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[start of p. 241] Socio-Economic and Cultural Rights and Wrongs After Armed Conflicts:

Using the State Reporting Procedure before the United Nations Committee on Economic, Social and Cultural Rights More Effectively

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Abstract:

Commentators and practitioners increasingly emphasise that redressing violations of economic, social and cultural rights (ESCR) and improving the living conditions of individuals and communities is key in countries emerging from armed conflicts and widespread human rights abuses. Yet, it remains difficult to achieve this objective in practice and it is not obvious how international law can contribute to the enhancement of ESCR in the aftermath of pervasive abuses. This article addresses some of the subject's conceptual and practical complexities: Based on an analysis of all relevant concluding observations, the article traces the evolution of the UN Committee on Economic, Social and Cultural Rights' jurisprudence on armed conflict. It then uses this analysis to highlight specific ways in which the reporting procedure before this supervisory body could be used more effectively to address ESCR problems related to armed conflicts, including by forging synergies with transitional justice mechanisms and broader post-conflict recovery policies.

Keywords: armed conflict; United Nations Committee on Economic, Social and Cultural Rights; post-conflict justice; transitional justice; education; internal displacement; health; impunity.

Mots clés: conflit armé ; Le Comité des Nations unies des droits économiques, sociaux et culturels ; justice transitionnelle ; éducation ; déplacement interne ; santé ; impunité.

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1. INTRODUCTION

Attempts to strengthen the protection of human rights during or in the aftermath of armed conflicts or situations of widespread violence inherently face daunting challenges. Not uncommonly, these challenges pertain to people's enjoyment of economic, social and cultural rights (ESCR). In Timor Leste, to mention just one example, the Truth Commission concluded that the parties to the conflict damaged 77 per cent of health facilities. Virtually all of the country's medical equipment and medicine was looted or destroyed. In 1999, 'hundreds of thousands of people were rounded up (...) and herded like cattle from their homes or places of shelter onto trucks and boats bound for West Timor'.¹ Not surprisingly, addressing the economic and social dimensions of such scenarios can be a core concern of the population most directly affected by the past conflict.

Traditionally, responses to the legacies of armed conflicts and widespread violence have, however, tended to focus on a narrow set of civil and political rights. It is only in recent years that consideration of ESCR has started to gain prominence in debates on post-conflict human rights work, including transitional justice, which is defined as the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses.² Links between ESCR, development and post-conflict measures have increasingly been made in the literature.³ Louise Arbour, former High Commissioner for Human Rights, expressed the conviction that by paying increased attention to redressing ESCR violations, transitional justice 'is poised to make the significant leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition'.⁴ In 2008, the UN Office of the High Commissioner for Human Rights commissioned a study for Professor Christine Chinkin to provide an overview of the guarantees of ESCR in post-

¹ Commission for Reception, Truth and Reconciliation in Timor-Leste, *Chega! Final Report* (CAVR 2005) 140-6.

² Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616, para 8.

³ See for instance P de Greiff and R Duthie, *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009). See also the special issue of the International Journal of Transitional Justice in December 2008. For an overview, see the editorial: R Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 International Journal of Transitional Justice 253.

⁴ L Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 New York University Journal of International Law and Politics 1, 2.

conflict situations.⁵ In this study, Professor Chinkin emphasises how the failure to strengthen the protection of ESCR ‘undermines the sought-after stability and human security post-conflict (including food, health, gender and physical security), which in turn lessens the ability or willingness of victims and witnesses to participate in [start of p.243] the formal processes of post-conflict justice’.⁶ In particular, commentators point out that addressing the conflict-related issues pertaining to people’s enjoyment of ESCR is often a core interest of those most directly affected by the past conflict. As Antoine Buyse posits, problems related to housing restitution and displacement, for instance, are ‘often one of people’s main economic, material and also psychological concerns’ and moreover affect not only a few, but often a large proportion of the population in post-conflict countries.⁷ The relative neglect of ESCR could fail many victims, and moreover seems difficult to reconcile with the recognition of the interrelation and indivisibility between civil and political rights and ESCR.⁸ In his first report, the new Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, stressed that ‘there is (...) great pressure also coming from the field to demonstrate the effectiveness of [measures taken in the aftermath of widespread abuses] both in redressing violations of economic, social and cultural rights and making contributions to improving the living conditions of individuals and communities previously affected by gross violations of human rights and serious violations of international humanitarian law’.⁹ Yet, despite increasing attention being paid to the issue in the literature and in the work of a handful of truth commissions,¹⁰ the legal framework of contemporary international human rights law on ESCR remains weakly integrated into efforts to strengthen the human rights protection in post-conflict countries.¹¹ The report of the Liberian Truth and

⁵ C Chinkin, ‘The Protection of Economic, Social and Cultural Rights Post Conflict’ (OHCHR 2008) <www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed 8 July 2013.

⁶ *ibid* 4.

⁷ A Buyse, ‘Home Sweet Home? Restitution in Post-Conflict Bosnia and Herzegovina’ (2009) 27 *Netherlands Quarterly of Human Rights* 9, 10. S Leckie and C Huggins, *Conflict and Housing, Land and Property Rights: A Handbook on Issues, Frameworks, and Solutions* (CUP 2011). S Parmentier, M Valiñas and E Weitekamp, ‘How to Repair the Harm after Violent Conflict in Bosnia? Results of a Population-Based Survey’ (2009) 27 *Netherlands Quarterly of Human Rights* 27, 36-37, reporting that 81% of respondents in a survey emphasised the issue of housing and property restitution.

⁸ For instance, LJ Laplante, ‘On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development’ (2007) 10 *Yale Human Rights and Development Law Journal* 141. Citing the work of P Uvin, *Human Rights and Development* (Kumarian Press 2004) 39.

⁹ UNHCR ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (2012) UN Doc A/HRC/21/46, para 50.

¹⁰ Notable examples of truth commissions that included considerations of ESCR in their analysis include the commissions of East Timor, Sierra Leone, Morocco, Guatemala and Peru.

¹¹ For the most recent overviews of the relative lack of attention paid to ESCR, see D Sharp, ‘Addressing Economic Violence in Times of Transition’ (2012) 35 *Fordham International Law Journal* 780, 782. See also L Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’ (2012) 21 *Social and Legal*

Reconciliation Commission provides a striking example. The report opens with the Commission's finding that poverty, inequality and unequal access to education or land tenure figured most prominently among the root causes of the long civil war.¹² Yet, the legal [start of p.244] analysis of the final report barely touches upon ESCR at all, with the Commission simply stating that the references in its mandate to 'violations of international human rights standards' and 'violations of international humanitarian law' would somehow imply that the TRC Act was 'almost exclusively concerned with gross violations of civil and political rights as opposed to economic, social and cultural rights'.¹³ Similarly, external experts and organisations advising national stakeholders on transitional justice issues tend to simply delegate ESCR issues to development agencies despite the well known limitation that 'development and economic growth do not necessarily translate into improved living conditions for specific groups or the realization of their human rights unless specific measures are taken to that end'.¹⁴ As a consequence of the still widespread assumptions on the lesser normative quality or importance of ESCR in international law, mainstream transitional justice approaches relegate socio-economic or cultural issues to the background as if ESCR abuses are significant only for the context they provide to other conflict-related human rights problems.¹⁵ Those who continue to believe that international law has nothing or very little to say about the protection of ESCR in general will, quite naturally, tend to assume that recourse to existing human rights law is unlikely to contribute to addressing the socio-economic and cultural issues that so prominently trouble many post-conflict societies.¹⁶ This unfortunate state of affairs can, however, be at least partially remedied by drawing attention to the

Studies 171, in particular at 173-4 for a (controversial) attempt to explain and possibly justify this relative neglect of ESCR.

¹² Truth and Reconciliation Commission of Liberia, *Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I: Findings and Determinations* (Truth and Reconciliation Commission of Liberia 2008). See further E Schmid, 'Liberia's Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice' (2009) 24 PRAXIS - The Fletcher Journal of Human Security 5.

¹³ Truth and Reconciliation Commission of Liberia, *Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I: Findings and Determinations* (Truth and Reconciliation Commission of Liberia, 2008) 55. Parts added subsequently to the report of the Liberian TRC contain references to the ICESCR and an appendix with a chapter on 'economic crimes and the conflict, exploitation and abuse' but no concrete analysis of Liberia's legal obligations in the realm of ESCR.

¹⁴ L Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 New York University Journal of International Law and Politics 1, note 59.

¹⁵ On this point, see in particular Z Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 International Journal of Transitional Justice 267.

¹⁶ This has led some authors to imply that 'legalism', or the assumptions on 'laws place as the core framework around which transitions from conflict are constructed' must be abandoned before socio-economic rights can be meaningfully addressed in transitional justice. K McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 413, 8.

potential of relying on the existing international legal framework dealing with socio-economic and cultural human rights issues in attempts to tackle the legacies of an abusive past.

This article will demonstrate concrete ways in which the most well known and most widely ratified international treaty specifically addressing ESCR can be employed to increase the prospects of remedying ESCR problems after armed conflicts. Based on a discussion of the practice of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR, or ‘the Committee’), this article [start of p.245] explores how the main international treaty dedicated to ESCR, the International Covenant on Economic, Social and Cultural Rights (ICESCR, or ‘the Covenant’), and its supervision procedure can play a meaningful role in enhancing the protection of ESCR in the aftermath of conflicts or other situations of widespread violence. The analysis pursues two objectives: first, the article provides an empirical analysis of how the CESCR has already addressed conflict-related ESCR challenges in the State reporting procedure. What redress, if any, does the Committee recommend for violations of ESCR occurring in armed conflict or in other situations of massive human rights abuses? And how does the body supervising the implementation of the Covenant address the protection of the rights to food, housing, water, health, education and other so-called ESCR in countries struggling with the legacies of an armed conflict? The second objective is to highlight specific ways in which the Committee’s role in supporting and complementing efforts of addressing ESCR-related concerns during and after conflicts could be enhanced and how stakeholders such as civil society organisations could use the State reporting procedure more effectively.

