# Chapter 3

Implementation of Human Rights

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1. **Executive Summary**

- States are the traditional actors within the international legal system and have the primary responsibility for implementing human rights. The international human rights framework makes it clear that both federal and state governments have responsibilities in relation to the realisation of human rights.

- States’ implementation responsibilities have three aspects: to respect, protect and fulfill human rights.

- The implementation of economic, social and cultural rights raises specific issues as it often depends on the resources and level of economic development of the relevant state. This is reflected in the idea of ‘progressive realisation’. In any event, the Committee on Economic Social and Cultural Rights has emphasised that there are minimum ‘core obligations’ that must be met by all states parties.

- International human rights law incorporates the right to an effective remedy. This is primarily the responsibility of the state, but individuals can pursue certain human rights complaints against states via the Human Rights Committee (although this requires that all effective domestic remedies be exhausted first), or by an Individual Complaint to the relevant UN Special Rapporteur where, for example, an alleged breach of the ICESCR or the CAT is concerned.

- Domestic legislation does not comprehensively provide for effective remedies for every human rights violation, but some remedies are available for some violations.

2. **Who is Responsible for Implementation?**

The ICC is an example of a forum in which responsibility for the most serious violations of international human rights law can be visited upon an individual. However, states are the traditional actors within the international legal system, which until the end of the Second World War was concerned largely with regulating inter-state relations. It is a fundamental tension in international human rights law that while the various international human rights instruments are concerned with the rights of the individual, it is the state and not the individual that is party to the instruments. It is largely upon the state that the individual must depend for the realisation and enjoyment of her or his human rights.

A state’s responsibility to implement human rights involves more than avoiding conduct that infringes the rights of persons within its territory. As discussed further in Part 3 below, it has become accepted that states are under a tripartite obligation to ‘respect, protect and fulfill’ human rights. These three levels of obligation place distinct obligations on states with respect to each human right contained in the *International Covenant on*
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Civil and Political Rights (‘ICCPR’)¹ and the International Covenant on Economic Social and Cultural Rights (‘ICESCR’),² and arguably to those in other human rights treaties as well. The domestic implementation of human rights is discussed in Chapter 4.

The international human rights framework makes it clear that both federal and state governments have responsibilities in relation to the realisation of human rights. Article 28 of the ICESCR and art 50 of the ICCPR expressly provide that, in federations such as Australia, the obligations of the Covenants are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at whatever level — national, state or local — must act to respect, protect and fulfill human rights.³

3. Typology of Obligations

3.1 Background

International human rights law is often described as imposing three levels or types of obligations: obligations to respect, protect and fulfill. This tripartite typology was introduced by Henry Shue in his book Basic Rights: Subsistence, Affluence and U.S. Foreign Policy⁴ and then developed by Asbjørn Eide, who acted as the UN’s Special Rapporteur for Food during the early 1980s.

Eide described the obligations as follows:

- the obligation to ‘respect’ requires states to abstain from violating a right;
- the obligation to ‘protect’ requires states to prevent third parties from violating that right; and
- the obligation to ‘fulfill’ requires the state to take measures to ensure that the right is enjoyed by those within the state’s jurisdiction.⁵

¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
Today a number of UN human rights bodies have incorporated the tripartite typology into their language. 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 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 Human Rights Committee, 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 tripartite typology is also commonly referred to by legal scholars and non-governmental organisations.

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3.2 Why Categorise Obligations?

The tripartite typology can provide a helpful analytical tool. Categorising obligations under human rights law into obligations to respect, protect and fulfill clarifies the nature and scope of the obligations. Dividing human rights obligations in this way highlights the fact that states have an active role to play in the implementation of human rights, rather than a mere obligation of non-interference.

Traditionally, the state has been regarded as only being under negative, 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 the rights as between private parties. This may be referred to as the doctrine of horizontality. Under the doctrine of horizontality, it is not necessary for the state to have committed the breach itself, or even acquiesced to the breach.

This horizontal obligation is one of due diligence: states must take reasonable measures against human rights abusers, and if possible, prevent abuses. It should be noted that, in discharging their duties to prevent human rights abuses, states must act in a manner which is compatible with the human rights of all individuals, including suspects and the accused, and not just the human rights of the victim. For instance, it would be unreasonable to assert that a state, in protecting the right to life of one individual, could violate a potential murderer’s right to be presumed innocent.

