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# ISSUES RELEVANT TO THE DISCUSSIONS OF THE UNITED NATIONS WORKING GROUP CONSIDERING OPTIONS REGARDING THE ELABORATION OF AN OPTIONAL PROTOCOL TO THE ICESCR

**10 – 21 JANUARY 2005**

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**THE EVOLUTION OF AN OPTIONAL PROTOCOL COMPLAINTS MECHANISM UNDER THE ICESCR**

## Introduction

1. The International Commission of Jurists, (hereinafter ICJ), welcomes the decisions of the fifty-ninth and sixtieth sessions of the Commission on Human Rights that mandated an open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, (Res. 2003/18 and Res. 2004/29). In the view of the ICJ, the issue of an optional protocol is now properly before a political body as it will be capable of thoroughly considering this proposed international instrument. Such working group deliberations will naturally build on the considerable efforts of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and the United Nations Committee on Economic, Social and Cultural Rights, (hereinafter Committee), that previously studied the various questions and modalities associated with the drafting of an optional protocol text. In the view of the ICJ, the working group, as a matter of priority, should proceed with drafting the substantive provisions of an optional protocol.

## The Consideration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the Committee

2. In 1990, the Committee commenced discussions concerning the preparation of an optional protocol, an issue that came under formal consideration by the Committee from its 1990 sixth session through its 1996 fifteenth session.[1] Throughout this period, the basis for extensive discussions within the Committee were facilitated by four separate reports, prepared at the Committee's request, by Mr. Philip Alston, (E/C.12/1991/WP.2, E/C.12/1992/WP.9, E/C.12/1994/12, and E/C.12/1996/CRP.2/Add.1).

3. At its seventh session the Committee adopted a consolidated "analytical paper" which it submitted to the World Conference on Human Rights. Through this paper the Committee strongly supported the development of an optional protocol, (A/CONF.157/PC/62/Add.5, annex II, para. 18 and annex II).

4. A 1997 report, (E/CN.4/1997/105, annex), reflected the collective outcome of Committee optional protocol discussions and included an in-depth consideration on a specific set of draft optional protocol proposals.[2] The final result of these discussions included a Committee prepared draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights. Further, the report provided an analysis of optional protocol issues that merited examination by the Commission on Human Rights.

[1] See E/1992/23 - E/C.12/1991/4, paras. 360-366 and E/CN.4/1997/105, para 2.
[2] See E/C.12/1994/SR.42, 45 and 56; E/C.12/1995/SR.5 and 50; E/C.12/1996/SR.19 and 20; and E/C.12/1996/SR.42-49 and 54).

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**The Consideration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the Commission on Human Rights**

5. In 1994, the Commission on Human Rights took note of the "steps taken by the Committee ... for the drafting of an optional protocol... and invite[d] the Committee to report thereon to the Commission...."[3] During its 1996 fifty-second session, the Commission on Human Rights welcomed the optional protocol progress report (E/CN.4/1996/96) issued by the Committee.[4]

6. The Committee continued and concluded its consideration of a draft optional protocol at its fifteenth session (E/C.12/1996/SR.44-49 and 54). The report of the Committee, including the Committee prepared draft optional protocol (E/CN.4/1997/105, annex), was submitted to and considered by the Commission on Human Rights at its 1997 fifty-third session. Subsequently, on three separate occasions,[5] the Commission on Human Rights requested States, intergovernmental and non-governmental organisations to submit comments on this proposed international instrument. On the basis of these requests, comments were received from a limited number of States, intergovernmental and non-governmental organisations, (E/CN.4/1998/84 and Add.1, E/CN.4/1999/112 and Add.1 and E/CN.4/2000/49).

7. Through resolution 2001/30, the Commission on Human Rights appointed an independent expert to examine the question of the draft optional protocol. The appointed expert, Professor Hatem Kotrane, submitted his first (E/CN.4/2002/57) of two reports to the 2002 58th session of the Commission on Human Rights. Through this report, the independent expert report supported the drafting of an optional protocol text.

8. The 2002 fifty-eighth session of the Commission on Human Rights decided to renew the mandate of the independent expert and establish, at its fifty-ninth session, an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol, (Res. 2002/24).

9. At the 2003 fifty-ninth session of the Commission on Human Rights, the Independent Expert delivered his second report, (E/CN.4/2003/53), affirming the justiciability of economic, social and cultural rights while offering further support for the development of an optional protocol text. Through resolution E/CN.4/RES/2003/18, the Commission on Human Rights, requested the open-ended working group to meet for a period of 10 working days, prior to the sixtieth session of the Commission, with a view to considering options regarding the elaboration of an optional protocol.

10. The 2004 sixtieth session of the Commission on Human Rights adopted resolution E/CN.4/RES/2004/29 in which it decided to continue the mandate of the open-ended working group for a further two years. In the view of the ICJ, the current mandate of the working group is not a progressive mandate, in that it does not specifically require the working group to move promptly towards drafting an Optional Protocol. Rather, the mandate merely requires the working group to consider options regarding the elaboration of an optional protocol to ICESCR. In the ICJ's view, such a mandate is insufficient and undermines the need for the consideration of these issues to progress on a more practical level.

[3] E/CN.4/RES/1994/20, para. 6.
[4] E/CN.4/RES/1996/11, para. 12.
[5] E/CN.4/RES/1997/104, E/CN.4/RES/1998/33 and E/CN.4/RES/1999/25.

**The Consideration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the Sub-Commission on Prevention of Discrimination and Protection of Minorities**

10. In 1992, the Sub-Commission on the Promotion and Protection of Human Rights became involved in the deliberations concerning an optional protocol to the International Covenant on Economic, Social and Cultural Rights when the adoption of this instrument was expressly recommended by Mr. Danilo Türk, the Special Rapporteur of the Sub-Commission on the realization of economic, social and cultural rights, (E/CN.4/Sub.2/1992/16, para. 211).

11. Through resolution 1996/13, the Sub-Commission called for the elaboration of an optional protocol. Subsequently, the Sub-Commission suggested that the Commission on Human Rights establish an open-ended working group entrusted with the further study of a draft optional protocol, (Res. 2000/9). Further, in 2001, the Sub-Commission urged the Commission on Human Rights to give high priority to the consideration of a draft optional protocol (Res. 2001/6). Through resolution 2002/14, the 2002 Sub-Commission further urged the Commission on Human Rights, at its fifty-ninth session to mandate the open-ended working group to proceed with the drafting of the substantive text of an optional protocol.

