



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 "

**REPORT OF THE EXPERT'S ROUNDTABLE CONCERNING
ISSUES CENTRAL TO THE PROPOSED OPTIONAL PROTOCOL
TO THE
*INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL
RIGHTS***

Hosted by the International Commission of Jurists

26-27 September 2002

Geneva, Switzerland

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INTRODUCTION

On 26-27 September 2002, the International Commission of Jurists convened a roundtable of experts to discuss issue areas mandated to the Optional Protocol independent expert by the 58th session of the Commission on Human Rights, (hereinafter the Commission), to report on during the Commission's 59th session. Pragmatic in focus, roundtable experts examined existing sources of information with regard to guidance that may be offered to both the independent expert and the *ICESCR*/Optional Protocol working group that will be established at the 59th session of the Commission. In specific, available information was analysed on the following issues:

- (i) States parties' obligations under the *ICESCR*;
- (ii) The justiciability of economic, social and cultural rights with particular reference to the experience gained in recent years from the application of universal, regional and national human rights instruments and mechanisms; and
- (iii) The benefits and practicability of an *ICESCR* complaints mechanism and the complementarity between the proposed Optional Protocol and other complaints mechanisms.

I. ISSUE ONE: THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS UNDER THE *ICESCR*

Roundtable experts pointed out a basic misconception relating to human rights: civil and political rights are often perceived as simple freedoms, whereas economic, social and cultural rights are only associated with the provision of services that may place onerous resource burdens on States parties. Countering this misconception, the experts stated that, while the realisation of economic, social and cultural rights would entail the dedication of State party resources, the fulfilment of civil and political rights also required resources. Here, for example, it was noted that the right to individual security, the right to fair trial and the holding of elections require the establishment and maintenance of extensive and costly legal systems and political processes. Further, the sheer mass of international, regional and national interpretive adjudication of civil and political rights demonstrates that civil and political rights are not as "simple and straightforward" as some might assume. Like civil and political rights, the realisation of economic, social and cultural rights require states parties to assume both negative and positive obligations.

I.(a) The Obligation to Respect, Protect and Fulfil: Understanding States Parties' Obligations under the *ICESCR*

The State party obligation to "respect, protect and fulfil" *Covenant* rights is grounded in the contention that, as with civil and political rights, *ICESCR* rights are formulated in both negative and positive terms. Unfortunately, obligations associated with economic, social and cultural rights appear somewhat different from those associated with civil and political rights because the positive obligations associated with civil and political rights have been obscured by steps already taken by most States to establish the infrastructure necessary for their guarantee.

With regard to economic, social and cultural rights, the *obligation to respect* requires States parties to abstain from actions that would prevent individuals from using available material resources in the way that they deemed best to satisfy basic needs. For example, under the obligation to "respect" a State party should not confiscate the crops of subsistence farmers. The *obligation to protect*

requires States parties to implement measures directed at preventing individuals and/or groups from violating the integrity of individual freedom of action or other human rights. Here, for example, a State party should prevent landlords from evicting tenants for unjustified reasons. The *obligation to fulfil* requires States parties to take measures necessary to ensure that each person within its jurisdiction is afforded the opportunity to obtain basic need satisfaction that cannot be secured through personal efforts. The obligation to fulfil is subdivided between:

- (i) the obligation to promote assistance measures that enable individuals to access information towards the fulfilment of their *Covenant* rights, for example, States parties should provide education as to the health implications associated with the contraction of HIV/AIDS; and,
- (ii) the direct provision of basic resources to vulnerable individuals and groups when no other alternatives exist.¹

With reference to the chart, below, it was noted that neither the respect and protect obligations nor the promote/inform subdivision of the fulfilment obligation involves State resource allocations:

<p>RESPECT (Does not require a dedication of State resources)</p>
<p>PROTECT (Does not require a dedication of State resources)</p>
<p>(A) FULFIL – “FACILITATE” Obligation to Promote and Inform (Does not require a dedication of State resources)</p> <p>-----</p> <p>(B) FULFIL - “PROVIDE” Obligation to Provide (Requires a dedication of State resources to vulnerable individuals and groups when no alternatives exist)</p>

I.(b) The Margin of Discretion

As already applied to the adjudication of civil and political rights on the international level, roundtable experts were of the opinion that States parties to the *ICESCR* would enjoy a relatively wide margin of discretion in selecting the means through which they satisfied their *ICESCR* obligations. That said, States parties would still have to justify their *ICESCR* realisation efforts or non-efforts while demonstrating that they possessed a plan to care for the basic needs of vulnerable individuals and groups.

