

The Government of Portugal and the International Commission of Jurists

**REPORT OF THE EUROPEAN ROUNDTABLE ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Lisbon, Portugal

24-25 May 2004

TABLE OF CONTENTS

Introduction	3
I. Conceptual Overview: The Justiciability of Economic, Social and Cultural Rights	4
II. The Efficacy and Nature of an International Economic, Social and Cultural Rights Complaints Mechanism	6
III. The Effect of an Optional Protocol on State Resource Expenditures and Domestic Policy Prioritisations	8
IV. The Practical Application of an Optional Protocol to the <i>ICESCR</i> in Relation to <i>Covenant</i> Article 2(1), "International Co-operation and Assistance"	11
V. The Protection and Promotion of Economic and Social Rights Under the <i>European Social Charter</i>	13
VI. An Assessment of the Communications Procedure Under the Optional Protocol to the <i>CEDAW</i>	14
Conclusion	16

INTRODUCTION

1. On 24-25 May 2004, the Government of Portugal and the International Commission of Jurists convened the European Roundtable on Economic, Social and Cultural Rights in Lisbon, Portugal, a conference attended by a broad range of Council of Europe member States and national and international non-governmental and civil society organizations.

2. The threefold objectives of the Roundtable were to:

- (i) Allow for an exchange of views and the building of a constructive dialogue in promoting further State and civil society understanding of economic, social and cultural rights;
- (ii) Discuss issues related to the elaboration of an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*); and
- (iii) Provide a forum for the exchange of experiences, learning and strategies towards the further national, regional and international protection and promotion of economic, social and cultural rights.

3. The European Roundtable on Economic, Social and Cultural Rights was designed to both prepare for and assist the work of the United Nations Working Group, mandated by the 60th session of the United Nations Commission on Human Rights to further *consider options regarding the elaboration of an Optional Protocol to the ICESCR*.¹ To that end, the roundtable report will be submitted to the Working Group by the Government of Portugal as a general reference instrument.

4. The European Roundtable was opened by **Ambassador Henriques da Silva**, Director General for Multilateral Affairs with the Ministry of Foreign Affairs, Government of Portugal and **Edwin Berry**, Legal Officer with the International Commission of Jurists. Through their opening addresses, the inherent universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights was strongly reaffirmed. As symbolised by the second session of the upcoming *ICESCR/Optional Protocol Working Group*, States are progressing towards the further international recognition and implementation of economic, social and cultural rights, an advance mirrored through legislative and judicial developments at the national, regional and international levels.

5. A vigorous expression of support was also dedicated to the elaboration of an Optional Protocol adjudicative procedure dedicated to the resolution of State party *Covenant* violations. **Catarina de Albuquerque**, Chair of the *ICESCR/Optional Protocol Working Group* outlined the activities of its 2004 inaugural session and noted that, through years of discussions in the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and within the Committee on Economic, Social and Cultural Rights, many issues surrounding the proposed complaints mechanism have been clarified. While important questions remain, States should not allow political opposition to override the creation of an international legal instrument that has the potential to positively augment of realisation of economic, social and cultural rights throughout the world.

¹ United Nations Commission on Human Rights Resolution 2004/29, UN Doc. Ref. E/CN.4/RES/2004/29.

I. CONCEPTUAL OVERVIEW: THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

6. **Dr. Matthew Craven** of the Department of Law, School of Oriental and African Studies, University of London, commenced his presentation by offering a series of reflections designed to shed light on topical issue areas for *ICESCR*/Optional Protocol Working Group discussion. Acknowledging that a host of institutional and financial considerations will contribute to negotiations as to whether the an international complaints procedure pertaining to violations of the *Covenant* should be developed, Dr. Craven considered that, at this juncture, the most pressing question faced by States concerns whether the proposed Optional Protocol will contribute to efforts dedicated to the further realisation of economic, social and cultural rights. It is only if this question is answered in the affirmative that the Working Group will be capable of drafting a procedure through which the international augmentation of these rights may be strengthened.

7. Emphasizing that civil and political rights have benefited from decades of national, regional and international adjudicative clarification and that this is something of a recent development in the area of economic, social and cultural rights, Dr. Craven characterised the claim that these rights cannot be justiciable as fundamentally misconceived. While critics may point to feared outcomes associated with international adjudicative pronouncements relating to economic, social and cultural rights, such speculated consequences do not detract from the *ability* of an international complaints procedure to adjudicate over these issues. Under an Optional Protocol procedure, the monitoring body would simply evaluate claims, defences and supporting evidence against the terms of the *Covenant* to determine whether State action or inaction was either consistent or inconsistent with obligations assumed under the *ICESCR*. While the national implementation of certain Optional Protocol rulings many prove challenging, one should not suppose that international economic, social and cultural rights adjudicative decisions, *per se*, cannot be made.

