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The implementation of international law in the national legal order : a legislative perspective

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4.1 IMPLEMENTATION OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

4.1.1 General

The post-1945 era has witnessed the emergence of various human rights treaties, which depart from the premise that individuals, as humans, are inherently entitled to certain basic rights that should not be infringed upon by others, most notably by state authorities. A useful perspective that has been adopted in order to categorise the obligations flowing from human rights treaties, distinguishes between negative and positive obligations.³⁰⁹ Negative obligations, in short, are norms under which states are obliged to refrain from conduct that may constitute a violation of the rights to which their citizens are entitled. Positive obligations, in contrast, encompass norms that compel states to actively take measures in order to ensure the full application of the rights entrenched in the applicable treaty.³¹⁰ This section focuses on the latter category and addresses the question what legal requirements apply to the legislative measures that have been taken by states in order to comply with their positive obligations.

The exact scope and content of the positive obligations depend on the applicable right and on the context in which it is relied on. As we have seen in section 3.2.2, they may include, but are not limited to, the duty to adopt legislative measures. In contrast to negative human rights obligations, the established positive obligations do not only provide protection to individuals vis-à-vis the state, but are also intended as safeguards for individuals in relation to possible violations conducted by other private entities.³¹¹ Were

309 J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks no. 7, Council of Europe, Strasbourg 2007) 5.

310 Mowbray, in his book on positive obligations flowing from the ECHR, argues that the key characteristic of positive obligations is 'the duty upon states to undertake specific affirmative tasks'. A.R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford 2004) 2.

311 As the Human Rights Committee put it, 'the positive obligations on States Parties [...] 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'. UN Human Rights Committee, 'General Comment no. 31: the nature of the legal general obligation imposed on states parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, par. 8.

such a violation to occur, the state, depending on the circumstances, may be under the obligation to investigate and punish the harm inflicted upon its citizen. Although positive obligations may be found under several international human rights regimes, the ECtHR has developed the most elaborate case law relating to the doctrine of positive obligations. For this reason, this section focuses on the positive obligations flowing from the ECHR.

In section 3.2.2 it was argued that the source of any positive obligation to adopt implementing legislation can be found in article 1 ECHR, read in conjunction with its (other) substantive provisions. The question arises to what extent the ECtHR has formulated rules that govern the fulfilment of positive obligations by the authorities of the states party to the ECHR. In this regard, it must be pointed out that the ECtHR has consistently held that:

‘where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means’.³¹²

This starting point applies to positive measures in general, which also include measures that comprise the enactment of legislation.³¹³ However, as may be derived from the ECtHR’s case law, the freedom to choose the means necessary to comply with the positive obligations entrenched in the ECHR has been circumscribed in several ways. For the purpose of the present study, it is relevant to explore the circumstances in which the ECtHR has demanded the adoption of domestic legislation to comply with the positive obligation of the relevant provision of the ECHR. In addition, this section will examine whether the ECtHR indicates what elements such legislation should contain, and how it should be applied in practice. The scope and substance of the positive obligations depend on the right that is at stake; the duty to adopt implementing legislation may vary from one Convention right to the other. For reasons of space, the present section is limited to articles 2, 4, 5, 8 and 10 of the ECHR. As a result, it must be emphasised, relevant case law developed under other provisions of the ECHR, will not be discussed here. Therefore, we must be aware that the analysis contained in section 4.1 cannot an exhaustive discussion of all posi-

312 For example *Budayeva and others v Russia* (App no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECHR 20 March 2008, par. 134.

313 Arguably, the Court attaches greater importance to the result that is produced by a domestic measure than to the nature, either legislative or non-legislative, of the measure. In *Brincat and others v Malta*, which concerned the right to life, the Court expressed the view that ‘while there is a primary duty to put in place a legislative and administrative framework, it cannot rule out the possibility, *a priori*, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice.’ *Brincat and others v Malta* (App no 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11) ECHR 24 July 2014, par. 112.

tive obligations under the ECHR. However, this limitation will not prevent us from obtaining a fair impression of the subject matter.

4.1.2 Content of the Convention

4.1.2.1 *Right to life*

Article 2 ECHR embodies probably the most fundamental principle of the Convention: the right to life. The positive obligations that flow from this provision can be summarised by the responsibility of a state party to 'take appropriate steps to safeguard the lives of those within its jurisdiction'³¹⁴, which was stated in *Öneryildiz v. Turkey*. This case concerned a methane explosion at the site of a rubbish tip at the outskirts of Istanbul, Turkey, which had resulted in the deaths of thirty-nine people living in the vicinity. Prior to the accident, experts had concluded that the rubbish tip posed an imminent danger to the health of the area's inhabitants and to the surrounding environment. The question arose whether Turkey had failed to meet its obligations under article 2 ECHR. The ECtHR expressed the view that article 2 'entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.³¹⁵ This framework should encompass 'effective criminal-law provisions to deter the commission of offences against the person, backed up by lawenforcement machinery for the prevention, suppression and punishment of breaches of such provisions'.³¹⁶ In the particular context of dangerous activities, such as the collection of waste in *Öneryildiz v. Turkey*, it added that:

'special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. [...] In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.'³¹⁷

Instead of formulating the requirement that the legislative and administrative framework applicable to dangerous activities should guarantee 'effective protection' to the rights involved, the Court chose to enumerate

314 *L.C.B. v the United Kingdom* (App no 23413/94) ECHR 9 June 1998, par. 36.

315 *Öneryildiz v Turkey* (App no 48939/99) ECHR 2004-XII 79, par. 89.

316 *Osmanoğlu v Turkey* (App no 48804/99) ECHR 24 January 2008, par. 72. See also *Ghimp and others v Moldova* (App no 32520/09) ECHR 30 October 2012, par. 43, in which the Court held that 'the domestic legal system [is required] to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another'.

317 *Öneryildiz* (n 315) par. 90 and *Budayeva* (n 312) par. 132.

the different features that should be included in the framework. From the ECtHR's perspective, this level of detail may be justified by the importance of the interests that were at stake: individuals' lives.

In *Opuz v. Turkey*, the ECtHR reached a similar conclusion with regard to the obligation to adopt an 'effective deterrent' legislative framework. However, the subject matter was different. In this case, a woman, the applicant's mother, had died as a result of domestic violence committed by the applicant's husband. The applicant complained that the authorities had failed to provide sufficient protection to the applicant's mother and herself. The ECtHR was confronted with the question whether the criminal law provisions pertaining to the punishment of domestic violence lived up to Turkey's obligations under article 2 ECHR. These provisions contained *inter alia* the requirement that criminal investigations would not start until it was established that the acts had led to a minimum of ten days sickness for work. The Court considered that:

'[...] the application of the above-mentioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against [the victim] deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims.'³¹⁸

Thus, similar to the Court's reasoning in *Öneryildiz*, it placed the notion of 'effectiveness' at the heart of its evaluation of domestic law in the light of article 2 ECHR. It did not, however, specifically enumerate the elements which should have been included in the domestic legislative framework.

In addition to the obligation to put in place a deterrent legislative and administrative framework, states have a duty to ensure that the framework is 'properly implemented' and that breaches of the right to life are repressed and punished.³¹⁹ This entails the obligation to perform an independent and impartial official investigation into the circumstances of the breach of the right to life.³²⁰

In *Vo v. France* the ECtHR clarified what the obligation to 'properly implement' the domestic legal framework could entail in the field of public health. In this case, a woman's pregnancy had to be terminated as a result of a doctor's mistake.³²¹ French criminal law did not offer an effective remedy against the unintentional destruction of a fetus, and the question thus arose whether this amounted to a breach of France's positive obligations under

318 *Opuz v Turkey* (App no 33401/02) ECHR 2009-III 107, par. 145.

319 *Öneryildiz* (n 315) par. 91. Also *Guiliano and Gaggio v Italy* (App no 23458/02) ECHR 2011-II 275, par. 298 and *Fanzyeva v Russia* (App no 41675/08) ECHR 18 June 2015, par. 51.

320 *Fanzyeva* (n 319) par. 51.

321 *Vo v France* (App no 53924/00) ECHR 2004-VIII 67, par. 89.

article 2 ECHR. After it had pointed to the lack of consensus in Europe as to the question whether a fetus could be regarded as a 'person' that is entitled to the right to life, it decided, nonetheless, to consider the alleged failure of the French authorities under article 2 ECHR and held:

'The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable'.³²²

In the present case, the 'effective judicial system' did not, in the view of the ECtHR, necessarily require a remedy of a criminal legal nature. In the sphere of medical negligence, the availability of civil redress or disciplinary measures would suffice to fulfil the positive obligations under article 2. Therefore, the ECtHR found no violation of the right to life.³²³ More generally, the ECtHR has held that where an infringement on the right to life has not been intentional, article 2 ECHR does not necessarily require recourse to criminal prosecution.³²⁴

In view of the above, it must be concluded that article 2 ECHR, as interpreted by the ECtHR, imposes some constraints on the national legislature that takes appropriate measures to protect the lives of the citizens that it represents. These constraints cannot conceal, however, the significant amount of latitude that is allowed to states. As the ECtHR has eloquently summarised this state of affairs:

'In principle, States should have the discretion to decide how a system for the implementation of a regulatory framework protecting the right to life must be designed and implemented. What is important, however, is that whatever form the investigation takes, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress. Any deficiency in the investigation, undermining its ability to establish the cause of the death or those responsible for it, may lead to the finding that the Convention requirements have not been met [...]'.³²⁵

4.1.2.2 Prohibition of slavery and forced labour

Pursuant to article 4 ECHR, no one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labour. From this

322 Ibid, par. 89. Also *Kudra v Croatia* (App no 13904/07) ECHR 18 December 2012, par. 103 and *Bajić v Croatia* (App no 41108/10) ECHR 13 November 2012, par. 89.