I.(c) Minimum Core Obligations of States Parties

At a minimum, States parties to the *Covenant* should “respect” and “protect” all *Covenant* rights to the best of their ability. With regard to State party obligation to substantively “fulfil” *Covenant* rights, roundtable experts supported the CESCR position that States parties are obliged to provide or engage in a plan to provide minimum essential levels for each *Covenant* right to the most vulnerable segments of society and ensure that there is no discrimination in the enjoyment of economic, social and cultural rights. In this regard, however, numerous experts were of the opinion that the minimum core doctrine should be developed and applied by each State party through the use of realistic minimum core benchmarks, ie. nationally determined goals/targets that are taken into account in designing/implementing *ICESCR* policies/programs. Into the future, the relative attainment or non-attainment of minimum core obligations could be assessed through the use of economic, social and cultural rights indicators. Under this system, one which essentially requires States parties to provide “good governance”, minimum core obligations could be discharged through the demonstration that States parties had adopted comprehensive and coordinated programs reasonably capable of facilitating the minimum core realisation of *Covenant* rights, that special measures attended to the basic needs of vulnerable groups and that *ICESCR* policies/programs had been reasonably implemented and monitored.²

I.(d) The Effect of an Optional Protocol on State Resource Expenditures

Beyond the satisfaction of minimum core obligations under the *Covenant*, roundtable experts stressed that the establishment of an Optional Protocol will not contribute to the imposition of a planned economy on States parties as the proposed instrument merely builds on national practices concerning the regulation of domestic economies. The text of the *Covenant* and CESCR General Comments support this notion through a position of neutrality concerning the type of economic system required to achieve the substantive realisation of *Covenant* rights. Under an Optional Protocol, the CESCR would not stand in the shoes of national governments to question their resource allocations and/or policy priorities that impacted on the substantive fulfilment of *Covenant* rights. This assertion is supported by the past practice of the Human Rights Committee that, in examining economic, social and cultural rights issues, declined to review State budgetary allocations in favour of examining human rights principles negatively affected by the established socio-political systems in place.³

I.(e) ICESCR Obligations in Times of Austerity

Roundtable experts recognized as unavoidable, national austerity programs mandating retrogressive measures that affect economic, social and cultural rights. Within this context, support was offered for the position that, 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.⁴ It was suggested, however, that an Optional Protocol adjudicative body should provide an expansive interpretation to the margin of discretion doctrine in examining retrogressive measures as this body would not possess the knowledge or understanding that existed at the national level and would not bear the burden of justifying austerity measures to domestic populations. It was recommended that Optional Protocol claims in this area would only be valid in clear instances where the adjudicative body was confident that a State had not acted justly and equitably in preserving its minimum core obligations.

I.(f) International Assistance and Cooperation

For the purposes of the treaty body interpretation of ICESCR rights, roundtable experts discussed the meaning of the phrase "international assistance and cooperation" contained in article 2(1) of the *Covenant* and, in specific, 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 was 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.

Roundtable experts submitted that, 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.⁵

I.(g) The Optional Protocol: Providing Guidelines for Interpretation

Roundtable experts speculated that, in an effort to calm States parties' anxieties concerning their obligations under the *Covenant*, "guidelines for interpretation" could accompany an *ICESCR* Optional Protocol to facilitate the adjudicative interpretation of the *Covenant*. The experts recalled that during negotiations on Protocol 12 of the European Convention on Human Rights, (concerning non-discrimination), the Steering Committee prepared an "Explanatory Report" that provided such normative clarity and facilitated in the adoption of the Protocol.

