the human rights aspects of such plans;
 - (d) Refrain from stigmatizing communities affected by large-scale development projects and those defending their rights, and recognize that their concerns are legitimate and necessary components in a process aimed at securing sustainable human development;
 - (e) Ensure that the rights to freedom of expression, association and peaceful assembly are respected by allowing those affected by large-scale development projects to express concern and discontent, and ensure in this context that those protesting are protected from violations, notably by ensuring that law enforcement officials are properly equipped and trained to apply proportionate use of force if needed;

- (f) Engage with all stakeholders in large-scale development projects, especially communities affected and individuals defending their rights, in good faith, not just as a formality;
- (g) In collaboration with non-governmental organizations and human rights defenders, make every effort to strengthen the capacity of those traditionally marginalized or excluded from decision-making to actively and meaningfully participate in decision-making processes that affect them;
- (h) Recognize the protection needs of those engaging in development processes and provide protection accordingly, in close consultation with those in need of protection;
- (i) Consider enshrining in law clear provisions for access to information that facilitate maximum disclosure and allow exceptions to the principle of maximum disclosure only in clearly defined and limited circumstances, in compliance with international standards on the right to access to information;
- (j) In a similar vein, provide for similar regulations with regard to access to information in contracts, permits, certificates and other documentation required for large-scale development projects to go ahead;
- (k) Facilitate and assist communities affected by large-scale development projects and those defending their rights in obtaining information regarding a given project, as the complexity of the information might make it difficult to find;
- (l) Ensure that information communicated to communities affected and those defending their rights is conveyed in a manner that is understandable to them and is culturally sensitive, through appropriate media and in a language they understand;
- (m) Enshrine the protection of whistle-blowers in law and in practice;
- (n) In the case of indigenous peoples affected by large-scale development projects, recognize their right to free, prior and informed consent where this has not already been done, incorporate that right in the regulatory framework for large-scale development projects and implement it effectively;
- (o) Ensure that various types of accountability mechanisms are available to those who feel that their rights have been infringed upon in the context of large-scale development projects, including judicial and administrative mechanisms that are well resourced, impartial, effective, protected against corruption and free from political and other types of influence;
- (p) Where appropriate, consider facilitating the creation of multi-stakeholder initiatives and independent oversight mechanisms in addition to State-based accountability mechanisms;
- (q) Ensure that State-based accountability mechanisms respect standards for confidentiality and have an early warning system in case of threats or other violations against those who have filed or are considering filing a petition, with proper risk assessment and protection measures available;
- (r) Empower national human rights institutions to deal with complaints relating to large-scale development projects.

82. In the context of the post-2015 development agenda, States should:

- (a) Ensure that the post-2015 development agenda is guided by internationally agreed human rights principles and standards, both during its development and its implementation, and that it ensures the active and meaningful participation of affected communities and individuals advocating their rights in the implementation of all development goals, and strengthen their capacity to do so;
- (b) Recognize the important role of human rights defenders in developing and implementing the post-2015 development agenda in the outcome document, and also recognize the right of defenders to participate in such processes, monitor progress, hold those responsible to account at the national and local levels and be protected from violations in this context.

83. Private companies should:

- (a) Exert human rights due diligence in all operations;
- (b) Adopt a policy commitment to respect all human rights that is approved at the highest levels of the organization, and perform ongoing human rights impact assessments in a meaningful way and in every project, with the full participation of potentially affected communities, those defending their rights and, especially, those traditionally marginalized or excluded from decision-making;
- (c) Fully involve stakeholders, especially affected communities and those defending their rights, in all stages of large-scale developments projects, and engage with such stakeholders in good faith and in a meaningful way, not just as a formality;
- (d) Be attentive to displays of concern and discontent that take place outside the processes facilitated by the company, for example public assemblies, and refrain from stigmatizing those expressing themselves in such a way;
- (e) Ensure that they, as well as security companies and other subcontractors, respect human rights defenders and do not harass or perpetrate violence against them and that those employing private security forces consider joining initiatives such as the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Service Providers;
- (f) Assess any security issues in close cooperation with human rights defenders and communities affected by large-scale development projects;
- (g) Disclose information related to large-scale development projects in a proactive and timely manner and in a way that is understandable and accessible to the affected stakeholders, and have clear and publicly communicated provisions for when information can be withheld from publication;
- (h) Engage in initiatives, notably the Extractive Industries Transparency Initiative and the United Nations Global Compact, aimed at increasing the transparency of corporations;
- (i) Establish accountability mechanisms, including project- or company level grievance mechanisms, that are legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on dialogue and engagement (see Guiding Principle No. 31 of the Guiding Principles on Business and Human Rights);
- (j) Cooperate fully with State-based and other accountability mechanisms.

