CHAPTER – III

THE NATURE AND SCOPE OF OBLIGATIONS OF STATES UNDER THE UNITED NATIONS’ NINE CORE HUMAN RIGHTS TREATIES

3.1 Introduction:

The United Nations’ (UN) Nine Core Human Rights Treaties contain a comprehensive catalogue of human rights including civil, political, economic, social, cultural rights and also issue/group based (vulnerable) rights, such as, torture, racial, disability, enforced disappearance, women, children and migrant workers which States Parties pursuant to the obligations engrafted under these treaties have agreed to guarantee the rights envisaged therein. The enjoyment of these treaty rights depends on the implementation measures taken by the States Parties. In fact, domestic implementation is the primary mechanism contemplated by these treaties to give effect to the individual rights stated therein and the reporting system, inter-state complaint system and individual complaint system are designed to monitor/supervise the implementation of the treaties at the domestic level and hence are secondary means of implementation.

3.2 Typology of Obligations:

Under the UN Nine Core Human Rights Treaties, the State Party obligation is generally expressed as one to ‘respect’, ‘recognize’, ‘ensure’, ‘secure’, or ‘give effect to’ the rights provided therein. Further, State Parties are directed to adopt all necessary measures including legislative, administrative and judicial to give effect to the rights guaranteed therein in accordance with their constitutional process. According to Henry Shue\(^1\) and Asbjorn Eide\(^2\) International Human Rights Law impose three levels or types of obligations (triptite typology), namely, 1) obligation to respect, 2) obligation to protect and 3) obligation to fulfill. Similarly, M. Magdalena Sepulveda and Maria Magdalena Sepulveda Carmona classify the human

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rights treaty obligations into three categories: 1) Rights based obligation, 2) General or basic obligations and 3) Procedural obligations.\(^3\)

Categorizing State Party obligations under International Human Rights Law clarifies the nature and scope of the obligations. For example, traditionally, the State has been regarded as only being under negative duty-*vertical obligations*- not to abuse the rights of private parties. However, the duty to protect human rights also implies a positive obligation for States to prevent and remedy abuses of rights as between private parties-*horizontal obligation*. Thus, Asbjorn Eide described the *tripartite* obligations as:

1) The obligation to “respect” requires States to abstain from violating a right;

2) The obligation to “protect” requires States to prevent third parties from violating that right;

3) The obligation to “fulfill” requires the States to take measures to ensure that the right is enjoyed by those within the State’s jurisdiction.\(^4\)

Today a number of International Human Rights Treaties have incorporated the *tripartite typology* into their language including the UN Nine Core Human Rights Treaties. For example, in relation to the right to adequate food, the Committee on Economic, Social and Cultural Rights (CESCR), has stated that:

“The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources

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\(^4\) Asbjorn Eide, Supra, *note* 2.
and means to ensure their livelihood, including food security. Finally, where an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by means at their disposal, States have an obligation to fulfill (provide) that right directly.  

The Committee on Civil and Political Rights (CCPR), while not expressly using the language of the *tripartite typology*, has also remarked that States Parties have more than a mere obligation to “respect” the right to life guaranteed in the *ICCPR*:

“The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life… The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”

The Maastricht Guidelines on violations of economic, social and cultural rights has also commented on the *tripartite typology* which is as follows:

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The

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6 CCPR General Comment no. 6 on The right to life, available at http://www.ohchr.org/english/bodies/hrc/comments.htm. Visited on 23-10-2012 at 08.22 pm
7 On the occasion of the 10th anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, a group of more than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.
obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.8

The way States Parties need to implement these treaties domestically is outlined in the UN Nine Core Human Rights Treaties. These provisions have given rise to a number of issues as to when and to what extent these treaties require a particular act of implementation. The challenge faced when implementing these treaties at the domestic level become apparent if one considers the vast differences between the legal systems of the States Parties. It is in this context it is necessary to examine the relevant provisions of the UN Nine Core Human Rights Treaties on State Parties obligations to implement the treaty provisions.

3.3 Typology of Obligations under UN Nine Core Human Rights Treaties:

A careful scrutiny of provisions relating to States Parties obligation under the UN Nine Core Human Rights Treaties display four types of obligations in relation to the implementation of treaty provisions which can be classified as under:

1. Absolute and Immediate obligations
2. Qualified and Progressive obligations
3. Obligations to provide Domestic Remedies (including judicial) for enforcement of rights.
4. Obligations to Legislate or adopt Other Measures to give effect to the rights.

