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Background paper prepared by the Secretariat

Selection of case law on economic, social and cultural rights

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Introduction

1. The Office of the High Commissioner for Human Rights submits the present paper as background information to assist the working group in its deliberations. The purpose of the paper is to summarize some cases on economic, social and cultural rights. To this end, the Office has chosen a selection of cases to reflect: a range of economic, social and cultural rights; a selection of regions; and a mix of national, regional and international cases. Consequently, the mix is as follows:

    a. *Rights*: There are: two cases on workers' rights, two cases on the right to social security; one case on the right to food; two cases on right to adequate housing; two cases on right to health; and one case on right to education.
    b. *Regional representation*: There are four cases from the African region (three from South Africa and one from Ghana); two cases from Latin America (one from Bolivia and one from Colombia); one case from Asia-Pacific (India); and three cases from Western Europe (one from Portugal, one from France and one from Switzerland).
    c. *Tribunals, Courts and other Bodies:* Seven cases were before national tribunals; three cases were before regional bodies.

2. The cases are presented according to specific rights. It is important to note that the cases respond to specific definitions of those rights under national, regional or international law. Consequently, generic terms such as right to health or right to adequate housing are used as indications only. Similarly, where cases involve questions concerning more than one economic, social and cultural right, the summary headings refer to the dominant issue before the tribunal or body.

3. The present paper supplements a similar document presented to the first session of the working group (E/CN.4/2004/WG.23/CRP.1) which also summarizes some cases on economic, social and cultural rights. That document has also been made available to the working group.

I. WORKERS' RIGHTS

A. European Council of Police Trade Unions v Portugal – Complaint No 11/2000 – European Committee of Social Rights

4. *Facts*: The authors of the communication argued that legislation allowing Public Security Police (PSP) to establish professional associations fell short of guaranteeing the right to organize as the relevant legislation afforded personnel merely a right of association and did not grant full trade union rights. Further, the authors argued that the PSP professional associations did not enjoy the right to bargain collectively as, legally, they were under-represented in the national consultative bodies attached to the director of the PSP and in practice, these consultative bodies did not deal with matters of interest to those associations. The Government rejected the claims, particularly in light of 2002 legislation (enacted after commencement of proceedings) governing the freedom of association and collective bargaining of police personnel.

5. *Claim*: The authors asked the Committee to rule that Government – as a result of the relevant Act and its practice - was in breach of articles 5 (right to organize) and 6 (right to collective bargaining) of the European Social Charter.

6. *Decision*: In relation to the right to organize, the Committee noted that the Charter permits States to restrict, but not to completely deny, police officers' right to organize. Under the right to organize, police personnel must be able to form or join genuine organizations and such organizations must be able to benefit from most trade union prerogatives. A state will be in conformity with the Charter right to organize if it guarantees the following: first, basic guarantees concerning the constitution of professional associations (the creation itself; the accession to an existing association; its hypothetical affiliation to other organizations; and its internal organization and operation); second, guarantees of trade union prerogatives for the associations (ability to make demands with regard to working conditions and pay; access to the workplace; and, right of assembly and speech); third, guarantees to protect trade union representatives. After reviewing the relevant legislation – particularly the 2002 legislation - the Committee held that these requirements had been met.

7. In relation to the article 6 claim, the Committee noted that ordinary collective bargaining, in the context of officials, may be subject to regulations determined by law so long as officials retained their right to participate in any processes directly relevant to them. The Committee noted that the professional associations of the PSP were poorly represented on national consultative bodies; however, professional associations in practice were able to meet with the Minister and his representatives to negotiate matters relating to the status, working conditions and pay of PSP personnel. Consequently, in practice, PSP professional associations did participate in direct negotiations with Government on most questions. Further, the 2002 legislation explicitly provided for the implementation of the right to collective bargaining in this context.

8. *Orders*: The Committee concluded unanimously that the situation of PSP personnel was in conformity with the right to organize and the right to collective bargaining under the Charter.