At the very least, states should make certain acts and omissions crimes. For example, for a state to protect an individual’s freedom from torture, the state must legislate with respect to the crime of assault (among others), paying special attention to the needs of society’s vulnerable. To take another example, states must protect children from child abuse by enacting laws prohibiting unreasonable corporeal punishment. States should also investigate any alleged abuses, and if the abuse is substantiated, punish the abuser and compensate the victim. This investigation and prosecution must respect the rights of suspects and, eventually, the accused.

In addition, states should regulate the conduct of private bodies wherever there is a power imbalance. In Australia, this is illustrated to some extent by workplace relations.

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11 *A v United Kingdom* (1998) VI Eur Court HR 2692.
12 *Velasquez Rodriguez v Honduras* [1988] Inter-Am Court HR (ser C) No 4.
14 *A v United Kingdom* (1998) VI Eur Court HR 2692.
15 Ibid.
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laws governing the relationship between employers and employees, and corporations 

and corporations 

laws creating directors’ duties.

The Human Rights Committee’s (‘HRC’) General Comment on art 2 of the ICCPR states 

that:

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

The comments of the Committee on Economic, Social and Cultural Rights on the right to food cited above illustrate that the tripartite typology may also assist in ascertaining which actions are necessary or required in the implementation of a particular right. More recently this typology of obligations has been used to distinguish the human rights obligations of corporations and other non-state actors from those of states.

However, a typology-based analysis has limitations. Koch points out that ‘typologies are at best abstract instruments for temporarily fending off the complexities of concrete reality that threaten to overwhelm our circuits.’

3.3 Application to States

States’ obligations to respect, protect and fulfill can be applied across the spectrum of human rights. Since making its General Comment on the right to adequate food, CESCR has consistently referred to the tripartite typology in its General Comments, which have concerned:

- the right to education;
- the right to health;

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16 See the Workplace and Employee Relations Act 1996 (Cth).
17 See ch 2D of the Corporations Act 2001 (Cth).
19 Koch, above n 8, 81.
20 The CESCR’s General Comments are available at http://www.ohchr.org/english/bodies/cescr/comments.htm.
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- the right to water;\textsuperscript{23}
- the equal right of men and women to the enjoyment of all economic, social and cultural rights;\textsuperscript{24}
- 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 he or she is the author;\textsuperscript{25} and
- the right to work.\textsuperscript{26}

In relation to the right to water the Committee gave specific examples of the actions that each level of obligation entails:

- Examples of the obligation to respect included refraining from: engaging in any activity which denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; and unlawfully diminishing or polluting water.\textsuperscript{27}
- Examples of the obligation to protect included adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water.\textsuperscript{28}
- Examples of the obligation to fulfill included ensuring that water is affordable to everyone and facilitating improved and sustainable access to water.\textsuperscript{29}

3.4 Application to Non-State Actors

While the tripartite typology was developed with the human rights obligations of states in mind, it can also be applied to the obligations of non-state actors such as corporations and non-government organisations.\textsuperscript{30}


\textsuperscript{25} CESC, \textit{General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author}, UN Doc E/C.12/GC/17 (2006) available at http://www.ohchr.org/english/bodies/cescr/comments.htm.


\textsuperscript{27} CESC, \textit{General Comment 15}, above n 23, [21].

\textsuperscript{28} Ibid [23].

\textsuperscript{29} Ibid [26].

4. Implementation of Economic, Social and Cultural Rights

4.1 Introduction and Framework

Formally, all human rights are ‘indivisible and interdependent and interrelated’,\(^{31}\) but in practice a distinction is often drawn between civil and political rights on the one hand, and economic, social and cultural rights on the other. In particular, states parties’ obligations under the *ICESCR* are often — and, arguably, erroneously — said to be ‘softer’ than those under the *ICCPR*.

States parties’ obligations under the *ICESCR* are set out in art 2:

1. Each State Party to the present *Covenant* undertakes to take steps, individually and through international assistance and cooperation, 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.