Based on this analysis, it will become apparent that contemporary human rights law allows for potentially useful synergies between efforts to address past and current denials of ESCR and post-conflict/transitional justice processes, and that these linkages deserve to be explored where the population affected by the conflict believes that conflict-related ESCR concerns should be addressed. In particular, we will see how the legal framework of the ICESCR and the State reporting procedure before the Committee can be used to give weight to local efforts to include ESCR considerations in post-conflict human rights reforms, or to obtain support for ongoing local advocacy efforts to implement recommendations already made by national mechanisms such as truth commissions or other commissions of inquiry.

The benefits of clarifying the use of the framework provided by the ICESCR in responses to socio-economic and cultural human rights problems resulting from armed conflicts are noteworthy. The State reporting procedure before the CESCR is the most

prominent mechanism for monitoring the implementation of ESCR internationally. 160 States have ratified the treaty and the Committee's openness to submissions from civil society and humanitarian stakeholders makes the State reporting procedure a mechanism whose potential for synergies with post-conflict initiatives merits analysis. The Committee can clarify links between ESCR and post-conflict considerations and invite State delegations to provide information on whether and how the chosen or discussed approaches, including mechanisms of transitional justice, could be considered appropriate measures towards the full realisation of the Covenant's rights. In doing so, the Committee can support efforts to ensure that the past is effectively addressed, without ignoring the current situation concerning the protection of ESCR.

A more systematic treatment of conflict-related ESCR issues by the Committee would also send an important signal to the human rights community, globally and locally, that advocating for stronger protection of ESCR in 'transitional' contexts [start of p.246] can be done with reference to existing international human rights law. Where the Committee has made concrete and post-conflict relevant recommendations, they have served to enable civil society and technical cooperation partners to invoke them in their own efforts. Moreover, such recommendations can also be used as a yardstick to monitor the government's post-conflict policies. This is particularly relevant because the CESCR is a permanent body that can be relied on again for follow-up when the State Party presents a subsequent report a few years later.

The potential advantages of the approach suggested in this article are amplified by the fact that 'transitional moments' often present unique opportunities. The obligations for States to progressively realise the rights recognised in the ICESCR and to redress ESCR violations gain particular relevance when societies strive to deal with the legacy of a conflict. As in Nepal or Guatemala, for instance, a fresh look at policies affecting the protection of ESCR is sometimes explicitly included in the official political agenda of the post-conflict government.¹⁷ When examining reports from States affected by a past or ongoing armed

¹⁷ See for instance the Comprehensive Peace Agreement of Nepal (signed 21 November 2006), unofficial translation <http://un.org.np/sites/default/files/report/tid_188/2006-11-29-peace_accord-MOFA.pdf> accessed 8 July 2013, Preamble (referring to the 'democratic restructuring of the state and social, economic and cultural transformation of Nepalese society'). See also Pushpa Kamal Dahal 'Prachanda', 'Address at the UN General Assembly' (26 September 2008) UN Doc A/63/PV.11, 14-17; or Guatemala's Agreement on a Firm and Lasting Peace (Acuerdo de Paz Firme y Duradera) (signed 29 December 1996) 36 ILM 315, in particular art 6 ('La paz firme y duradera debe cimentarse sobre un desarrollo socioeconómico participativo orientado al bien común (...). Dicho desarrollo requiere de justicia social como uno de los pilares de la unidad y solidaridad nacional...')

conflict, the supervisory Committee can often expect that its recommendations will be received with much interest.

Despite its potential, a cautionary note ought to be sounded in respect of the State reporting procedure before the CESCR. It is one thing to have the CESCR improve its approach to conflict-related concerns and quite another to enhance the availability of redress and the protection of ESCR on the ground. The various human rights reporting mechanisms of the UN in Geneva rarely change national policies by themselves, and their lack of resources and coherence is a serious and well-recognised problem that has led to an ongoing debate about their reform.¹⁸ Moreover, not every State has ratified the Covenant and the Committee can only examine the reports of those States that are Parties to the treaty and that actually comply with their reporting obligation. States engaged in conflict (and others as well) have sometimes failed to submit their reports in a timely manner. While we will see that the Committee has increasingly dealt with situations of armed conflict and has started to emphasise [start of p.247] that monitoring is particularly relevant in times of crisis,¹⁹ it must be emphasised that the analysis and suggestions made in this article must be supplemented by an examination of what other mechanisms are available, in particular where the State is not Party to the ICESCR.²⁰

It should also be noted that this article is not concerned with the debate on the normative nature of ESCR, or whether ESCR should necessarily be included in the work of transitional justice mechanisms or whether they should better be dealt with by other means in any given context. Rather, the article starts from the premise that there are situations in which national consultations reveal the need and hope of the affected population that ESCR-related concerns will be addressed in efforts to support a country's recovery from armed conflict.

The State reporting procedure before the CESCR is simply an additional tool at the disposal of many stakeholders seeking to enhance redress for past abuses of ESCR and the

(‘Lasting and sustainable peace requires participatory socioeconomic development (...). Such development requires social justice as one of the pillars of unity and national solidarity’).

¹⁸ The UN High Commissioner for Human Rights has recently summarised her reform proposals in N Pillay, ‘Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights’ (OHCHR, 2012).
<www2.ohchr.org/english/bodies/HRTD/docs/HCRptTBStrengthening.pdf> accessed 8 July 2013.

¹⁹ See for instance CESCR, ‘Concluding Observations: Colombia’ (2010) UN Doc E./C.12/Col/CO/5, para 7, and section 3.3 below.

²⁰ Other avenues include the Universal Periodic Review of the UN Human Rights Council or the use of so-called Special Procedures. See further C Golay, C Mahon and I Cismas, ‘The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights’ (2011) 15 *International Journal of Human Rights* 299.

overall protection of ESCR in post-conflict States. As we shall see, the potential of employing this procedure has not yet been maximised. The central suggestion made in this article is, therefore, that the reporting procedure should be used more systematically and strategically to encourage, question and support authorities to integrate ESCR in the measures they take to address the legacies of the armed conflict, or at least to consider all available options carefully.

The article is organised as follows: by way of background, the following section 2 briefly outlines States' obligations to work towards the full realisation of the rights recognised in the Covenant by 'all appropriate means', including by providing domestic forms of redress for past violations of ESCR. Section 3 takes stock of how concerns related to armed conflict and widespread violence have so far been addressed by the CESCR. Based on this empirical analysis, section 4 makes recommendations to the Committee and to other stakeholders.

2. BACKGROUND: OBLIGATIONS OF POST-CONFLICT STATES

States affected by armed conflicts are confronted with two relevant types of legal obligations pertaining to ESCR. On the one hand, such States often face particularly serious challenges concerning the *overall realisation of ESCR*. Dysfunctional health or educational systems, discrimination, poverty and scarce financial or human resources [start of p.248] often disproportionately plague societies devastated by armed conflicts. The ICESCR requires all States to take steps by all appropriate means to fully realise ESCR. When examining the reports from vulnerable States, the CESCR provides advice on how these legal obligations of the Covenant could be implemented in the challenging circumstances in which a State affected by an armed conflict finds itself. On the other hand, States should provide *remedies* for past violations related to the legacy of the conflict. For instance, where government forces displaced people from their homes, it is increasingly recognised that victims have a right to benefit from remedies and reparation.²¹

Two essential considerations indicate that the ICESCR requires States to provide at least some forms of redress when violations of ESCR have occurred. First, the ordinary meaning of the term 'all appropriate means' in the ICESCR indicates that a broad range of

²¹ UNGA Res 60/147 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005), Preamble. See also D Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2005) 7-10.

measures is envisioned.²² Article 2(1) of the ICESCR requires states to respect, protect and fulfil Covenant rights. The relevant provision of ICESCR broadly refers to ‘legislative and other appropriate means’.²³ Article 2(1) stipulates:

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.²⁴

Taking into account resource constraints, the word ‘appropriate’ refers to those feasible measures that seem most useful, suitable and promising to the realisation of the rights contained in the Covenant. If it is accepted that the provision of remedies is ‘essential to the full and non-discriminatory realisation of human rights’,²⁵ then ‘all appropriate means’ necessarily also includes at least some redress for violations. Second, the object and purpose of the ICESCR as a human rights treaty is to effectively enhance the position of the individual to claim his or her [start of p.249] rights.²⁶ Providing redress for past abuses ensures ‘that the measures taken towards the full realisation of the rights are not purely superficial and vacuous’.²⁷ The High Court of Kenya at Nairobi, for instance, explained the relationship between the general obligation to realise the rights recognised in the treaty and the provision of remedies as follows:

[S]ince Kenya is a State that is a party to the aforesaid Covenant, the Court must rise to the occasion in addressing, recognizing and giving remedies under the Covenant.

²² The interpretation of the provisions of the ICESCR has to start with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.

²³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(1).

²⁴ *ibid* (emphasis added).

²⁵ Vienna Declaration and Programme of Action of the World Conference on Human Rights (adopted 25 June 1993) UN Doc A/CONF.157/23, para 27.