B. César Huanca Matías c/ Edgar Bazán Ortega, H. Alcalde Municipal – Constitutional Court of Bolivia

9. *Facts*: The applicant had suffered polio during his childhood and continued living with disabilities as an adult. In June 1998, after obtaining a degree in Business Administration, the applicant gained employment with the local Municipality. However, in May 2000, the Municipality retrenched the applicant "as a result of the transition to the new Municipal Government". The applicant brought a claim before a lower court to declare the act illegal, however the Court rejected the claim. The applicant appealed to the Constitutional Court.

10. *Claim*: The applicant claimed that the decision of the Municipality to retrench him violated his rights as a disabled person, including the right to life and the right to professional integration for people with disabilities. In particular, the applicant claimed violations of the rights under the Special Law for People with Disabilities (1995) and its regulations, as well as ILO Convention 159 (Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983) under which States must ensure that people with disabilities obtain and maintain adequate and stable work. As a result, the applicant sought reinstatement in his work as well as damages for losses suffered.

11. *Decision*: The majority of the Court noted that people living with disabilities were often socially marginalized and that the recognition of the rights of people with disabilities at both the national and international levels had been slow. Further, the majority noted that existing international instruments recognized that disability is not only a question for individuals but also for society at large. For this reason, a positive social environment directed towards the integration of people living with disabilities could have a decisive effect on facilitating the lives of these people. Moreover, these principles had been recognized in the Constitution and national laws. In particular, ILO Convention 159 - including the duty on States to allow a person with disabilities to obtain and maintain adequate work and to progress in that work - had been incorporated into national law. Consequently, an employer should not obstruct the right to work of a person with disabilities unless it was clearly demonstrated that the disabilities of the person were incompatible and impossible to resolve with the requirements of the job. In the present case, the majority held that the Municipality had retrenched the applicant illegally and arbitrarily upon the reasoning that it was part of a transition to the new municipal government.

12. *Orders*: The Court overturned the decision of the lower court and granted damages to the applicant.

II. THE RIGHT TO SOCIAL SECURITY

A. Louis Khosa and Others v The Minister of Social Development and Others (Case CCT 12/03); Saleta Mahlaule and Anor v The Minister of Social Development and Ors (Case CCT 13/03) – Constitutional Court of South Africa

13. *Facts*: The applicants were citizens of Mozambique who had acquired permanent residence status in South Africa in 1991. The applicants were destitute and would have qualified for social assistance but for the fact that they were not South African citizens. The applicants brought a case before the High Court to challenge the constitutionality of the relevant provisions of the *Social Assistance Act* (1992). The High Court made orders of invalidity of the relevant sections of the Act that effectively obliged the State to provide social assistance under the Act to all qualified "residents", irrespective of citizenship. This implied an obligation on Government to provide assistance to both permanent and temporary residents. The orders of the High Court were referred to the Constitutional Court for confirmation, as required under the Constitution.

14. *Claim*: The applicants claimed that the exclusion of all non-citizens from the social security scheme was inconsistent with the State's obligations under the Constitution, which guaranteed everyone the right to have access to social security. In this regard, the State had to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of the right. The applicants also made various claims related to the right to equality, the right to life and the right to dignity.

15. *Decision*: The majority of the Court balanced various competing considerations in evaluating the High Court's orders. Of crucial importance was the fact that, under the Constitution, "everyone" had the right to have access to social security. The denial of social security to permanent residents would mean that those permanent residents in need of assistance would be relegated to the margins of society. Taking into account the fact that the requirement that the State act "within its available resources" effectively limited the enjoyment of the right, the majority held that "the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations" upon which the State relied in its defence. For the same reason, the majority held that the denial of access to social security on the basis of citizenship was not a "reasonable legislative measure" within the terms of the Constitution. The fact that the case considered the exclusion of non-citizens who were destitute was an important consideration in the case. In contrast, it might be reasonable to exclude others, such as workers, visitors or illegal immigrants with a tenuous link with the country, from the legislative scheme.

16. *Orders*: The majority read the words "or permanent resident" into the appropriate legislation after the word "citizen" as a "just and equitable" means of retaining the right of access to social security for citizens, making it instantly available to permanent residents.