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.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present *Covenant* to non-nationals.\(^{32}\)

States parties’ levels of compliance with, and implementation of, the *ICESCR* are monitored by the CESCR.\(^{33}\) From time to time, the Committee adopts and publishes

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\(^{32}\) Article 2(3) was intended ‘to end the domination of certain economic groups of non-nationals during colonial times’ and so the qualification it establishes ‘should be interpreted narrowly’: *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN.4/1987/17, annex (1987) [43] (‘*Limburg Principles*’). For this reason, art 2(3) is not discussed in any detail here. The *Limburg Principles* were produced by a group of distinguished experts in international law which met in 1986 to consider the nature and scope of the obligations of states parties to the *ICESCR*. The Principles primarily seek to describe the state of the relevant international law but also have a normative cast in places.

\(^{33}\) The CESCR was established on 28 May 1985 by Resolution 1985/17 of the Economic and Social Council.
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General Comments to clarify the operation and effect of the ICESCR. These General Comments are not strictly legally binding, but have a strong normative effect given that the Committee is the peak body charged with oversight of the ICESCR.

4.2 Progressive Obligations

CESCR has said that ‘[t]he central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein’.\(^\text{34}\) This obligation is often analysed in terms of duties to respect, protect and fulfil the rights expressed in the Covenant. The duty to fulfil encompasses subsidiary duties to facilitate, provide and, in some cases, promote those rights.\(^\text{35}\)

Under ICESCR art 2(1), states parties are obliged to use ‘all appropriate means, including particularly the adoption of legislative measures’ to realise the rights recognised in the ICESCR. The enactment of legislation will often be necessary to meet this obligation — for example, where there are existing laws which violate a state’s obligations under the Covenant. However, legislation will not always be sufficient to satisfy a state party’s obligation. Other types of measures which may be required to meet this obligation include — but are not limited to — administrative, judicial, policy, budgetary, economic, social, educational and promotional measures.\(^\text{36}\)

Two principles of international law are particularly relevant to the domestic implementation of the ICESCR:

- The provisions of a state’s domestic laws are no excuse for failure to perform a treaty. This is relevant to the obligation to amend laws discussed in the previous paragraph.

- Everyone has a right to an effective remedy from a domestic tribunal where there is a violation of their fundamental rights as granted by constitution or law. The ICESCR does not explicitly require states parties to provide judicial or other remedies for violations of economic, social and cultural rights recognised in the Covenant, but in

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\(^{35}\) See generally CESCR, *General Comment 14*, above n 22, [33]. For a more detailed discussion of this typology of obligations, see Part 3 above.

many — if not most — cases, the provision of such remedies would be necessary for a state party to discharge its obligations under the Covenant.\(^{37}\)

The ICESCR does not prescribe a 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.\(^{38}\)

Article 2(1) obliges each state party to ‘take steps … with a view to achieving progressively the full realization of the rights recognized in [the ICESCR]’. This can be contrasted with the wording of the ICCPR, which clearly imposes immediate obligations on states parties to that Covenant. However, in General Comment 3, which concerns the nature of states parties’ obligations under the ICESCR, CESCR emphasises that this obligation of ‘progressive realization’ should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.\(^{39}\)

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.\(^{40}\)

\(^{37}\) CESCR, General Comment 9, above n 34, [3], [9]–[10], citing the VCLT, above n 3, in relation to the first principle, and the Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3\(^{rd}\) sess, 183\(^{rd}\) plen mtg, UN Doc A/Res/217A (1948) art 8 in relation to the second principle.

\(^{38}\) CESCR, General Comment 9, above n 34, [7]–[8].


\(^{40}\) CESCR, General Comment 14, above n 22, [31].
Similar comments can be made in respect of the requirement that each state party ‘take steps … to the maximum of its available resources’ — this proviso, too, does not allow a state to defer the progressive realisation of rights required by the ICESCR on the basis of its national level of economic development.

Moreover, there is

a strong presumption that retrogressive measures taken in relation to [rights recognised in the ICESCR] are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.  

Article 2(2) also requires that states parties eliminate discrimination in relation to the enjoyment of economic, social and cultural rights, both on their own parts (as governments) and as practised by private individuals acting in the public sphere. Again, this is an immediate obligation and again it may involve measures including but not limited to the enactment of legislation.

It is also worth noting that art 2(1) obliges states parties to take steps ‘individually and through international assistance and cooperation, especially economic and technical’. This means that states parties’ obligations extend beyond their own individual national circumstances and include obligations in relation to the broader global community. The availability of international resources is also considered in determining whether a state has taken steps to the maximum of its available resources.

### 4.3 Core Obligations

In General Comment 3, CESCR states that there is:

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights … incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.