3.4 Specific Provisions on “Absolute and Immediate” Obligations of States Parties to the UN Nine Core Human Rights Treaties:

The following are the text of UN Nine Core Human Rights Treaties imposing absolute and immediate obligation on States Parties:

3.4.1 **International Covenant on Civil and Political Rights, 1966 (ICCPR).**

Article 2(1): Each State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant.

Article 3: The States Parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present covenant.

3.4.2 **International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).**

Article 2 (2): The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3: The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

3.4.3 **International Convention on the Elimination of All forms of Racial Discrimination, 1965 (ICERD).**

Article 5: In compliance with the fundamental obligations laid down in Article 2 of this convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and guarantee the right of everyone.

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9 ICCPR came in to force on 23/03/1976 and India acceded to it on 10/04/1979.
10 ICESCR came in to force on 03/01/1976 and India acceded to it on 10/04/1979.
11 CERD came in to force on 04/01/1969 and India acceded to it on 03/12/1968.
12 Article 2 reads as; (1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division. (2) States Parties shall, when the circumstances so warrant, take, in the
Article 7: States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information with a view to combating prejudices which lead to racial discrimination and…..

3.4.4 Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW).\textsuperscript{13}

Article 7: States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, an equal terms with men…

Article 10: States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:…..

3.4.5 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT).\textsuperscript{14}

Article 4(1): Each state party shall ensure that all acts of torture are offences under its criminal law.

Article 4(2): Each state party shall make these offences punishable by appropriate penalties, which take into account their grave nature.

3.4.6 Convention on the Rights of the Child, 1989 (CRC).\textsuperscript{15}

Article 2(1): States Parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind.

Article 2(2): States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment…

\textsuperscript{13} CEDAW came into force on 03/09/1981 and India ratified to it on 09/07/1993.

\textsuperscript{14} CAT came into force on 26/06/1987 and India signed on 14/10/1997 but not yet ratified as on 23-10-2012. The Prevention of Torture Bill, 2010 is currently before Select Committee of Rajya Sabha.

\textsuperscript{15} CRC came into force on 02/09/1990 and India acceded to it on 11/12/1992.
3.4.7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICRMW).16

Article 7: States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

3.4.8 Convention on the Rights of Persons with Disabilities, 2006 (CRPD).17

Article 4 (1): States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability…

3.4.9 International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (CPED).18

Article 1(1): No one shall be subjected to enforced disappearance.

Article 1(2): No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

3.5 Nature and Scope of Absolute and Immediate Obligations:

These are the provisions in ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, ICRMW, CRPD and CPED which impose upon their respective States Parties the obligations to secure and respect the human rights and fundamental freedoms enshrined in these treaties. These obligations display two principal features:

a) They are absolute— that is they are not expressed as being limited either by the resources available to the State, or by reference to the means to be employed in performing them;

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16 ICRMW came into force on and as on 23-10-2012, India has not yet signed the treaty.
17 CRPD came into force on 03-05-2008 and India ratified it on 01-10-2007.
18 CPED came into force on 23-12-2010 and India signed it on 06-02-2007 but has not yet ratified it.
b) They are immediate – that is, each State is bound to take the necessary steps to secure the human rights and fundamental freedoms concerned from the moment that the treaty comes into force for that State.

3.5.1 Beneficiaries:

Their beneficiaries are defined, in respect of each State Party, as “all individuals within its territory and subject to its jurisdiction” in ICCPR, in ICESCR “to every one” and “to men and women”, in ICERD “to every one”, in CEDAW “to women”, in CRC “to each child within their jurisdiction”, in CAT “a person” and “any individual”, in ICRMW “all migrant workers and their family members”, in CRPD “all persons with disability” and in CPED “no one” shall be subjected to enforced disappearance. Thus, in no case is the protection limited by reference to any nationality, race, caste, religion etc. and that these treaties offer universal protection.