²⁶ As the CESCR stressed in General Comment No 9, the expression ‘appropriate means’ in art 2(1) must necessarily cover the provision of redress because of the ‘fundamental requirements of international human rights law’. CESCR, ‘General Comment No 9: The Domestic Application of the Covenant’, (1998) UN Doc E/C.12/1998/24, para 2.

²⁷ M Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press 1995) 128.

(...) The Court should bear in mind that the rights under the Covenant are intended to be guaranteed by each party state and effectively redressed whenever infringed.²⁸

The ICESCR thus tasks States to take steps that will enhance the protection for victims of armed conflict but also the general population within the State's jurisdiction. But what types of measures does the Covenant envisage? States have considerable discretion in the conduct they pursue to achieve the full realisation of the rights recognised in international treaties.²⁹ Given the variety of economic, social and legal systems, as well as the different levels of development and circumstances of each State, each State Party's approach to implementing the Covenant's obligations may legitimately vary. But this discretion is not unlimited. The Committee understands the 'broad and flexible approach of Article 2(1)'³⁰ to include the provision of judicial or other remedies, where appropriate, as well as administrative, financial, educational and social measures.³¹ Other possible 'appropriate means' are 'strategies, policies and plans' as well as the provision of 'institutions and mechanisms' capable of 'effectively address[ing] the individual and structural nature of the harm'.³² [start of p.250]

States must 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 prevailing circumstances'.³³

The Committee has noted that measures should be non-discriminatory,³⁴ deliberate, concrete, and targeted,³⁵ accessible, affordable, timely and effective.³⁶ Sepúlveda's observation that the Committee has not developed a test for effectiveness³⁷ remains largely true. However, the CESCR has emphasised that it considers the consultation and participation

²⁸ *Republic v Minister for Home Affairs and 2 Others Ex Parte Sitamze*, High Court of Kenya at Nairobi, Judgment, 18 April 2008, 16.

²⁹ Y Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis' (1985) 26 *Virginia Journal of International Law* 627, 660.

³⁰ CESCR General Comment No 9 (n 26) para 1.

³¹ CESCR, 'General Comment No 3: The Nature of States Parties Obligations' (1990) UN Doc E/1991/23, para 7.

³² CESCR, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights' (2009) UN Doc E/C.12/GC/20, para 40.

³³ *ibid* para 11.

³⁴ ICESCR (n 23) art 2(2).

³⁵ General Comment No 3 (n 31) para 2. See also CESCR, 'Statement on an Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1, para 8b.

³⁶ See for instance CESCR, 'General Comment No 14: The Highest Attainable Standard of Health' (2000) UN Doc E/C.12/2000/4, paras 11, 12, 59.

³⁷ M Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia 2003) 337.

of the affected population to be a crucial requirement for effectiveness.³⁸ The Committee has deemed measures to be ineffective in circumstances where the State did not allocate the necessary resources to implement them,³⁹ or if the authorities failed to take into account the situation of the most disadvantaged members of society.⁴⁰

To date, the CESCR has made a range of specific recommendations related to armed conflicts, which will be outlined and analysed next. We will see that the Committee's approach to ESCR concerns arising from armed conflict remains inconsistent and cursory, yet the CESCR has provided indications on how the main instrument in international human rights law on ESCR pertains to armed conflict and on the measures States should take in order to strengthen the protection of ESCR during or in the aftermath of armed conflict or other situations of massive violence.

3. THE COMMITTEE'S APPROACH TO CONFLICT-RELATED ESCR CONCERNS

The method used to examine the observations the Committee has so far made on armed conflict and attempts to deal with the legacies of past abuses is a content analysis of concluding observations, i.e. the texts adopted by the Committee following examination of a State's report. A summary of the empirical data can be found in Table 1. In this analysis, the concluding observations since the [start of p.251] beginning of the Committee's adoption of such documents have been included,⁴¹ but it is important to note that conflict-affected States often fail to report to UN supervisory bodies, and some have not ratified the ICESCR. Hence, the number of relevant concluding observations is limited by the fact that the Committee does not always have an opportunity to make recommendations to all States affected by armed conflicts.⁴²

³⁸ CESCR, 'General Comment No 4: The Right to Adequate Housing' (1991) UN Doc E/1992/23, para 12.

³⁹ For a recent example: CESCR, 'Concluding Observations, Angola' (2008) UN Doc E/C.12/Ago/CO/3, para 27 (displacement).

⁴⁰ CESCR Statement (n 35) para 8.

⁴¹ The CESCR adopted its first Concluding Observations in 1993. CESCR, 'Concluding Observations, Australia' (1993) UN Doc E/C.12/1993/9.

⁴² Note that the CESCR has recently decided to take a bolder approach to the issue of the non-reporting. After several reminders and a lack of response from the concerned State, it has reserved the right to review the State's implementation even in the absence of a State report, based on the information available from other stakeholders. It did so for the first time in November 2012 in relation to the Republic of Congo (Congo Brazzaville) and Equatorial Guinea. See also OHCHR, 'Committee on Economic, Social and Cultural Rights - Working Methods: Overview of the Present Working Methods of the Committee' <www2.ohchr.org/english/bodies/cescr/workingmethods.htm> accessed 8 July 2013.

The way in which the Committee has dealt with situations of ongoing or past armed conflict in its reporting procedure can roughly be grouped into three phases along a continuing spectrum.

3.1 PHASE I: ARMED CONFLICT AS AN EXCUSE FOR SUB-OPTIMAL OUTCOMES

In a first phase, the Committee used to merely mention the existence of an armed conflict or widespread violence in an introductory section of the concluding observations entitled ‘factors and difficulties impeding the implementation of the Covenant’.⁴³ The CESCR rarely analysed the consequences of this observation any further. References to armed conflict in this section of the concluding observations are worded as an acknowledgement of the difficulties faced by the State Party. It appears that the Committee intended them simply as an indication that it was aware of the challenges raised by an armed conflict in the State Party. In 1998, for instance, the Committee recognised:

that the prolonged period of violence and conflict that has affected Sri Lanka since 1983 has hampered the realization of economic, social and cultural rights in the country. The conflict has resulted in large-scale internal displacement of people, hindered government efforts to provide essential services in the affected areas, and diverted resources from social and development objectives.⁴⁴ [start of p.252]

The first concluding observations on Sri Lanka are typical of the early approach of the CESCR to mention the existence of an ongoing or past armed conflict, but not to analyse the consequences of this observation any further in any other part of the concluding observations.

This early approach contrasts with more recent concluding observations. References to a conflict as a factor impeding the implementation of the Covenant seem less forthcoming in later concluding observations even when the situation could arguably have qualified as an armed conflict. When reviewing the periodic report of Kenya in 2008, the Committee explicitly noted ‘the absence of any significant factors or difficulties preventing the effective implementation of the Covenant in the State Party’.⁴⁵ The country had been ravaged by armed violence following the elections in 2007 and thousands of people had been displaced by

⁴³ In this category, I included all concluding observations that indicate that the Committee was concerned about an armed conflict or a situation of widespread violence, even where it did not qualify the situation as an armed conflict. In other words, I counted concluding observations referring to terms such as ‘social conflict’ or ‘tensions and political instability’.

⁴⁴ CESCR, ‘Concluding Observations, Sri Lanka’ (1998) UN Doc E/C.12/1/Add.24, para 5.

⁴⁵ CESCR, ‘Concluding Observations, Kenya’ (2008) UN Doc E/C.12/Ken/CO/1, para 8.

clashes over land, pasture, cattle, and water. Conceivably, the situation could have qualified as a non-international armed conflict at the time of the events reviewed by the Committee.⁴⁶ The establishment of whether or not there are significant factors or difficulties impeding the implementation of the treaty is not based on a mechanical analysis, but may also depend on whether the Committee intended to give the State some more leeway by acknowledging its difficult circumstances, in other words, whether the Committee accepts the existence of an armed conflict as an excuse for a sub-optimal situation of ESCR protection. In the concluding observations on Kenya, the Committee did take into account the post-election violence,⁴⁷ but the violence was not deemed to be a factor impeding the implementation of the Covenant. Since the November 2010 session, this introductory section has disappeared from the structure of concluding observations altogether.⁴⁸

Instead, the Committee has, over time, started to analyse conflict-related concerns pertaining to ESCR in more depth and in relation to the substantive rights recognised in the Covenant. Three substantive areas have particularly gained the Committee's attention: population displacement, mental health, and education. [start of p. 253]

⁴⁶ See, for instance, Geneva Academy of International Humanitarian Law and Human rights, 'Rule of Law in Armed Conflict Global Database: Kenya: Applicable International Law' <www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=119> accessed 8 July 2013 (last updated 18 July 2012).

⁴⁷ CESCR, 'Concluding Observations, Kenya' (2008) UN Doc E/C.12/Ken/CO/1, para 12.

⁴⁸ This evolution makes sense since the obligations of the Covenant are worded flexibly enough to allow a State to comply with the requirements of the Covenant even when it is affected by a conflict. The general obligation clause of the ICESCR (art 2(1)) refers to the 'maximum of available resources'. This clause implies that when interpreting the substantive rights of the Covenant, the Committee can take into account the fact that a post-conflict State faces a plethora of competing claims and the level of resources available within the State may be lower than it would have been in the absence of an armed conflict.