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41 Ibid [32]. While these remarks were made in reference to art 12 of the ICESCR (the right to the highest attainable standard of health), it is clear that CESCR intended them to be of general application to all rights recognised in the Covenant.

42 Limburg Principles, above n 32, [35]–[41].

43 CESCR, General Comment 3, above n 39, [10].
In that General Comment, CESCR recognises that an assessment of whether a state party has discharged its minimum core obligations under the ICESCR must take account of resource constraints but emphasises that states parties must make every effort to use all of their available resources to satisfy at least their minimum core obligations.\(^{44}\)

Moreover, even if a state party is, because of resource constraints, unable to satisfy its minimum core obligations, it is obliged ‘to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances’.\(^{45}\)

*General Comment 14* affirms that a state party to the ICESCR ‘cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in [General Comment 14], which are non-derogable’.\(^{46}\) The remarks in *General Comment 14* appear in the context of a discussion of art 12 of the ICESCR (the right to the highest attainable standard of health) but have a general application to all rights recognised by the *Covenant*.\(^{47}\)

The Committee 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;\(^{48}\)
- education;\(^{49}\)
- health;\(^{50}\)
- water;\(^{51}\)
- 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;\(^{52}\)

\(^{44}\) Ibid.

\(^{45}\) Ibid [11].

\(^{46}\) CESCR, *General Comment 14*, above n 22, [47].

\(^{47}\) In a statement adopted on 4 May 2001, CESCR considered itself to have, in its General Comments on the subject, confirmed that core obligations under the ICESCR are non-derogable: CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) [16].


\(^{49}\) CESCR, *General Comment 13*, above n 21, [57].

\(^{50}\) CESCR, *General Comment 14*, above n 22, [43], [47].

\(^{51}\) CESCR, *General Comment 15*, above n 23, [37].

\(^{52}\) CESCR, *General Comment 17*, above n 25, [39].
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.

4.4 Further Resources

The key materials relating to the content of these notes are the relevant General Comments of the Committee (particularly General Comments 3 and 9) the Limburg Principles and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. However, the following additional materials also useful for their consideration of issues concerning the implementation of economic, social and cultural rights:

- John Squire, Malcolm Langford and Bret Thiele (eds), The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights (2005); especially Matthew Craven’s ‘Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights’, at 27–42.

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53 CESCR, General Comment 18, above n 26, [31].
54 Above n 32.
5. The Obligation to Provide an Effective Remedy

5.1 The Right to an ‘Effective Remedy’

The requirement to provide an ‘effective remedy’ as part of a state’s obligations in relation to particular human rights is found in many human rights conventions. For example, under art 2(2) of the ICCPR, a State Party undertakes to: ‘adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant’, and art 2(3)(a) further provides that states parties to the ICCPR must ensure that people whose rights are violated have an ‘effective remedy’. Complaints should be determined by ‘competent judicial, administrative or legislative authorities’, and a remedy, if granted, should be enforced.

While certain international tribunals and bodies have the ability to hear complaints regarding breaches of various human rights conventions, the primary responsibility for compliance with human rights treaties lies within the domestic legal systems of the states parties. For instance, CESCR has stated that international procedures for the pursuit of individual claims are ‘only supplementary to effective national remedies’.

5.2 HRC and CESCR Jurisprudence

In General Comment 31, the HRC addressed the implementation obligations that art 2 of the ICCPR imposes on states parties. The HRC observed the ‘unqualified’ nature of the obligation expressed in art 2(2), stating that a failure to comply with the obligation ‘cannot...
be justified by reference to political, social, cultural or economic considerations within the State’.

In relation to art 2(3), the HRC stated that states must provide individuals with accessible domestic remedies, which should be appropriately adapted so as to take account of the ‘special vulnerabilities of certain categories of person, including in particular children’. The elderly and persons with disabilities would also certainly be within the HRC’s contemplation of persons with ‘special vulnerabilities’. The HRC also considers that the right to an effective remedy imposes on the state a duty to investigate allegations of human rights breaches, and the failure to discharge that duty may itself constitute a separate breach of the ICCPR.