States Parties are required to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment no. 15 by the CCPR, the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.19 This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.20

The CCPR observed that the obligations under the ICCPR apply also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the

19 CCPR General Comment no.15 on the position of aliens under the Covenant, adopted on 04-11-1986. See at http://www2.ohchr.org/english/bodies/hrc/comments.htm. Visited on 24-10-2012 at 11.29 pm.
20 Ibid.
interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.\(^\text{21}\)

Further, the obligation requiring that States Parties to respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the ICCPR,\(^\text{22}\) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

### 3.5.2 Nature of obligation - Positive or Negative:

The State obligation in ICCPR is to respect and to ensure those rights and freedoms for those beneficiaries, in ICESCR is to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights, in CERD is to undertake to prohibit to guarantee the right of every one and to adopt immediate and effective measures, in CEDAW is to ensure to women on equal terms with men, in CRC is to respect and ensure the rights set forth in the Convention to each child within their jurisdiction, in CAT is to ensure that all acts of torture are offences under its criminal law, in ICRMW is to respect and to ensure to all migrant workers and members of their families within their territory, in CPRD is to ensure and promote the


\(^{22}\) Article 6 reads as: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7 reads as: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
full realization of all human rights and fundamental freedoms for all persons with disabilities, in CPED is to ensure that enforced disappearance shall constitute an offence under its criminal law.

The CCPR in its General Comment no.3 stated that, the obligations for State Parties under ICCPR is not confined to mere respect for human rights, but requires specific activities on their part to enable individuals to enjoy those rights. Constitutional or legislative enactments may not be enough. It is particularly important that individuals should know what their rights are, and that all administrative and judicial authorities should know what obligations their State Party has assumed. ICCPR should therefore be publicized in all the State Party’s official languages, and included in the training of the State’s authorities.23

The obligations under the absolute and immediate category define the scope of the legal obligations undertaken by the States Parties. An absolute and immediate obligation is imposed on States Parties to respect the treaty rights and to ensure them to all individuals in their territory and subject to their jurisdiction. Further, pursuant to the principle articulated in Article 26 of the Vienna Convention on the Law of Treaties, 196924 States Parties are required to give effect to the obligations under the Covenant in good faith.25

The obligations of the State Parties under the absolute and immediate category are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the

24 Article 26 is titled as Pacta sunt servanda and reads as: Every treaty in force is binding upon parties to it and must be performed by them good faith.
Law of Treaties, according to which a State Party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Although Article 2 (2) of ICCPR allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States Parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the CCPR reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions “shall extend to all parts of federal states without any limitations or exceptions”. It further observed that the obligation under Article 2 (1) of ICCPR to respect and ensure the rights recognized in the Covenant has immediate effect for all States parties. Article 2 (2) provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected and accordingly indicated in its General Comment no. 24 that reservations to Article 2 would be incompatible with the Covenant when considered in the light of its objects and purposes.

The legal obligation under this category is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by these treaties, and any restrictions on any of those rights must be permissible under the relevant provisions of therein. Where such restrictions are made, States Parties must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of treaty rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a treaty right.

While commenting on the obligations of States Parties under Article 2 (1), CCPR said that the Article 2 (1) obligations are binding on States Parties and do not,
as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2, paragraph 3. The Covenant itself envisages in some Articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of Article 17 of ICCPR must be protected by law. It is also implicit in Article 7 of ICCPR that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of Article 26 of ICCPR.\(^{30}\)

3.6 Specific Provisions on “Qualified and progressive obligations” Obligations of States Parties to the UN Nine Core Human Rights Treaties:

3.6.1 ICESCR:

Article 2(1): 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

\(^{30}\) Ibid. Article 26 of ICCPR reads as: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(2): The State 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, color, sex, language, religion, political or other opinion, national or social origin, property or birth or other status.

3.6.2 CRC:

Article 4:...with regard the economic, social and cultural rights, states parties shall undertake such measures to the maximum extent of their available resources and where needed, within the framework of international co-operation.

3.7 Nature and Scope of Qualified and Progressive Obligations:

The State obligations under ICESCR and CRC (Art.4) differ in two important respects from those under ICCPR, CERD, CEDAW, CAT, CRC (except Art.4), ICRMW, CRPD and CPED. They are:

i) They are qualified rather than absolute – that is, they are limited to the “maximum of the resources available” to the State Parties.

ii) They are progressive rather than immediate – that is they call for steps to be taken or for measures to be adopted “with a view to achieving progressively the full realization” of the rights concerned.