323 *Vo* (n 321) par. 90 and 95.

324 *Anna Todorova v Bulgaria* (App no 23302/03) ECHR 24 May 2011, par. 73. Also, in relation to the protection of life from road traffic accidents, *Ciobanu v Moldova* (App no 62578/09) ECHR 24 February 2015, par. 32.

325 *Ciobanu* (n 324) par. 33. Also *Zubkova v Ukraine* (App no 36660/08) ECHR 17 October 2013, par. 37.

provision the ECtHR has derived various positive obligations, such as an obligation to investigate cases of potential human trafficking in an effective and independent manner.³²⁶

In addition, the ECtHR has identified a positive obligation to adopt domestic legislation of a criminal nature to penalise the acts referred to in article 4, and to enforce that legislation in practice.³²⁷ As a justification for this interpretation of article 4, it pointed *inter alia* to the fact that this provision, together with articles 2 and 3 ECHR, 'enshrines one of the basic values of the democratic societies making up the Council of Europe' from which no derogation is permitted.³²⁸

In *Siliadin v. France*, the ECtHR investigated French criminal legal provisions applicable to the case of a Togolese woman who had come to France as a minor, and who was held in servitude and subjected to forced labour for several years. The applicant complained that French criminal law had not afforded her sufficient protection against the situation and had made it impossible to punish the offenders. The relevant provisions of the French Criminal Code did not expressly criminalise acts of servitude or forced labour; instead, it referred to acts of 'exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'. The ECtHR referred to its earlier case law and seems to have attached great importance to the required 'effectively deterrent' character of domestic legislation. In the present case, this effective deterrent character was not sufficiently present in the French penal provisions in force at the time, as had become clear from the different interpretations that had been adhered to by several French courts. Therefore, the French legislation in force did not afford the applicant 'practical and effective protection against the actions of which she was a victim'.³²⁹ It thus found a breach of article 4 ECHR.³³⁰

The positive obligations under article 4 also include the more specific obligation of states to put in place a legislative and administrative framework to prohibit and punish trafficking, as was established by the ECtHR in *Rantsev v. Cyprus and Russia*. Moreover, states are under the obligation to adopt adequate measures regulating businesses often used as a cover for human trafficking and a state's immigration rules must 'address relevant

326 *Rantsev v Cyprus and Russia* (App no 25965/04) ECHR 2010-I 65, par. 288.

327 *Siliadin v France* (App no 73316/01) ECHR 2005-VII 333, par. 89 and 112. For a discussion of this case, see H. Cullen, 'Siliadin v France. Positive obligations under article 4 of the European Convention on Human Rights' 6 *Human Rights Law Review* 3 (2006) 585-592, 587-589; A. Nicholson, 'Reflections on *Siliadin v. France*. Slavery and legal definition' 14 *International Journal of Human Rights* 5 (2010) 705-720, 707.

328 *Siliadin* (n 327) par. 82 and 112.

329 As Nicholson puts it, 'we see the court [...] re-affirming that the requirement that laws be effective requires more than the creation of relevant laws'. Nicholson, 'Reflections on *Siliadin v. France*' (n 327) 707.

330 *Siliadin* (n 327) par. 142-149. Also *C.N. and V. v France* (App no 67724/09) ECHR 11 October 2012, par. 105-108, in which the Court reached the same conclusion.

concerns relating to encouragement, facilitation or tolerance of trafficking'.³³¹ In this case, the ECtHR stated that, similar to the conclusion it had drawn in *Siliadin v. France*, 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking'.³³² The ECtHR had to determine whether the legislative and administrative framework currently in place in Cyprus could offer such 'practical and effective protection'. Whereas the Cypriot legislation prohibiting trafficking and sexual exploitation was considered to be in conformity with the demand imposed by article 4 ECHR, the ECtHR identified a number of weaknesses as regards the Cypriot immigration policy, in particular in relation to the regime of 'artiste' visas.³³³ Under this regime, visas were issued to foreign nationals who went to work in Cypriot cabarets, musical-dancing places or other forms of night entertainment. It was widely known, however, that the women to whom these visas were issued, would in practice become victims of human trafficking.³³⁴ After the analysis of several aspects of this visa regime, the ECtHR concluded that the applicable immigration regulations did not meet the standard laid down in article 4. This case demonstrates that the criminalisation in domestic law of certain acts that fall within the scope of article 4, as was required by the Court in *Siliadin*, may not be sufficient to pass the test of practical and effective protection; other branches of domestic laws may also require modification.³³⁵

4.1.2.3 Right to liberty and security

Article 5 ECHR, according to which everyone is entitled to a right to liberty and security of person, encompasses a positive obligation upon states to 'take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge'.³³⁶ There is only scarce evidence in the case law of the ECtHR, however, that article 5 ECHR may require the enactment of measures of a legislative nature.³³⁷

331 *Rantsev* (n 326) par. 284-285.

332 *Ibid*, par. 284.

333 *Ibid*, par. 290-291.

334 For a more extensive discussion of the facts of the case, see J. Allain, 'Rantsev v Cyprus and Russia' 10 *Human Rights Law Review* 3 (2010) 546-557, 547-550.

335 See also R. Piotrowicz, 'States' obligations under human rights law towards victims of trafficking in human beings. Positive developments in positive obligations' 24 *International Journal of Refugee Law* 2 (2012) 181-201, 196.

336 *Storck v Germany* (App no 61603/00) ECHR 2005-V 111, par. 102 and *Stanev v Bulgaria* (App no 36760/06) ECHR 2012-I 81, par. 120.

337 These measures may not, however, expand the grounds on the basis of which an individual may be deprived of his personal liberty. See for example *Ostendorf v Germany* (App no 15598/08) ECHR 7 March 2013, par. 87.

In *Lobanov v. Russia*, the applicant, a Russian national, had been convicted by a Kazakh court for the commission of drug-related offences. He had been sentenced to five years imprisonment. After having served more than one year of his prison term in Kazakhstan, the applicant was transferred to Russia, at his request. Meanwhile, however, the Kazakh court had conducted a supervisory review of Mr. Lobanov's case, which led to a reclassification of the facts and a reduction of the sentence. It ordered the immediate release of the convict, who at the time was detained in a Russian prison to serve the remainder of his prison term. Mr. Lobanov, however, was not released until almost four months after this order. Subsequently he brought proceedings against the Russian authorities seeking compensation for damages he had incurred during the almost four months'-period of his illegitimate detention. His request was rejected. Before the ECtHR the issue was raised whether the delay in his release from prison could be reconciled with the provisions contained in article 5, which permits infringements upon an individual's liberty only in case of lawful arrest or detention. While some delay in the execution of an order to release a prisoner is often inevitable, the ECtHR argued, especially when the order has to be carried out by the authorities of another state, as in the case of Mr. Lobanov, it held that:

'the State must put in place a legislative and administrative framework which would ensure that each and every step required for a person's release in such a situation is taken promptly and diligently.'³³⁸

In the present case, the ECtHR found that the delay in the execution of the order to release Mr. Lobanov was too long and clearly demonstrated neglect on the part of the Russian authorities. Therefore, it found it a violation of article 5.³³⁹

However, it remains unclear what standards the required 'legislative and administrative framework' should meet. Indeed, it seems that the ECtHR is indifferent with regard to the manner in which it will be implemented, as long as it achieves the aim that is part of article 5 ECHR: to rule out unnecessary delay in the execution of an order to release a detainee.

4.1.2.4 Right to respect for family and private life

Under article 8 everyone has the right to respect for his private and family life, his home and his correspondence. Again, to observe this right, states may be required to adopt domestic legislation. In *Sari and Çolak v. Turkey*, the ECtHR held that the state's failure to provide practical and effective protection against violations of the right of persons in police custody to communicate with family members, constituted a breach of article 8.³⁴⁰ Similarly, in

338 *Lobanov v Russia* (App no 16159/03) ECHR 16 October 2008, par. 49.

339 *Ibid*, par. 47-50.