Table 1. References by the CESCR to conflict-related issues in the State reporting procedure

Year	Conflict as a factor or difficulty impeding the implementation of the Covenant	Displacement	Mental health	Education	References to Impunity or Transitional Justice
1993	Lebanon, E/C.12/1993/10, § 8.	Lebanon, E/C.12/1993/10, § 8, 11.			
1995	Philippines, E/C.12/1995/7, § 9.	Suriname E/C.12/1995/6, § 21.			
1996	Guatemala, E/C.12/1/Add.3, § 10.	Guatemala, E/C.12/1/Add.3, § 20.			
1997	Azerbaijan, E/C.12/1/Add.20, § 12; Iraq, E/C.12/1/Add.17, § 7.	Azerbaijan, E/C.12/1/Add.20, § 12.	Iraq, E/C.12/1/Add.17, § 34.		
1998	Sri Lanka, E/C.12/1/Add.24, § 5.				
1999	Bulgaria, E/C.12/1/Add.37, § 8.				
2000	DRC, E/C.12/1/Add.45, § 8, 9; Kyrgyzstan, E/C.12/1/Add.49; § 11; Sudan, E/C.12/1/Add.48, § 14, 16.	DRC, E/C.12/1/Add.45, § 9.			
2001	Colombia, E/C.12/1/Add.74 ('increase of violence'), § 8; Croatia, E/C.12/1/Add.73, § 7; Senegal, E/C.12/1/Add.62, § 10.	Colombia, E/C.12/1/Add.74, § 11; Croatia, E/C.12/1/Add.73, § 8.			
2002	Solomon Islands, E/C.12/1/Add.84, , § 5 ('tensions and political instability')				
2003	Guatemala, E/C.12/1/Add.93, § 9.				
2004	Azerbaijan, E/C.12/1/Add.104, § 10-11.	Azerbaijan, E/C.12/1/Add.104, § 10-11.			
2005	Serbia and Montenegro, E/C.12/1/Add.108, § 8.		Serbia and Montenegro, E/C.12/1/Add.108, § 36,63.		
2006	Bosnia and Herzegovina, E/C.12/BIH/CO/1, § 7; Tajikistan, E/C.12/TJK/CO/1, § 10.	FYROM, E/C.12/Mkd/CO/1, § 24, 44; Morocco, E/C.12/Mar/CO/3, § 13, 27, 35.			Morocco, E/C.12/Mar/CO/3, § 5 (truth commission).
2008	Angola, E/C.12/Ago/CO/3, § 7; Nepal, CO E/CN.12/Npl/CO/2, § 10; Document submitted by UNMIK, E/CN.12/UNK/CO/1, § 8.	Angola, E/C.12/Ago/CO/3, § 27.	Nepal, CO E/CN.12/Npl/CO/2, § 25,45.	Nepal, CO E/CN.12/Npl/CO/2, § 47; Kenya, E/C.12/Ken/CO/1, § 34.	Kenya, E/C.12/Ken/CO/1, § 12 (impunity and prospective truth commission).
2009	Cyprus, E/C.12/CYP/CO/5, § 8 ('the continuing partition'); Chad, E/C.12/TCD/CO/3, § 7 ('armed uprisings and intercommunal conflicts'); DRC, E/C.12/COD/CO/4, § 6; Cambodia, E/CN.12/Khm/CO/1, § 11.		Cambodia, E/CN.12/Khm/CO/1, § 33.		Cambodia, E/CN.12/Khm/CO/1, § 24, 31; Chad, E/C.12/TCD/CO/3, § 11, 20; DRC, E/C.12/COD/CO/4, § 17 (impunity).
2010	Afghanistan, E/C.12/Afg/CO/2-4, § 12.	Sri Lanka, E/C.12/1/Add.24, § 5,7; Afghanistan, E/C.12/Afg/CO/2-4, § 22, 23; Colombia, E./C.12/Col/CO/5, § 15, 17, 19, 21, 24, 26, 27; Algeria, E/C.12/DZA/CO/4, § 19.	Afghanistan, E/C.12/Afg/CO/2-4, § 42; Algeria, E/C.12/DZA/CO/4, §16.	Colombia, E./C.12/Col/CO/5, § 26.	Afghanistan, E/C.12/Afg/CO/2-4, § 15, 31 (impunity); Colombia, June 2010, E./C.12/Col/CO/5, § 12 (impunity, reparations).
2011		Israel, E/C.12/ISR/CO/3, § 26.	Israel, E/C.12/ISR/CO/3, § 32.	Russian Fed., E/C.12/RUS/CO/5, § 33; Israel, E/C.12/ISR/CO/3, § 33.	
2012		Ethiopia, E/C.12/ETH/CO/1-3, § 22-3		Ethiopia, E/C.12/ETH/CO/1-3, § 26.	

[start of p.255]

3.2 PHASE II: SOME SCRUTINY AND RECOMMENDATIONS ON CONFLICT-RELATED ESCR PROBLEMS

When the Committee has taken into account a situation of armed conflict, the first and by far the most frequently analysed aspect has been population displacement. Undoubtedly, displacement affects the realisation of a broad range of ESCR and displaced individuals are highly vulnerable.⁴⁹ It is perhaps unsurprising that displacement was the first conflict-related issue that appeared in the Committee's concluding observations.⁵⁰ Among the numerous concluding observations referring to displacements, a few of the most recent examples illustrate how the Committee has recommended measures that the State Party should take to address conflict-related problems in the realm of ESCR.

In the document submitted by the UN Interim Administration Mission in Kosovo, the Committee prominently analysed population displacement resulting from the armed conflict. The Committee noted that the submission process for immovable property claims was problematic given that the short deadline precluded many internally displaced persons (IDPs) from submitting their claims to the Kosovo Property Agency.⁵¹ The Committee also mentioned the lead contamination of an IDP camp and examined social security schemes from the point of view of conflict-related displacement. It criticised the fact that displaced land owners are generally excluded from social security, though they are often effectively prevented from using their land, due to security reasons or because their land has been occupied by others.⁵²

When examining the report of Nepal in 2008, displacement was also one, albeit not the only, focus of the Committee in relation to the armed conflict: the Committee noted that property had not been returned to IDPs, contrary to the peace agreement.⁵³ The CESCR recommended that the State Party should ensure the safe and sustainable return of the

⁴⁹ UNSC, 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' (2007) UN Doc S/2007/643, para 54.

⁵⁰ For the earliest instance, see CESCR, 'Concluding Observations, Lebanon' (1993) UN Doc E/C.12/1993/10, para 11.

⁵¹ CESCR, 'Concluding Observations on the document submitted by UNMIK' (2008) UN Doc E/CN.12/Unk/CO/1, para 28.

⁵² *ibid* para 21.

⁵³ *ibid* para 14. In para 16, the Committee also notes 'that the conflict has exacerbated the harsh conditions of women living in rural areas, including Tharu women who have found themselves widowed as a result of the death or disappearance of their spouses during the conflict'.

displaced.⁵⁴ Similarly, the Committee referred extensively to displacement in the concluding observations on Kenya, Afghanistan, Algeria, Colombia and most recently Sri Lanka and Israel. In relation to IDPs, the Committee recommended that Kenya allocate sufficient financial assistance to IDPs,⁵⁵ a recommendation that [start of p.256] has previously been made to Macedonia and to Cyprus.⁵⁶ The experts encouraged Afghanistan to curb unemployment of IDPs and to provide basic social security.⁵⁷ To Algeria, the Committee recommended measures to increase the standard of living in rural areas to facilitate the return of IDPs.⁵⁸ The CESCR urged Colombia to prevent and protect displaced women and children from violence, sexual exploitation and trafficking. The Committee recommended strengthening the protection of IDPs by ensuring that displaced children are registered, by implementing a national food policy to combat malnutrition, and by providing access to adequate housing solutions and reproductive health services.⁵⁹ In 2010, the Committee also made forthright recommendations to Sri Lanka. The CESCR urged the authorities to close the so-called High Security Zones from which IDPs are prevented from returning to their homes. The Committee also tried to persuade the State to improve the conditions of IDPs in general, to abstain from hindering those who assist them, and to provide detailed information on the situation of IDPs in the next report.⁶⁰ In the most recent concluding observations relevant to this analysis, the Committee recommended ‘that [Israel] review and reform its housing policy and the issuance of construction permits in East Jerusalem, in order to prevent demolitions and forced evictions and ensure the legality of construction in those areas’.⁶¹

The second substantive issue on which the Committee has made specific statements tailored to (post-)conflict situations concerns mental health. It did so for the first time in 1997 when examining the report from Iraq, urging the Iraqi authorities to submit ‘concrete and comprehensive information on measures taken or foreseen in order to address the

⁵⁴ *ibid* para 33.

⁵⁵ CESCR, ‘Concluding Observations, Kenya’ (2008) UN Doc E/C.12/Ken/CO/1, para 27.

⁵⁶ CESCR, ‘Concluding Observations, the Former Yugoslav Republic of Macedonia’ (2006) UN Doc E/C.12/Mkd/CO/1, para 44. The Committee recommended that destroyed farming goods be replaced and that the authorities settle pending compensation claims. The CESCR addressed a similar recommendation to Cyprus: CESCR, ‘Concluding Observations, Cyprus’ (2009) UN Doc E/C.12/Cyp/CO/5, para 12 (access to social benefits for displaced women and children).

⁵⁷ CESCR, ‘Concluding Observations, Afghanistan’ (2010) UN Doc E/C.12/Afg/CO/2-4, paras 22, 23.

⁵⁸ CESCR, ‘Concluding Observations, Algeria’ (2010) UN Doc E/C.12/Dza/CO/4, para 19.

⁵⁹ CESCR, ‘Concluding Observations, Colombia’ (2010) UN Doc E/C.12/Col/CO/5, paras 15, 17, 19, 21, 24, 26.