B. Gebrüder V. v Regierungsrat des Kanton Berns – Supreme Court of Switzerland

17. *Facts*: The applicants were stateless and living illegally in the country. They applied to the cantonal authorities for social assistance, but their claim was rejected. After the applicants lodged several appeals, the *Regierungsrat* (the authority wielding highest executive authority in the canton), upheld the previous decisions to reject the application. The applicants appealed to the Supreme Court.

18. *Claim*: The applicants claimed a breach of their right to minimum social security. The applicants based their claim on the new cantonal constitution which, since 1995, had explicitly recognized the right to minimum social assistance. They further claimed that the *Regierungsrat* had ruled arbitrarily in its interpretation of the cantonal welfare law.

19. *Decision*: The Court found that the refusal by the cantonal authorities to provide social assistance to the applicants was against Constitutional law. The Court based its arguments not only on the cantonal Constitution – which explicitly recognized the right to minimum social assistance - but also considered the position under the national Constitution. The Court noted that the national Constitution did not explicitly recognize a right to social security. However, the Court was prepared to imply such a right into the Constitution, deriving the implied right from rights explicitly recognized. The Court noted that the satisfaction of elementary human needs such as food, clothing and housing were preconditions of human existence and an indispensable element of a democratic polity. Further, the existence of a right to social security could be derived from both a general societal consensus, deduced from cantonal law and standing legal practice which was unequivocal as to the principle that people in need have a right to social assistance. The Federal Court had ruled in various decisions that it was a precept of humanity and an inherent obligation of the modern state to prevent the people living on its territory from physical distress. Jurisprudence almost unanimously acknowledged a right to subsistence by referring to the inherent dignity of each human being, to the right to life, to the principle of personal freedom and the principle of equality, which encompassed a minimum degree of material equality. The right to minimum social assistance including the right to food could be the foundation of a justiciable claim for official assistance. Moreover, the Court underlined that the enjoyment of the right was not contingent on the legal status of the individual and thus illegal immigrants could also enjoy the right. The refusal of the cantonal authorities to grant social assistance was thus contrary to Constitutional law.

20. *Orders*: The Court overturned the decision of the *Regierungsrat*.

III. THE RIGHT TO FOOD

A. People's Union for Civil Liberties v Union of India and Others, Writ Petition [Civil] No. 196 of 2001 – Supreme Court of India

21. *Facts*: The case concerned the role of government in the protection of food security in two aspects. The first referred to the public food distribution system to families living below the poverty line. The petitioners criticized the system, arguing that: monthly quotas per family did not meet the daily nutritional requirements set by the Indian Council of Medical Research; the definition of families living below the poverty line was unreliable; and, the distribution was unequal and inconsistent. The second aspect concerned the adequacy of the relief. Various State Governments provided for food relief through Famine Codes which provided mandatory relief upon the declaration of a drought. While national grain stockpiles existed, the petitioners claimed that these had not been administered to drought stricken families or made available to State Governments where necessary. Further, while the Famine Codes included a duty on States to provide work to those seeking relief, one State Government had imposed labour ceilings that restricted work relief to a small percentage of those seeking assistance.

22. *Claim*: The petitioners sought relief against the Government, the national food corporation and six state governments under the Constitutional right to life including the right to food. The petition was subsequently broadened to include all state governments and union territories.

23. *Decision*: Since petitioners brought the petition in 2001, the Supreme Court has made a series of interim orders. The final judgment is still pending. In making the orders, the Supreme Court has ruled that beneficiaries of the official food security programmes enjoyed legal entitlements to those programmes, a factor which the Court has held was an important means to facilitate access to the programmes.

24. *Orders*: - The Court has made orders to the State and Union governments on twelve occasions since 2001. Those orders have focused in particular on the effective implementation of existing relief schemes. Orders have included: the implementation of the mid-day meal scheme so that children are provided with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days; the provision of food to the aged, infirm, disabled, destitute women, destitute men in danger of starvation, pregnant and lactating women and destitute children; the implementation of employment schemes including payment of minimum wages and the sanctioning of payment in food grains either partly or in full; the identification by State and Union Governments of people living below the poverty line; the effective provision of information (right to information) to those people entitled to receive food relief; the implementation of existing family benefit and maternity benefit schemes including the payment of benefits within time frames set by the Court; encouragement to the Union Government to assist State Governments not complying with relief schemes; and, the holding of Chief Secretaries and Administrators of States and Union Territories personally liable for implementation of the Court's orders.