Currently, a substantial body of material can be accessed to provide guidance on the types of situations that may be considered violations under the *Covenant*. Through regional instruments, CESCR interpretations, (Reporting Procedure/General Comments), other soft law documentation such as the *Maastricht Guidelines*, the *Limburg Principles*⁶ and a wealth of academic scholarship, the nature and scope of States parties' obligations under the *Covenant* has received a great deal of attention. However, the most ideal mechanism for developing normative clarity is the proposed complaints mechanism itself whereby the nature and scope of States parties' obligations under the *Covenant* would be clarified in the context of concrete complaints.

II. ISSUE TWO: THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Roundtable experts addressed the widespread tendency to deem economic, social and cultural rights as something "other" than civil and political rights as only the latter are perceived as justiciable. Posited 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, as the *ICESCR* and the *International Covenant of Civil and Political Rights*, (hereinafter *ICCPR*), are both legally binding human rights instruments of equal force, economic, social and cultural rights should be equal to civil and political rights in terms of their justiciability. 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 monitoring procedures under the *ICESCR* and the *ICCPR* should be different. National and international precedents support the contention that it would neither be new nor innovative for the proposed Optional Protocol to provide for the submission of complaints addressing the violation of economic, social and cultural rights. In this, it must be recognized that the instrument would not create new obligations under the *ICESCR*, it would simply provide a mechanism to bring about the substantive realisation of the rights previously agreed to by the international community.

II.(a) Justiciability: National Experiences

The experiences of Bangladesh, Colombia, Finland, France, Germany, Guyana, India, Japan, Latvia, Mauritius, New Zealand, the Philippines, Portugal, South Africa, Switzerland, Venezuela and numerous other nations in adjudicating economic, social and cultural rights demonstrates the leading role Courts may play in interpreting and implementing *ICESCR* rights. In South Africa, the 1996 Constitution encompassed a wide range of economic, social and cultural rights on an equal footing with civil and political rights. Despite the fact that South Africa has signed but not yet ratified the *ICESCR*, South African Courts have increasingly created a foundation of jurisprudence, moving towards the improved protection of these rights. One notable example is the case, *Government of the Republic of South Africa v. Grootboom*,⁷ that concerned the forced eviction of squatters. This landmark decision stood 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.

In conclusion, roundtable experts noted that most, if not all nations, have recognized that labour, social security and education rights are justiciable before national Courts/Tribunals. While the entitlements adjudicated upon may not be labelled rights, they nonetheless deal with *ICESCR* subject matter formulated in a way that renders justiciability unproblematic.⁸ Further, national Courts are increasingly creating a foundation of jurisprudence that accepts the domestic justiciability of economic, social and cultural rights. This process would greatly benefit from a strong international message to national Courts, through the adoption of an Optional Protocol to the *ICESCR*, that economic, social and cultural rights claims are justiciable.

II.(b) Justiciability: International Experiences

On the international level, remedies exist for the violation of economic, social and cultural rights, however, existing mechanisms do not cover the full range of rights prescribed by the *Covenant*. Despite this, 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, (hereinafter ILO), Committee on the Freedom of Association, (CFA), 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.

(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 these 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*.⁹

(iii) The European System

Under the European Convention on Human Rights that 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. 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.¹⁰

(iv) 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.

(v) 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.¹¹

(vi) 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 civil, political, 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.

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

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

II.(c) The Obligation to "Fulfil" Under the *ICESCR*: Employing a Judicial Review Approach

Roundtable experts were of the opinion that it would be relatively simple for an adjudicative body under the *ICESCR* to pronounce upon State party violations concerning their "respect" "protect" and non-discrimination obligations under the *Covenant*. Where complaints concerned State party fulfilment obligations, the adjudicative body could adopt a public law judicial review approach to determine whether the State party instituted remedial policies and if so, whether such policies were reasonable or fundamentally flawed on a point of substance.¹² This type of evaluation was utilised by the South African Constitutional Court in *Soobramoney v. Minister of Health, KwaZulu-Natal*,¹³ where, through an examination of the South African health system, a "chronic lack of resources" supported the finding that there was no unqualified State obligation to meet all medical requirements for South African patients. The same evaluative process was utilised by the South African Constitutional Court in *Government of the Republic of South Africa v. Grootboom*,¹⁴ where, through an examination of South African housing policies, the Court found that State efforts had not 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.