⁶⁰ CESCR, ‘Concluding Observations, Sri Lanka’ (2010) UN Doc E/CN.12/LKA/CO/2-4, paras 29, 33.

⁶¹ CESCR, ‘Concluding Observations, Israel’ (2011) UN Doc E/CN.12/ISR/CO/3, para 26.

psychological and emotional problems affecting children after years of armed conflict'.⁶² In the concluding observations on Serbia and Montenegro, the Committee noted that domestic violence often resulted from psychological distress caused by unemployment and traumatic disorders related to the armed conflict.⁶³ More recently, the Committee recommended to Nepal and Cambodia that a higher priority be accorded to mental health care in relation to persons affected by the [start of p.257] conflict.⁶⁴ In 2010, the Committee also recommended that Afghanistan, if necessary, seek international cooperation to address conflict-related traumatic disorders.⁶⁵

The third substantive conflict-related issue invoked by the Committee concerns education. Similar to the Committee's recommendations on the provision of mental health care to strengthen implementation of the right to health in countries affected by an ongoing or past conflict, the Committee sometimes, but not consistently, made links between the right to education and efforts to overcome the legacy of armed conflict or widespread violence. To Nepal, the CESCR stressed 'the value of education as a tool for national reconciliation' to emphasise its recommendation on equal access to free primary education.⁶⁶ Similarly, the Committee called upon Sri Lanka to ensure that human rights and peace education be included in school curricula.⁶⁷ When reviewing the report of the Russian Federation in 2011, the Committee expressed concern that 'in spite of the information provided by the delegation, children living in Chechnya and the Northern Caucasus reportedly remain affected in one or other way by the prevailing consequences of the ended conflict, in particular with regard to their right to education'.⁶⁸ The experts recommended that the authorities take 'urgent measures to ensure that all children living in Chechnya and the Northern Caucasus and those internally displaced pursue their schooling (...) to prevent their voluntary recruitment into military units'.⁶⁹ The trend to emphasise conflict-related concerns pertaining to the right to education has resulted in a set of very specific recommendations addressed to Israel in 2011: the Committee had detailed information at its disposal and made thorough recommendations

⁶² CESCR, 'Concluding Observations, Iraq' (1997) UN Doc E/C.12/1/Add.17, para 34.

⁶³ CESCR, 'Concluding Observations, Serbia and Montenegro' (2005) UN Doc E/C.12/1/Add.108, para 23.

⁶⁴ CESCR, 'Concluding Observations, Nepal' (2008) UN Doc E/CN.12/Npl/CO/2, paras 25, 45. CESCR, 'Concluding Observations, Cambodia' (2009) UN Doc E/CN.12/Khm/CO/1, para 33.

⁶⁵ CESCR, 'Concluding Observations, Afghanistan' (2010) UN Doc E/C.12/Afg/CO/2-4, para 42.

⁶⁶ CESCR, 'Concluding Observations, Nepal' (2008) UN Doc E/CN.12/Npl/CO/2, para 47.

⁶⁷ CESCR, 'Concluding Observations, Sri Lanka' (2010) UN Doc E/CN.12/LKA/CO/2-4, paras 29, 33.

⁶⁸ CESCR, 'Concluding Observations, Russian Federation' (2011) UN Doc E/C.12/RUS/CO/5, para 33.

⁶⁹ *ibid.*

about how the higher dropout rate and shortage of classrooms in Arab schools compared to Hebrew schools should be addressed despite the unsettled conflict.⁷⁰

Conversely, the recommendations on education to Afghanistan, Cambodia, or Morocco were not linked to the measures taken by the authorities to address the challenges related to the armed conflicts, even though there seems to be no substantive reason to suggest such a linkage to Nepal, for instance, but not to Cambodia or Morocco, given that all these States are engaged in efforts to deal with a violent past, in which discrimination in education probably played a role.⁷¹ [start of p.258]

3.3 PHASE III: TOWARDS A MORE SUBSTANTIAL AND SYSTEMATIC APPROACH?

Despite the limited analysis of displacement, mental health and education, there is as yet no systematic discussion as to how the Committee frames its recommendations on ESCR-related concerns arising from an armed conflict. The approach of the Committee appears inconsistent and somewhat unsystematic, but there is evidence of a tentative evolution of the Committee towards a more substantial analysis of conflict-related ESCR challenges.

3.3.1 Closer Scrutiny

A comparison between two subsequent concluding observations on Colombia illustrates this yet uncertain development. In 2001, the Committee cautiously recommended that the State ‘reduce inequality and put an end to conflict by political negotiation, which is the only way effectively to guarantee the ESCR of all citizens’,⁷² and expressed concern about children affected by the conflict.⁷³ In its 2010 session, the Committee used much more explicit language. Considering that concluding observations are worded very diplomatically, the following paragraph indicates that the experts of the Committee were not impressed with the State Party’s report:

⁷⁰ CESCR, ‘Concluding Observations, Israel’ (2011) UN Doc E/C.12/ISR/CO/3, para 33.

⁷¹ See, for instance, the statement in the Concluding Observations on Cambodia that children whose first language is not Khmer may face discrimination in education. CESCR, ‘Concluding Observations, Cambodia’ (2009) UN Doc E/CN.12/Khm/CO/1, para 34. In the cases of Kenya and Colombia, the Committee did make a weak link between the violent situation and education, but only as far as displaced children’s access to education was concerned. CESCR, ‘Concluding Observations, Kenya’ (2008) UN Doc E/C.12/Ken/CO/1, para 34; CESCR, ‘Concluding Observations, Colombia’ (2010) UN Doc E./C.12/Col/CO/5, para 27 (and 26 on the negative effect of the use of narcotics which, in the Committee’s view, finance the armed conflict).

⁷² CESCR, ‘Concluding Observations, Colombia’ (2001) UN Doc E/C.12/1/Add.74, para 30.

⁷³ *ibid* para 20.

The Committee is deeply alarmed about the consequences of the long-standing internal armed conflict in the State Party. The Committee regrets the lack of sufficiently detailed information regarding the actual implementation by the State Party of its obligations under the Covenant, in relation to the civilian populations, in the areas affected by the internal armed conflict. The Committee urges the State Party to take immediate and effective measures to implement the plans described in the report to address the ongoing armed violence. In this regard, the Committee requests the State Party, in its next periodic report, to provide detailed information on the implementation of its obligations, as required by the Covenant, in relation to all economic, social and cultural rights of the civilian populations affected by the internal armed conflict. The Committee reminds the State Party that it is precisely in situations of crisis, that the Covenant requires the protection and promotion of all economic, social and cultural rights, in particular of the most marginalized and disadvantaged groups of the society, to the best of its ability under the prevailing adverse conditions.⁷⁴ [start of p.259]

The Committee moreover urged the State Party to address the situation of displaced children, women and girls,⁷⁵ and formulated a detailed recommendation on the incorporation of ESCR in a national strategy to combat drug-trafficking and corruption – two evils that according to the Committee finance all sides of the internal armed conflict.⁷⁶ The openness with which the Committee referred to these controversial issues shows that the CESCR will not shy away from sensitive issues negatively impacting a State's implementation of the Covenant.

3.3.2 *Addressing Impunity*

In addition, the Committee has also started to emphasise links between impunity and the realisation of ESCR. Table 1 indicates that this is clearly a recent trend. While the CESCR regularly insists on the provision of judicial remedies for victims of violations of ESCR,⁷⁷ it has so far only very rarely made recommendations to investigate, prosecute and punish perpetrators. This is true whether we are concerned with impunity for violations of ESCR,⁷⁸

⁷⁴ CESCR, 'Concluding Observations, Colombia' (2010) UN Doc E./C.12/Col/CO/5, para 7.

⁷⁵ *ibid* paras 15, 16.

⁷⁶ *ibid* para 28.

⁷⁷ It does this most often by expressing concern about the lack of domestic procedures and/or case-law. See CESCR General Comment No 9 (n 26) para 3.

⁷⁸ The earliest references on impunity relate to child labour. CESCR, Concluding Observations, Paraguay, January 2008, UN Doc E/C.12/Par/CO/3, para 23(h).

or for civil and political rights abuses that indirectly hamper the realisation of ESCR (such as the repression of human rights defenders concerned with ESCR).

However, in the concluding observations on Cambodia of May 2009, the Committee framed some of its concerns in terms of requiring enhanced efforts from the State Party to fight impunity, especially the ‘repression of repression of human rights activists defending [ESCR], particularly those defending housing and land rights’.⁷⁹ In the analysis of Kenya’s report, the Committee for the first time addressed structural inequalities in the enjoyment of ESCR in the same paragraph as it addressed impunity and armed violence.⁸⁰ In its November 2009 session, the Committee moved further in the same direction. In the concluding observations on Chad, the Committee recommended that the authorities redouble their efforts to fight corruption and impunity based on the Committee’s view that these hinder the realisation of ESCR, in particular of women and displaced persons.⁸¹ The recent moves of the Committee towards addressing impunity can also be seen in the concluding observations on the DRC in November 2009. Not only was the Committee concerned about impunity in relation to several substantive rights of the ICESCR (particularly those of the Pygmies),⁸² but [start of p.260] it also observed that ‘impunity for human rights violations and the illegal exploitation of the country’s natural resources’ impede the implementation of the Covenant in the DRC.⁸³ This forms strong evidence that the CESCR considers impunity a serious obstacle to the realisation of ESCR – a link that is also increasingly emphasised in the literature on economic and social dimensions of post-conflict justice.⁸⁴ Similarly, in its spring 2010 session, the Committee observed the lack of effective measures to combat widespread corruption and impunity in Afghanistan,⁸⁵ and also urged Colombia to firmly combat impunity, by investigating all cases, prosecuting and sentencing those responsible, including by prosecuting those responsible for child recruitment, trafficking in children, drug-trafficking and corruption.⁸⁶ These recent examples seem to support the conclusion that the Committee

⁷⁹ CESCR, ‘Concluding Observations, Cambodia’ (2009) UN Doc E/CN.12/Khm/CO/1, paras 24, 31.