The Committee on ICESCR (CESCR) has interpreted the key terms appeared in the qualified and progressive obligations which are authoritative for the States Parties for implementation of the provisions of ICESCR. Further, a group of distinguished experts in International Law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht from 2 to 6 June 1986 to consider the nature and scope of the obligations of States Parties to the ICESCR.

31 Twenty nine experts from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, the United Kingdom, the United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat, and the sponsoring organizations participated in the Meeting. Four of the participants were members of the ECOSOC Committee on Economic, Social and Cultural Rights.
the consideration of States Party reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international cooperation under Part IV of ICESCR. The principles adopted in the meeting on the Nature and Scope of States Party Obligations to the ICESCR is known as Limburg Principles.32

While commenting on “The nature of States parties’ obligations”, the Committee on ICESCR (CESCR) in its General Comment no.3 interpreted the following terms, which are guiding principles for implementation of the provisions of ICESR.

On the term to achieve progressively the CESCR said:

“The principal obligation of result reflected in Article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in Article 2 of the ICCPR which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison detre, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully

justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”

The intent of drafting States Parties’ obligations in terms of “progressive realization” was not to allow states to postpone or defer the realisation of rights recognised in the *ICESCR* until a certain national level of economic development has been reached. Rather, all States Parties must take immediate steps towards the realisation of those rights, moving ‘as expeditiously and effectively as possible’ towards such realisation. This is a “specific and continuing” obligation.

On the term *adoption of legislative measures*, the CESCR said:

“The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be ‘all appropriate means, including particularly the adoption of legislative measures’. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in Articles 6 to 9, legislation may also be an indispensable element for many purposes.”

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33 CESCR General Comment no.3 on *The nature of States parties obligations (Article 2 (1))*, adopted on 14-12-1990. See at http://www2.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 8.16 pm.

34 CESCR, General Comment no.14 on *The right to highest attainable standard of life (Article 12)*, adopted on 11-08-2000. See at http://www2.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 8.16 pm. The Limburg Principles also of the same view.

35 Further the Committee observed that “States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase “by all appropriate means” must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the “appropriateness” of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.”
On the term to take steps\textsuperscript{36}, individually and through international assistance and cooperation, especially economic and technical, the CESCR said:

“The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.”\textsuperscript{37}

The Limburg Principles states that, irrespective of differences in their political, economic and social systems, States shall cooperate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences. States parties shall take steps by international means to assist and cooperate in the realization of the rights recognized by the Covenant. International cooperation and assistance shall be based on the sovereign equality of States and be aimed at the realization of the rights contained in the Covenant.\textsuperscript{38}

\textsuperscript{36} Further, the CESCR observed that the term “to take steps”, which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is “to take steps”, in French it is “to act” (“s’engage à agir”) and in Spanish it is “to adopt measures” (“a adoptar medidas”). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. See General Comment no.3, Supra note 33.

\textsuperscript{37} CESCR General Comment No.3, Supra note 33.

\textsuperscript{38} See http://www.unhcr.org/refworld/docid/48abd5790.html. Last visited on 24-10-2012 at 7.23 pm.
On the term to the maximum of its available resources, the CESCR said:

“…any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.39

States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. “Its available resources” refers to both the resources within a State and those available from the international community through international cooperation and assistance. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources. In the use of the available resources due priority shall be given to

the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

However, Article 2 (3) which deals with non-nationals in developing countries provides an exception to the equal treatment of everyone relating to the use of resources. As a general rule the ICESCR applies equally to nationals and non-nationals. The purpose of Article 2 (3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in Article 2 (3) should be interpreted narrowly. This narrow interpretation of Article 2 (3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.40

It is pertinent to note that ICESCR does not prescribe a specific methodology for its implementation. However, CESCR has identified some general principles pertaining to the obligation of States Parties to give effect to the ICESCR: First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. … Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. … Third, while the Covenant does not formally oblige States to (directly) incorporate its provisions in domestic law, such an approach is desirable.41 However, the CESCR has considered the specific core obligations entailed in certain substantive rights enumerated in the ICESCR. It has specified the core obligations entailed in the rights to: food;42 education;43 health;44 water;45 benefit