III. ISSUE THREE: THE BENEFITS AND PRACTICABILITY OF AN *ICESCR* COMPLAINTS MECHANISM AND THE COMPLEMENTARITY BETWEEN DIFFERENT COMPLAINTS MECHANISMS

III.(a) The Benefits of an Optional Protocol to the *ICESCR*

Through roundtable discussions, it was asserted that an Optional Protocol to the *ICESCR* would benefit numerous segments of society including, individuals, States parties, the United Nations and human rights institutions as the proposed instrument would:

Benefits to States Parties

- (i) Discourage other non-economic, social and cultural rights complaints mechanisms from entering the *ICESCR* field, current practice in the absence of an Optional Protocol;
- (ii) Assist States parties in promoting the rights ratified under the *Covenant* by providing them with incentives to seriously address economic, social and cultural rights issues;
- (iii) Assist States parties in justifying resource allocations on the domestic level;
- (iv) Provide States parties with a direct role in the development of economic, social and cultural rights jurisprudence;
- (v) Provide States parties with the opportunity to defuse national/local socio-political problems that are difficult to resolve through domestic political processes. In this, an Optional Protocol could provide enhanced legality, uniformity, justice and stability to balance potentially volatile economic and political forces at play within the national fora;
- (vi) Provide incentives to States parties to provide detailed information to the Optional Protocol adjudicative body which would also serve to strengthen the institutional knowledge of the reporting mechanism;

General Benefits

- (i) Place a renewed emphasis on economic, social and cultural rights, combat the notion that economic, social and cultural rights are non-justiciable and, through example, support the further domestic recognition of economic, social and cultural rights;
- (ii) Facilitate the work of non-governmental organisations and agencies engaged in the promotion of economic, social and cultural rights;
- (iii) Promote the development of greater normative precision and a broader understanding of economic, social and cultural rights; and
- (iv) Provide complainants, from *ICESCR* States parties not party to other regional/international mechanisms, with the opportunity to have their claims heard.

III.(b) The Complementarity Between the Proposed *ICESCR* Optional Protocol and Other International and Regional Complaints Mechanisms

Roundtable experts addressed the suitability of an *ICESCR* Optional Protocol complaints mechanism in the face of other mechanisms that adjudicate over economic, social and cultural rights. Acknowledging overlaps between the proposed instrument and the work of the ILO-CFA, the European Committee of Social Rights, the African Commission on Human and Peoples' Rights and the Inter-American Commission/Court, roundtable experts advised that:

- (i) Similar overlaps between civil and political rights complaints mechanisms have proven unproblematic;
- (ii) An *ICESCR* Optional Protocol could include a provision similar to Article 3(3)(b) of the draft Optional Protocol which mandates the 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; and
- (iii) Existing economic, social and cultural rights complaint' mechanisms are fairly limited in terms of the subject matter they are competent to hear and the complainants provided with standing. Here, for example, the UNESCO procedure entertains only a narrowly defined class of complaints while the ILO mechanism primarily confines itself to complaints concerning the freedom of association.

III.(c) The Practicability of an *ICESCR* Optional Protocol

Roundtable experts highlighted certain issues pertaining to the structure and form of the Optional Protocol complaints mechanism that should receive attention from the upcoming working group. These issues concerned the types of *Covenant* violations that the *ICESCR* complaints mechanism should entertain and the structure of adjudicative body hearing such complaints.