340 *Sari and Çolak v Turkey* (App no 42596/98) ECHR 2006-V 295, par. 37. Also *Uçar v Turkey* (App no 52392/99) ECHR 11 April 2006, par. 141.

cases of medical negligence, states are under the obligation to ‘maintain and apply in practice an adequate legal framework enabling victims to establish any liability on the part of the physicians concerned and to obtain appropriate civil redress, such as an award of damages, in appropriate cases’.³⁴¹

Another interesting case in this respect was *A., B. & C. v. Ireland*, which concerned the question whether the Irish policies in the field of abortion were in accordance with the ECHR. The Irish Constitution contained a provision which stipulated that the state ‘acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right’.³⁴² This provision, laid down in article 40, third paragraph, sub 3, had been interpreted by the Irish Supreme Court as permitting abortion only in cases where it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health of the mother, including a risk of self-harm, which can only be avoided by a termination of the pregnancy. One of the applicants, who had received chemotherapy as part of cancer treatment, had complained that due to the failure of the Irish legislature to provide an effective and accessible procedure, she had not been able to establish whether she qualified for a lawful abortion in Ireland on the ground of a risk to her life or her pregnancy. The ECtHR was thus confronted with the question whether there was a positive obligation on the state to provide for such an effective and accessible procedure under article 8 ECHR.

The ECtHR noted that the constitutional provision, including its explanation by the Supreme Court had been formulated in broad terms. This contributed to a sense of legal insecurity, as the applicant and her doctor ran the risk of criminal prosecution if they would decide to end her pregnancy in contravention of applicable provision. This uncertainty could have been removed if the Irish national legislature would have adopted legislation to implement the relevant provision of the Irish constitution, as the Irish courts had suggested on various occasions. Against this background, the ECtHR held that:

‘the authorities failed to comply with their positive obligation to secure to the [...] applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with [...] the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.’³⁴³

341 *S.B. v Romania* (App no 24453/04) ECHR 23 September 2014, par. 66 and 81.

342 Constitution of the Republic of Ireland 2015 art 40.3.3 (The Stationery Office, Dublin 2015) <https://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf> (accessed 29 March 2018).

343 *A., B. & C. v Ireland* (App no 25579/05) ECHR 2010-VI 185, par. 267-268.

Thus, the ECtHR found that the sole absence of domestic legislation which would clarify the boundary between lawful and unlawful abortions amounted to a breach of the right to respect for the private life of the applicant. The ECtHR seems to attribute considerable importance to the demand of legal certainty; arguably, the notions of legal certainty and effective protection under article 8 ECHR are closely connected. This may not be surprising given the fact that in the case before it, a violation of the domestic legislative framework could very well have resulted in the criminal prosecution of the person. Nevertheless, it would go too far to infer from this the existence of a separate and *general* criterion of legal certainty that is applicable to domestic implementing legislation. Instead, it will depend on the circumstances, such as the threat of criminal prosecution, whether an effective protection of the right laid down in article 8 ECHR requires a clear legal framework.

4.1.2.5 Right to freedom of expression

Article 10, first paragraph, ECHR, stipulates that everyone has the right to freedom of expression. The ECtHR has accepted that, under circumstances, this provision, read in conjunction with article 1 ECHR, may impose the obligation upon states to adopt legislative measures in order to comply with their positive obligations under the ECHR. In *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, an Italian broadcasting company had obtained a license for nationwide television broadcasting. According to the license, the company was entitled to three frequencies covering 80% of national territory. However, the license also referred to the national frequency-allocation plan, which would provide for the allocation of the frequencies to the holders of a license. This plan was, nevertheless, not implemented by the Italian authorities. As a result, the company was not able to broadcast until ten years later, as it had not been given any frequencies to which it was entitled on the basis of the license.

Did the Italian state act in contravention of its obligations under the ECHR? The ECtHR emphasised the principal importance of pluralism and the right to freedom of expression for the proper functioning of democracy. In Italy, media pluralism had come under pressure, it was feared, as two companies commanded more than 90% of the television audience, thus creating a duopoly (both of which happened to lie in the hands of one man: business man and Italy's then prime minister, Mr. Berlusconi). Against this backdrop, the ECtHR held that:

'to ensure true pluralism, [...] it is necessary [...] to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed'.³⁴⁴

344 *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App no 38433/09) ECHR 2012-III 339, par. 130.

To this end, the Italian state was under the positive obligation to 'put in place an appropriate legislative and administrative framework to guarantee effective pluralism'.³⁴⁵ While the applicant company had obtained a broadcasting license, this license had remained without practical purpose as the Italian authorities had failed to allocate frequencies to the license-holder. This amounted to a 'substantial obstacle' to the applicant company's right to impart information and ideas. The ECtHR thus found a violation of article 10 ECHR.³⁴⁶

In the present case, the ECtHR did not elaborate on the content of the 'appropriate legislative and administrative framework' that it had perceived as necessary for the compliance with article 10 ECHR. It only referred to the purpose it should serve: to guarantee effective media pluralism in the country.

4.1.3 Legislative standards

4.1.3.1 Effectiveness

What legislative standards could be derived from the case law discussed above and from the ECHR? It has become clear that the ECtHR's case law in relation to this kind of implementing legislation has provided some guidance as to the criteria that must be observed by national legislatures in order to respect their obligations under the ECHR. First and foremost, this is the criterion of effectiveness, which has led the ECtHR to investigate whether the laws adopted on the domestic level ensure the *effective protection* of the applicable ECHR rights. This has been eloquently phrased by the ECtHR itself, which on several occasions has stated that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.³⁴⁷ As has been noted by Xenos, 'the principle of effectiveness is approached as an objective factor to guide the determination of the content of positive obligations'.³⁴⁸ Thus, what could be expected from a state in the case at hand in order to meet the requirements entrenched in the ECHR, is identical to the answer to the question what amounts to the effective protection of individuals under the applicable right. As we have seen in *Lobanov*, a legislative and administrative framework will meet the standard of effective protection under article 5 ECHR if it ensures that 'each and every step required for a person's release in such a situation is taken promptly and diligently'.³⁴⁹ Similarly, under article 10 ECHR, the effective protection of a person's right to freedom of expression

345 Ibid, par. 134 and 156.

346 Ibid, par. 138.

347 *Airey v Ireland* (App no 6289/73) ECHR 9 October 1979, par. 24.

348 D. Xenos, *The positive obligations of the state under the European Convention of Human Rights* (Routledge, London 2012) 91.

349 *Lobanov* (n 338) par. 49.

may only be complied with if the applicable domestic legal framework guarantees 'effective pluralism'.³⁵⁰

In addition to the aim that the domestic implementing legislation should achieve, the ECtHR on several occasions has indicated which material elements it should consist of. In *Öneryildiz*, the ECtHR pointed out the elements that should be included in the domestic legal framework that is applicable to dangerous activities such as the collection of waste. In *Rantsev*, the ECtHR held that the states' law-making activities must go beyond the mere prohibition and punishment of trafficking; domestic legislation should also include adequate measures regulating businesses often used as a cover for human trafficking and a state's immigration rules must 'address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'. As we have seen above, in cases of medical negligence, states are under the obligation to put in place an 'adequate legal framework enabling victims to establish any liability on the part of the physicians concerned and to obtain appropriate civil redress, such as an award of damages, in appropriate cases'. These stipulations of the content of the legislative measures cannot be considered an end in itself; rather they must be seen as a means to ensure 'effective protection' of the individual in a specific case.

4.1.3.2 Non-discrimination

A legislative standard that has not been mentioned in the context of the discussion of the various ECHR rights above, consists of the prohibition of discrimination. Pursuant to article 14 ECHR,

'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Non-discrimination, of course, is at the heart of the ECHR system. It must therefore also be considered to apply to domestic legislation that has been enacted by state parties in order to fulfil the positive obligations under the ECHR. From this point of view, the exclusion of certain minorities from the scope of a particular positive obligation to adopt domestic implementing legislation, will certainly amount to a breach of the ECHR on the part of the state.