42 CESCR General Comment no.11 Plans of Action for Primary Education (Article 14) 1999. Available at http://www.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 08.43 pm. Though CESCR does not explicitly state that the obligations enumerated in General Comment 11 are “core obligations” in the Comment itself, but subsequently affirmed their status as such in its statement of 4 May 2001: CESCR, Poverty and the International Covenant on Economic, Social and Cultural Rights.
43 CESCR General Comment no.13 on The right to education (Article 13), 1999. Available at http://www.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 08.50 pm.
44 CESCR General Comment no.14 on The right to the highest attainable standard of health (Article 14), 1999. Available at http://www.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 09.00 pm.
from the protection of the moral and material interest arising from any scientific, literary or artistic production of which a person is the author;\textsuperscript{46} and work.\textsuperscript{47}

These core obligations are necessarily expressed at a fairly general level in the General Comments, which do not lend themselves to the promulgation of highly specific prescriptions of rules or standards. Nonetheless, they are useful because they are explicitly identified obligations which CESCR considers to be non-derogable and binding on all states parties to the ICESCR.

3.8 Specific Provisions on States Parties “Obligation to provide domestic remedies” for enforcement of rights under UN Nine Core Human Rights Treaties:

3.8.1 CERD:

Article 6: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

3.8.2 ICCPR, 1966:

Article 2 (3): Each State Party to the present covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

\textsuperscript{45} CESCR General Comment no.15 on \textit{The right to water} (Article 15), 1999. Available at http://www.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 09.10 pm.

\textsuperscript{46} CESCR General Comment no.17 on \textit{The right of everyone to benefit from the protection of the moral and material interest arising from any scientific, literary or artistic production of which a person is the author} (Article 15 (1) (c)), 1999. Available at http://www.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 09.20 pm.

\textsuperscript{47} CESCR General Comment no.18 on \textit{The right to work} (Article 6), 1999. Available at http://www.ohchr.org/english/bodies/cescr/comments.htm. Last visited on 23-10-2012 at 09.30 pm.
c) To ensure that the competent authorities shall enforce such remedies when granted.

3.8.3 CAT:

Article 2: Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

3.8.4 CRC:

Article 12 (1): States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

3.8.5 ICRMW:

Article 83: Each State Party to the present Convention undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

3.8.6 CPED:

Article 20 (2) Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18,
paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

3.9 Nature and Scope of Obligation to provide domestic remedies for enforcement of rights:

It is needless to emphasize that redress for violations of human rights and fundamental freedoms should be available to victims within their own States, rather than that they should need to resort to international institutions. However, since in the nature of things the most frequent violators of such rights and freedoms will be the governments or other executive or administrative authorities of the State, effective redress can only come through institutions that have the necessary independence and impartiality, such as courts or tribunals.

As to the nature of forum, CERD, ICCPR, CAT and ICRMW specifies ‘judicial, administrative or legislative authorities or by any competent authority’ provided under the legal system of State Party. CPED specifies “judicial remedy”. On the other hand CEDAW content itself with ‘national tribunals and other state institutions’

Further, ICCPR 2(3) specifically provides that the State Party concerned shall have to lend its force to the enforcement of the remedies when they are granted.

The phrase ‘effective remedy’ used in ICCPR needs to be emphasized. The remedy provided to enforce human rights must be ‘effective’ in the sense that it should be: (a) accessible – that is to say that the individual must be in a position to start a procedure which will result in a decision from the relevant authority; (b) sufficient – that is to say that the relevant authority must have the power to redress the alleged violation if it is in fact established; (c) no pre-condition – that is to say there must not be pre-conditions for its availability; (d) not same or similar – that is to say

48 Article 18 (1) reads as: Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information: (a) The authority that ordered the deprivation of liberty; (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty; (c) The authority responsible for supervising the deprivation of liberty; (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer; (e) The date, time and place of release; (f) Elements relating to the state of health of the person deprived of liberty; (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.
the remedy provided must not be repetitive of a remedy which has already been used.\textsuperscript{49}

This obligation requires that in addition to effective protection of treaty rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.\textsuperscript{50}

On Article 2(3) of ICCPR, the CCPR observed that States Parties are under an obligation to make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by Articles 9 (5) and 14 (6), the CCPR considers that the Covenant generally entails appropriate compensation. The CCPR notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant

\textsuperscript{49} Paul Seighart, Supra note 23.
\textsuperscript{50} Paul Seighart, Supra note 23.
laws and practices, as well as bringing to justice the perpetrators of human rights violations.\textsuperscript{51}

3.10 Obligations to Legislate or adopt other measures to give effect to the rights.\textsuperscript{52}

3.10.1 ICERD:

Article 2 (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

3.10.2 ICCPR:

Article 2(2): Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, \textit{in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.}\textsuperscript{53}

3.10.3 ICESCR:

Article 2(1): 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

\textsuperscript{51} CCPR General Comment no.3 on \textit{The nature of States parties obligations (Article 2 (1))}, adopted on 14-12-1990. See at http://www2.ohchr.org/english/bodies/cedh/comments.htm. Last visited on 23-10-2012 at 8.16 pm.