⁸⁰ CESCR, ‘Concluding Observations, Kenya’ (2008) UN Doc E/C.12/Ken/CO/1, para 12.

⁸¹ CESCR, ‘Concluding Observations, Chad’ (2009) UN Doc E/C.12/Tcd/CO/3, para 11, 20.

⁸² CESCR, ‘Concluding Observations, DRC’ (2009) UN Doc E/CN.12/COD/4, para 17 (referring to extermination, persecution and social marginalization of Pygmies, ‘committed in total impunity’).

⁸³ *ibid* para 6.

⁸⁴ See in particular, R Carranza, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?’ (2008) 2 *International Journal of Transitional Justice* 310, explaining how impunity in the field of ESCR and impunity in the field of civil and political rights mutually reinforce each other.

⁸⁵ CESCR, ‘Concluding Observations, Afghanistan’ (2010) UN Doc E/C.12/Afg/CO/2-4, paras 15, 31 (impunity for violence against women and girls).

⁸⁶ CESCR, ‘Concluding Observations, Colombia’ (2010) UN Doc E./C.12/Col/CO/5, paras 12, 15, 16, 28.

places increasing emphasis on the relationship between impunity and the realisation of human rights, including ESCR.⁸⁷

The Committee's approach in recent concluding observations should be welcomed. There is no legal reason why the Committee should not further develop its approach on the judicial and non-judicial responses to violations of the Covenant. Investigations and criminal proceedings may in some circumstances be a necessary component of 'appropriate means' in complying with the obligations of States to respect, protect and fulfil the rights recognised in the Covenant.⁸⁸

3.3.3 *References to Transitional Justice*

In addition to more assertive and substantial recommendations on conflict-related ESCR-concerns, the CESCR has also started to show interest in transitional justice mechanisms. The first concluding observations in which the Committee referred to the existence of a transitional justice mechanism are the concluding observations [start of p.261] regarding Morocco in 2006.⁸⁹ A cursory but explicit reference to transitional justice mechanisms was also made in the concluding observations on Kenya⁹⁰ and Colombia.⁹¹ In all three cases, the Committee mentioned the existence of such mechanisms in the list of positive aspects or refers to them briefly, but did not analyse the mechanisms in detail to assess whether their establishment could be considered an appropriate measure towards the full realisation of the rights recognised in the Covenant. We will revisit this point in section 4.

The foregoing analysis demonstrates that the Committee has not yet provided very systematic guidance to State Parties as to the resolution of conflict-related challenges in the protection of economic, social and cultural rights. The experts of the CESCR have tailored some of their recommendations to the challenges resulting from armed conflicts and there

⁸⁷ The Human Rights Committee supervising the implementation of the Covenant on Civil and Political Rights has referred to impunity in more than 50 concluding observations, in particular when analysing reports from countries affected by armed conflict or other widespread violence.

⁸⁸ Recommendations to fight impunity for civil and political rights abuses against human rights defenders advocating for ESCR will not come as a surprise to States and commentators. In some circumstances, an argument could also be made that States have certain obligations to investigate the alleged conduct by virtue of international criminal law for those violations of ESCR that amount to international crimes (such as war crimes or crimes against humanity). On this point, see E Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) 71 Heidelberg Journal of International Law 523. E Davidsson, 'Economic Oppression as an International Wrong or as Crime against Humanity' (2005) 23 Netherlands Quarterly of Human Rights 173.

⁸⁹ CESCR, 'Concluding Observations, Morocco' (2006) UN Doc E/C.12/Mar/CO/3, para 5, mentioning Morocco's Equity and Reconciliation Commission.

⁹⁰ CESCR, 'Concluding Observations, Kenya' (2008) UN Doc E/C.12/Ken/CO/1, para 12.

⁹¹ CESCR, 'Concluding Observations, Colombia' (2010) UN Doc E/C.12/Col/CO/5, para 12.

seems to be an evolution towards paying more attention to issues related to armed conflicts and the responses taken to address their legacies.

This evolution and the increasing openness of the Committee to discuss conflict-related issues seems unsurprising given the general trend in international law to explore the parallel application of human rights law and international humanitarian law.⁹² In addition, international human rights law concerning ESCR has significantly developed over the last decades, moving beyond the point when it considered ESCR an orphan of human rights law. The dichotomy between ESCR and civil and political rights has been eroding in the practice of courts, human rights organs, advocacy and in the scholarly literature, and States have expressed their commitment to recognise ESCR on the same footing as civil and political rights.⁹³ Many countries have also entrusted their judiciaries to adjudicate claims based on ESCR.⁹⁴ The recognition by States of the interdependence and indivisibility of all human rights has certainly played a role in furthering the recognition of the practical relevance of people's access to economic, social and cultural rights for the prevention and mitigation of armed conflicts and civil strife. Although this section has revealed lacunae in the Committee's current approach, the Committee is capable of tailoring its recommendations to countries dealing with an armed conflict provided that it is equipped with relevant information from stakeholders. At the same time, it is too early to conclude whether the evolution in the Committee's approach will be sustained over time. As Table 1 shows, recent [start of p.262] concluding observations in 2012 only contained references on the standard of living and education of those displaced in Ethiopia.⁹⁵

Based on the above analysis, we can identify practical steps to strengthen the Committee's approach and the use of the reporting procedure in responses to conflict-related challenges in the realm of ESCR.

⁹² The International Court of Justice has repeatedly confirmed that human rights law remains applicable in times of armed conflict. It has made an explicit statement on the ICESCR in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004, ICJ Rep 2004,178 – 191, paras 106-112.

⁹³ Vienna Declaration and Programme of Action (n 25) para 5.

⁹⁴ M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008). For a useful overview, see also COHRE, 'Leading Cases on Economic, Social and Cultural Rights' (Working Paper No 7, COHRE 2009).

⁹⁵ CESCR, 'Concluding Observations, Ethiopia' (2012) UN Doc E/C.12/ETH/CO/1-3, paras 22-3 and 26.

4. OPPORTUNITIES AND RECOMMENDATIONS

The following suggestions to the Committee as well as to other stakeholders could serve to enhance the Committee's role in addressing the protection of people's enjoyment of ESCR in States affected by armed conflicts or massive violence.

4.1 RECOMMENDATIONS TO THE UN COMMITTEE ON ESCR

4.1.1 *Asking the Right Questions and Forging Links with Transitional Justice Processes*

The first recommendation to the experts of the CESCR is to engage State delegations in more detailed discussions of the conflict-related challenges in the implementation of ESCR and the measures taken to address them, including the existence and mandate of existing or potential transitional justice mechanisms. Even if the time of the interactive dialogue with State Parties is very limited, a broader and more specific list of conflict-related issues would deserve to be discussed.

The CESCR should not only ask questions more frequently and systematically but it should also expand the list of conflict-related issues it enquires about. For instance, while mental health is certainly a crucial post-conflict challenge related to ESCR, it is unclear why the Committee does not systematically ask questions, for instance, about access to rehabilitation more generally.

How should the Committee identify suitable questions? In order to tailor its questions to the situation of the State Party, the Committee could carefully vet the submissions it receives from all stakeholders for the most salient conflict-related issues and prepare its list of questions accordingly. Inspiration could also come from a consideration of recommendations previously made by domestic actors engaged in attempts to deal with the abusive past. For instance, in a number of concluding observations, the Committee has discussed issues very similar to those examined by a previous transitional justice mechanism. The Commission for Historical Clarification in Guatemala, for example, issued its report in 1999 and included recommendations on a range of ESCR-related issues, including reparations and land restitution, [start of p.263] access to ESCR for indigenous communities and agricultural reform.⁹⁶ At the next examination of Guatemala's report, the Committee could have actively engaged with these recommendations, instead of simply taking 'note of the efforts made by

⁹⁶ Comisión para el esclarecimiento histórico, *Guatemala: Memoria del silencio* (AAAS 1999) 'Recomendaciones' [Guatemala Truth Commission Report – Recommendations].

the State Party towards the implementation of the National Reparation Programme' and issuing a very generically phrased recommendation 'that the State Party make every possible effort (...) to provide adequate follow-up to various issues contained in the Peace Agreements of 1996'.⁹⁷ Had the Committee asked the State Party for additional detail on the ESCR-related aspects of the commitments made in the peace agreement, this would in all likelihood have been a more fruitful use of the dialogue time between the Guatemalan representatives and the CESCR experts. Such an interaction might have resulted in more substantial and tailored recommendations in the concluding observations.