The HRC has defined the right to an ‘effective remedy’ as requiring ‘reparations’ to be made to individuals whose ICCPR rights have been violated. Such ‘reparations’ may include:

- restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

Accordingly, an ‘effective remedy’ may require measures beyond a victim-specific remedy such as compensation. This principle is mirrored in art 2(1) of the ICESCR, in which states parties undertake to take steps, individually and through international assistance and cooperation, 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.

The CESCR has stated that the provision of remedies at the national level is one of the ‘appropriate means’ for giving effect to the ICESCR.

CESCR has also stated that ‘[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be

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63 Ibid [15].
64 Ibid [18].
65 Ibid [16].
66 Ibid [17].
67 ICESCR, above n 2, art 2(1) (emphasis added). CESCR has emphasised that ‘although the full realization of the relevant rights may be achieved progressively’, art 2(1) requires immediate, targeted steps to be taken towards meeting the ICESCR obligations: CESCR, Report of the Committee on Economic, Social and Cultural Rights, UN Doc E/1991/23 (1991) 83–7.
68 CESCR, General Comment 3, above n 39, [5].
adequate …’.

Nevertheless, some ICESCR obligations, such as those concerning non-discrimination, cannot be made fully effective without the possibility of recourse to a judicial remedy.

5.3 The Right to a Remedy for Serious Human Rights Violations

The importance of making available effective remedies for serious human rights violations has been expressed by the UN General Assembly in Principle 2 of the 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, which states:

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

In its introductory notes, the General Assembly indicates two key reasons for adopting Resolution 147:

- to affirm ‘the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels’; and

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69 Ibid [9].
70 Ibid.
71 GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, UN Doc A/RES/60/147 (2005) (‘Resolution 147’) (emphasis added).
to recognise ‘that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field.’

This statement is a clear recognition by the General Assembly that a state’s obligation to provide effective remedies is an essential part of its commitment to the protection of human rights through law and legal processes. Resolution 147 sets out suggested positions and approaches that states should adopt in making available remedies at the domestic level for human rights violations, and provides guidance in areas including:

- the obligation to prosecute perpetrators of gross human rights violations;
- the application of statutes of limitation;
- the manner of treatment of victims;
- issues relating to a victim’s access to justice;
- the elements to be considered in making reparations for gross human rights violations; and
- the ability of a victim to obtain information in relation to the relevant human rights violations.

5.4 Seeking Remedies at International Law: The Duty to Exhaust All ‘Effective’ Domestic Remedies

Potential mechanisms under international law for obtaining remedies in respect of violations of human rights include, for example:

- a communication to the HRC under the First Optional Protocol to the ICCPR in relation to alleged violations of the ICCPR; or
- an Individual Complaint to a UN Special Rapporteur in relation to an alleged violation of the ICESCR or the CAT.

These avenues of redress are discussed in detail in Chapter 6.

However, a general precondition to the admissibility of any claim at the international level is that a person may only seek a remedy at the international level if they have exhausted all domestic remedies. This requirement is contained in several international treaties. For example, art 2 of the First Optional Protocol to the ICCPR states that:

individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Similarly, art 36 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:
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The [European] Commission [of Human Rights] may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.\(^\text{72}\)

It is important to note that the requirement to exhaust domestically available remedies is not absolute. It only extends to ‘effective’ remedies, and not to all theoretically possible avenues of redress. Applicants are not obliged to exhaust domestic remedies that are not effective. For example, an applicant is not expected to pursue domestic remedies where it would be very difficult in practical terms for an aggrieved party in the applicant’s position to effectively mobilise judicial mechanisms, or where the authorities show a clear reluctance to investigate claims. The European Court of Human Rights has stated that the requirement to exhaust domestic remedies becomes ‘inapplicable where an administrative practice … has been shown to exist, and is of such a nature as to make proceedings futile …’\(^\text{73}\)

The requirement to exhaust all effective domestic remedies is considered in further detail in Chapter 6.

5.5 Remedies under Australian Law

Human rights may be enforceable in Australia at either the Commonwealth or state level, and under common law or statute law.

