

- ♦ examining complaints alleging violations of applicable economic, social and cultural rights standards within the state.

The Committee called upon states parties to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights and requested that details both of the mandates and the principal relevant activities of such institutions be included in reports submitted to the Committee.

General Comment on the domestic application of the ICESCR

In December 1998 the Committee adopted General Comment 9 (E/C.12/1998/24) on the domestic application of the ICESCR, divided into four sections: first, the duty to give effect to the ICESCR in the domestic legal order; second, the status of the ICESCR in the domestic legal order; third, the role of legal remedies; and fourth, the treatment of the ICESCR in domestic courts.

General Comment 9 states that questions relating to the domestic application of the ICESCR must be read in the context of two principles of international law: first, the government may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation; and second, everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law. With those principles in mind, the Committee stated that a government seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" (article 2(1) of the ICESCR) or that, in view of other means used, they are unnecessary.

With regard to the status of the ICESCR in the domestic legal order, the Committee stated that, in general, legally binding international human rights standards should operate directly and immediately within the domestic legal system, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The ICESCR does not stipulate, however, the specific means by which its terms are to be implemented in the national legal order and there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Nonetheless, several principles follow from the duty to give effect to the ICESCR: the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the ICESCR; account should be taken of the means which have proven to be most effective to ensure the protection of other human rights; and while the ICESCR does not formally oblige states to incorporate its provisions into domestic law, such an approach is certainly desirable since direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the ICESCR rights by individuals in national courts.

On the role of legal remedies the Committee stated that the right to an effective remedy need not be interpreted as always requiring a judicial remedy and further, that administrative remedies will, in many cases, be adequate. Such administrative remedies should be accessible, affordable, timely, and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. Whenever a ICESCR right cannot be made fully effective without some role for the judiciary, for example in relation to non-discrimination, judicial remedies are necessary. With regard to justiciability, General Comment 9 notes that, in relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential but that the contrary presumption is too often made in relation to economic, social and cultural rights. There is no ICESCR right which could not, in the majority of legal systems, be considered to possess at least some significant justiciable dimensions. The Committee noted: it is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts; courts are generally already involved, however, in a considerable range of matters which have important resource implications; the adoption of a rigid classification of economic, social and cultural rights which places them, by definition, beyond the power of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent; and such a rigid classification would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

With regard to the treatment of the ICESCR in domestic courts, the Committee noted that some courts have applied the provisions of the ICESCR either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the ICESCR for interpreting domestic law but, in practice, the impact of the ICESCR on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the ICESCR in cases in which individuals have sought to rely on it. The Committee stated that courts should take account of ICESCR rights where necessary to ensure that the state's conduct is consistent with its obligations. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law which must always be taken to include respect for international human rights obligations.

General Comment 9 concluded that when a domestic decision-maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the ICESCR and one that would enable the state to comply with the ICESCR, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