(i) Scope and Nature of Violations under an Optional Protocol Complaints Mechanism

Roundtable experts reviewed the report of the independent expert to the 58th Commission on Human Rights and, in specific, his contention that an Optional Protocol complaints procedure should be limited to "situations revealing a species of gross, unmistakable violations of failures to uphold any of or the rights set forth in the *Covenant*". The independent expert believed that the "gross violations" criterion:

- (1) Would prevent arbitrary appeals against simple oversights in national *ICESCR* policies/programmes;¹⁵
- (2) Enable the Optional Protocol adjudicative body to draw on relevant comments made to the Commission on Human Rights by special rapporteurs on questions relating to the rights set forth in the *Covenant*; and¹⁶
- (3) Minimise the risk of overlapping with or diverging from other economic, social and cultural rights investigative or settlement bodies.¹⁷

On this issue, roundtable experts stressed that limiting the Optional Protocol to gross violations of economic, social and cultural rights would:

- (1) Duplicate the United Nations Commission on Human Rights 1503 procedure which examines consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms;
- (2) For all practical purposes, introduce a collective element to Optional Protocol complaints. This is due to the fact that "gross violations" heard before international mechanisms tend to reflect violations against groups and in this, individual complaints are limited;
- (3) Tend to incline the complaints mechanism to address States parties unable to provide the basic necessities for life. The proposed instrument could thus create an imbalance between developed and developing nations; and
- (4) Restrict the development of relevant domestic jurisprudence concerning economic, social and cultural rights.

(ii) Separating the Adjudicative and Reporting Mechanisms under the Proposed Optional Protocol to the ICESCR

Roundtable experts expressed concern over the independent experts' claim that there could be a "conflict of authority" if the CESCR were to both consider periodic reports from States parties and adjudicate over complaints concerning alleged *Covenant* violations.¹⁸ In particular, they disagreed with the independent expert's view that the reporting procedure is essentially a non-confrontational exercise. Roundtable experts asserted that the CESCR would be less effective were the reporting and adjudicative mechanisms to be separate under an Optional Protocol. Consolidating these functions would benefit the CESCR as information presented to it during the reporting stage would provide an overall context for arguments presented within the complaints procedure and would allow the CESCR to more fully respond in an efficient and more fully informed manner. Likewise, issues dealt with through the complaints procedure would set the stage for appropriate follow-up through the reporting procedure. To date, the European Social Charter - Committee of Independent Experts, the Committee on the Elimination of Discrimination Against Women and the Human Rights Committee have not found a "conflict of authority" in having one body receive State party reports and adjudicate over complaints.

(iii) Claims Under and ICESCR Optional Protocol

Roundtable experts examined the possibility that an *ICESCR* complaints mechanism could lose its effectiveness in furthering economic, social and cultural rights were it to be flooded by complaints. Roundtable experts were of the opinion that an Optional Protocol complaints mechanism would not be flooded by such complaints as:

- (1) The body of individuals and groups entitled to complain of *ICESCR* violations would depend on the speed with which States parties ratify the Optional Protocol;
- (2) The experience of other economic, social and cultural rights instruments/procedures¹⁹ and jurisdictions²⁰ lend credence to the holding that an *ICESCR* Optional Protocol procedure will not be inundated with complaints.

IV. THE MANDATE OF THE UNITED NATIONS *ICESCR* OPTIONAL PROTOCOL WORKING GROUP

Roundtable experts were of the firm belief that the *ICESCR*/Optional Protocol working group should focus on negotiating the text of an Optional Protocol, as the most effective way to prompt States parties to discuss *ICESCR* and Optional Protocol issues is to sit them around a table to translate, into concrete terms, proposals and concerns regarding this proposed international instrument. The experts endorsed resolution E/CN.4/Sub.2/2002/L.50 of the 2002 fifty-fourth session of the Sub-Commission on the Promotion and Protection of Human Rights. This Resolution urged the Commission on Human Rights, at its 2003 fifty-ninth session, to mandate the *ICESCR*/Optional Protocol working group to proceed with the drafting of the substantive text of an Optional Protocol.