12. The 2003 Sub-Commission adopted a resolution that urged the Commission on Human Rights, at its sixtieth session, to mandate the open-ended working group to proceed with drafting the substantive text of an optional protocol. Further, the Sub-Commission urged the open-ended working group to draft an optional protocol that would be comprehensive while providing for individual, representative and collective complaints and that the instrument should be conceptualised as both a complaints mechanism and an injury procedure that should preclude State party reservations.

**Conclusion**

13. In the view of the ICJ, the issue of an optional protocol to the International Covenant on Economic, Social and Cultural Rights is properly before the United Nations working group set to convene its second session in 2005 as this body will be capable of thoroughly considering this proposed international instrument. Such deliberations will naturally build on the considerable efforts of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and the Committee itself that previously studied the various questions and modalities associated with the drafting of an optional protocol text, as well as the progress achieved at the inaugural working group session in 2004.

14. In the view of the ICJ, the working group, as a matter of priority, should proceed with drafting the substantive provisions of an optional protocol.

## THE MANDATE OF THE ICESCR/OPTIONAL PROTOCOL WORKING GROUP

At the 2003 fifty-ninth session, through resolution E/CN.4/RES/2003/18, the Commission on Human Rights, requested the open-ended working group to meet for a period of 10 working days, prior to the sixtieth session of the Commission, with a view to considering options regarding the elaboration of an optional protocol.

The 2004 sixtieth session of the Commission on Human Rights adopted resolution E/CN.4/RES/2004/29 in which it decided to continue the mandate of the open-ended working group for a further two years to consider options regarding the elaboration of an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

In the view of the ICJ, the current mandate of the working group is not a progressive mandate, in that it does not specifically require the working group to move promptly towards drafting an Optional Protocol. Rather, the mandate merely requires the working group to consider options regarding the elaboration of an optional protocol to ICESCR for a further 2 years. In the ICJ's view, such a mandate is insufficient and undermines the need for the consideration of these issues to progress on a more practical level.

Learning from the experience of other instruments that established optional protocols, the ICESCR/optional protocol working group should adopt a pragmatic yet determined approach towards the completion of its mandate. In this, working group recommendations and the Commission on Human Rights should bear in mind the latter's decision of 26 April 2000, (Decision 2000/109, contained in E/CN.4/2000/112), which endorsed that,

> (working group), (m*)andates should always offer a clear prospect of an increased level of human rights protection and promotion,* (and that), (i*)n creating any standard-setting working group, the Commission should consider a specific time-frame within which the group would be called upon to complete its task. ...*(I*)n most instances, the established time-frame should not in principle exceed five years.*

In the view of the ICJ, the working group, as a matter of priority, should proceed with drafting the substantive provisions of an optional protocol.

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# THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: NATIONAL, REGIONAL AND INTERNATIONAL EXPERIENCES

## Introduction

In both affluent and developing nations, massive violations of economic, social and cultural rights occur on a routine basis. Examples of current economic, social and cultural rights violations include housing demolitions and forced evictions of large numbers of citizens in Nigeria and social assistance reductions in Canada and the United States which deprive millions of human beings of their most basic economic, social and cultural rights. In light of this, it is imperative that such violations are addressed more effectively than they have been in the past. On the national, regional and international levels, those responsible for violations of economic, social and cultural rights must be held fully accountable.

Under international law, civil, political, economic, social and cultural rights are said to be indivisible, inter-related and interdependent. Despite this affirmation, the division of rights included in the Universal Declaration of Human Rights into the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) and the *International Covenant of Civil and Political Rights* (*ICCPR*) has generated confusion and divisiveness that has damaged their indivisiblity, inter-relatedness and interdependence.

It has taken the international community several decades to reach its current level of understanding with regard to the nature and content of internationally-recognized civil and political rights. In comparison to these rights, the precise legal meaning and content of economic, social and cultural rights is less well developed, not because these rights are inherently more complex or difficult to understand and define, but because the human rights movement and national governments have, until now, neglected economic, social and cultural rights, devoting little time and attention to both understanding and protecting them. In this, there has been a widespread tendency to deem economic, social and cultural rights as something "other" than civil and political rights as only civil and political rights are perceived as justiciable. Here, it sometimes mentioned that economic and social rights are not suitable for judicial consideration because of the wide range of issues that have to be taken into account and the uncertainty surrounding effective means of achieving the ends in question. Positioned as national and or international policy aspirations, economic, social and cultural rights have thus been said to fall below the justiciable threshold for individual legal enforcement.

Counter-arguments to this view assert that, Courts make law and do not merely declare it, they are thus directly and routinely involved in policy decisions and there is consequently no reason why Courts should refrain from dealing with the kinds of issues raised in arguments over the implementation of economic, social and rights.

## National Experiences With Regard to the Justiciability of Economic, Social and Cultural Rights

The experiences of Argentina, Bangladesh, Canada, Colombia, Costa Rica, Finland, France, Germany, Guyana, Hungary, India, Japan, Latvia, Mauritius, Mexico, New Zealand, Nigeria, the Philippines, Poland, Portugal, Spain, South Africa, Switzerland, Venezuela and numerous other nations in adjudicating economic, social and cultural rights demonstrates the leading role adjudicative procedures may play towards the further realisation of economic, social and cultural rights. A leading example of this comes from South Africa whose 1996 Constitution encompassed a wide range of economic, social and cultural rights on an equal footing with civil and political rights. With such recognition, South African Courts have increasingly created a foundation of jurisprudence moving towards the improved protection of economic, social and cultural rights. One notable example of this may be found in the case of *Government of the Republic of South Africa* v. *Grootboom*.

The facts of this case are as follows: Irene Grootboom was one of a group of 390 adults and 510 children living under appalling conditions in a South African shanty-town settlement. Illegally occupying land reserved for low-cost housing, the State forcibly evicted the "Grootboom group" and bulldozed their primitive domiciles. Prior to this, many of the inhabitants had applied for State subsidised low-cost housing and had been on a waiting list for up to seven years. Petitioning the High Court, Irene Grootboom sought State supplied basic shelter on behalf of her 800 member squatter society basing her argument on her South African constitutional right to housing.

