

## 5. Violations

Assessing violations in concrete situations is one of the most important and controversial aspects of ESCR. Lack of clarity as to what constitutes a violation has impeded efforts to implement and enforce ESCR. Part of the difficulty lies in the Covenant's "progressive realization" clause (discussed below), which some states have erroneously interpreted to avoid any accountability for violations. But the biggest obstacle remains the lack of political will on the part of policy-makers and failure of the human rights movement to hold policy-makers accountable for economic injustice.

This is changing, as more and more activists and NGOs turn to rights-based advocacy to mobilize opposition to systemic poverty. Their efforts are beginning to have an impact, but the problem of how to assess violations remains a major obstacle. In recent years, legal scholars, advocates, and UN agencies have developed methodologies and lists of indicators for measuring violations.<sup>1</sup> While detailed lists of indicators for each right can help clarify the theoretical components of the rights, a basic legal framework for assessing violations in specific situations may be of more practical use to advocates.

What follows is a very simple framework that divides violations into two broad categories: failure to “progressively realize” rights, and discrimination in access to rights.

### Progressive Realization

The first category of violations is based on the much-debated provision in the Covenant that state parties are obligated to “progressively” realize ESCR “to the maximum of available resources.”<sup>2</sup> While this language recognizes that poor states are not immediately capable of guaranteeing the same levels of education and health care as developed states, the concept of progressive realization does not permit the perpetuation of economic injustice and disparity.<sup>3</sup> On the contrary, state parties are required to take steps to continuously improve people’s enjoyment of ESCR. These rights are therefore violated when a government does not allocate sufficient resources towards basic social services, or when these services are undermined through corruption, or when the institutional structures necessary to deliver these services are deliberately neglected.

Within the progressive realization paradigm, there are two types of policies that always constitute violations of ESCR. First are policies that deprive people of a basic level of subsistence necessary to live in dignity: the principle of minimum core content. Second are measures that actually worsen people’s access to ESCR: the principle of non-regression.

It is widely agreed that failure to satisfy essential human needs, based on the minimum core content of ESCR, is an immediate and absolute violation of human rights that can

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<sup>1</sup> For example, a group of legal experts met in 1986 and produced a comprehensive set of legal criteria on ESCR known as the Limburg Principles, which were subsequently expanded at a meeting in Maastricht in 1997. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex, reprinted in Human Rights Quarterly, vol. 9 (1987), pp. 122-135. See also, Tomasevski, “Human Rights Indicators: The Right to Food as a Test Case” in *The Right to Food* (see full cite in note 21).

<sup>2</sup> The Covenant, see note 4, Art. 2(1).

<sup>3</sup> General Comment 3, UN doc. E/C.12/1990/12, paras. 8--11.

never be excused by a country's level of development.<sup>4</sup> This recognizes that people's very survival depends upon access to essential services and that no state is too poor to meet those basic needs. As noted by Danilo Turk, the UN Special Rapporteur on ESCR: "States are obliged, regardless of their level of economic development, to ensure respect for minimum subsistence rights for all."<sup>5</sup> Along the same lines, the Committee has affirmed that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is, *prima facie*, failing to discharge its obligations under the Covenant."<sup>6</sup>

The Committee has also declared that responsible parties may not adopt regressive measures that harm ESCR, for example through "a general decline in living and housing conditions directly attributable to policy and legislative decisions by States parties."<sup>7</sup> The principle of non-regression would prohibit a government from cutting back on basic services such as health care or primary education, even under pressure from international lenders such as the IMF and World Bank, if such cutbacks lessened people's access to those services.

## Discrimination

The second category of violations is the prohibition of discrimination in access to ESCR. The obligation not to discriminate is not subject to the limitation of progressive realization, but rather is an immediate duty of states and non-state actors. The Covenant flatly prohibits discrimination in access to food, health care, housing, work, education and other ESCR on the grounds of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>8</sup> The prohibition against discrimination is absolute. Discrimination may not be justified under any circumstances, such as low levels of development. A government's failure to provide the same standard of health care or education to girls as to boys is *per se* a violation of ESCR under all circumstances. Moreover, policies are considered discriminatory if their effects are discriminating in practice, even if those effects were not intended.<sup>9</sup>

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<sup>4</sup> See, Turk, Second Progress Report of the UN Special Rapporteur on Economic, Social and Cultural Rights, UN Doc. E/CN.4/Sub.2/1991/17, p. 18, para. 10; General Comment 3, see note 24, UN Doc. E/C.12/1990/8, para. 10. International law scholar Richard Falk argues that a state which "maintains an economic situation in which a small proportion of the population gains most of the wealth while a large majority subsists at or below the poverty line is guilty of violating this category of human rights." Falk, *Human Rights and State Sovereignty*, (New York: Holmes & Meier Publishers, 1981).

<sup>5</sup> See Turk, *ibid.*

<sup>6</sup> General Comment No. 3 of the Committee, see n. 24, para. 10.

<sup>7</sup> General Comment No. 4, see note 11, para. 11.

<sup>8</sup> The Covenant, see note 4, Art. 2(2).

<sup>9</sup> Craven, see note 3, pps. 166-167.