Two examples from the ECtHR's case law may support this view. The case *Eremia v. Moldova* concerned a woman who had been the victim of domestic violence by her husband. Before the ECtHR the question was raised whether the Moldovan state, which had not protected her from domestic violence and had not prevented the recurrence of such violence, had failed to discharge its obligations under article 3 ECHR. This article

350 *Centro Europa 7 S.R.L. and Di Stefano* (n 344) par. 134 and 156.

embodies *inter alia* the prohibition of inhuman and degrading treatment.³⁵¹ The ECtHR found, in accordance with its case law, that article 3 requires:

‘on the one hand, setting up a legislative framework aimed at preventing and punishing ill-treatment by private individuals and, on the other hand, when aware of an imminent risk of ill-treatment of an identified individual or when ill-treatment has already occurred, to apply the relevant laws in practice, thus affording protection to the victims and punishing those responsible for ill-treatment’.³⁵²

With regard to the former obligation, the ECtHR established that a legislative framework to take measures against persons accused of family violence was indeed present in Moldova in accordance with article 3 ECHR.³⁵³ As regards the obligation to apply the laws in force, however, the ECtHR concluded that the Moldovan authorities had failed to comply with the positive obligation entrenched in article 3. In short, it based its finding on evidence that the authorities had refused to take action in order to prevent further domestic violence against the applicant, even though they had been well aware that the applicant was in jeopardy.³⁵⁴ For the purpose of the present section, the more interesting aspect of this case was that the applicant also complained of a breach of the prohibition of discrimination as covered by article 14 ECHR. The applicant argued that the domestic violence of which she was a victim, was gender-based. The failure of the state authorities to adequately respond to the imminent threats against the applicant, despite available information to this effect, thus amounts to discrimination on the basis of gender, she claimed.³⁵⁵ The ECtHR sided with the applicant and found a breach of article 14 in conjunction with article 3 ECHR, as it concluded that:

‘the authorities’ actions were not a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman’.³⁵⁶

While *Eremia v. Moldova* concerned the discriminatory nature of the *application in practice* of the domestic laws in force, in contravention of the articles 3 and 14, the ECtHR discussed the discriminatory nature of domestic laws itself in *Marckx v Belgium*. In this case the ECtHR was requested to assess the Belgian laws applicable to the establishment of maternal affiliation of a woman’s child which was ‘illegitimate’ in the sense that the mother was unmarried at the time of birth. Under Belgian law, no legal bond between an unmarried mother and her child arose from the mere fact of birth;

351 *Eremia v the Republic of Moldova* (App no 3564/11) ECHR 28 May 2013, par. 40.

352 *Ibid*, par. 56.

353 *Ibid*, par. 57.

354 *Ibid*, par. 66.

355 *Ibid*, par. 82.

356 *Ibid*, par. 89.

maternal affiliation was not established until after voluntary recognition by the mother or a court ruling. In this respect, the legal position of unmarried mothers differed from married mothers: whereas an unmarried mother had to take steps in order to ensure her recognition as the child's mother before the law, the latter were recognised automatically as the child's mother upon the presentation of a birth certificate.³⁵⁷ Did this distinction amount to discrimination as prohibited under article 14 of the Convention? The ECtHR answered in the affirmative as the distinction could not be 'objectively and reasonably justified'.³⁵⁸

From the foregoing it may be concluded that the adoption of discriminatory domestic laws in order to give effect to positive obligations under the ECHR, or their application in practice, may constitute a breach of the ECHR. Therefore, the ECtHR's case law seems to support that the view that non-discrimination must be considered to apply as a legislative standard to domestic legislation that is adopted as part of the positive obligations under the ECHR.

4.1.3.3 *Enforcement, remedies and 'proper implementation'*

Another element of the national legislative frameworks that states are required to adopt in order to fulfil their positive obligations under the ECHR, consists of enforcement. As we have seen above, the articles 2 and 4 ECHR demand states to criminalise certain unlawful acts. States must ensure that the necessary criminal law provisions are in place to prosecute any person suspected of the intentional taking of human life. Similarly, under article 4, states have a duty to adopt domestic legal provisions which prohibit and punish human trafficking. In other situations, the enforcement of the applicable domestic legal framework can be secured through the presence of provisions of a non-criminal nature, such as legal procedures to obtain civil redress in case of damage as a result of medical negligence, as we have seen in the context of the discussion of article 8 ECHR.

At this point we should also refer to article 13 ECHR on effective remedies, which reads:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.³⁵⁹

If a person enjoys a right under domestic implementing legislation on the basis of a positive obligation which originates from the ECHR, he should be able to have a remedy to enforce that right. The contours of the 'effective remedy' which is imperative under the ECHR, can be summarised as

357 *Marckx v Belgium* (n 50) par. 14 and 35.

358 *Ibid*, par. 43.

359 ECHR art 13.

follows. First of all, it is not needed that a violation of the latter right is established beyond doubt before claiming a violation of article 13; in order to invoke article 13 ECHR, it suffices to bring an 'arguable complaint'.³⁶⁰ State parties enjoy some discretion in the implementation of this provision within their national legal orders, in particular with regard to the form of remedies.³⁶¹ However, the competent national authority must deal with the substance of the complaint and be in the position to grant appropriate relief.³⁶² What amounts to an effective remedy clearly depends on the specific situation in which the claimant finds itself, such as a deprivation of liberty.³⁶³ In the end the crucial test is whether the remedy is effective 'in practice as well as in law'.³⁶⁴

The adoption of implementing legislation will not always suffice to fulfill the obligations under the ECHR; states may also be under the obligation to 'properly implement' the laws in place. This may include the repression and punishment of breaches of a right entrenched in the ECHR. For instance, as we have seen, the ECtHR has maintained that states are under the duty to institute criminal proceedings in response to any intentional taking of human life. In other words, the mere presence of domestic criminal laws is not enough; to fully comply with the relevant positive obligations under the ECHR, states must also apply those laws in practice.

4.1.3.4 Formal aspects

Finally, in some cases the ECtHR has demanded the observance of formal criteria as well, such as the requirement of clarity.³⁶⁵ As we have seen in *A., B. & C. v. Ireland*, this may serve the purpose of legal certainty for individuals who are entitled to the protection that is offered by the ECHR rights. In other cases, such as *Siliadin v. France*, the ECtHR has emphasised the necessity of clarity in order to maximise the deterrent effect of the implementing legislation. The interest of deterrence could also demand the adoption of legislation of a criminal legal nature, as opposed to civil or administrative legal provisions. Although the formal requirements (clarity and nature of the implementing legislation) that are applicable to implementing legislation might be viewed as separate criteria, it may be more convincing to consider these as accessory to the material requirement of effective protection. At the end of the day, the ECtHR will assess whether the state authorities have provided 'effective protection' to an individual in the case before it.

360 A recent example is *De Tommaso v Italy* (App no 43395/09) ECHR 23 February 2017, par. 180.

361 B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights* (6th edn OUP, Oxford 2014) 133.

362 *Aydin v Turkey* (App no 23178/94) ECHR 25 September 1997, par. 103.

363 See for an extensive discussion of the applicable criteria Council of Europe, *Guide to good practice in respect of domestic remedies* (Council of Europe, Strasbourg 2013) < www.coe.int >.

364 *Wille v Liechtenstein* (App no 28396/95) ECHR 1999-VII 279, par. 75.

365 As will be discussed in section 11.3.3.1, this requirement bears a resemblance to the requirement of 'foreseeability'.

The clarity of the domestic law at hand may be an indication whether the standard of effective protection has been met. On the other hand, it could be argued on the basis of *A., B. & C. v. Ireland* that the lack of a clear legal norm may not be sufficient to find a violation of the ECHR when the domestic law, despite its obscurity, has not negatively affected the protection to which an individual is entitled.

4.1.4 Overview

As appears from the above, states party to the ECHR are under the duty not only to abstain from conduct that constitutes an infringement on the ECHR rights, but also to take effective measures to safeguard access to those rights by its citizens. These so-called positive obligations can be derived from article 1, read in conjunction with the various substantive rights embodied in the ECHR. Positive obligations may entail the adoption of all kinds of measures. In most cases the ECtHR has demonstrated a considerable level of indifference as to the nature of these measures, either legislative or non-legislative. In some cases, however, the ECtHR has made clear that a state's positive obligations can only be successfully complied with after the enactment of certain legislative measures that meet the legislative standards prescribed by the ECtHR. They demand that domestic implementing legislation meets the requirements of effectiveness and non-discrimination. Moreover, with regard to the articles 2 and 4, the adoption of criminal laws may be mandatory, as is the application of those laws in practice and the provision of an effective remedy under article 13 ECHR. Finally, the ECtHR has stated that the observance of formal criteria may also be imperative in specific circumstances.

4.2 IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

4.2.1 General

In addition to the protection of civil and political rights, as entrenched in the ECHR and the International Covenant on Civil and Political Rights (ICCPR), the international community has made efforts to codify economic, social and cultural rights. Examples include the right to health and the right to an adequate standard of living. Their most comprehensive codification is the International Covenant on Economic, Social and Cultural Rights (ICESCR), the origins of which can be found in the Universal Declaration of Human Rights (UDHR), a (non-binding) resolution adopted by the UNGA in 1948.³⁶⁶ The UDHR enumerates various human rights, including both

³⁶⁶ UNGA res 217(III)A (10 December 1948).

civil and political rights and economic, social and cultural rights. After its adoption, efforts were made to codify both categories in binding instruments as well. Eventually, this resulted in two separate treaties: ICCPR and ICESCR.³⁶⁷ They are, in combination with the UDHR, often referred to as the International Bill of Rights.³⁶⁸

The ICESCR was adopted in 1966 and entered into force on 3 January 1976. Currently 167 states are party to the ICESCR.³⁶⁹ In 2008 it was supplemented by the Optional Protocol which established an individual complaints procedure. As yet, 23 states are party to the protocol.³⁷⁰

Scholars have written extensively on the differences between civil and political rights (often referred to as 'first generation human rights') on the one hand, and economic, social and cultural rights (usually categorised as 'second generation human rights') on the other hand. There is neither a need, nor space to revisit this debate in its entirety.³⁷¹ However, it may be useful to briefly address some perceived differences between the ICCPR and the ICESCR in order to fully understand the character of the obligations flowing from economic, social and cultural rights. A major difference between the ICCPR and the ICESCR lies in the nature of the state obligations entrenched in the respective treaty. Whereas the ICCPR provides for an obligation to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant', ICESCR contains a state duty to take steps towards the 'progressive realisation' of the rights embodied in ICESCR.³⁷² Due to the terms used in the ICESCR, it has been argued that economic, social and cultural rights, in contrast to civil and political rights, cannot be legally enforced as they do not contain 'rights' but obligations to take certain (policy) measures.³⁷³ This certainly is an 'oversimplification'.³⁷⁴ For instance, as we have seen in the previous section on the ECHR, civil and political rights may also encompass positive obligations to take certain specified measures; they may not be limited to the state obligation to refrain from certain conduct if that conduct constitutes an infringement on the protected interest of an individual. Furthermore, the CESCER has emphasised that the rights entrenched in the

367 M. Senyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford 2009) 26-27; M. Craven, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development* (Clarendon Press, Oxford 1995) 6-7.