The key question appealed to the Constitutional Court was whether the constitutionally enshrined housing and shelter rights placed a positive obligation on the South African State to provide housing for the petitioners. The facts of this case presented the Constitutional Court with a very difficult choice: to approve the illegal occupation of land by homeless people or to ratify the inaction of the Government to deal with the issue of homelessness. On October 4, 2000 the Court held that the South African government was positively obliged to remedy the conditions faced by the Grootboom group through the provision of basic housing. This result was arrived at through the finding that the State housing policies were unreasonable. In determining the 'reasonableness' of said policies, the Court decided that while limited State resources were an important factor, in the instant case the State had a duty to address the needs of the most vulnerable members of society. Thus, in the context of the right of access to housing, the Court held that South African State policy, in order to be reasonable, had to take account of the different socio-economic levels of the South African population and could not ignore those whose needs were most urgent. In conclusion, the Constitutional Court declared that the State housing programme had to include measures "to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations."

This landmark *Grootboom* decision stands for a number of important economic, social and cultural rights principles:

**(i)** The justiciability of economic, social and cultural rights cannot be determined in the abstract;

**(ii)** Civil, political, economic, social and cultural rights are indivisible, interrelated and interdependent; and

**(iii)** The "reasonableness" standard with regard to socio-economic rights mandates Courts, in determining whether the State is complying with its obligations of progressive implementation, to evaluate whether measures were adopted to address problem areas and whether such measures were reasonable, both in their conception and implementation. In assessing the reasonableness of South African housing programs under *Grootboom*, State measures were considered in light of the social, economic and historical context and the capacity of institutions responsible for implementing housing programmes. The Court found that South African housing programs failed to address the needs of the most desperate and thus failed against the reasonableness standard.

It must be noted that most, if not all nations throughout the world have recognized that certain aspects of economic, social and cultural rights are justiciable before national Courts and Tribunals. While the entitlements adjudicated over may not necessarily be labelled rights, they nonetheless deal with economic, social and cultural rights subject matter formulated in a way that renders their justiciability unproblematic.

**Regional Experiences With Regard to the Justiciability of Economic, Social and Cultural Rights**

**(v) The European System for the Protection of Human Rights**

Under the European Convention on Human Rights that, by in large, concerns civil and political rights, economic, social and cultural rights or some aspects of them have, in practice, been the subject of complaints before the European Court of Human Rights and the European Commission. Indeed, an examination of relevant jurisprudence reveals that these bodies have not upheld a strict separation between economic and social rights and the civil and political rights listed in the *European Convention*. Instead, the European Commission and the European Court of Human Rights have adopted a dynamic approach that has, where possible, taken account of economic and social rights concerns. For example, in interpreting *European Convention* Article 6, which concerns the right to fair trial, the European Court of Human Rights extended procedural protections to matters concerning public social insurance benefits. Further, the European Commission indicated its willingness to extend Article 2, right to life protections to an issue area directly linked with the right to health. Here, through a review of State health institutions that failed to meet certain minimum standards, the European Commission found that sub-standard health facility conditions could constitute a State failure "to take appropriate steps to safeguard life" as required by the European Convention. A final illustration of how economic and social rights have been extended European States through the judicial interpretation of the *European Convention* may be found through a European Commission decision that extended Article 8, (protection of private and family life), guarantees to a claimant that contracted health problems caused by serious environmental damage.

With the adoption of the 1995 Additional Protocol to the European Social Charter, an instrument that provides for a system of collective complaints on a selection of economic and social rights, the European system confirmed the international justiciability of these rights as unproblematic. Here, the European Committee of Social Rights has proceeded so far as to derive a justiciable right to medical and social assistance despite the fact that the wording of the European Social Charter does not provide for this individual right, but is addressed to the states parties that are to commit themselves to ensuring the enjoyment of a certain right.

**(vi) The African Charter on Human and Peoples' Rights**

The African Commission on Human and Peoples' Rights has accepted cases under the *African Charter on Human and Peoples' Rights* that concern economic, social and cultural rights. For example, in a landmark 2002 decision, the African Commission held that the former military regime of Nigeria violated the economic and social rights of the Ogoni people by failing to protect their property, lands, and health from destruction caused by foreign oil companies and the Nigerian security forces.

**(vii) The Inter-American Commission of Human Rights and the San Salvador Protocol**

Within the Inter-American System, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", provides for the submission of individual complaints to the Inter-American Commission and the Inter-American Court with regard to trade union/association rights and the right to education. There are also a number of examples of cases where the Inter-American Commission of Human Rights has declared violations of economic, social and cultural rights, in particular violations of rights such as the protection of the family, education, health, wellbeing, and labour rights.[6]

[6] See for example: The Inter-American Human Rights Commission Decision in Case 7898 (Cuba), Decision in Case 7602 (Cuba), Decision in Case 7615, Indigenas Yanomami (Brasil), and Decision in Case 2137, Testigos de Jehova (Argentina).

**International Experiences With Regard to the Justiciability of Economic, Social and Cultural Rights**

Turing to the justiciability of economic, social and cultural rights on the international level, as the *ICESCR* and the *ICCPR* are both legally binding human rights treaties of equal force, economic, social and cultural rights should be equal to civil and political rights in terms of their justiciability. Currently, while an international adjudicative mechanism exists under the United Nations to monitor violations of civil and political rights, not such adjudicative mechanism exists with regard to economic, social and cultural rights. As has been stressed time and again through numerous United Nations resolutions and pronouncements, if human rights are indeed indivisible, interrelated and interdependent, there is no substantive reason why the adjudicative monitoring procedures under the *ICESCR* and the *ICCPR* should be different. Indeed, national and international precedents support the contention that it would neither be new nor innovative for the introduction of a United Nations mechanism to provide for the submission of complaints addressing the violation of economic, social and cultural rights. Towards this end, momentum has been building towards the drafting of a United Nations adjudicative mechanism that would consider violations of the economic, social and cultural rights enumerated under the *ICESCR*.

Aside from discussions concerning the justiciability of economic, social and cultural rights under the existence of the following regional and international remedial mechanisms demonstrate that economic, social and cultural rights are justiciable on the international level.

**(i) The International Labour Organisation Committee on the Freedom of Association**

The International Labour Organisation, Committee on the Freedom of Association is a tripartite body that examines complaints from governments, workers' and employers' organizations concerning allegations that member States are not respecting basic freedom of association principles. The longstanding existence, functioning and jurisprudence of this body with regard to labour rights has proven that labour and related economic, social and cultural rights are justiciable on the international level.

**(ii) The United Nations Human Rights Committee**

Although this adjudicative mechanism focuses on civil and political rights, the practice of the Human Rights Committee has been to interpret civil and political rights in a way that has allowed for adjudication on some elements of economic, social and cultural rights. In this, Human Rights Committee precedents and rules of operation may prove useful to a complaints mechanism under the *ICESCR*. For example, the Human Rights Committee has advised that the ICCPR non-discrimination clause is also applicable in relation to the enjoyment of economic, social and cultural rights.