IV. RIGHT TO ADEQUATE HOUSING

A. President of the Republic of South Africa and Ors v Modderklip Boerdery Pty Ltd – Supreme Court of Appeal of South Africa

25. *Facts*: Modderklip was part owner of land upon which some 40,000 squatters had occupied, a third of whom were illegal immigrants. The owners applied and received an eviction notice however the police authorities refused to enforce the eviction without a sizeable money guarantee by the owner which the owner was unable to pay. Other State organs were also unwilling to enforce the eviction order. The owner then sought enforcement of the eviction notice before the Court. One of the problems behind the case were the difficulties faced by the owner and the State authorities of how to evict humanely so many squatters - this was ultimately seen as a question of land reform that raised important Constitutional questions rather than simply being a question of enforcing an eviction notice. Among the Constitutional questions the Court had to consider was the enjoyment of the squatters' right of access to adequate housing.

26. *Claim*: In seeking enforcement of the eviction notice, the owner claimed relief on the basis of a range of Constitutional rights including the right to property and the right to equality.

27. *The decision*: The Court noted that it had to consider and balance the different fundamental rights involved and then judge the appropriate relief that it should grant. This required in part a balancing of the right to property of the owners and the right of access to housing of the squatters – both human rights protected under the Constitution. In considering this balance, the Court noted that the real issue was whether the State had "taken any steps in relation to those who, on all accounts, fall in the category of those in 'desperate need'". This in turn required the examination of whether the provision of relief to the squatters in the form of expedited allocation of land and housing, would force the land reform and housing programme to collapse by allowing the squatters to "queue jump". To this last question, the Court noted that there was no evidence that the occupation took place with any intent to obtain precedence over any other person – the squatters simply had nowhere else to go. The Court also noted that the police authorities' failure to execute the eviction order was understandable and reasonable given the number and circumstances of the squatters and given the obligation to ensure that evictions were executed humanely. The Court found that the State had failed to protect the right to property of the owners by not providing alternative land to the squatters and instead allowing the burden of respecting the squatters' right of access to housing to fall on the owners.

28. *The orders*: In devising a remedy, the Court noted that it should attempt to synchronize the real world with the ideal construct of a constitutional world and thus provide effective relief. The Court stated that effective relief would differ from case to case. Return of the land was in the present case not practicable. Consequently, the Court ordered the State to pay damages to the owner. Such relief would allow the squatters to remain on the land without the State having to locate alternative land while at the same time provide compensation to the owners. The Court ordered an inquiry into damages.

B. Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others – Constitutional Court of South Africa

29. *Facts*: After heavy rains that had led to flooding and extensive damage to property, Government decided to provide temporary housing for 300 residents of Alexandra Township on state owned land that also housed a prison. In making the decision, government failed to hold discussions with the nearby permanent residents of Kyalami. The residents brought an urgent application in the High Court and upon that basis, the High Court set aside the decision requiring Government to reconsider the decision after proper consultation with the Kyalami residents. Government applied to the Constitutional Court on the grounds that the case raised important Constitutional questions. One of the flood victims, Mr. Mukwevho, also applied to be a party to the appeal. In the meantime, the flood victims continued to live in deplorable conditions, waiting for the temporary housing on the prison land.

30. *Claim*: The Kyalami residents argued that Government: first, in making the decision, had acted outside its legal powers in deciding to construct the temporary housing; and second, had failed to respect their constitutional right to just administrative action (the right to lawful administrative action; the right to procedurally fair administrative action) and certain of their constitutional environmental rights. The residents also claimed that the establishment of the temporary housing would constitute a nuisance. Mr. Mukwevho, who would have benefited from the temporary housing, claimed that he and the other victims had a constitutional right of access to adequate housing and that this obliged Government to take reasonable measures within its available resources to give effect to this right. Government argued that its decision was lawful, partly on the basis that it took the decision in fulfillment of its obligation to respect the right of access to adequate housing of the flood victims.