368 Craven, *The International Covenant on Economic, Social and Cultural Rights* (n 367) 16-17.

369 <http://indicators.ohchr.org/> (accessed 29 March 2018).

370 Ibid.

371 For an overview of this discussion, see Craven, *The International Covenant on Economic, Social and Cultural Rights* (n 367) 7-16.

372 ICCPR art 2, first paragraph, and ICESCR art 2, first paragraph. Although this difference is correct in general, there may be exceptions. Th. van Boven, 'Categories of rights' in: D. Moeckli, S. Shah and S. Sivakumaran (eds) *International human rights law* (2nd edn OUP, Oxford 2014) 143-156, 144-145.

373 B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, cases, and materials* (1st edn OUP, Oxford 2014) 1.

374 Craven, *The International Covenant on Economic, Social and Cultural Rights* (n 367) 11.

ICESCR contain 'significant justiciable dimensions'.³⁷⁵ Perhaps for these reasons, Van Boven observes 'a significant evolution [...] over the years towards the enhanced status of economic, social and cultural rights', which have been brought 'on a par' with civil and political rights.³⁷⁶

4.2.2 Content of the Convention

The ICESCR enumerates several economic, social and cultural rights. The most important rights are the right to work (article 6), the right to the enjoyment of just and favourable conditions of work (article 7), the right to form trade unions (article 8, first paragraph, sub a), the right to strike (article 8, first paragraph, sub d), the right to social security (article 9), the right to an adequate standard of living (article 11), the right to health (article 12), the right to education (article 13) and the right to take part in cultural life (article 15). Moreover, article 1 ICESCR stipulates that all peoples have the right of self-determination, a provision which is an exact copy of article 1 ICCPR.

The state obligations and, at the receiving end, the rights of individuals, entrenched in the ICESCR have three 'dimensions': an obligation to respect, protect and fulfil. They cannot be derived from the text of the ICESCR, but must be considered part and parcel of the substantive rights included in Part III.³⁷⁷ Whereas the 'obligation to respect' imposes a duty on states to refrain from conduct in violation of the applicable rights, the 'obligation to protect' provides that states must take measures to prevent violations by third parties. In this regard, the 'obligation to protect' bears some resemblance to the positive obligations under the ECHR examined in section 4.1. The 'obligation to fulfil' requires states to take measures aimed at the full realisation of the rights embedded in the ICESCR.³⁷⁸

In order to promote compliance with the ICESCR, it provides for the establishment of a supervisory body. While this task was originally intended to be performed by the Economic and Social Council, one of the principal organs of the UN, in 1985 it was decided to put in place a committee of independent experts to take over this task: the Committee on Economic, Social and Cultural Rights.³⁷⁹ Its main duty is to oversee state compliance with the ICESCR on the basis of reports submitted by state parties pursuant to article 16. Furthermore, the CESCR may receive and consider complaints

375 CESCR, 'General Comment no. 9: the domestic application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, par. 10.

376 Van Boven, 'Categories of rights' (n 372) 149.

377 CESCR, 'General Comment no. 12: the right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, par 15.

378 Ch. Tomuschat, *Human rights. Between idealism and realism* (2nd edn OUP, Oxford 2008) 43.

379 ECOSOC, 'Review of the composition, organisation and administrative arrangements of the Sessional Working Group of Governmental Experts on the implementation of the International Covenant on Economic, Social and Cultural Rights' Res 1985/17 (28 May 1985) UN Doc E/RES/1985/17.

issued by aggrieved individuals in accordance with the Optional Protocol to the ICESCR.³⁸⁰

4.2.3 Legislative standards

4.2.3.1 *Implementation and progressive realisation*

States have a duty to adopt domestic measures required for the implementation of the ICESCR. This follows from article 2, first paragraph, which reads:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.

Whatever the means of implementation, they must be ‘adequate to ensure fulfillment of the obligations under the ICESCR’.³⁸¹ The CESCR has expressed the view, in its General Comment on the above-cited provision, that ‘in many instances legislation is highly desirable and in some cases [...] even indispensable’.³⁸² For example, the CESCR has argued that it may be difficult to combat discrimination if a ‘sound legislative foundation’ for the necessary measures is absent.³⁸³ In the same vein, as was noted by Saul, Kinley and Mowbray, the CESCR has ‘subsequently made very clear the importance it attaches to states enacting legislation (and enforcing it) as effective means to realize the Covenant’s rights’.³⁸⁴

The substance of the obligation to adopt domestic legislation in order to implement the above-cited provision is largely dependent upon the meaning attributed to the phrases ‘to the maximum of [a state’s] available resources’ and ‘achieving progressively the full realization of the rights’.

380 On the condition that states that are believed to be in breach of their obligations have become a state party to the Optional Protocol.

381 CESCR, ‘General Comment no. 9’ (n 375) par. 7.

382 CESCR, ‘General Comment no. 3: the nature of states parties’ obligations (art. 2, para 1, of the Covenant)’ (14 December 1990) UN Doc E/1991/3, par. 3.

383 Ibid. See also paragraph 17 and 18 of the Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights. The Limburg Principles were agreed upon in 1986 by 29 ‘distinguished experts in international law’ convened under the auspices of the International Commission of Jurists, a non-governmental organisation dedicated to the protection of human rights. Although these principles do not have a legal basis in the Covenant, or in international law in general, they reflect the experts’ view of the ‘present state of international law’ <<https://www.escri-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>> (accessed 29 March 2018).

384 Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (n 373) 159.

The reference to the maximum of a state's available resources is 'unavoidably subjective', as it will be the state itself that assesses which resources are available and until what maximum.³⁸⁵ On the other hand, it may be argued that a lack of resources may not be invoked as a justification for inertia on the part of the state. In this regard, the CESCR has stated that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.³⁸⁶

The reference to the 'progressive realisation' of the rights embedded in the ICESCR indicates, in the view of the CESCR, that:

[t]he concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.³⁸⁷

These statements expressed by the CESCR cannot conceal the fact that the precise scope of article 2, first paragraph, remains somewhat vague. For this reason, it seems very hard to infer from these general observations specific legislative standards. An exception may be found in the principle of non-discrimination, which has a separate legal basis in the ICESCR. Fortunately, the interpretation of the *specific* ICESCR rights by the CESCR may provide for additional guidance as to the standards that should be met in the relevant domestic legislation. These principles and standards, which can be found in the so-called 'General Comments' and recommendations ('Concluding Observations') issued by the CESCR, and, to a lesser extent, in the views adopted by CESCR in the context of the individual complaints procedure under the Optional Protocol, will be discussed in the remaining part of this section.³⁸⁸

4.2.3.2 Non-discrimination

Perhaps the most important legislative standard which may be derived from the text of the ICESCR is the prohibition of discrimination, i.e. differ-

385 Ibid, 143-144.

386 CESCR, 'General Comment no. 3' (n 382) par. 10.

387 Ibid, par. 9.

388 In cases where a particular legislative standard can be derived from several or even many sources, we have - for the sake of brevity - limited the references to the General comments or the most recent reports.

ential treatment which cannot be objectively and reasonably justified.³⁸⁹ It has been codified in article 2, second paragraph, which stipulates:

‘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’.³⁹⁰

The CESCR has recognised that ‘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’.³⁹¹ Therefore, the standard of non-discrimination has been termed an ‘immediate and cross-cutting’ obligation in the ICESCR.³⁹²

The importance of equal treatment has also been emphasised with regard to other specific rights entrenched in the ICESCR. For example, with regard to discrimination on the basis of gender, article 3 stipulates that state parties ‘undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights’ set forth in the ICESCR. Articles 2, second paragraph, and 3, have been described as ‘integrally related and mutually reinforcing’.³⁹³ They require that ‘the principle of equality [...] 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’.³⁹⁴ Identical arguments have been made with regard to *inter alia* a person’s access to social security, which must be ensured without discrimination, and a person’s right to participate in a particular cultural activity under the articles 9 and 15 respectively.³⁹⁵ In practice, this means that the domestic legislation that was enacted in order to implement the requirements of the ICESCR may not discriminate on prohibited grounds.³⁹⁶

389 CESCR, ‘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)’ (2 July 2009) UN Doc E/C.12/GC/20, par. 13.

390 Other provisions which entail a prohibition of discrimination of women can be found in articles 3 and 7, sub a, sub i.