**(iii) The Optional Protocol to the *Covenant on the Elimination of Discrimination Against Women***

The Optional Protocol to the *Covenant on the Elimination of Discrimination Against Women,* (hereinafter CEDAW), entered into force on 22 December 2000. The structure of this instrument provides for an individual complaints procedure with respect to numerous economic, social and cultural rights. In the beginning of discussions concerning this Optional Protocol, in draft form, States parties debated the issue of justiciability and found it to be a non-issue.

**(iv) The United Nations Educational, Scientific and Cultural Organization Complaints Procedure**

The United Nations Educational, Scientific and Cultural Organization established a confidential procedure for the examination of complaints concerning alleged violations of human rights in the fields of education, science, culture and information.

## Conclusion

In conclusion, if we look to the collective experiences of many nations and the practice of numerous international and regional bodies adjudicating over economic, social and cultural rights, the issue of the justiciability of economic, social and cultural rights is, in fact, a non-issue and demonstrates the leading role adjudicative procedures may play towards the further realisation of economic, social and cultural rights.

**THE COMPLEMENTARITY BETWEEN THE PROPOSED OPTIONAL PROTOCOL TO THE ICESCR AND OTHER INTERNATIONAL AND REGIONAL COMPLAINT'S MECHANISMS**

In examining the issue of complementarity between the proposed Optional Protocol and other international and regional complaint's mechanisms adjudicating over economic, social and cultural rights infractions, it is acknowledged that some degree of overlap exists between the proposed instrument and existing regional and international complaint's procedures. That said, existing international and regional economic, social and cultural rights complaint's mechanisms are fairly limited in terms of the subject matter that they are competent to adjudicate over and/or the complainants provided with standing, (the capacity to submit a communication). Here, for example, an International Labour Organisation complaint's mechanism primarily confines itself to communications from governments, workers' and employers' organizations concerning allegations that member States are not respecting basic freedom of association principles while a UNESCO complaint's procedure entertains only a narrowly defined class of complainants and the process is confidential. Given the structural constraints of existing economic, social and cultural rights complaint's mechanisms, access to these procedures is limited, either in terms of the economic, social and cultural rights covered and/or in terms of the individuals/groups competent to lodge a complaint.

Concerns with regard to complementarity also exist within the realm of civil and political rights complaint's mechanisms, however, the experience of these mechanisms have proven such concerns to be unfounded. For example, the United Nations Committee against Torture is authorised, under Article 22 of *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter *CAT*), to examine communications concerning *CAT* violations however, this does not preclude the United Nations Human Rights Committee from receiving individual complaints regarding alleged violations of *ICCPR* Article 7, (torture or to cruel, inhuman or degrading treatment or punishment).

Concerns over duplication in this and within other civil and political complaint's mechanisms have proven unproblematic due to the well established principle of non duplication and the utilisation of procedural clauses that prevent the simultaneous examination of specific cases by two or more civil and political rights complaint's mechanisms. Mirroring the safeguards already established in the *ICCPR Protocol One*, *CAT*, *The Convention on the Elimination of All Forms of Discrimination Against Women*, as well as other regional and international instruments, Article 3(3)(b) of the draft Optional Protocol mandates the *ICESCR* adjudicative body to not admit claims that raise the same issues of fact and law under examination by another procedure of international investigation or settlement. This follows the well established rule of non duplication whereby international and regional bodies are unable to examine cases concerning the same facts that are already under examination or have already been examined by another body.

Existing international and regional complaint's procedures that deal with violations of economic social and cultural rights include:

**1. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**

*Can examine communications from:*

(i) Individuals;
(ii) Groups of individuals; and
(iii) Communications may also be submitted on behalf of individuals or groups of individuals, with their consent.

*Economic, social and cultural rights dealt with:*

(i) Education. as related to discrimination against women;
(ii) Health, as related to discrimination against women;
(iii) Employment, as related to discrimination against women; and
(iv) Economic and social benefits, as related to discrimination against women.

*Note:* The procedure is limited in terms of the economic, social and cultural rights that it is competent to deal with. Its general applicability is further restricted through a focus on gender discrimination.

**2. The International Labour Organisation Special Procedure With Respect to the Freedom of Association**

*Can examine communications from:*

(i) Organizations of workers;
(ii) Employers; and
(iii) Governments.

*Economic, social and cultural rights dealt with:*

(i) Trade union rights

*Note:* Only a restricted class of complainants are qualified to launch actions under this procedure. The procedure is also limited in terms of the economic, social and cultural rights that it is competent to deal with.

**3. The United Nations Educational, Scientific and Cultural Organisation Complaints Procedure**

*Can examine communications from:*

(i) Individuals;
(ii) Groups of persons; and
(iii) Non-governmental organisations having reliable knowledge of the violation of rights which fall within UNESCO's sphere of competence.

*Economic, social and cultural rights dealt with:*

(i) Education; and
(ii) Culture.

*Note:* This complaint's procedure is limited in terms of the economic, social and cultural rights that it is competent to deal with. The procedure is also limited as complaint's are kept confidential.

**4. The Additional Protocol to the European Social Charter, (1995)**

*Can examine communications from:*

(i) International organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the European Social Charter;

(ii) International non-governmental organisations possessing consultative status with the Council of Europe that have been put on a list established by the Governmental Committee; and
(iii) Representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

*Economic, social and cultural rights dealt with:*

(i) Work;
(ii) Health;
(iii) Social Security; and
(iv) The Family.

*Note:* Only a restricted class of complainants are qualified to launch actions under this procedure. The procedure is also limited in terms of the economic, social and cultural rights that it is competent to deal with. Its general applicability is further restricted through a regional focus.

**5. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights**

*Can examine communications from:*

(i) Individuals

*Economic, social and cultural rights dealt with:*

(i) Trade union rights; and
(ii) Education.

*Note:* Only a restricted class of complainants are qualified to launch actions under this procedure. The procedure is also limited in terms of the economic, social and cultural rights that it is competent to deal with. Its general applicability is further restricted through a regional focus.

**6. African Charter on Human and Peoples' Rights**

*Can examine communications from:*

(i) Individuals;
(ii) Groups;
(iii) Parties that lunch complaints on behalf of individuals and groups; and
(iv) States.

*Economic, social and cultural rights dealt with:*

(i) Work;
(ii) Health;
(iii) Education; and
(iv) Economic, social and cultural development.

*Note:* The procedure is also limited in terms of the economic, social and cultural rights that it is competent to deal with. Its general applicability is further restricted through a regional focus.