At common law, for example, courts have traditionally exercised a jurisdiction to issue a writ of \textit{habeas corpus} to order the release of a person who has been unlawfully detained under Australian law.\(^\text{74}\)

There is also a range of Australian legislation that implements, to varying degrees, Australia’s obligations under international human rights conventions, and in certain circumstances, provides remedies for breaches of the rights they implement. At the Commonwealth level, these include the \textit{Racial Discrimination Act 1975} (Cth), \textit{Age Discrimination Act 2004} (Cth), \textit{Disability Discrimination Act 1992} (Cth) and \textit{Sex Discrimination Act 1984} (Cth), which prohibit different forms of discrimination and harassment in the workplace and in various aspects of public life. While engaging in such prohibited conduct is unlawful, an aggrieved party has no immediate right to take civil action against the wrongdoer to obtain remedies. Instead, the initial remedy is a right

\(^{72}\) Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘\textit{European Convention on Human Rights}’).

\(^{73}\) \textit{Akdivar v Turkey} (1996) IV Eur Court HR 1192, 1210.

\(^{74}\) \textit{Re Hood; Ex parte Mullen} (1935) 35 SR (NSW) 289, 294–7 (Jordan CJ) (FC); \textit{Hinton Demolitions Pty Ltd v Lower [No 2]} (1971) 1 SASR 512, 532–8 (Wells J) (FC); \textit{Commissioner for Motor Transport v Kirkpatrick} (1988) 13 NSWLR 368, 372–8 (Mahoney JA), 387–94 (Priestley JA) (NSWCA).
to lodge a complaint with the Human Rights and Equal Opportunity Commission (‘HREOC’),\textsuperscript{75} although it is an offence, for example, under the \textit{Racial Discrimination Act 1975} (Cth) to dismiss or otherwise prejudice an employee because the employee has made, or proposes to make, a complaint to HREOC.\textsuperscript{76} Only if HREOC’s inquiry and conciliation process leaves the matter unresolved may a complainant then take action in the Federal Court or Federal Magistrates’ Court, which has power to order remedies such as:

- a declaration of unlawful discrimination;
- a direction that the respondent not repeat or continue the unlawful discrimination;
- an order requiring the respondent to act to redress loss suffered by the complainant, or to employ/re-employ the complainant; and
- damages to compensate loss suffered by the complainant.\textsuperscript{77}

While HREOC also has the power to receive complaints regarding alleged breaches of human rights by the Commonwealth (eg by a federal government department) against accepted international standards (such as those contained in the \textit{ICCPR}), there is no right for the complainant to take action in the Federal Court if conciliation fails to resolve the matter. It merely has the power to report to the responsible federal Minister regarding the matter.\textsuperscript{78}

The key statutes providing remedies for human rights violations in Victoria are:

- the \textit{Equal Opportunity Act 1996} (Vic), which aims to promote equal recognition and acceptance among all people, as well as eliminate discrimination and sexual harassment; and
- the Victorian \textit{Charter of Human Rights and Responsibilities Act 2006} (Vic), which is discussed in detail in \textbf{Chapter 5}.

Other Victorian legislation also contains provisions relating to certain rights.\textsuperscript{79}

While statutes may provide important protection of rights, they do not cover all of the rights contained in the \textit{ICCPR}, \textit{ICESCR} and other international human rights instruments. In addition, even where a right is recognised under existing legislation, it is not always possible to achieve an effective remedy for a breach of that right.

\textsuperscript{75} \textit{Human Rights and Equal Opportunity Commission Act 1986} (Cth) Part IIB.
\textsuperscript{76} \textit{Racial Discrimination Act 1975} (Cth) s 27.
\textsuperscript{77} \textit{Human Rights and Equal Opportunity Commission Act 1986} (Cth) s 46PP.
\textsuperscript{78} \textit{Human Rights and Equal Opportunity Commission Act 1986} (Cth) s 11(1)(f).
\textsuperscript{79} See, eg, \textit{Racial and Religious Tolerance Act 2001} (Vic); \textit{Information Privacy Act 2000} (Vic); \textit{Freedom of Information Act 1982} (Vic); \textit{Evidence Act 1958} (Vic); \textit{Crimes Act 1958} (Vic).
Chapter 3 – Implementation of Human Rights

A detailed discussion on the implementation and use of international human rights law in domestic law and courts is contained in Chapter 4.

5.6 Deficiencies in Domestic Protection

The quality of Australia’s compliance with its obligations to provide effective remedies to victims of human rights breaches has also been questioned. The HRC has stated, in its Concluding Observations on Australia’s third and fourth periodic reports regarding implementation of the ICCPR, that ‘[t]here are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated’.  

CESCR has also stated, in response to Australia’s third periodic report on the implementation of the ICESCR, that ‘the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions’.  