84. Donors and investors should:

- (a) Fully integrate a human rights-based approach in their policies for allocating funds to projects, especially large-scale development projects;
- (b) In the same vein, make human rights impact assessments a requirement for obtaining funding, and ensure the inclusion of proper mitigation strategies (including for setting up project- or company-level accountability and grievance mechanisms) and realistic assessments of whether a project can be implemented without causing an adverse impact on the human rights of those affected, recognizing that such an impact is unacceptable and should not be funded;
- (c) Pay close attention to protection assessments for those participating in and affected by large-scale development projects;
- (d) Proactively disclose information about projects they support;
- (e) If they are private and institutional donors and investors, have accountability mechanisms in place for those adversely affected by projects or who feel their rights have been violated as a result of a project, and ensure that such mechanisms respect standards for confidentiality, have an early warning system in case of threats or other violations against those who have filed or are considering filing a petition, with proper risk assessment and protection measures available;

- (f) If they are State donors, ensure that accountability issues are also addressed in their home countries, notably by ensuring that the national contact point of the Organization for Economic Cooperation and Development receives adequate resources and is properly equipped to deal with complaints;
 - (g) Cooperate with State-based and other accountability mechanisms when approached by them;
 - (h) Coordinate with other donors through relevant forums to ensure the implementation of human rights-based approaches;
 - (i) Allocate funds to capacity-building for those affected by large-scale development projects and those defending their rights;
 - (j) Exert political pressure on those responsible for large-scale development projects, when needed and appropriate, to ensure compliance with international human rights standards.
85. Human rights defenders should:
- (a) Engage constructively in processes relating to large-scale development projects;
 - (b) Pay close attention to the needs and views of local communities, and ensure participation of those traditionally marginalized or excluded from decision-making.
86. United Nations agencies should:
- (a) Ensure that a human rights impact assessment is conducted for every project undertaken, and pay specific attention to the participation and protection needs of affected communities and those defending their rights;
 - (b) Support accountability mechanisms, whether initiated by States or other stakeholders.

Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, On the specific risks and challenges faced by selected groups of defenders, including journalists and media workers, defenders working on land and environmental issues and youth and student defenders, A/HRC/19/55, 21 December 2011

[...]

III. Selected groups of defenders at risk: journalists and media workers; defenders working on land and environmental issues; and youth and student defenders

[...]

B. Risks and challenges faced by the selected groups of defenders at risk

[...]

Defenders working on land and environmental issues

a) *International human rights framework and approach of the mandate holder*

60. The two International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights share a common article 1 which provides, inter alia, that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”.

61. The Declaration on Human Rights Defenders, in its preamble, recognizes the legitimacy of activities for the promotion of economic, social and cultural rights when it acknowledges the “valuable work of individuals, groups and associations” in the elimination of violations including those resulting from “the refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources”.
62. As the Special Representative had highlighted, the protection accorded to defenders by the Declaration on Human Rights Defenders is not dependant on whether the focus of the work of the defender(s) in question is on civil and political rights or economic, social and cultural rights. All peaceful actions by defenders to call attention to possible failures of the State to create the necessary social and economic conditions for the enjoyment of rights and freedoms in practice are legitimate and fall within the scope of the Declaration (A/HRC/4/37, paras. 27–30).
63. The Special Rapporteur is aware of the particular risks that these defenders face, often at the hands of non-State actors or unknown individuals acting in collusion with them. She has received, and continues to receive, allegations indicating that security guards employed by oil and mining companies allegedly use death threats, acts of intimidation and attacks against defenders who denounce the perceived negative impact of the companies’ activities on the enjoyment of human rights by local communities (A/65/223, paras. 9–12).

b) Activities, risks and challenges faced by defenders working on land and environmental issues

64. Between December 2006 and May 2011, a large number of communications sent during the reporting period (106) concerned alleged violations against defenders and activists working on land and environmental issues. According to the information received, this group is thoroughly heterogeneous. It includes defenders carrying out a vast range of activities related to land and environmental rights, including those working on issues related to extractive industries, and construction and development projects; those working for the rights of indigenous and minority communities; women human rights defenders; and journalists.
65. Therefore, this section of the report has been structured on the basis of the different subgroups identified, with each subsection including information on profile of activities, alleged violations, perpetrators and regional trends. It is also worth mentioning that there is certain overlap between the different subgroups, particularly between the group of those defenders working on issues related to extractive industries and construction and development projects and those working for the rights of indigenous and minority communities.