**7. American Declaration of the Rights and Duties of the Man and the Inter-American Commission on Human Rights**

*Can examine communications from:*

(i) Individuals;
(ii) Groups;
(iii) Parties that lunch complaints on behalf of individuals and groups.

*Economic, social and cultural rights dealt with:*

(i) Preservation of heath and well-being;
(ii) Education;
(iii) Benefits of culture;
(iv) Work and fair remuneration;
(v) Leisure;
(vi) Social security; and
(vii) Property.

*Note:* The procedure is also limited in terms of the economic, social and cultural rights that it is competent to deal with. Its general applicability is further restricted through a regional focus.

## THE ADDED VALUE OF AN OPTIONAL PROTOCOL TO THE ICESCR

The drafting of an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*, (*ICESCR* or *Covenant*), could potentially benefit individuals, States parties and the international community through:

- *Reinforcing the international protection of economic, social and cultural rights through an international remedy?*

An Optional Protocol to the *ICESCR* could provide individuals and groups with access to an international adjudicative procedure that would engage in remedial actions with respect to *Covenant* right violations. This would result in effective international protection through an international complaint mechanism for international rights.

- *The Further Clarification of State Party ICESCR Obligations?*

As demonstrated through the first Optional Protocol to the *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), an Optional Protocol to the *ICESCR* could contribute to the further clarification of *ICESCR* rights and corresponding State party obligations through the development of international jurisprudence. Further, an Optional Protocol could assist in transforming general *ICESCR* provisions into concrete and tangible norms as the Committee would be able to focus on individual *ICESCR* applications in providing States parties with guidance as to their *Covenant* obligations in specific circumstances.

- *Assisting States Parties in Protecting and Promoting Covenant Enshrined Rights?*

The elaboration of an Optional Protocol to the *ICESCR* may stimulate States parties to take steps towards *Covenant* implementation and could thus mark an important step in strengthening the principle that, through ratification, States parties have dedicated themselves to progressively realise *Covenant* rights. Further, through active participation in an Optional Protocol complaint's mechanism, States parties could be provided with further remedial opportunities in defusing national/local socio-political complexities that prove difficult to resolve though domestic political processes.

- *Encouraging the Development of Domestic Jurisprudence Concerning Economic, Social and Cultural Rights?*

An Optional Protocol may provide States parties with a direct role in the development of international economic, social and cultural rights jurisprudence. In turn, international *ICESCR* jurisprudence could promote the development of domestic jurisprudence on economic, social and cultural rights issues. In deliberating on issues such as the right to health, housing and social security, national level Courts could take judicial notice of international *ICESCR* jurisprudence towards the further domestic recognition of economic, social and cultural rights.

- *Strengthening International Enforcement of Economic, Social and Cultural Rights?*

An Optional Protocol to the *ICESCR* may serve to strengthen the relationship between States parties and the Committee by creating an impetus for nations to promote the effective national implementation of *Covenant* rights. Through this instrument, States parties could be furnished with incentives to provide detailed information to the Optional Protocol adjudicative body that would serve to strengthen the institutional knowledge of the *ICESCR* reporting mechanism. Scholars and non-governmental organisations have long noted that one of the major constraints faced by the Committee, in the development of its working practices, has derived from the absence of a provision that requires State party co-operation beyond the submission of periodic reports. An Optional Protocol could thus lead to a new and more involved relationship between the Committee and States parties.

- *Reinforcing the Universality, Indivisibility, Interrelatedness and Interdependence of All Human Rights?*

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Given the existence of an international complaint's procedure concerning the adjudication of *ICCPR* rights infractions, the creation of an Optional Protocol to the *ICESCR* could provide States Parties with an exceptional opportunity to reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights.

- *Increase Public Awareness of Economic, Social and Cultural Rights?*

An Optional Protocol to the *ICESCR* could place a renewed emphasis on economic, social and cultural rights and, through the publication of international communications, inquiries and views of the Committee,, may serve to promote public awareness of *ICESCR* human rights standards.

**THE EFFECT OF AN OPTIONAL PROTOCOL TO THE ICESCR ON STATE PARTY RESOURCE EXPENDITURES**

The Committee on Economic Social Cultural Rights, (hereinafter, the Committee), has employed a "typology of State party obligations" to facilitate understanding with regard to the fulfilment of economic social and cultural rights. Under this model, States parties should "respect", "protect" and "fulfil", (fulfil-facilitate/fulfil-provide), the rights embodied in *ICESCR*.[7]

With regard to the dedication of State party resources to realise *Covenant* rights, the below chart is illustrative:

| |
|---|
| **I. OBLIGATION TO RESPECT**<br>**(Does not require a dedication of State resources)** |
| **II. OBLIGATION TO PROTECT**<br>**(Does not require a dedication of State resources)** |
| **III.(a) OBLIGATION TO FULFIL - FACILITATE**<br>**(Does not require a dedication of State resources)**<br>**----------**<br>**III.(b) OBLIGATION TO FULFIL - PROVIDE**<br>**(Requires a dedication of State resources)** |

Concern has arisen over the possibility that an *ICESCR* complaints procedure could be used to question national public policy prioritisations. According to Committee members, *ICESCR* complaints concerning public policy would not lend themselves to the Optional Protocol remedial procedure as this is the classic area of the *ICESCR* State reporting system that builds a constructive and co-operative dialogue between States parties and Committee members. Article 8 of the draft Optional Protocol further mitigates against the possibility that an *ICESCR* complaints procedure could be used to question national public policy prioritisations. Under Article 8, States parties retain the final decision as to the substantive measures enacted in response to any views proffered by the Committee regarding the realisation of *Covenant* rights.

[7] See further the Committee's General Comment 3: The nature of States parties obligations (Art. 2, par. 1) (Document E/1991/23) where the Committee refers to "obligations of conduct" and "obligations of result", the "undertaking to guarantee" and the obligation "to take steps".

## THE STATE OBLIGATION TO RESPECT, PROTECT AND FULFIL ICESCR RIGHTS

The Committee on Economic Social Cultural Rights, (hereinafter, the Committee), has employed a "typology of State party obligations" to facilitate understanding with regard to the fulfilment of economic social and cultural rights. Under this model, States parties should "respect", "protect" and "fulfil", (fulfil-facilitate/fulfil-provide), the rights embodied in the *International Covenant On Economic, Social And Cultural Rights* (hereinafter *ICESCR* or *Covenant*).

*The obligation to respect* requires State parties to abstain from actions that prevent persons from using available material resources in the way that they deem best to satisfy basic needs.