\textsuperscript{52} Two other equally important UN treaties concerning human rights that call for the adoption of legislative measures at the national level are: (1) Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (came into force on 12/01/1951 and India acceded to it on 27/08/1959). Article V: The contracting Parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and in particular to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III. (2) Convention on the Suppression and Punishment of the Crime of Apartheid, 1973(came into force on 18/07/1976 and India acceded to it on 22/09/1977). Article IV: The States Parties to the present convention undertake: a) to adopt any legislative or other measures necessary to suppress as well as to prevent necessary any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; b) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction…

\textsuperscript{53} Emphasis supplied.
Covenant by all appropriate means, including particularly the adoption of legislative measures.54

3.10.4 CEDAW:

Article 3: States Parties shall take in fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 6: States Parties shall take all appropriate measures including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

3.10.5 CAT:

Article 2: Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

3.10.6 CRC:

Article 4: States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present convention.

Article 19: States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury…… of the child.

3.10.7 ICRMW:

Article 84: Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.

3.10.8 CPED:

Article 4: Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

54 Emphasis supplied.
Article 25 (1): Each State Party shall take the necessary measures to prevent and punish under its criminal law: (a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;…

3.10.9 CRPD:

Article 4 (1) States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

3.11 Nature and Scope of Legislative Obligation:

The above provisions mandate the State Parties to bring home the treaty rights through proper domestic legislation. The underlying importance in calling for domestic legislation is to suit the legal system of respective State Parties and to constitutionalise the same for effective realization of human rights. The words ‘in accordance with constitutional processes’ used under Article 2(2) of ICCPR further strengthen this argument. Further the terms ‘shall take or adopt legislative measures’ is mandatory and not optional. However, that does not mean that rights provided under these treaties cannot be given effect to at the national level without domestic legislation incorporating the treaty rights. A State Party while ratifying/acceding to the treaty has undertaken to implement the treaty rights through appropriate measures provided under the treaty including domestic legislation. The delay in enacting suitable legislation cannot be a ground for refusing to enforce the treaty rights.

The obligation to legislate or adopt necessary measures requires that States Parties take the necessary steps to give effect to the treaty rights in the domestic order. It follows that, unless treaty rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic
laws and practices as are necessary to ensure their conformity with the treaty provisions. Where there are inconsistencies between domestic law and the treaty concerned, this obligation (to legislate) requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees. In fact, this obligation (to legislate) allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that these treaties be directly applicable in the courts, by incorporation of the treaty into national law. However, the CCPR observed that, ICCPR guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation is part of the domestic legal order. Accordingly, it invited those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by Article 2.55

3.12 Obligation of Conduct and Obligation of Result:

The *tripartite typology* of obligations to respect, protect and fulfill each contains elements of obligation of conduct and obligation of result. The obligation of conduct means that a state has to *undertake a specific step* (act or omission). For example, enacting a law prohibiting forced labor is an action. The action or conduct must be rather specific. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality.

An obligation that says, “The state has to achieve result X,” is sometimes called an “obligation of result.” The obligation of result means the obligation to *attain a particular outcome* through active implementation of policies and programs. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

The simple fact that result X was not achieved cannot necessarily be blamed on the State in question, and therefore cannot always be called a violation of human rights. In fact, some obligations of result may be mere programmatic statements that can be politically important for the human right, but do not help in determining a violation in legal terms. For example, launching a “polio free India by 2012” mission by the Government of India. This mission is an element of right to health. If the Government of India failed in this mission, the Government of India is not in breach of the duty to guarantee the right to health as it is mere programmatic and policy matter. On the contrary, if the right to health is guaranteed under a municipal law and the Government of India failed to facilitate the realization of the right through establishing hospitals, staff and medicines, then it is liable for the breach of its duty. Assessing whether a State is in breach of its duty to guarantee the rights is case specific and depends upon facts and circumstances of each case.