Defending land and environmental issues in connection with extractive industries and construction and development projects

66. During the period, the mandate holder sent 34 communications regarding defenders working on land and environmental issues in connection with the activities of extractive industries as well as construction and development projects. The main context in which these violations occurred was ongoing land disputes with both State and non-State actors, including multinational corporations and private security companies.
67. The violations reported were the result of activities connected to different extractive industries, construction and development projects, including hydroelectric power stations and cement factories (Guatemala, Brazil); dams (Brazil, India); dumps (Mexico); gas pipelines (Brazil); gated communities and marinas (Bahamas); residential and leisure complexes (Mexico); the operation of mines (China, Mexico, Ecuador, Papua New Guinea, Peru); nuclear power plants (Philippines) and the production of oil and petrol (China, Nigeria, Peru), as well as logging (Brazil, Cambodia, Honduras, Mexico).
68. According to the information received, defenders working on such issues seem to face a high risk of violations to their physical integrity, including attempted killings (Brazil, Ecuador), killings (Brazil, Cambodia, Ecuador, El Salvador, Honduras, Mexico, Philippines), attacks (Brazil, Mexico, Papua New Guinea), assault and ill-treatment (Philippines), and excessive use of force by the police during demonstrations (India). They have also been subjected to threats and death threats (Brazil, El Salvador, Guatemala, Mexico, Nigeria, Peru, Philippines) and different forms of intimidation (Peru, Bahamas, Brazil, Guatemala, Papua New Guinea) and harassment (China, Mexico, Peru).

69. In some instances, these defenders have suffered raids on their homes (China, Nigeria) and have had their houses destroyed by fire (Guatemala). In the Americas region, they have often been stigmatized by campaigns against them (Guatemala) and statements made by public officials (Peru). They have also faced criminalization on charges of extortion and blackmailing (China), espionage (Angola), defamation (Cambodia), terrorism (Peru) and intent to sell drugs (Bahamas). Others have been subjected to arrest and arbitrary detention (Ecuador, India, Mexico, Nigeria).
70. Violations against these defenders are carried out at the hands of State and non-State actors. State actors have included police, local authorities and public officials who have spoken out publicly against the work of defenders (Peru). Non- State actors have included transnational companies (Cambodia), media (Guatemala), paramilitary groups (Brazil, Colombia, Mexico) and private security guards (Brazil, Ecuador).
71. Defenders working on land and environmental issues in connection with extractive industries and construction and development projects in the Americas were the subject of most of the communications (21) within the group during the reporting period. They also faced the highest risk of death as a result of their human rights activities. Seven of the 21 communications sent were related to killings, six of which were sent to the Americas. This particular group of defenders in this region also faced a wide range of other violations such as death threats, attacks, attempted killings, intimidation, harassment, as well as stigmatization and discrediting campaigns.
72. Defenders working on these issues in the Asia Pacific region were the subject of nine of the total of 34 communications sent during the period, two of which concerned killings (Philippines, Cambodia). They also faced criminalization, threats, arrest and intimidation. In the African region, three communications were sent in total, two to Nigeria and one to Angola).