31. *Decision*: The Constitutional Court rejected the Kyalami residents' first claim that the Government acted outside its powers in taking its decision. The Court held that, taking into account Government's rights as owner of the land and to its executive power to implement policy decisions, the Government did have Constitutional power to take the decision and did not need specific legislation empowering it to do so. Importantly, the Court noted that "The provision of relief to the victims of natural disasters is an essential role of government in a democratic state, and government would have failed in its duty to the victims of the floods, if it had done nothing". In relation to the second claim, the Court held that the Government, in taking its decision to provide temporary housing, did not infringe the Kyalami residents' right to just administrative action nor their environmental rights. On the specific question of whether Government had failed to act with procedural fairness, the Court highlighted the relevance of proportionality in determining what fairness required. Thus, procedural fairness required the balancing of various factors including: the nature of the decision; the rights affected by it; the circumstances in which it was made; and, the consequences of the decision. If all persons with an interest in the choice of location for the temporary housing were to be heard, this would have been contentious and drawn out and would have worked against an expeditious decision and the protection of the right of access to adequate housing of the flood victims. While Government might have found an appropriate method to inform the residents before contractors moved on site, the absence of consultation did not invalidate the decision. The appeal was therefore upheld.

V. THE RIGHT TO HEALTH

A. Nilson E. Pinilla Pinilla (No de radicación 4501) – Corte Suprema de Justicia, Bogota, Columbia

32. *Facts*: The Public Defender brought proceedings before the lower court against the Minister of Justice and the prison authorities (INPEC) with a view to protecting the right to health and other rights of a significant number of prisoners held in police stations throughout the capital. In particular, the Public Defender sought medical and hospital assistance and protection against cruel, inhuman and degrading treatment for the prisoners who were subjected to extreme over-crowding, deplorable hygiene and under-nourishment while awaiting transfer from police stations to prisons. The lower court ordered INPEC to provide health services to the prisoners within 48 hours of the decision and further ordered both the Minister and INPEC, in co-ordination with the district authorities, to design and harmonize the transfer of prisoners from police stations to prisons. The Minister and INPEC appealed the decision to the Supreme Court.

33. *Claim*: The Minister claimed that the lower court had erred in ordering it to design and harmonize prison transfer programmes as this would have been outside the Minister's powers. INPEC claimed that neither the Constitution nor the law required it to provide health services to prisoners which should instead be provided by the General System of Health Social Services.

34. *Decision*: In relation to the appeal by the Minister, the Court noted that the penal system could not seek its objectives at the cost of respect for the fundamental principles of human dignity. While prisoners did lose some civil and political rights as a result of their imprisonment, national and international human rights law established that other rights, such as the right to health, could neither be suspended nor restricted for prisoners. The penal system therefore could not simply interpret its mandate narrowly (eg crime prevention, development of criminal law, decriminalization of activities etc) but instead it should consider wider issues relating to the efficiency of the system, including the coordination and integration of other organizations and programmes with a view to guaranteeing the efficient administration of justice. Furthermore, relevant national laws obliged the Minister to undertake functions such as the design and harmonize prisoner transfer programmes, a fact which clearly confirmed the lower court's orders. In relation to the appeal by INPEC, the Court noted that the Penal Code affirmed that everyone deprived of his or her liberty had a right to be visited by a medical professional. Relevant legislation also required INPEC to organize medical services for prisoners and each prisoner had to be examined on entry and exit from prison; legislation also obliged INPEC to promote hygiene and disease prevention programmes. Consequently, INPEC could not deny prisoners their right to health by claiming that the provision of medical services was the responsibility of another department.

35. *Order*: The Court confirmed the sentence of the lower court and forwarded the documents to the Constitutional Court for possible revision.