*The obligation to protect* requires States to implement measures necessary to prevent other individuals or groups, (third parties), from violating the integrity, freedom of action, or other human right of the individual including the infringement on his or her material resources. Here, as far as economic social and cultural rights are concerned, States parties are required to protect individual freedom of action.

*The obligation to fulfil-facilitate* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and the means to ensure the realisation of *Covenant* rights. *The obligation to fulfil-provide* requires States parties to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal. For example, with regard to the right to food, the obligation to *fulfil-facilitate* suggests State party assistance to provide informational and other opportunities for persons to obtain food whereas the obligation to *fulfil-provide* implies the direct provision of food or resources when no other alternatives exist due to unemployment, disadvantage, age, sudden crisis/disaster, marginalisation etc.

## INTERNATIONAL ASSISTANCE AND COOPERATION UNDER THE ICESCR

The meaning of the phrase "international assistance and cooperation" contained in article 2(1) of the *Covenant* may be questioned as to whether a complaint under the proposed Optional Protocol could be brought against States parties for not providing international assistance and cooperation towards the realisation of *Covenant* rights. The question of allowing such claims may be answered in the negative as:

**(i)** It would be impracticable to find a causal link between alleged violations of individual/group economic, social and cultural rights and the non-provision of international cooperation by particular States parties; and

**(ii)** Article 2(1) should be interpreted as mandating States parties to seek international assistance and cooperation, however, a corresponding obligation on other States parties to provide such assistance would not exist as the international community cannot be found liable for the failure of individual States parties to fulfil their *Covenant* obligations.

In exceptional circumstances, international assistance and cooperation could be taken into account at the hearing of an *ICESCR* Optional Protocol complaint where:

**(i)** The lack of international assistance and cooperation contributed to the non-fulfilment of *Covenant* obligations. In this, a lack of international assistance and cooperation could be utilised to defend against claims that a State party violated its obligations under the *Covenant*; or conversely where

**(ii)** A State either refused or did not properly utilise provided international assistance and/or cooperation to augment domestic economic, social and cultural rights.[i]

Through General Comment No. 3, the Committee has stressed that international co-operation for the realisation of economic, social and cultural rights is an obligation of all States parties and is especially incumbent on developed nations in a position to assist developing nations. Members of the Committee have advised, however, that international co-operation and assistance should not be made the subject of Optional Protocol communications through State to State complaints as the procedure envisaged under the draft Optional Protocol posits States parties, (the holder of *Covenant* obligations), against individual and group victims, (the holders of *Covenant* rights). As the obligation to extend international co-operation and assistance is unrelated to the State/victim dichotomy, complaints concerning the non-provision of international co-operation and assistance could not be linked to the draft Optional Protocol, complaints procedure. One should read the *ICESCR* article 2(1), the obligation of progressive realisation through national efforts and international assistance and co-operation, as an obligation of States parties trying to fulfil the obligation rather than as an obligation of developed nations to assist developing nations with *Covenant* right realisation. In this, it would be unhelpful to allow the proposed Optional Protocol to take on a character of somehow being a State to State issue on whether or not international assistance had been provided. The obligation contained in *ICESCR* article 2(1) thus has to be read as one of States parties taking steps to achieve the realisation of *Covenant* rights and one method under which *ICESCR* rights may be realised is through international assistance and co-operation. There should not be a justiciable obligation on States parties to provide specific assistance, however the non-provision of international co-operation and assistance could play a role in determining *Covenant* compliance under an Optional Protocol. Here, the lack of such co-operation and assistance could viewed as a mitigating factor with regard to the non-realisation of *ICESCR* obligations by developing nations.

## POSSIBLE REMEDIES FOR *ICESCR* VIOLATIONS UNDER AN OPTIONAL PROTOCOL

Remedial possibilities under an Optional Protocol to the *ICESCR* include:

- *Declaratory pronouncements*

Looking to the practice of bodies such as the European Social Charter Committee, the European Committee for Social Rights and/or the International Labour Organisation Freedom of Association Committee, these bodies remedy successful complaints by way of declaratory pronouncements which are left to the discretion of the accountable States in terms of substantive redress. This remedial measure is also utilised by the United Nations Human Rights Committee that employs a standard formula in calling on *ICCPR* offending States to take effective and enforceable remedial action which must be communicated to the Human Rights Committee within a certain time period, typically 90 days.

- *Reparation, including restitution, compensation and satisfaction*

One remedy that may be considered under an *ICESCR* Optional Protocol is the recommendation that an accountable State pay victim(s) reparation, including restitution, compensation or satisfaction. This remedy is frequently recommended by the Human Rights Committee, the Committee Concerned with the Elimination of Racial Discrimination and the International Labour Organisation Freedom of Association Committee.

- *The enactment or enforcement of legislation*

There will be situations under an Optional Protocol to the *ICESCR*, where the Committee will be asked to make recommendations with regard to individual State party social policies that deal with, for example, education, housing, social security or health-care. Here, the Committee might recommend States enact or enforce legislation that, in very general terms, meets *Covenant* requirements. There is, however, a question as to how far Committee recommendations may go where they concern the allocation of finite State resources. In making such recommendations the Committee would no doubt follow the practice of the Human Rights Committee and the European Social Charter Committee that have advocated similar remedial actions while shying away from touching on State party resource allocation priorities. Finally, the Committee could make remedial recommendations with regard to bringing State administrative practices more in line with *ICESCR* obligations.

- *A public law judicial review approach*

Where Optional Protocol complaints concern *Covenant* fulfilment obligations that involve the dedication of State party resources, the Committee could not easily or comfortably investigate situations and advise States how to allocate their resources. That said, a public law judicial review approach could be adopted to look into the issue so as to determine whether the State party in question had a policy dealing with the issue at all and if so, whether it is reasonable. Further, the Committee could examine State party policy to determine whether if was fundamentally flawed on a point of substance. On the national level, the aforementioned process was utilised by the South African Constitutional Court in *Government of the Republic of South Africa* v. *Grootboom*. Here, through an examination of South African housing policy, the Court found that no provision had been directed at ameliorating the conditions faced by individuals in desperate need of basic housing. Flawed in a substantive regard, the housing policy was held to be unreasonable. Within the context of access to housing, the Court held that State policy, in order to be reasonable, had to take account of the different socio-economic levels of the South African population and could not ignore those whose needs were most urgent.

- *An examination of regressive State financial measures*

The Committee could examine regressive State party financial measures as they impact upon domestic economic, social and cultural rights policies and comment on whether there was justification for such fiscal cutbacks.