Defenders working for the rights of indigenous peoples and minorities

73. The mandate holder has also received and acted upon allegations of violations against defenders working on land and environmental issues as they relate to indigenous peoples and minority communities (29 communications). The activities in which they are engaged include participating in negotiations with local authorities in order to resolve land disputes (Brazil, Colombia and Guatemala) and investigating cases of land-grabbing (Bangladesh); defending the rights of indigenous communities (the Plurinational State of Bolivia, Cambodia, Guatemala, India, New Zealand, Peru) and representing indigenous communities at local and national levels (Bangladesh, Chile, Guatemala, Malaysia, Mexico, Peru and Tanzania); campaigning against forced evictions (Mexico, Colombia); participating in protests (Chile, India, Nepal); raising awareness abroad regarding violations of human rights (Papua New Guinea); campaigning for the protection of borders of their natural reserve (Brazil); and the submission of information to the United Nations human rights mechanisms (Guatemala).
74. A number of communications in relation to human rights defenders in this group concerned women defenders in Colombia, Guatemala, India, Mexico, Nepal and Peru.
75. Violations reported included threats to physical integrity in the form of killings (the Plurinational State of Bolivia, Brazil, Chile, Colombia, Guatemala, Malaysia and Mexico); attempted killings (one women defender in Mexico); physical attacks (36 women defenders in Nepal, an entire community in Brazil, five youths in Honduras, Chile, Nigeria and Papua New Guinea); and ill-treatment in detention (Bangladesh).
76. Violations against psychological integrity were also reported in the form of death threats (one women defender in Mexico and three defenders, including two women, in Peru); threats (Bangladesh, Brazil, Peru, three defenders in Nigeria, Papua New Guinea and a community in the United Republic of Tanzania), and harassment and intimidation (women defenders in Mexico, Bangladesh, Brazil and Peru).
77. Defenders working on these issues have also been subjected to arrest (India) and detention (Chile, New Zealand, Brazil, Nepal, Bangladesh and Tanzania). They have faced criminalization in the form of accusations of possession of illegal weapons, land-grabbing (Bangladesh) and terrorism-related offences (17 defenders in New Zealand). NGOs in Guatemala faced stigmatization and a public

campaign to discredit them following the presentation of a report to the Committee on the Elimination of Racial Discrimination.

78. These defenders have also reported to have been subjected to forced evictions (Colombia) and raids on their homes (Cambodia, New Zealand and Nigeria).
79. The perpetrators of the violations against this particular group of defenders reportedly included State and non-State actors and unidentified groups and individuals. Of the communications concerning killings (10), four were allegedly committed by State actors, one by non-State actors, and five by unknown groups or individuals.
80. In terms of regional trends, of the 29 communications sent concerning this group of defenders, 18 were sent to the Americas region (Chile 3, Guatemala 3, Peru 3, Mexico 2, Colombia 2, Brazil 3, Honduras 1, Plurinational State of Bolivia 1) and, of these, 10 dealt with killings, while others concerned death threats and threats (Brazil, Chile, Peru) and criminalization (Chile) and defamation (Guatemala). Nine communications were sent to the Asia Pacific region, including to Bangladesh (2) Malaysia (1), India (2), Nepal (1) and Cambodia (1). One of the communications expressed concern regarding an alleged killing (Malaysia) and four dealt with detention of defenders (India 2, Bangladesh and Nepal). Two communications were sent to the African region namely to Nigeria and the United Republic of Tanzania).

Women defenders working on land and environmental issues

81. Women human rights defenders working on land and environmental rights issues have been the subject of a number of communications (25) sent during the reporting period to countries in the Americas (17), Asia Pacific (6) and Africa (2).
82. These women defenders were active in negotiations with local authorities to resolve land conflicts (900 women in Brazil, Colombia Guatemala, India) and denouncing landgrabbing (China); working for reparations for indigenous people (India, Nepal and Peru) and denouncing encroachments on their lands (India, Nepal); organizing community events (Colombia); campaigning against nuclear power plants (Philippines 2); campaigning against the development of a gated community and marina development (Bahamas); working for the rights of field workers (Honduras); protesting against the creation of a residential and leisure complex (Mexico); filming a documentary on the harmful impact of oil production (Nigeria); campaigning for water rights and against the construction of a dam (India); and campaigning against mining projects (Peru).
83. In doing this kind of work, women human rights defenders have been subjected to threats against their physical integrity including: killings, mostly in the Americas region (Colombia, Guatemala, Honduras); excessive use of force against them during protests (Brazil, India and Nepal); and attacks by armed assailants (Guatemala). They have also been subjected to threats and death threats (Colombia, Ecuador, Mexico, Philippines, Peru); and harassment and intimidation (Bahamas, Mexico, Peru), including against their families (Colombia).
84. These women defenders have also suffered stigmatization (Peru) and criminalization on accusations of espionage (Angola) and have been sentenced to prison on charges of extortion and blackmailing following a trial allegedly without legal representation (China). Some of them have been arrested and arbitrarily detained (India, Nepal and Nigeria). The alleged perpetrators of the aforementioned violations mostly included State actors (20) but also non-State actors (3) and unknown or unidentified actors (13).
85. As mentioned, the Americas region received most of the communications (17) sent by the mandate holder during the period concerning women defenders working on land and environmental issues, most of them related to killings and attempted killings. Other communications to this region dealt with threats and death threats (5) and harassment and intimidation (9). Alleged perpetrators in this region were mostly unidentified groups or individuals (12) followed by State and non-State actors.
86. All of the communications sent to countries in the Asia Pacific region related to women defenders working on these issues indicated State actors as the alleged perpetrators of the violations (6).