3.13 Permissible derogations from legal obligations:

The rights guaranteed under the UN Nine Core Human Rights Treaties are not absolute, but are subject to certain restrictions that may be imposed by the State Parties through law. Thus, State Parties are permitted to derogate from their legal obligations in exceptional circumstances which are outlined in the respective treaties. The following are the grounds or condition upon which a State Party is permitted to derogate from its legal obligations to guarantee the treaty rights.

3.13.1 The condition of a “public emergency which threatens the life of the nation” (Article 4 (1) of ICCPR):

The State Party envisaging derogation must be facing a situation of exceptional threat that jeopardizes the nation’s life, thus excluding minor or even more serious disturbances that do not affect the functioning of the State’s democratic institutions or people’s lives in general.

3.13.2 The condition of official proclamation (Article 4 (1) of ICCPR):

The existence of a public emergency which threatens the life of the nation must be “officially proclaimed”. The reason behind this condition is “to prevent States from derogating arbitrarily from their obligations under the Covenant when such an action was not warranted by events.
3.13.3 The condition of non-derogability of certain obligations (Article 4 (2) of ICCPR):

This provision in ICCPR enumerates some rights from which no derogation can ever be made even in the direst of situations. These rights are: the right to life (Article 6), the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 7), the right to freedom from slavery, the slave-trade and servitude (Article 8(1) and (2)), the right not to be imprisoned merely on the ground of inability to fulfill a contractual obligation (Article 11), the prohibition of ex post facto laws (Article 15), the right to legal personality (Article 16) and, lastly, the right to freedom of thought, conscience and religion (Article 18).

However, it does not mean that, because a specific right is not listed in Article 4(2), it can necessarily be derogated from. Consequently, some rights may not be derogated from because they are considered to be “inherent to the treaty as a whole”; one such example is the right to judicial remedies in connection with arrests and detentions as set out in Article 9(3) and (4) of ICCPR.

3.13.4 The condition of strict necessity (Article 4 (1) of ICCPR):

This condition means that the State Party can only take measures derogating from its “obligations under the ... Covenant to the extent strictly required by the exigencies of the situation”, the condition of strict necessity compels a narrow construction of the principle of proportionality, in that the legislative measures taken must as such be strictly required by the exigencies of the emergency situation; and, secondly, any individual measure taken on the basis of that legislation must likewise be strictly proportionate. In such a situation it becomes necessary to consider whether the measures taken are strictly required in order to deal with the emergency situation and are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened.

3.13.5 The condition of consistency with other international legal obligations:

Measures adopted to derogate from a treaty obligation must be consistent with other obligations under international law, such as, for instance, other treaties for the protection of the individual or even international humanitarian law or customary international law.
3.13.6 The condition of non-discrimination:

As a general rule the ICESCR applies equally to nationals and non-nationals, however Article 2 (3) of ICESCR allows developing countries to derogate from their legal obligation to guarantee the equal treatment of everyone to economic rights on the ground of nationality. The purpose of Article 2 (3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in Article 2 (3) should be interpreted narrowly and applies only to developing countries.

3.13.7 The condition of international notification (Article 4 (3) of ICCPR):

In order to avail itself of the right of derogation, a State Party must immediately submit a notification of derogation to the other States parties through the Secretary-General. It must describe “the provisions from which it has derogated and the reasons by which it was necessiated”. A second notification must also be submitted “on the date on which it terminates such derogation”. Such derogations must also comply with the principles of non-derogable rights, non-discrimination, consistency with the State Party’s other international obligations and the principle of international notification.

3.14 Violations of Treaty Obligations:

A failure by a State party to comply with an obligation contained in the human rights treaties is, under international law, a violation of the treaty obligations. In determining what amounts to a failure to comply, it must be borne in mind that the treaties afford to a State Party a margin of discretion in selecting the measures for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights. A State Party will be in violation of the treaty obligations, either through acts of commission or acts of omission on the following among others:56

3.14.1 Violations through acts of commission:

Violations of treaty rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

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(a) The formal removal or suspension of legislation necessary for the continued enjoyment of treaty rights that are currently enjoyed;

(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

(c) The active support for measures adopted by third parties which are inconsistent with treaty rights;

(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to treaty rights, unless it is done with the purpose and effect of increasing equality and improving the condition of vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The deliberate obstruction of, or halt to, the progressive realization of a right protected by the treaty, in particular ICESCR, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