391 CESCR, ‘General Comment no. 20’ (n 389) par. 2. Also J. Clifford, ‘Equality’ in: D. Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn OUP, Oxford 2013) 420-445, 434-435.

392 CESCR, ‘General Comment no. 20’ (n 389) par. 7.

393 CESCR, ‘General Comment no. 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of the International Covenant on Economic, Social and Cultural Rights)’ (11 August 2005) UN Doc E/C.12/2005/4, par. 3.

394 Ibid, par. 9.

395 CESCR, ‘General Comment no. 19: the right to social security (art. 9)’ (4 February 2008) UN Doc E/C.12/GC/19, par. 30; CESCR, ‘General Comment no. 21: 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)’ (21 December 2009) UN Doc E/C.12/GC/21, par. 22.

396 CESCR, ‘General Comment no. 20’ (n 389) par. 8.

4.2.3.3 *Consultation*

Furthermore the CESCR has underlined the importance of consultation in ‘formulating, implementing, reviewing and monitoring laws and policies’ related to the right to just and favourable conditions of work, which is entrenched in article 7 ICESCR. In the view of the CESCR, such consultation could be performed with various organisations. Among them are the traditional social partners, such as workers’ and employers’ organisations, and other interest groups. The latter category encompasses organisations that represent minority groups, such as persons with disabilities, younger and older persons, women, workers in the informal economy, migrants, lesbian, gay, bisexual, transgender and intersex persons, and persons that belong to ethnic groups and indigenous communities.³⁹⁷ In the same vein, consultations should be held by state parties that consider the enactment of implementing legislation in order to perform their duty under the right of everyone to take part in cultural life. Indeed, the CESCR asserts that the applicable article 15, first paragraph, sub a:

‘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’.³⁹⁸

Thus, as may be derived from this statement, the main reason for holding consultations with parties involved is to seek support for national implementing legislation.

Also beyond articles 7 and 15 ICESCR, the CESCR has emphasised the importance of ‘[carrying] out a broad process of consultation and participation in the drafting and adoption [of national legislation].’³⁹⁹

4.2.3.4 *Observance of applicable international law*

In many cases the CESCR has also indicated that the domestic implementing legislation under the ICESCR must be consistent with other international legal obligations to which the state is bound. For instance, with regard to the right to just and favourable conditions of work, which emanates from article 7, the CESCR has stated:

³⁹⁷ CESCR, ‘General Comment no. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)’ (27 April 2016) UN Doc E/C.12/GC/23) par. 56 and 65, sub c. See also paragraphs 35 and 40 on exceptions to limitation on daily hours of work or weekly rest periods respectively.

³⁹⁸ CESCR, ‘General Comment no. 21’ (n 395) par. 16, sub c.

³⁹⁹ For example CESCR, Concluding observations on the sixth periodic report of Colombia (6 October 2017) UN Doc E/C.12/COL/CO/6, par. 18; CESCR, Concluding observations on the sixth periodic report of Canada (4 March 2016) UN Doc E/C.12/CAN/CO/6, par. 14.

'[...] States parties should ensure that other international agreements do not negatively affect the right to just and favourable conditions of work, for example, by restricting the actions that other States parties could take to implement the right'.⁴⁰⁰

A similar point was made with regard to the right to social security, to which the CESCR added that '[a]greements concerning trade liberalization should not restrict the capacity of a State Party to ensure the full realization of the rights to social security'.⁴⁰¹ In other words, state parties to the ICESCR must observe and continue to observe its requirements when they contract other international legal obligations.

Whereas the aforementioned examples reflect the requirement that other international agreements which are concluded by a state party must be consonant with the obligations of that state under the ICESCR, the inverse situation has also been addressed by the CESCR. In order to perform their obligations under the right to sexual and reproductive health, which is considered part of article 12 ICESCR, states 'should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA)'. It then referred to several authoritative interpretations of the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women.⁴⁰²

The CESCR has made similar statements with regard to, *inter alia*, the rights of indigenous peoples⁴⁰³, the rights of persons with disabilities,⁴⁰⁴ the rights of minors,⁴⁰⁵ the rights of refugees, asylum seekers and stateless persons,⁴⁰⁶ the right to join and form trade unions⁴⁰⁷ and the right to housing⁴⁰⁸.

The CESCR's references to other international norms must be seen as an attempt to ensure the consistent interpretation of the various applicable human rights instruments by states and, in particular, as a recognition that

400 CESCR, 'General Comment no. 23' (n 397) par. 72 and 79.

401 CESCR, 'General Comment no. 19' (n 395) par. 57 and 65.

402 CESCR, 'General Comment no. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22, par. 49. Also CESCR, Concluding observations on the initial report of Pakistan (23 June 2017) UN Doc E/C.12/PAK/CO/1, par. 48.

403 CESCR, Concluding observations on the sixth periodic report of Colombia (6 October 2017) UN Doc E/C.12/COL/CO/6, par. 18.

404 CESCR, Concluding observations on the initial report of Pakistan (n 402) par 24.

405 Ibid, par 56.

406 Ibid, par 26.

407 CESCR, Concluding observations on the sixth periodic report of Colombia (n 403) par 40; CESCR, Concluding observations on the fifth report of Australia (23 June 2017) UN Doc E/C.12/AUS/CO/5, par 30; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (7 October 2016) E/C.12/DOM/CO/4, par. 40.

408 CESCR, Concluding observations on the sixth periodic report of Canada (4 March 2016) UN Doc E/C.12/CAN/CO/6, par. 40; CESCR, Concluding observations on the second periodic report of the Sudan (9 October 2015) UN Doc E/C.12/SDN/CO/2, par. 48.

the interpretation of the ICESCR, and the domestic legislation which is adopted in order to give effect to its provisions, is subject to the meaning which is attributed under the other related, instruments, guidelines and protocols.

4.2.3.5 Monitoring of compliance and enforcement

The CESCR has indicated that the mere adoption of legislation by state parties in order to fulfil their obligations under the ICESCR is insufficient; states must also monitor compliance and ensure the adequate enforcement of the legislation in practice. Of course, these two elements go hand in hand; enforcement of legislation, in the sense of punishment of violations, presupposes the establishment of a breach of the law. In turn, a violation of the applicable legislation can only be determined if a system has been put in place to monitor compliance with that legislation.

Therefore, the obligation to establish a system to monitor compliance has been considered an integral part of the ICESCR rights. Under the right to water, the CESCR recommends that states adopt domestic legislation which provides, *inter alia*, for 'national mechanisms for its monitoring'.⁴⁰⁹ In addition, as part of the right to just and favourable conditions of work, compliance by the private sector should be monitored 'through an effectively functioning labour inspectorate'.⁴¹⁰ Elsewhere, with regard to the right to social security, the CESCR has suggested that monitoring should be performed 'independently', although it did not clarify how this criterion must be understood.⁴¹¹ In some case the CESCR has expressly mentioned the sectors which should be the object of compliance monitoring. For instance, under the right to sexual and reproductive health (article 12 ICESCR), the state parties should aim their monitoring efforts in particular on private health-care providers, health insurance companies, educational and childcare institutions, institutional care facilities, refugee camps, prisons and other detention centers and pharmaceutical companies operating abroad.⁴¹²

409 CESCR, 'General Comment no. 15: the right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11, par 50.

410 CESCR, 'General Comment no. 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2005) UN Doc E/C.12/2005/4, par. 24. Also CESCR, 'General Comment no. 23' (n 397) par. 47, sub f; Also CESCR, Concluding observations on the initial report of Burundi (9 October 2015) UN Doc E/C.12/BDI/CO/1, par. 26. With regard to labour conditions for domestic workers, CESCR, Concluding observations on the second periodic report of Greece (9 October 2015) UN Doc E/C.12/GRC/CO/2, par. 26.

411 CESCR, 'General Comment no. 19' (n 395) par. 46.

412 CESCR, 'General Comment no. 22' (n 402) par. 60.

As regards the requirement of enforcement, we could by way of example refer to the following statement of the CESCR, which particularly addresses the state obligations under article 7 on the right to just and favourable conditions of work:

‘States should ensure that laws, policies and regulations governing the right to just and favourable conditions of work, such as a national occupational safety and health policy, or legislation on minimum wage and minimum standards for working conditions, are adequate and effectively enforced. States parties should impose sanctions and appropriate penalties on third parties, including adequate reparation, criminal penalties, pecuniary measures such as damages, and administrative measures, in the event of violation of any of the elements of the right.’⁴¹³

However, the obligation to ensure the legislation’s enforcement is by no means limited to the laws that have been enacted under article 7 ICESCR. It must also be considered integral part of *inter alia* the rights codified in articles 3⁴¹⁴, 6⁴¹⁵, 9⁴¹⁶, 10⁴¹⁷, 11⁴¹⁸, 12⁴¹⁹ and 15, first paragraph, sub a⁴²⁰ and c⁴²¹.