Of these communications, one dealt with death threats (Philippines) and five dealt with arrest and detention (India 3, China, Nepal).

87. Two communications concerning women defenders working on land and environmental issues were sent to the African region namely to Angola and Nigeria.

Journalists working on land and environmental issues

88. According to the information received by the mandate holder during the reporting period, a specific group of defenders that also appears to be at particular risk is journalists working on land and environmental issues.
89. The communications sent during the reporting period related to this group (9) indicate that the activities in which they were engaged included: presenting and producing a televised news programme, which dealt with land issues and raised concerns regarding links between national police and private security groups (Honduras); the covering of forced evictions (Uganda); writing on environmental issues (China, El Salvador, the Islamic Republic of Iran and the Russian Federation); reporting on the work of mining companies (Mexico); making video-documentaries on demonstrations related to land and environmental issues (Nigeria); and covering the exhumation of bodies (Guatemala).
90. These journalists have been killed (Honduras, Mexico); suffered physical attacks (Russian Federation, Uganda) and death threats (Honduras, El Salvador); and been subject to different forms of intimidation (Guatemala). They have also been exposed to their cameras being confiscated by police (Uganda) and subjected to raids and searches of their homes and offices, during which images and production equipment were stolen (Guatemala). Journalists working on land and environmental issues have also faced charges of espionage (Islamic Republic of Iran), been arrested (China) and been arbitrarily detained without access to lawyers (Nigeria).
91. State actors were the alleged perpetrators in a number of communications (Uganda, China, the Islamic Republic of Iran, Nigeria), but unknown perpetrators (Honduras, Guatemala, Russian Federation) and non-State actors (El Salvador, Mexico) were also cited in some communications.
92. Four of the nine communications sent regarding this group of defenders were addressed to countries in the Americas region, of which two concerned the killings of journalists (Honduras, Mexico). The communications sent to the African region (Uganda and Nigeria) during the period dealt with violations allegedly committed by State actors. One communication was sent to the region of Europe and Central Asia (Russian Federation) and one to the Asia Pacific region (China).

[...]

IV. Conclusions and recommendations

117. The Special Rapporteur is very concerned at the extraordinary risks that these groups of defenders face due to their work in defence of human rights. Most of these risks not only directly affect their physical integrity and that of their family members, but also include the abusive use of legal frameworks against them and the criminalization of their work. The Special Rapporteur is also extremely concerned at reports received indicating that State actors, including Government officials, State A/HRC/19/55 20 security forces and the judiciary, are the perpetrators of many of the violations committed against these defenders.

[...]

B. Defenders working on land and environmental issues

123. Defenders working on land and environmental issues are also highly exposed to attacks to their physical integrity, often by non-State actors, and many are killed because of their work on the environmental impact of extractive industries and development projects, or the right to land of indigenous peoples and minorities. The Americas seems to be the region where these defenders are most at risk.

124. States should give full recognition to the important work carried out by defenders working on land and environmental issues in trying to find a balance between economic development and respect of the environment, including the right to use land, natural wealth and resources, and the rights of certain groups, including indigenous peoples and minorities.
125. States should not tolerate the stigmatization of the work of these defenders by public officials or the media, particularly in context of social polarization, as this can foster a climate of intimidation and harassment which might encourage rejection and even violence against defenders.
126. States should combat impunity for attacks and violations against these defenders, particularly by non-State actors and those acting in collusion with them, by ensuring prompt and impartial investigations into allegations and appropriate redress and reparation to victims.

[...]



Economic Commission for Latin America and the Caribbean (ECLAC)
Comisión Económica para América Latina y el Caribe (CEPAL)
www.eclac.org