3.14.2 Violations through acts of omission:

Violations of treaty rights can also occur through the omission or failure of States Parties to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) The failure to take appropriate steps as required under the treaties;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the treaty;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the treaties;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating treaty rights;
(e) The failure to utilize the maximum of available resources towards the full realization of the treaty rights, in particular, ICESCR;

(f) The failure to monitor the realization of treaty rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly the obstacles which it is under a duty to remove to permit the immediate fulfillment of a right guaranteed by the treaty;

(h) The failure to implement without delay a right which it is required by the treaty to provide immediately;

(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

(j) The failure to submit periodic reports to the treaty bodies as mandated under the treaties.

The violations referred to above are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims. The drawback of these obligations is that, none of the UN Nine Core Human Rights Treaties propose sanction for their violation. This does not mean that the obligations have no meaning under law. A States Party is answerable to the treaty bodies when its periodic report is taken up for deliberation and to the UN Human Rights Council (HRC) when its Universal Periodic Report (UPR) is being considered.

As long ago as 1925, the Permanent Court of International Justice (PCIJ) described as “self evident” the principle that “a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken”, and a state cannot invoke the provisions even of its national constitution with a view to evading its treaty obligations. The principle of pacta sunt servanda, which has attained the

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57 Advisory Opinion on Exchange of Greek and Turkish Populations, PCIJ, Series B, No. 10. 20. Full text of the judgment is available at www.icj-cij.org

58 Advisory Opinion on the Treatment of Polish Nationals and Other Persons of Polish Origin in the Danzig Territory, PCIJ, Series A/B, No. 44, at p. 24. Full text of the judgment is also available at www.icj-cij.org
status of *jus cogens* (peremptory norm of international law) warrants that every treaty must be respected in good faith.

3.15 Conclusion:

All States Parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the UN Nine Core Human Rights Treaties. At the national level States Parties shall use all appropriate means, including legislative, administrative, judicial, educational measures, consistent with the nature of the rights in order to fulfill their obligations under the treaties. Legislative measures alone are not sufficient to fulfill the obligations of the treaties. However, treaty obligations would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the treaties. States Parties shall provide for effective remedies including, where appropriate, judicial remedies. The appropriateness of the means to be applied in a particular State is determined by the State Party concerned, and is subject to review by the treaty bodies.

A dominant issue as to the implementation of the treaties is whether they create only duties of result, as the duty to refrain from human rights violations, or also duties of conduct, as the enactment of specific safeguards against violations. According to International Law Commission (ILC) “there is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.” Hence while an obligation of result leaves open the means to be adopted to achieve the mandatory result, an obligation of conduct determines specifically the action through which a result shall be achieved. For example, Article 20 of ICCPR obliges States Parties to prohibit any propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. While the overall goal

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60 Articles 20 of Draft Articles on State Responsibility adopted at the 51st Session, 19th April- 3rd May- 23rd July 1999. The text of Article 20 proposed by the Special Rapporteur reads as follows: Article 20. Obligations of conduct and obligations of result: (1) An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct. (2) An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.”Full Report available at http://www.un.org/law/ilc/index.htm. Last visited on 28-10-2012 at 09.20 pm.
is to preserve freedom, a particular course of conduct, that is the adoption of legislation prohibiting propaganda of war, is mandated. The mere non adoption of this course of conduct is a breach of the international obligation irrespective of the consequences of the non adoption of legislation. The obligation is breached even if no specific instance of war propaganda or hate speech of national, racial or religious that constitute incitement to discrimination, hostility or violence has been found. However, most of the UN Nine Core Human Rights Treaty provisions contain substantive rights of individuals without spelling out a particular course of conduct and thus seems to constitute obligation of result. For example, Article 22 (1) of ICCPR states that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” This provision does not spell out any particular measure as to how this right be implemented. Further, on the one hand, Article 2 (2) of ICCPR explicitly mandates the States Parties to adopt legislative or other measures and on the other hand to take necessary steps, in accordance with its constitutional processes to give effect to the rights recognized in the ICCPR. This gives so much of freedom/discretion to the States Parties in the area of implementation of ICCPR that one can interpret the treaty imposing obligation of result. However, whatever the measure States Parties adopt to give effect to the treaty rights it must be “effective”, be it legislative, administrative or judicial.