- *Specific remedial actions*

There are numerous context oriented specific remedial actions that the Committee might avail itself of as seen through other international remedial mechanisms. For example the International Labour Organisation Freedom of Association Committee, in confronting the situation of the unjustified detention of trade union representatives, recommended their release.

- *Friendly settlement*

Under an Optional Protocol to the *ICESCR*, remedial provisions concerning "friendly settlement" procedures could be employed. A friendly settlement procedure is used very successfully and with increasingly frequency by the European Court of Human Rights, the Inter-American Court, and the Inter-American Commission of Human Rights, which avoids the need for a final decision on the merits of a complaints by the way of recommendations.

**AGAINST WHOM SHOULD COMPLAINTS BE INITIATED UNDER AN OPTIONAL PROTOCOL TO THE ICESCR?**

Complaints under an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*), should be submitted against the States parties to the *Covenant* as States parties are the only obligation holders under the *Covenant*. With regard to potential complaints against trans-national corporations and other non-State actors, as these entities are not *Covenant* signatories, they cannot be made directly liable, however, non-State actors may still be held de facto accountable under the *ICESCR* through the positive obligations that exist on States parties in respect of all non-state actors either wholly or partially within their jurisdictions.

Through General Comment No. 3, the Committee has stressed that international co-operation for the realisation of economic, social and cultural rights is an obligation of all States parties and is especially incumbent on developed nations in a position to assist developing nations. Members of the Committee have advised, however, that international co-operation and assistance should not be made the subject of Optional Protocol communications through State to State complaints as the procedure envisaged under the draft Optional Protocol posits States parties, (the holder of *Covenant* obligations), against individual and group victims, (the holders of *Covenant* rights). As the obligation to extend international co-operation and assistance is unrelated to the State/victim dichotomy, complaints concerning the non-provision of international co-operation and assistance could not be linked to the draft Optional Protocol, complaints procedure.

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## THE PARTIES CAPABLE OF INITIATING COMPLAINTS UNDER AN OPTIONAL PROTOCOL TO THE *ICESCR*

With regard to the parties possessing the capacity/ability to initiate a complaint under an Optional Protocol to the *ICESCR,* at a minimum, individual and group[8] victims of State party *Covenant* violations should possess this competence along with interested individuals and groups, (representatives), that could initiate complaints *on behalf of* individual and collective victims.

The importance of including representatives, particularly non-governmental organisations, that could submit communications on behalf of individual and groups victims of *ICESCR* violations is evident as, under existing instruments, complaints *on behalf of* individual and group victims have either been specifically included[9] or such representative standing has been provided through adjudicative interpretation.[10] The inclusion of representative complaints is rooted in the fact that these types of communications play an essential role in initiating international complaint's procedures where victims face the risk of ill-treatment or other retaliation for directly engaging in the process.

[8] Nowak, M., "The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" in International Commission of Jurists, *The Review: Economic, Social and Cultural Rights and the Role of Lawyers*, France: 1995 at 160. Limiting standing/ability to initiate complaints under an Optional Protocol to the *ICESCR* to individuals would be to prevent to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

[9] Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims of State party *ICESCR* rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women, A*rticle 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 77 of *the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

[10] Arambulo, K., *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural Aspects*, Intersentia, Antwerpen: 1999 at 223, 233-4. Through the practice of the United Nations Human Rights Committee, communications submitted *on behalf of* victims of State party *ICCPR* violations have been accepted.

## THE RELATIONSHIP BETWEEN NATIONAL REMEDIES AND INTERNATIONAL PROTECTION

Article 3(3)(a) of the draft Optional Protocol provides that a complaint cannot be brought before the Committee until all domestic remedies have been exhausted. The "exhaustion of all domestic remedies" provision is standard in respect of international claims/communications procedures.

In drafting an Optional Protocol to the *ICESCR*, States parties may wish to follow the practice of the United Nations Human Rights Committee, the Inter-American Commission, and the African Commission on Human and Peoples Rights, in compelling potential complainants to proceed through their national legal systems, to avail themselves of domestic remedies, as a precondition to lodging an international complaint. In cases where the provision of domestic remedies are mired in excessive and/or unreasonable delay an *ICESCR* Optional Protocol complainant could proceed without exhausting domestic remedies.

## STATE PARTY RESERVATIONS UNDER AN OPTIONAL PROTOCOL TO THE ICESCR

Precluding reservations to the Optional Protocol[11] to the ICESCR would represent a significant commitment by States parties which ratify the Protocol, to uphold the integrity of internationally recognised economic, social and cultural rights. Excluding the use of reservations would be appropriate as:

**(i)** The *raison d'etre* of an Optional Protocol would to provide to people an international procedure to obtain protection on the enjoyment of their economic, social and cultural rights as enshrined in the *ICESCR*. As a tool to both complement and strengthen the *Covenant*, to allow State party reservations to an Optional Protocol would be to undermine its potential as a tool for the full realisation of economic, social and cultural rights;

**(ii)** An Optional Protocol would by its very nature be optional and as such, reservations that curtailed its applicability would be unnecessary;

**(iii)** An Optional Protocol would be a procedural instrument as it would neither introduce new nor expand present economic, social and cultural rights obligations that States parties accepted through their ratification of the *Covenant.* An Optional Protocol would thus merely serve as a means through which States parties would be encouraged to realise existing *ICESCR* obligations.

**(iv)** An effective Optional Protocol must recognise the indivisible and interdependent relationship amongst all *Covenant* rights. To allow States parties to individually select the *ICESCR* rights subject to an Optional Protocol strike at the core this relationship and the instruments ability to protect and promote *Covenant* rights. Such a selective approach would open the door to arguments as to the hierarchy of and inequality between economic, social and cultural rights, thereby encroaching upon the universality, interdependence, indivisibility and interrelatedness of all human rights.[12] Further, permitting the selection of economic, social and cultural rights subject to the Optional Protocol mechanisms would risk that some States parties would enhance their international prestige, through ratification, while restricting the instrument's substantive application.

State parties should bear in mind the comments made by the Human Rights Committee on the issue of reservations made upon ratification or accession to the ICCPR or its Optional Protocols, in its General Comment No. 24 (CCPR/C/21/Rev.1/Add.6), where it addressed the issue of whether reservations are permissible under the first Optional Protocol to the ICCPR, and if so, whether such reservations are contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. In this regard, the Committee stated:

> *"It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty*

[11] Article 17 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* explicitly states "No reservations to this Protocol may be permitted"

[12] The United Nations Division for the Advancement of Women Department of Economic and Social Affairs, *The Convention on the Elimination of All Forms of Discrimination Against Women, The Optional Protocol: Text and Materials,* United Nations: 2000, at 49-50.

