



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS WITH REGARD TO COMMISSION ON HUMAN RIGHTS RESOLUTION 2002/24, ARTICLE 9(F) ON THE QUESTION OF AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

I. INTRODUCTION

In response to Commission on Human Rights, (hereinafter, the Commission), Resolution 2002/24, paragraph 9(f), as motivated by a universal concern for the protection and promotion economic, social and cultural rights, the International Commission of Jurists submits the following views concerning the mandate of the open-ended working group that will be established, at the fifty-ninth session of the Commission, with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, (hereinafter ICESCR or Covenant).

II. CONTEXT

Guided by the principles relating to economic, social and cultural rights enshrined in the Universal Declaration of Human Rights and the ICESCR, it is clear that undivided State party adherence to the ICESCR is of considerable importance in protecting and promoting economic, social and cultural rights throughout the world. In this, it is recognised that the international community bears a collective responsibility to ensure that Covenant enshrined economic, social and cultural rights are not violated. The resulting need to assist in the fulfilment of these rights, through the provision of adequate remedial mechanisms in the event of their violation, is thus of paramount significance.

III. THE MANDATE OF THE WORKING GROUP

To further protect and promote ICESCR rights the 59th session of the Commission that will assign the mandate of the inter-sessional open-ended ICESCR/optional protocol working group should take into account the following considerations:

(a) Focused Agenda

Conceptual issues, related to an international adjudicative procedure empowered to receive complaints with regard to violations of economic, social and cultural rights, have received a thorough analysis from a wide variety of sources that include:

- (i) The abundant experience and jurisprudence of national, regional and international bodies/instruments that employ adjudicative procedures related to violations of economic, social and cultural rights. In this regard, reference may be made to the United Nations Human Rights Committee, the European Court of Human Rights, the European Committee on Social Rights, the African Charter on Human and Peoples' Rights, the San Salvador Protocol, (Inter-American Commission and Court), the Optional Protocol to the Covenant on the Elimination of Discrimination against Women, the United Nations Educational, Scientific and

Cultural Organization Complaint's Procedure, the International Labour Organisation Committee on the Freedom of Association and an abundance of national jurisprudence;

(ii) A plethora of national and international conferences and instruments that have clarified the nature and scope of economic, social and cultural rights and States parties obligations under the *ICESCR*. Amongst these, the Declaration of Delhi (1959), the Law of Lagos (1961), the Limburg Principles on the Implementation of the *ICESCR* (1986), the World Conference on Human Rights (1993), the World Summit for Social Development (1995), the Bangalore Plan of Action (1995), the Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights (1996) and United Nations/International Commission of Jurists' conferences on the optional protocol and economic, social and cultural rights, (1999), (2000), (2001) and (2002), amongst numerous others, may be instructive;

(iii) General Comments from the Committee on Economic, Social and Cultural Rights, (hereinafter *CESCR* or Committee), that have clarified various aspects of the *ICESCR* including: international technical assistance measures; the nature of States parties obligations under article 2; the right to adequate housing; the economic, social and cultural rights of persons with disabilities and of older persons; the right to adequate housing, (forced evictions); the relationship between economic sanctions and respect for economic, social and cultural rights; the domestic application of the Covenant; the role of national human rights institutions in the protection of economic, social and cultural rights; plans of action for primary education; the right to adequate food; the right to education; the right to the highest attainable standard of health; and the right to water;

(iv) *CESCR* discussions, summary records, studies and reports concerning its work on draft optional protocol and optional protocol issues, (E/C.12/1996/SR.44-49, 54), (E/C.12/1996/CRP.2/Add.1), (E/C.12/1994/12), (E/CN.4/1997/105), (E/1993/22), and (E/C.12/1992/WP.9), that have provided further clarification concerning the nature and scope of economic, social and cultural rights as they relate to an optional protocol to the *ICESCR*;

(v) The draft optional protocol to the *ICESCR* prepared by the *CESCR* for consideration by the United Nations Commission on Human Rights, (E/CN.4/1997/105);

(vi) The experience of numerous United Nations Special Rapporteurs engaged in various aspects of economic, social and cultural rights including housing, education, food and development;

(vii) The experience of the United Nations working group under which the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women was created;

(viii) Two reports from the independent expert appointed by the Commission on Human Rights, (resolution 2001/30), to examine the question of a draft optional protocol to the *ICESCR*. The initial report of the independent expert engaged in an examination of general *ICESCR* and optional protocol issues whereas the second

report provides an in-depth analysis of States parties' obligations under the ICESCR, the justiciability of economic, social and cultural rights, the benefits and practicability of an ICESCR complaints mechanism and the complementarity between the proposed optional protocol and other complaints mechanisms;

(ix) A vast amount of doctrine concerning optional protocol and economic, social and cultural rights issues, see the work of P. Alston, K. Arambulo, M. Craven, A. Eide, D. Harris, P. Hunt, S. Liebenberg, B. Porter, E. Riedel, M. Scheinin and F. van Hoof, to name but a few.

Given that conceptual issues related to an optional protocol to the ICESCR have received a thorough analysis from a wide variety of sources, the ICESCR/optional protocol working group should be empowered with a focused mandate that utilises the above listed wealth of resources as a primary basis point from which the text of an optional protocol to the ICESCR may be drafted.

(b) Comprehensive Approach

An optional protocol to the ICESCR should relate, in a comprehensive manner, to the rights embodied in the Covenant. This inclusive approach recognises that obligations arise from the ICESCR with the optional protocol serving as a means through which existing obligations already undertaken by States parties can be enforced. In drafting an optional protocol to the ICESCR, to not adopt a comprehensive approach would be to undermine the unity of the ICESCR and challenge the universality interrelatedness and indivisibility of all human rights.

(c) Membership

In order to effectively implement its mandate, ICESCR/optional protocol working group membership should remain open in order that the body may effectively collaborate with and receive/invite representations from States, non-governmental organizations, relevant human rights treaty bodies, national institutions, international, financial and development institutions, and specialised agencies, programmes and funds of the United Nations and civil society.

(d) Time Frame

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 empowering the working group, the 59th session of the Commission should bear in mind its decision of 26 April 2000, (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.

(e) **Resource Considerations, Accountability and Transparency**

The ICESCR/optional protocol working group must be endowed with adequate financial, organizational, technological and human resources to carry out its responsibilities in an effective manner.

Through electronic and print mediums, the working group should provide notice as to its upcoming meetings in order to ensure that States parties, non-governmental organisations and civil society will have the opportunity to provide input to the proceedings.

A full report of the working group's proceedings should be presented to each session of the Commission with working group members being available to provide further oral clarification.

IV. CONCLUSION

Guided by the wealth of information available to the working group that will be established at the fifty-ninth session of the Commission to consider options regarding the elaboration of an optional protocol to the ICESCR, the International Commission of Jurists submits that this United Nations body should be empowered to negotiate the substantive text of an optional protocol to the ICESCR.