ANNEX "A"

LIST OF EXPERTS ATTENDING THE INTERNATIONAL COMMISSION OF JURISTS ROUNDTABLE CONCERNING ISSUES CENTRAL TO THE PROPOSED OPTIONAL PROTOCOL TO THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

Dr. Kitty Arambulo, Deputy Secretary of the Committee on Economic Social and Cultural Rights, United Nations Office of the High Commissioner for Human Rights, Switzerland

Dr. Matthew Craven, Department of Law, School of Oriental and African Studies, University of London, United Kingdom

Louise Doswald-Beck, Secretary-General, International Commission of Jurists, Switzerland

Professor David Harris, University of Nottingham Faculty of Law, United Kingdom

Malcolm Langford, Centre of Housing Rights and Evictions, Coordinator of the esc rights litigation program.

Professor Sandra Liebenberg, Community Law Centre, Project Head, esc rights program The University of the Western Cape, South Africa

Professor Giorgio Malinverni, Université de Genève, Faculté de droit, Département de droit constitutionnel, member of the Committee on esc rights, Switzerland

Srinivasan Muralidhar, Advocate, Supreme Court of India, India

Simon Walker, Human Rights Officer, Office of the High Commissioner for Human Rights, charged with assisting the mandate of the independent expert examining the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Switzerland

APPENDIX "B"

AGENDA

Day One, 26 September 2002

Morning Session

Chair: Louise Doswald-Beck, Secretary General, ICJ

9:30 - 9:45 **OPENING OF THE ROUNDTABLE AND INTRODUCTORY REMARKS**

Louise Doswald-Beck, Secretary General, ICJ

9:45-10:15 **THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Introductory remarks by Professor Sandra Liebenberg, Community Law Centre, University of the Western Cape, South Africa

10:15-11:30 **Roundtable Discussion**

11:30-11:45 *Coffee Break*

11:45-13:00 **Continuation of the Roundtable Discussion**

13:00-15:00 *Lunch Break*

Afternoon Session

Chair: Louise Doswald-Beck, Secretary General, ICJ

15:00-16:15 **Continuation of the Roundtable Discussion**

16:15-16:30 *Coffee break*

16:30-17:00 **CONCEPTUAL ISSUES ON THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, WITH PARTICULAR REFERENCE TO THE EXPERIENCE GAINED IN RECENT YEARS FROM THE APPLICATION OF UNIVERSAL, REGIONAL AND NATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS**

Introductory remarks by Professor David Harris, Faculty of Law, University of Nottingham, United Kingdom

17:00-17:25 **Roundtable Discussion**

17.25-17.30 **FINAL REMARKS AND CLOSE OF DAY ONE ROUNDTABLE**

Louise Doswald-Beck, Secretary General, ICJ

Day Two, 27 September 2002

Morning Session

Chair: Louise Doswald-Beck, Secretary General, ICJ

9:30 - 9:40 DAY TWO OPENING OF THE ROUNDTABLE AND INTRODUCTORY REMARKS

Louise Doswald-Beck, Secretary General, ICJ

9:40-11:30 CONCEPTUAL ISSUES ON THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, WITH PARTICULAR REFERENCE TO THE EXPERIENCE GAINED IN RECENT YEARS FROM THE APPLICATION OF UNIVERSAL, REGIONAL AND NATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS

Continuation of the Roundtable Discussion

11:30-11:45 *Coffee Break*

11:45-13:00 Continuation of the Roundtable Discussion

13:00-15:00 *Lunch Break*

Afternoon Session

Chair: Louise Doswald-Beck, Secretary General, ICJ

15:00-15:30 THE BENEFITS AND PRACTICABILITY OF A COMPLAINT'S MECHANISM UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE COMPLEMENTARITY BETWEEN DIFFERENT COMPLAINT'S MECHANISMS

Introductory remarks by Dr. Matthew Craven, Department of Law, School of Oriental and African Studies, University of London, United Kingdom

15:30-16:15 Roundtable Discussion

16:15-16:30 *Coffee break*

16:30-17:20 Continuation of the Roundtable Discussion

17.20-17.30 FINAL REMARKS AND CLOSE OF THE ROUNDTABLE

Louise Doswald-Beck, Secretary General, ICJ

¹ *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (hereinafter *Maastricht Guidelines*), at para 6. Internet ref., www.umn.edu/humanrts/instr/Maastrichtguidelines_.html. See also generally, The Committee on Economic, Social and Cultural Rights: General Comment No. 12 - *The Right to Adequate Food*. Internet ref., www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3d02758c707031d58025677f003b73b9?OpenDocument.