*to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.*

Further, the Committee stated that "reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose".

## THE MINIMUM CORE OBLIGATIONS OF STATES PARTIES UNDER THE ICESCR

The Committee has clarified that there is a "minimum core obligation" incumbent on States parties to ensure the satisfaction of, at the very least, minimum essential levels for each *ICESCR* right. Such obligations were formulated to not be unnecessarily onerous especially if developed nations are able to provide co-operation and technical assistance to developing nations. In the words of the Committee, (General Comment 3),

> *A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is 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. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*

Further, the Committee has emphasised that "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."

## THE OBLIGATION "TO TAKE STEPS" AND "PROGRESSIVE REALISATION"

Article 2, paragraph 1 of the *ICESCR* requires all States parties to take measures towards guaranteeing the full enjoyment of all *Covenant* rights for all individuals. Here, the adoption of legislation, administrative, economic, financial, educational and social measures, the establishment of action programs, the creation of appropriate bodies and the establishment of judicial procedures may be necessary to secure economic social and cultural rights, (hereinafter ESC rights), (General Comment no. 3, § 4).

The requirement of "progressive realisation" reflects the fact that full realisation of all ESC rights will generally not be able to be achieved in a short period of time, (General Comment no. 3, § 9). The "progressive obligation" component of the *Covenant* does not mean that only once a State reaches a certain level of economic development must the rights established under the *Covenant* be realised. The duty in question obliges all States parties, notwithstanding their level of national wealth, to move towards the realisation of ESC rights. Here, countries who start from a relatively low level on the development scale will have to comply with a lower degree of ESC rights realisation than developed nations as the *Covenant* only requires what is possible under the "minimum core" doctrine.

The progressive realisation concept should never be interpreted as allowing States to defer indefinitely efforts to ensure the enjoyment of the rights laid down in the *Covenant* as certain obligations are intended to be implemented immediately. The immediate application stipulation would apply especially to *Covenant* non-discrimination provisions and the obligation of States parties to respect and protect ESC rights.

Through it's General Comment 3, the Committee on Economic, Social and Cultural Rights has further elaborated on the concept of progressive achievement. General comment 3 advises that the *Covenant* provides for the progressive realization of ESC rights within the context of the constraints placed on States due to the limits of available resources. Despite these constraints however, the *Covenant* imposes various obligations that are of immediate effect to bring about ESC rights realization. Of these, two are of particular importance: the "undertaking to guarantee" that relevant rights "will be exercised without discrimination" and the undertaking, in article 2(1) "to take steps". The concept of progressive realization is not to be misinterpreted as depriving *Covenant* obligations of all meaningful content as ESC rights realization objectives were designed to be flexible, reflecting the realities of the real world and attendant difficulties involved for countries in ensuring the full realization of said rights. The progressive realization concept thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Steps to bring about the full realization of ESC rights should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the *Covenant.* States should use "all appropriate means, which include but are not limited to: the adoption of legislative measures; judicial remedies for ESC rights violations; and appropriate administrative, financial, educational and social measures. Finally, General Comment 3 advises that there exists a minimum core obligation for States to ensure the satisfaction of, at the very least, minimum essential levels of each *Covenant* right that should be achieved with individual state and international assistance and cooperation.

# STATE OBLIGATIONS UNDER THE ICESCR: THE MARGIN OF DISCRETION & OBLIGATIONS IN TIMES OF AUSTERITY

## Margin of Discretion

In accordance with Article 2, paragraph 1, of the *Covenant*, States parties are required to utilise "all appropriate means, including particularly the adoption of legislative measures" in the implementation of *Covenant* obligations. This requirement, however, is subject to the principle that States parties enjoy a certain margin of discretion in selecting the means by which their respective obligations under the *Covenant* are implemented. That said, the Committee maintains that the *ICESCR* clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys at least minimum levels of each *Covenant* right.

## Obligations in Times of Austerity

National austerity programs necessitating retrogressive measures that affect economic, social and cultural rights may be unavoidable. However, in times of austerity, States parties should steadfastly protect minimum core *Covenant* obligations and bear the burden of justifying any retrogressive measures before the international community. The Committee has emphasised that severe resource constraints cannot justify State party inaction towards the weakest individuals and groups in society:

> *Even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.* (General Comment no. 3, § 12).

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## ICESCR RIGHTS THAT SHOULD BE THE SUBJECT TO AN OPTIONAL PROTOCOL

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Given that the first Optional Protocol to the International *Covenant* on Civil and Political Rights, (hereinafter *ICCPR*), relates in a comprehensive manner to all of the rights embodied in the that *Covenant*, to adopt a similar approach in drafting an Optional Protocol to the *ICESCR* would provide States with an excellent opportunity to reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights. Thus the ICJ advocates the adoption of a comprehensive Optional Protocol that encompasses all of the rights enshrined in the *Covenant* as a method of reinforcing the indivisibility of these rights.

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## NON-DISCRIMINATION AND EQUALITY UNDER THE ICESCR

Non-discrimination and equality are integral elements of the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*). Article 2, paragraph 2, requires States parties to prevent discrimination in relation to the augmentation of *ICESCR* economic, social and cultural rights. This provision not only obliges governments to desist from discriminatory behaviour and to alter laws and practices which allow discrimination, it also applies to the duty of States parties to prohibit private persons and bodies, (third parties), from practising discrimination in any field of public life. Importantly, the grounds of discrimination mentioned in this provision are not exhaustive and thus certain other forms of unfair discrimination negatively affecting the enjoyment of *Covenant* rights, (for instance, discrimination on the basis of sexual orientation), may also be prevented.

Non-discrimination is a general principle of international human rights law: the Human Rights Committee states in General Comment No. 18 that "non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights" (see paragraph 1). The Committee on Economic, Social and Cultural Rights has reinforced this through their General Comment No. 3 on The Nature of States Parties Obligations, where they state that one of the obligations imposed by the ICESCR is an "'undertaking to guarantee' that relevant rights 'will be exercised without discrimination …'." The Committee goes on to note that "the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies".

[i] See generally the United Nations General Assembly, World Conference on Human Rights, Preparatory Committee, Fourth Session, 1993, Status of Preparation of Publications, Studies and Documents for the World Conference, Note by the Secretariat. Internet ref. www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/f618c9ab1b9b6d92802568c400599042?Opendocument.