B. Purohit and Moore v Gambia – Communication 241/2001, African Commission on Human and Peoples' Rights

36. *Facts*: The authors of the complaint represented mental health patients detained in a psychiatric unit of the Royal Victoria Hospital. The authors argued that the relevant national legislation, the *Lunatics Detention Act* 1917 was outdated: there were no provisions or requirements establishing safeguards during diagnosis certification and detention of patients; there was no requirement to obtain the consent of patients for treatments; and, the psychiatric unit in question was overcrowded.

37. *Claim:*. The authors claimed violations under the African Charter on Human and Peoples' Rights of the right to freedom from discrimination, respect for human dignity and prohibition against ill-treatment, the right to a fair trial, the right to participate in government as well as the right to enjoy the best attainable state of physical and mental health and the right of the disabled to special measures of protection in keeping with their physical and moral needs.

38. *Decision:* The Commission found that the 1917 Act was lacking therapeutic objectives as well as the provision of resources and programmes for the treatment of people with mental health problems. Similarly, the Act did not contain any provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment. As a result, the Act did not satisfy the requirements of the right to health and other rights under the Charter. Further, mental health patients, as a result of their disabilities, came within the scope of those with a right to special measures of protection that would allow them to both attain and moreover to sustain their optimum level of independence and performance. However, the Commission recognized that the right to health was subject to resource limitations in recognition that the poverty suffered in Africa meant that governments were not always in a position to provide the necessary facilities and infrastructure to realize the right to health in all cases. The Commission therefore implied a limitation on the right to health under the Charter by including an obligation on States "to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind".

39. *Orders*: The Commission urged Government: to repeal the Act and replace it as soon as possible with a new legislative scheme for mental health compatible with the Charter and international standards for the protection of mentally ill or disabled persons; to create an expert body to review the cases of people already detained under the Act; and, provide adequate medical and material care for persons in the country suffering from mental problems. The Commission requested Government to report on the steps undertaken to comply with the decision in its next periodic report.

VI. THE RIGHT TO EDUCATION

A. Autism Europe v France - Complaint No 13/2002 – European Committee of Social Rights

40. *Facts*: According to the relevant State legislation, people with autism were able to attend mainstream schools, either individually (individual mainstreaming) in ordinary classes with the assistance of special auxiliary staff, or as part of a group (collective mainstreaming) through school integration classes (primary level) or educational integration units (secondary level). People who, due to the severity of their autism, were unable to integrate into the ordinary school system, were able to receive special education in a specialized institution. Individual mainstreaming was financed through the general education budget while collective mainstreaming was financed through the sickness-insurance benefit. Autism-Europe argued that Government did not, in practice, make sufficient provision for the education of children and adults with autism due to identifiable shortfalls – both quantitative and qualitative - in the provision of both mainstream education as well as in the so-called special education sector.

41. *Claim*: Autism-Europe claimed that the failure to take necessary steps to ensure the right to education of children and adults with autism resulted in violations of the right of persons with disabilities to independence, social integration and participation in the life of the community, the right of children and young persons to social, legal and economic protection and the prohibition on discrimination.

42. *Decision*: The Committee recalled that the implementation of the Charter required States parties to take not merely legal action but also practical action to give full effect to the rights recognized in the Charter. When the achievement of one of the rights in question was exceptionally complex and particularly expensive to resolve, a State Party had to take measures that allowed it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. In doing so, States should be mindful of the impact that choices of measures might have on groups with heightened vulnerabilities as well as for others affected, especially the families of vulnerable people. In light of the facts of the present case, the Committee noted that Government continued to use a more restrictive definition of autism than that adopted by the World Health Organization and that there were still insufficient official statistics that would rationally measure progress through time. Further, the proportion of children with autism being educated in either general or specialist schools was much lower than in the case of other children – whether disabled or not – and there was a chronic shortage of care and support facilities for autistic adults. For these reasons, Government had failed to achieve sufficient progress in advancing the provision of education for people with autism. The Committee also noted that establishments specializing in the education and care of disabled children – particularly those with autism – were not in general financed from the same budget as normal schools; however this did not amount to discrimination as it was for the States themselves to decide the modalities of funding.

43. *Finding*: The Committee stated that Government was not in conformity with the Charter.