² The Committee on Economic, Social and Cultural Rights: General Comment No. 3 - *The Nature of States Parties Obligations*, at para. 10. Internet ref., www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/94bdbaf59b43a424c12563ed0052b664?OpenDocument. See also, Vandenhoe, W., *An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, at para. 26. Internet ref., <http://www.11.be/index.htm?rights/index.htm&2>. Roundtable experts supported the work of national courts in Hungary, Germany, South Africa and Switzerland that have developed jurisprudence concerning the minimum core doctrine. The Constitutional Court of South Africa developed the minimum core doctrine in holding that, as opposed to the establishment of a national minimum core that is difficult to achieve, the State bears the burden of demonstrating that it has adopted special measures and reasonable policies targeting the needs of vulnerable and disadvantaged groups.

³ See *supra* at page 4 of this report, the Margin of discretion doctrine that would also operate in this area.

⁴ The Committee on Economic, Social and Cultural Rights: General Comment No. 2 - *International Technical Assistance Measures*, at para. 9. Internet ref., www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3659aaf3d47b9f35c12563ed005263b9?OpenDocument.

⁵ 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. See also *supra* note 2, at paras. 29-33. See also *supra* note 4, at para. 14.

⁶ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*. Internet ref., www.law.uu.nl/english/sim/instr/limburg.asp.

⁷ 2000 (11) BCLR 1169 (CC), (hereinafter *Grootboom*).

⁸ Scheinin, M., "Economic and Social Rights as Legal Rights" in Eide, A., Krause, C. & Rosas, A., *Economic, Social and Cultural Rights*, (Martinus Nijhoff Publishers: 2001), Chapter 3, pp. 29-54 at 49. See also Hunt, P., *Reclaiming Social Rights: International and Comparative Perspectives*, (Dartmouth: 1996), at 28-29.

⁹ *Ibid.*, (Scheinin), at 32.

¹⁰ *Ibid.*, (Scheinin), at 50-51. See also Rosas, A. & Scheinin, M., "Implementation Mechanisms and Remedies" in Eide, A., Krause, C. & Rosas, A., *Economic, Social and Cultural Rights*, (Martinus Nijhoff Publishers: 2001), Chapter 23, pp. 425-453 at 426.

The European Committee of Social Rights has built extensive jurisprudence that is without equal in detailing the meaning of a wide range of economic and social rights.

¹¹ See generally, *supra* note 7, (Hunt), at 30.

¹² It is during the reporting stage that the CESCR could make comments concerning the State allocation of resources towards the realisation of economic, social and cultural rights.

¹³ 1997 (12) BCLR 1696 (CC).

¹⁴ *Supra* note 7.

¹⁵ *Status of the International Covenants on Human Rights* - Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, at para. 34. Internet ref., <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/aa57ecbc9f263ac1256b9f00508122?Opendocument>

¹⁶ *Ibid.*, at para. 35.

¹⁷ *Ibid.*, at para. 36.

¹⁸ *Ibid.*, at para. 39.

¹⁹ See the International Labour Organisation Freedom of Association complaints procedure, the African Charter on Human and Peoples' Rights, the San Salvador Protocol, the Optional Protocol to CEDAW and the United Nations Educational, Scientific and Cultural Organization complaints procedure.

²⁰ See the national jurisprudence of Bangladesh, Colombia, Finland, France, Germany, Guyana, India, Japan, Latvia, Mauritius, New Zealand, the Philippines, Portugal, South Africa, Switzerland, Venezuela and numerous other nations.