A similar lack of detailed engagement with the ESCR challenges arising from a past conflict is apparent in the concluding observations on Algeria. In May 2010, the Committee recommended to Algeria to ensure that families of disappeared persons have access to social security, including if the family had not obtained a court declaration that the disappeared relative had died.⁹⁸ This recommendation concerns one of the main outcomes of the Algerian Ad Hoc Inquiry Commission in Charge of the Question of Disappearances. This inquiry operated from 2003 to 2005 and led to a controversial reparations plan for the families of the disappeared. An obviously problematic aspect of this scheme was that reparations were only awarded to those who presented a death certificate, which many families were reluctant to obtain without knowing the fate of the disappeared. For many families, this was interpreted as an attempt to bribe them to stop asking for information.⁹⁹

The fact that the Committee did not seem to ask more questions about the past conflict and the measures taken to address its consequences is a missed opportunity. Often, there is a local constituency lobbying for the implementation of recommendations made by truth commissions and commissions of inquiry even years after the completion of those mechanisms. Had the Committee been aware of this link, it could have included a more detailed analysis in its concluding observations. This in turn would have had the potential to support the local advocacy efforts in [start of p.264] Algeria around the issue of the right to

⁹⁷ CESCR, Concluding Observations, Guatemala, December 2003, UN Doc E/C.12/1/Add.93, paras 19, 28.

⁹⁸ CESCR, 'Concluding Observations, Algeria' (2010) UN Doc E/C.12/Dza/CO/4, para 13.

⁹⁹ See Algeria, Presidential Decree No 05-278 of 15 August 2005, available at <http://www.usip.org/files/file/resources/collections/commissions/Algeria-Charter_Decree05-278.pdf> accessed 8 July 2013. This decree submitted the reparations plan to a popular referendum. While promising compensation and other forms of reparations, the decree emphasises the view that 'the sovereign people of Algeria opposes any allegations that the Algerian State should take any responsibility for a deliberate pattern of enforced disappearances'. (Translation by the author. The original reads: 'Le Peuple algérien souverain rejette toute allégation visant à faire endosser par l'Etat la responsabilité d'un phénomène délibéré de disparition.')

social security and the struggle for redress and accountability for the abuses committed in the civil conflict.

Other missed opportunities are the instances in which the Committee noted the existence of transitional justice mechanisms, but did not assess whether their establishment or implementation could be considered an ‘appropriate measure’ towards the full realisation of the rights recognised in the Covenant. In these instances, the Committee could have enquired about the measures taken to respond to the conflict-related ESCR problems.

To illustrate this point, the 2008 concluding observations on Kenya mention the planned establishment of the Truth, Justice, and Reconciliation Commission (TJRC), but the Committee did not ask any questions on the mandate of the Commission and whether its establishment could help realise the rights of the Covenant.¹⁰⁰ When the Committee examined the report of Kenya,¹⁰¹ a debate on the design factors of the truth commission took place in Kenya. Domestic stakeholders discussed whether the mandate of the new truth commission should include ESCR, and what else should be done to overcome the socioeconomic inequalities plaguing the country at least since the electoral violence in 2007 and 2008.¹⁰²

The Committee could have asked a question to the State Party on the potential of the TJRC from the perspective of the Covenant, and it would probably have done so if civil society reports had brought the issue to the attention of Committee members. Asking a question in the interactive dialogue between the Committee and the State Party would possibly have furnished useful information to both, and would have enabled the Committee to provide further input and advice in the concluding observations.

Similarly, in the case of Nepal, there was a strong acknowledgement – reflected in the peace agreement – that addressing ESCR related abuses was a crucial aspect of the peace process.¹⁰³ The concluding observations on Nepal are, however, silent with regard to options for the establishment of transitional justice mechanisms.¹⁰⁴ It is argued that the Committee missed an opportunity to engage the State Party in an analysis of the potential of various

¹⁰⁰ CESCR, ‘List of Issues, Kenya’ (2007) UN Doc E/C.12/KEN/Q/1.

¹⁰¹ The constructive dialogue took place on 6 and 7 November 2008.

¹⁰² See for instance, Commission of Inquiry into Post-Election Violence (‘Waki Commission’), *Report* (15 October 2008), available at <www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf> accessed 8 July 2013, chapter 2; Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence: Final Report* (Kenya National Commission on Human Rights 2008).

¹⁰³ Nepal Peace Agreement (n 17).

¹⁰⁴ CESCR, Concluding Observations, Nepal, January 2008, UN Doc E/CN.12/Npl/CO/2.

options regarding the establishment of, for instance, the planned truth commission. The Committee also did not discuss any of the features of the Moroccan transitional justice mechanism, the *Instance Équité et Réconciliation* [Equity and Reconciliation Commission] (IER), despite the fact that the IER has been one of the few transitional justice mechanisms worldwide [start of p.265] that recommended reparations in the field of economic and social rights.¹⁰⁵ While the State Party included the full mandate of the IER in its periodic report,¹⁰⁶ the Moroccan authorities also failed to make the link with the Covenant explicit.¹⁰⁷ It would have been interesting for other countries, and potentially very useful for the Moroccan authorities, had the Committee examined the IER from the perspective of the Covenant to provide additional guidance as to how this mechanism could enhance the protection of ESCR.

The way the Committee has so far referred to transitional justice mechanisms contrasts with the way the Committee approaches national human rights institutions (NHRI). In order to provide more substantial recommendations on the use of transitional justice processes to strengthen the protection of ESCR, the Committee might want to ask similar questions on the measures taken by governments in response to an armed conflict as it does on NHRI. The Committee has developed significant jurisprudence on the latter, which are defined as administrative bodies set up to protect or monitor human rights.¹⁰⁸ The CESCR regularly requests that States include information on the mandate and activities of NHRI in periodic reports, and the Committee devoted a full general comment to the role of NHRI.¹⁰⁹ Once a NHRI has been established, the Committee emphasises the need for these institutions to operate transparently and with financial autonomy.¹¹⁰

An analytical study on transitional justice of the Office of the High Commissioner for Human Rights (OHCHR) insists that supervisory bodies should give due consideration to the subject of ESCR in transitional justice contexts and should encourage national actors to

¹⁰⁵ International Center for Transitional Justice, 'Truth and Reconciliation in Morocco', *Annual Report* (ICTJ 2009). N Roth-Arriaza and K Orlovsky, 'A Complementary Relationship: Reparations and Development' in P de Greiff and others (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009) 184, 91-92.

¹⁰⁶ CESCR, 'State Report of Morocco to the CESCR' (2005) UN Doc E/1994/104/Add.29, paras 7-12.

¹⁰⁷ *ibid.*

¹⁰⁸ See ECOSOC, 'Report of the UN High Commissioner for Human Rights on the Implementation of Economic, Social and Cultural Rights' (2009) UN Doc E/2009/90, paras 27-70.

¹⁰⁹ CESCR, 'General Comment No 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights' (1998) UN Doc E/C.12/1998/25, para 4; CESCR, 'Concluding Observations, Tunisia' (1999) UN Doc E/C.12/1/Add.36, paras 20, 28.

¹¹⁰ CESCR, 'Concluding Observations, Nepal' (2008) UN Doc E/CN.12/Npl/CO/2, para 12.

ensure that these rights are realised in post-conflict States.¹¹¹ Vice versa, when examining a NHRI in a transitioning State, the Committee might also consider emphasising or encouraging the role of the NHRI in the context of post-conflict justice. The OHCHR prepared a guidance note on NHRI and transitional justice in which it encouraged NHRI to consider dealing with ESCR in transitional justice situations.¹¹² This guidance note usefully lists possible activities for NHRI in relation to transitional justice and provides country experiences for each type of [start of p.266] activity. For instance, OHCHR encourages NHRI to ‘consider advocating that truth commissions address violations of these rights in their recommendations’.¹¹³ Further, the guidance note urges NHRI to promote steps to address systematic discrimination and inequality that may have caused or exacerbated the past conflict.¹¹⁴ It is suggested that the Committee take this guidance note into account and encourage State Parties to entrust their NHRI with the suggested activities related to the protection and promotion of ESCR in post-conflict environments.

4.1.2 A Day of General Discussion on the Implementation of State Obligations in Transitional Situations

Second, the Committee could also consider holding a so-called ‘day of general discussion’ on ESCR challenges resulting from armed conflicts. The CESCR regularly organises such days inviting a wide range of stakeholders. Days of general discussion are public meetings in which all interested stakeholders are welcome to take part. Usually, the Committee uses such days of general discussion as an opportunity to advance its formulation of a prospective general comment. The Committee might consider it worthwhile to organise such a day of general discussion in order to discuss whether a general comment on the implementation of State obligations in transitional situations would be useful. A day of general discussion could be used to foster a deeper understanding of the content and implications of article 2(1) of the Covenant in relation to recurring ESCR challenges in the aftermath of widespread violence or armed conflict.

If the Committee were to decide that a general comment should be adopted, the purpose of such a general comment on transitional situations would not be to convey the impression that the level of obligations under the Covenant is attenuated for States dealing

¹¹¹ OHCHR, ‘Analytical Study on Human Rights and Transitional Justice’ (6 August 2009) UN Doc A/HRC/12/18 paras 59-65.

¹¹² OHCHR, ‘Guidance Note on NHRI and Transitional Justice’ (27 September 2008) para 6.

¹¹³ *ibid* paras 33, 36, 41.

¹¹⁴ *ibid*.

with the legacies of a past armed conflict.¹¹⁵ Rather, the motivation for a general comment would be to provide assistance and clarification to States Parties with regard to treaty provisions and to assist States in implementing them and reporting adequately on the extent to which the protection of rights recognised in the Covenant is effective in practice. The CESCR could outline common ESCR challenges found in ‘transitioning’ States, such as displacement, access to housing, land and property, health and rehabilitation (including mental health), or the importance of education and the general obligation of non-discrimination.