In some cases the CESCR has argued that *criminal* enforcement constitutes the most appropriate form of enforcement. For example in the case of domestic violence, the CESCR has recommended:

413 CESCR, ‘General Comment no. 23’ (n 397) par. 59. Also CESCR, Concluding observations on the initial report of Pakistan (n 402) par. 64; CESCR, Concluding observations on the sixth periodic report of Cyprus (7 October 2016) UN Doc E/C.12/CYP/CO/6, par. 22; CESCR, Concluding observations on the combined fifth and sixth periodic reports of the Philippines (7 October 2016) UN Doc E/C.12/PHL/CO/5-6, par. 38; CESCR, Concluding observations on the sixth periodic report of Poland (7 October 2016) UN Doc E/C.12/POL/CO/6, par. 17; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (n 407) par. 33.

414 CESCR, Concluding observations on the combined second and third periodic reports of Liechtenstein (23 June 2017) UN Doc E/C.12/LIE/CO/2-3, par. 16.

415 CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22.

416 CESCR, ‘General Comment no. 19’ (n 395) par. 46 and 65.

417 CESCR, Concluding observations on the initial report of Pakistan (n 402) par 54; CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22; CESCR, Concluding observations on the second periodic report of Lebanon (7 October 2016) UN Doc E/C.12/LBN/CO/2, par. 46; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (n 407) par. 40; CESCR, Concluding observations on the second periodic report of Honduras (24 June 2016) E/C.12/HND/CO/2, par 38; CESCR, Concluding observations on the combined second to fifth periodic reports of Kenya (4 March 2016) UN Doc E/C.12/KEN/CO/2-5, par. 40; CESCR, Concluding observations on the initial report of Burundi (n 410) par. 38.

418 CESCR, ‘General Comment no. 15’ (n 409) par. 43 and 44, sub b.

419 CESCR, ‘General Comment no. 22’ (n 402) par 49, sub d, 55 and 64; CESCR, ‘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)’ (11 August 2000) UN Doc E/C.12/2000/4 par. 49 and 51.

420 CESCR, ‘General Comment no. 21’ (n 395) par. 50, sub d, and 63.

421 CESCR, ‘General Comment no. 17: 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 or she is the author (article 15, paragraph 1 (c), of the Covenant)’ (12 January 2006) UN Doc E/C.12/GC/17 par. 43 and 45.

'[...] that the State party should speed up the process of drafting and adopting comprehensive legislation to eliminate all forms of domestic violence, under which all sorts and degrees of domestic and gender violence will be characterized as crimes and appropriate sanctions provided'.⁴²²

The CESCR has expressed a similar view with regard to the enforcement of for instance national legislation to combat sexual violence against women⁴²³ and sexual harassment in the work place⁴²⁴.

A final point that needs to be made here concerns the penalties to be imposed in response to violations of national implementing legislation. The CESCR has demonstrated a certain reluctance, also with regard to individual state parties, to prescribe in great detail the penalties it considers adequate. Instead, it has considered that sanctions should be 'proportionate'⁴²⁵, 'deterrent'⁴²⁶ or 'dissuasive'⁴²⁷.

4.2.3.6 Remedies

Another legislative standard that can be inferred from the ICESCR consists of the availability of domestic remedies to persons whose rights have been (allegedly) infringed. This was also emphasised by the CESCR, which has stated:

'The Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place'.⁴²⁸

422 CESCR, Concluding observations on the fourth periodic report of Chile (19 June 2015) UN Doc E/C.12/CHL/CO/4, par. 23. Also CESCR, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China (23 May 2014) UN Doc E/C.12/CHN/CO/2, par. 27; CESCR, Concluding observations on the second periodic report of the Islamic Republic of Iran, adopted by the Committee at its fiftieth session (29 April-17 May 2013) (17 May 2013) UN Doc E/C.12/IRN/CO/2, par. 17; CESCR, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant (14 May 2004) UN Doc E/C.12/1/Add.97, par. 37.

423 CESCR, Concluding observations on the initial report of Indonesia (23 May 2014) UN Doc E/C.12/IDN/CO/1, p. 8-9.

424 CESCR, Concluding observations on the second periodic report of China (n 422) par. 55; CESCR, Concluding observations on the second periodic report of Kuwait (29 November 2013) UN Doc E/C.12/KWT/CO/2, par. 20; CESCR, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant (28 November 2003) UN Doc E/C.12/1/Add.94, par. 48.

425 CESCR, Concluding observations on the second periodic report of China (n 422) par. 55; CESCR, Concluding observations on the second periodic report of Kuwait (n 424) par. 20.

426 CESCR, Concluding observations on the initial report of Gabon (29 November 2013) UN Doc E/C.12/GAB/CO/1, par. 11.

427 CESCR, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant (20 May 2010) UN Doc E/C.12/KAZ/CO/1, par. 12.

428 CESCR, 'General Comment no. 9' (n 375) par. 2.

Also in the context of recommendations to states and the individual complaints procedure under the Optional Protocol, the CESCR has clearly stated that the requirement to adopt legislation to give effect to the ICESCR 'includes the adoption of measures that ensure access to effective judicial remedies for the protection of the rights recognized in the Covenant [...]'.⁴²⁹

The availability of remedies as a legal obligation can be traced back to article 2, first paragraph, which was cited in section 4.2.3.1, read in conjunction with the other substantive provisions of the ICESCR. This view is supported by General Comment no. 3 on article 2, first paragraph, in which it was argued that 'among the measures which might be considered appropriate [under this article], in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable'.⁴³⁰

This requirement is, of course, closely related to the ICESCR's validity in the domestic legal order; it may only acquire practical relevance if persons whose rights have been (allegedly) infringed, have legal avenues to enforce their rights. Therefore, it must be clear to them to what extent they can legally rely on the ICESCR. In this respect the CESCR has stated that the specific means by which the ICESCR is to be given effect in the domestic legal order is for each state party to decide, even though it has expressed its preference for the incorporation of the text into domestic law.⁴³¹ In any case, the obligation to put in place domestic remedies which enable persons to enforce their rights must be considered to extend to domestic legislation through which the ICESCR is implemented on the national level. This was emphasised by the CESCR when it recommended to 'take the legislative measures necessary to give full effect to the Covenant rights in [the state party's] legal order and ensure that victims have access to effective remedies'.⁴³² Only then the values that are reflected in the ICESCR can be realised in practice.

The CESCR may share this view, as it has suggested that states 'may find it advantageous to adopt framework legislation to operationalize their right to water strategy'. Such legislation, the CESCR added, should include *inter alia* remedies and recourse procedures, since persons whose rights have been infringed 'should be entitled to adequate reparation, including

429 CESCR, Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (fifty-fifth session) concerning Communication No. 2/2014 (17 June 2015) par. 11.3 and 17. Also CESCR, Concluding observations on the third periodic report of the Republic of Moldova (6 October 2017) UN Doc E/C.12/MDA/CO/3, par 19; CESCR, Concluding observations on the initial report of Pakistan (n 402) par 20; CESCR, Concluding observations on the combined second and third periodic reports of Liechtenstein (n 414) par. 12; CESCR, Concluding observations on the second periodic report of Honduras (n 417) par 22.

430 CESCR, 'General Comment no. 3' (n 382) par. 5.

431 CESCR, 'General Comment no. 9' (n 375) par. 5 and 8.

432 CESCR, Concluding observations on the sixth periodic report of Canada (n 399) par. 40.

restitution, compensation, satisfaction or guarantees of non-repetition'.⁴³³ Similar statements have been made with regard to the rights embodied in article 2, second paragraph⁴³⁴, 3⁴³⁵, 6⁴³⁶, 7⁴³⁷, 9⁴³⁸, 11⁴³⁹, 12⁴⁴⁰, 15, first paragraph, sub a⁴⁴¹ and c⁴⁴².