While a very small minority of States still consider it controversial for human rights supervisory bodies to make any statements about armed conflicts because they [start of p.267] believe that human rights law is inapplicable during times of armed conflict,¹¹⁶ there are no legal reasons why the Committee should not tailor its recommendations to a particular post-conflict situation so that the prospects for the full realisation of ESCR can be enhanced as effectively as possible. If the Committee was of the view that statements on armed conflicts would entangle it in the legal complexities of the parallel application of international human rights law and international humanitarian law in times of armed conflict, the CESCR has the option to limit the general comment to address post-conflict situations where the applicability of human rights law is beyond the slightest doubt.

In addition to the members of the CESCR, other actors also have a role to play in using the State reporting procedure before the UN Committee more effectively.

4.2 RECOMMENDATIONS FOR CIVIL SOCIETY AND OTHER STAKEHOLDERS

Civil society and other stakeholders (such as donors, humanitarian agencies or development cooperation partners) could undertake the following recommendations.

4.2.1 Sending the Right Information

In advance of an interactive dialogue, many Committee members openly welcome suggestions about what questions should be asked to a State Party.¹¹⁷ The type of questions

¹¹⁵ States have the same general obligations to respect, protect and fulfil ESCR, whether or not they are dealing with the legacies of an armed conflict. Other States arguably also face challenges in implementing ESCR, even if they are not suffering from an armed conflict.

¹¹⁶ Among the State Parties to the ICESCR, Israel is most prominently associated with this view and has – unsuccessfully – defended this position before the International Court of Justice. See Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 92) paras 106-112.

¹¹⁷ The human rights supervisory bodies of the United Nations have a reputation for working closely with civil society stakeholders. See in particular E Riedel, ‘The Development of International Law: Alternatives to Treaty-

posed by the experts in turn influence the substance of the interactive dialogue and the ensuing concluding observations. Quite naturally, there seems to be a tendency for Committee members to focus on those topics for which they either have personal expertise or solid and well-prepared information at their disposal.¹¹⁸ What Dankwa and Flintermann pointed out in 1987 is particularly relevant for the examination of the reports from volatile post-conflict countries: ‘The magnitude and importance of the responsibility of supervising the Covenant’s implementation cannot be overstated. But the task of the Committee will be made easier if it draws on the rich store of experience of institutions that have been involved in the promotion and protection [start of p.268] of human rights.’¹¹⁹ In other words, much depends on whether the Committee is supplied with relevant information about conflict-related ESCR issues and whether individual Committee members can be convinced that these issues are particularly important.

For instance, the fact that the Committee discussed the issue of mental health with conflict affected States Parties is the result of a (former) Committee member asking specific questions to the State delegations presenting the reports of their countries. The inclusion of this particular issue in its concluding observations seems to arise from a personal exchange between an expert and a stakeholder on mental health, with the stakeholder apparently convincing the Committee that the issue of mental health was particularly salient in the country to be reviewed.¹²⁰ This openness to persuasion and information provided by stakeholders shows that when members of the Committee are convinced that a ESCR issue is particularly significant in (post-)conflict situations, the Committee is likely to engage the concerned State Party in a dialogue and to include the issue in its analysis.

To illustrate this point, Bosnia and Herzegovina (BiH) provides an example of the type of engagement that this article hopes to strengthen.¹²¹ In 2006, the CESCR – apparently based upon information provided by civil society – encouraged BiH to modify in its domestic laws the definition of disability so that inequalities resulting from the diverging availability of

Making? International Organizations and Non-State Actors’ in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty Making* (Springer 2006). A Clapham, ‘The Use of International Human Rights Law by Civil Society Organizations’ (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033259> accessed 8 July 2013.

¹¹⁸ Conversation with Prof. Eibe Riedel (former member of the CESCR), September 2009.

¹¹⁹ V Dankwa and C Flinterman, ‘Commentary by the Rapporteurs on the Nature and Scope of States Parties’ Obligations’ (1987) 9 Human Rights Quarterly 136, 137.

¹²⁰ Conversation with Prof. Eibe Riedel (former member of the CESCR), September 2009.

¹²¹ I thank Laure-Anne Courdesse, OHCHR, for bringing this development to my attention in October 2010 at the OHCHR Expert Workshop on Experiences of Transitional Justice Processes in Dealing with Violations of Economic, Social and Cultural Rights.

funds in the cantons could be eliminated.¹²² BiH subsequently adopted the proposed Law on Amendments to the Law on Social Protection, Civilian War Victims, and Families with Children.¹²³ Broader categories of beneficiaries were not entitled to social protection. A few years later, in June 2010, BiH started to prepare for the next examination of its State report before the CESCR. The interactive dialogue with the Committee will probably take place in November 2013. At the time of writing, the written report of BiH was already publicly available. In this report, the Government explains the measures it took to implement the Committee's recommendation from the concluding observations of 2006.¹²⁴ Civil society and other stakeholders can now provide the Committee with their own assessment of the measures taken by the authorities. If the Committee deems it appropriate, it may provide further guidance to the State [start of p.269] Party on how to improve the realisation of ESCR in this post-conflict situation. This example illustrates potential avenues for using the reporting procedure to strengthen the protection of ESCR in the aftermath of conflicts. At the same time, this example also illustrates that if and whether the Committee mentions conflict-related issues depends on what information the Committee has at its disposal. Stakeholders wishing to have an impact on the topics discussed in the dialogue between the State Party and the Committee have to submit information well in advance of the relevant session. This limitation applies independently of whether or not the State Party is a post-conflict State, but given that post-conflict environments are often very volatile, the time lag between the submission of information and the examination of the State's report can be considerably inconvenient. Stakeholders therefore need to make an additional effort to plan ahead to ensure that Committee members are aware of relevant topics as early as possible and are persuaded as to their relevance.

4.2.2 *Capacity-Building*

It would also be helpful to consider building the capacity of Committee members and OHCHR staff to systematically explore further the synergies between the State reporting procedure and efforts to address ESCR-related problems in post-conflict States. Staff members of the OHCHR play an important role in supporting the CESCR and in filtering the information, preparing meetings and materials related to upcoming sessions of the CESCR

¹²² CESCR, 'Concluding Observations, Bosnia and Herzegovina' (2006) UN Doc E/C.12/Bih/CO/1., para 40.

¹²³ Official Gazette of the Federation of BiH, No 39/06. For a critical assessment, see L Popic and B Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina* (Sabah Print 2010).

¹²⁴ ECOSOC, 'State Report, Bosnia and Herzegovina' (2010) UN Doc E/C.12/BIH/2.

and other UN human rights bodies. Governments willing to contribute to the post-conflict work of the OHCHR might consider funding initiatives that would build knowledge and capacity on post-conflict issues among Committee members and the OHCHR staff working within the Human Rights Treaties Branch, for instance by producing and disseminating a handbook on transitional justice, post-conflict reconstruction and ESCR or by funding additional staff capacities.

5. CONCLUSION

Employing the reporting procedure of the main international human rights treaty on ESCR in (post-)conflict contexts will obviously not solve all the problems that plague societies struggling to address widespread socio-economic and cultural human rights problems. But those hoping to increase attention to economic, social or cultural matters in attempts to deal with the consequences of armed conflicts have not yet maximised the potential of the legal framework provided by the main international treaty dedicated to ESCR. The analysis has revealed that the ICESCR, as part of the International Bill of Rights, can be used meaningfully to support efforts to enhance the protection of ESCR at the national level. When States submit their reports to the supervisory CESCR, the experts can advise vulnerable conflict and post-conflict States on specific ESCR challenges related to armed conflicts, such as displacement, [start of p. 270] access to health care and rehabilitation, education or discrimination exacerbated by the conflict. If used strategically by stakeholders, observations from UN bodies can carry significant weight internationally and at the domestic level. Over the last few decades, the Committee has already provided some guidance on the provision of redress for violations of ESCR. It has, notably, made clear that States Parties must justify why they consider the measures taken as the most appropriate under the prevailing circumstances.

At the same time, the Committee's approach to armed conflicts and the measures taken to recover from conflicts is, as yet, cursory and inconsistent. The article recommends that the Committee ought to raise more questions to State delegations as to whether or not the measures to deal with the ESCR-challenges resulting from a conflict can be considered 'appropriate means' in the sense of Article 2(1) of the ICESCR. The CESCR should also analyse existing or planned mechanisms of transitional justice, such as truth commissions or reparations programmes, to analyse the pros and cons of engaging these mechanisms in attempts to strengthen the protection and realisation of ESCR. Civil society and other stakeholders can encourage the Committee to take a more conflict-sensitive approach if they

supply the CESCR with specific and timely information on the links between the realisation of ESCR and specific conflict-related challenges. Lastly, building the capacity of Committee members and of OHCHR support staff in relation to transitional justice mechanisms would enhance the chances that the synergies between the work of the CESCR and transitional justice could be maximised.

The literature on responses to armed conflicts has long suggested that redress for massive human rights violations is not possible in courts alone, and that large-scale remedial programmes and combinations of measures and mechanisms are required,¹²⁵ just as the flexible provisions of the ICESCR accommodate. Prioritising what past abuses and ongoing human rights problems should be addressed, and in what ways, is inherently challenging in any post-conflict situation. But where national consultations reveal the need to address ESCR, the experts of the UN Committee monitoring the implementation of the ICESCR have provided at least some guidance. In particular, the Committee has made clear that an ongoing or past armed conflict does not excuse the State Party from the obligation to take concerted steps to identify and adopt all appropriate means with a view to realising the rights recognised in the ICESCR, including by providing redress for conflict-related harm.

¹²⁵ See notably M Minow, *Between Vengeance and Forgiveness* (Beacon 1998); and R Falk, 'International Law, and Global Justice: A New Frontier' in P de Greiff (ed), *The Handbook of Reparations* (OUP 2006).