Another interesting question concerns the required features of those remedies. Under article 15, first paragraph, sub c, these characteristics comprise the elements of availability, accessibility and quality.⁴⁴³ Whereas the requirement of availability refers to the mere presence of domestic remedies, the accessibility-criterion demands that individuals have access to those remedies. According to the CESCR, accessibility has three dimensions: national courts must be physically accessible by both abled and disabled persons; the procedures must be economically affordable for all; and states must safeguard the accessibility of information in order to ensure that individuals can collect all the information that is necessary to institute proceedings. Finally, the element of quality demands that the remedial procedures are administered 'competently and expeditiously' by the authorities.⁴⁴⁴ The CESCR has made a similar statement with regard to the right to sexual and reproductive health when it contended that 'effective exercise of the right to remedy requires funding access to justice and information about the existence of these remedies'.⁴⁴⁵

433 CESCR, 'General Comment no. 15' (n 409) par. 50 and 55.

434 CESCR, 'General Comment no. 20' (n 389) par. 40; CESCR, Concluding observations on the fifth periodic report of Costa Rica (7 October 2016) UN Doc E/C.12/CRI/CO/5, par. 17; CESCR, Concluding observations on the second periodic report of Honduras (n 417) par. 22.

435 CESCR, 'General Comment no. 16' (n 410) par. 21. Also CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 14.

436 CESCR, 'General Comment no. 18: article 6 of the International Covenant on Economic, Social and Cultural Rights' (6 February 2006) UN Doc E/C.12/GC/18, par. 48. Also CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22.

437 CESCR, 'General Comment no. 23' (n 397) par. 50 and 57. Also CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22.

438 CESCR, 'General Comment no. 19' (n 395) par. 72 and 77.

439 CESCR, 'General Comment no. 12: the right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, par. 32. Also with a view of providing protection to victims of forced evictions, the CESCR has recommended to 'adopt a legislative framework providing adequate legal protection against forced evictions and relocations for those without secure tenure to land and housing, and provide compensation and redress to those forcibly relocated'. CESCR, Concluding observations on the fifth periodic report of Sri Lanka (23 June 2017) UN Doc E/C.12/LKA/CO/5, section C.

440 CESCR, 'General Comment no. 14' (n 419) par. 59; CESCR, 'General Comment no. 22' (n 402) par. 49, sub h and 64.

441 CESCR, 'General Comment no. 21' (n 395) par. 63 and 72.

442 CESCR, 'General Comment no. 17' (n 421) par. 18, 34, 43, 44 and 51.

443 Ibid, par. 18.

444 Ibid, par. 18.

445 CESCR, 'General Comment no. 22' (n 402) par. 64.

4.2.3.7 *Evaluation of legislation*

Once domestic implementing legislation has entered into force, it should be periodically reviewed in order to evaluate its consequences in practice. This obligation may be derived from article 3 on the equal treatment of men and women, which reads:

‘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’.⁴⁴⁶

Similar obligations exist under articles 7 (the right to just and favourable conditions of work) and 9 (right to social security) ICESCR. They seem to serve the same purpose. While the evaluation of legislation under article 3 serves the purpose to ensure consonance with the ICESCR,⁴⁴⁷ such review under articles 7 and 9 must be performed ‘with a view to updating [labour] standards in the light of practice’ and ‘towards the realization of the right to social security’ respectively.⁴⁴⁸ To this end, the CESCR has contended that states should identify ‘factors and difficulties affecting implementation of their obligations’.⁴⁴⁹

Also in the context of other rights the CESCR has recommended the performance of evaluation of domestic legislation in order to give effect to the ICESCR, such as the right to housing⁴⁵⁰, the right to work⁴⁵¹, the rights to health⁴⁵² and the rights of indigenous people⁴⁵³.

446 CESCR, ‘General Comment no. 16’ (n 410) par. 34. Elsewhere, the Committee has stated that ‘a 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’. Ibidem, par. 41. Also CESCR, Concluding observations on the sixth periodic report of the Russian Federation (6 October 2017) UN Doc E/C.12/RUS/CO/6, par 25; CESCR, Concluding observations on the initial report of Pakistan (n 402) par 34; CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 14; CESCR, Concluding observations on the combined fifth and sixth periodic reports of the Philippines (n 413) par. 38.

447 It may be added that in the view of the Committee, special attention must be given to ‘adverse effects on disadvantaged or marginalised individuals or groups, particularly women and girls’. CESCR, ‘General Comment no. 16’ (n 410) par. 21.

448 CESCR, ‘General Comment no. 19’ (n 395) par. 74; CESCR, ‘General Comment no. 23’ (n 397) par. 62.

449 CESCR, ‘General Comment no. 19’ (n 395) par. 74.

450 CESCR, Concluding observations on the fifth report of Australia (n 407) par 42.

451 CESCR, Concluding observations on the sixth periodic report of Poland (n 413) par. 17.

452 CESCR, Concluding observations on the initial report of Burundi (n 410) par. 54.

453 CESCR, Concluding observations on the sixth periodic report of Sweden (24 June 2016) E/C.12/SWE/CO/6, par. 14.

4.2.3.8 *Formal aspects*

The CESCR has also made statements with regard to national legislation's form. In these, rather exceptional, cases it expresses its disapproval of national legislation which it considers too vague. As a consequence, the CESCR contends, national legislation fails to provide protection as required under the ICESCR. An example can be found in national legislation on forced evictions in the context of development projects. The CESCR, fearful of the possibility that such evictions cause homelessness, has recommended to 'strictly define the circumstances and safeguards under which evictions can take place'.⁴⁵⁴ Elsewhere the CESCR has criticised 'moral turpitude' as a justification for removal, dismissal or disqualification from employment in the civil service of Nepal on the ground that the term 'is not defined with sufficient precision and which can lead to arbitrary interpretations'.⁴⁵⁵ Similarly, with regard to *lèse-majesté*, as criminalised under Thailand's national legislation, and its negative consequence for the enjoyment of the right to take part in cultural life, the CESCR has urged the state party to amend its legislation with a view to 'ensuring clarity and unambiguity regarding the prohibited acts'.⁴⁵⁶ These examples demonstrate that the CESCR has on several occasions sought to persuade state parties to provide for national legislation which is clear and unambiguous, especially when the application of vague norms may constitute impediments to the enjoyment of economic, social and cultural rights embedded in the ICESCR.

4.2.3.9 *Information to the public*

On a few occasions, the CESCR has suggested that the provisions of the ICESCR may not only require the adoption of national implementing legislation, but may also demand that state parties undertake information campaigns. Sometimes the latter recommendations are expressly related to the adoption of national implementing legislation. Therefore, they amount to what we have called 'legislative standards' and deserve to be discussed here.

One example applies to domestic violence, about which the CESCR urged the state party to 'adopt without delay specific legislation on domestic violence [...] and to undertake a major information campaign to raise aware-

454 CESCR, Concluding observations on the initial report of Indonesia (n 423) par. 30. Also CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (18 November 2009) UN Doc E/C.12/TCD/CO/3, par. 28.

455 CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (29 August 2001) UN Doc E/C.12/1/Add.66, par. 25.

456 CESCR, Concluding observations on the combined initial and second periodic reports of Thailand (19 June 2015) UN Doc E/C.12/THA/CO/1-2, par. 35. Similarly, with regard to the Irish criminalisation of abortion, see CESCR, Concluding observations on the third periodic report of Ireland (19 June 2015) UN Doc E/C.12/IRL/CO/3, par. 30.

ness about such legislation.⁴⁵⁷ It has made similar statements with regard to information campaigns about national anti-tobacco legislation and legislation aimed at the protection of persons infected with HIV with a view on 'raising awareness among the public'.⁴⁵⁸

In some cases the information should, in the view of the CESCR, not be directed to the public in general, but to the organisations and persons which are primarily affected by the legislation. In the context of its discussion on the need to adopt national legislation to combat corruption, it suggested to conduct 'awareness-raising campaigns among political leaders, judges, legislators and public officials on the need to strictly enforce anti-corruption legislation and to work towards the complete eradication of that phenomenon'.⁴⁵⁹ With regard to national legislation aimed to ensure the protection of women on maternity leave, the CESCR has called upon the state party to 'circulate its legislation widely among employers'.⁴⁶⁰

4.2.4 Overview

From the above, it may be concluded that the text of the ICESCR establishes only the most rudimentary standard which must be respected by states which adopt domestic legislation in order to perform their obligations under the treaty. It consists of the principle of non-discrimination, which means that domestic implementing legislation may not distinguish between persons or groups on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, if such distinction cannot be objectively and reasonably justified. However, a closer look at the General Comments on the various ICESCR rights and the various recommendations to state parties reveals that the CESCR adheres to an interpretation of the ICESCR which encompasses several other legislative standards as well. They include, as we have seen in the previous sections, the elements of consultation, monitoring of compliance and enforcement, remedies, the evaluation of legislation, the provision of information to the public and legislative clarity.

457 CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (16 May 2007) UN Doc E/C.12/NPL/CO/2, par. 35.

458 CESCR, Concluding observations on the initial report of Togo (17 May 2013) UN Doc E/C.12/TGO/CO/1, par. 31; CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (18 May 2012) UN Doc E/C.12/SVK/CO/2, par. 23.

459 CESCR, Concluding observations on the fourth periodic report of Morocco (8 October 2015) UN Doc E/C.12/MAR/CO/4, par. 12.

460 CESCR, Concluding observations concerning the fourth periodic report of Belgium (29 November 2013) UN Doc E/C.12/BEL/CO/4, par. 15.