8. Concerning the impact of an Optional Protocol complaints procedure on the allocation of finite State resources, Dr. Craven emphasized that it was unlikely that the adjudicative body would try to stand in the shoes of national governments questioning determining domestic resource allocations and/or policy priorities that impact on the substantive fulfilment of *Covenant* rights. Undoubtedly, while the realisation of economic, social and cultural rights, like civil and political rights, entails resource considerations, operating under *ICESCR* article 2(1) doctrines of “progressive realisation” and “the maximum of available resources,” it was theorised that the adjudicative body would be hard pressed to find a *Covenant* breach if the State did not possess resources to address issues underlying the alleged violation. Undeniably, however, as all States possess a certain amount of resources at their disposal, the question then becomes one of how an Optional Protocol adjudicative body would operate in this area. Here, Dr. Craven suggested three principles of general application:

- (i) The adjudicative body would look at the extent to which the State itself was directly implicated in the alleged violation. Clearly, if the State actively created and/or maintained the conditions of deprivation underlying the alleged infringement of economic, social or cultural rights, it would be less difficult for a violation to be found;

(ii) The resource expenditure required to remedy the alleged violation would impact on whether an infringement of the *ICESCR* could be found. If the alleged violation could be resolved through a relatively insignificant financial investment, the adjudicative body may be more inclined to find in favour of a meritorious complaint; and

(iii) States parties to the Optional Protocol would enjoy a relatively wide margin of discretion in selecting the means through which findings of *ICESCR* violations could be remedied. States would thus fully retain the right to determine national spending priorities subject to only to reasonable justification. Engaging a similar focus adopted by the United Nations Human Rights Committee under the first Optional Protocol to the *ICCPR*, the adjudicative body would not order States to redistribute finite resources. Rather the procedure would focus on the points at which the legitimate rights of individuals were not recognised and those occasions in which States ignore or perhaps deliberately target sections of the population to deprive them of rights and/or benefits available to wider societal interests. Primary focus would thus primarily extend to situations where States act in an aberrant manner.

9. Dr. Craven posited that the current Optional Protocol debate should focus on the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. As European nations have championed the further development and implementation of human rights throughout the world, they would be poorly served by continuing to emphasize civil and political rights while neglecting economic, social and cultural rights.

10. As a wide range of developed and developing nations, non-governmental organizations and civil society constituencies have awoken to the importance of economic, social and cultural rights, European governments must respond to these interests if they intend to continue with the global protection and promotion of human rights. Civil, cultural, economic, political and social rights have to be *sold as a package* as to proceed otherwise is to court developing nation perceptions that human rights are merely a “Western concept” with little global applicability. The introduction of an Optional Protocol to the *ICESCR* would signal international intentions to treat the protection of *all* human rights in a holistic and comprehensive manner.

11. The drafting of an Optional Protocol to the *ICESCR* is also underscored by perceptions of access to justice. It is peculiarly difficult to explain why it might be that individuals and groups can legally contest, for example, unlawful detentions and infringements of press freedoms but not the arbitrary destruction of homes or the State refusal to licence certain HIV/AIDS antiretroviral medicines. The denial of a right to complain in the latter cases only creates a sense of injustice that is hard to square with State affirmations of the universality, interdependence, indivisibility and interrelatedness of all human rights. On the international level, an Optional Protocol would clearly assist in rectifying this imbalance.

12. In answer to a question concerning the effect of public service privatisation on the operation of an Optional Protocol, Dr. Craven pointed to a European Court of Human Rights decision in *Costello-Roberts v. United Kingdom*² which stands for the proposition that the simple transference of responsibility for the provision of certain public services

² [1993] IIHRL 22 (23 March 1993).

does not eliminate State responsibility for the regulation of such traditionally public functions. Supporting this assertion, **Professor Martin Scheinin** cited United Nations Human Rights Committee adjudicative findings which confirm continued State responsibility in ensuring that public functions, provided by sources that are not purely public, comply with the ICCPR.³ **Professor Eibe Riedel** added that it would not be the task of the Optional Protocol adjudicative body to rule on State policy choices concerning the provision of services through either the public sphere, the private sphere or public/private partnerships, but rather, attention would focus on the overall realisation of economic, social and cultural rights for individuals and groups, particularly for the most marginalised segments of the population.

13. Whereas Dr. Craven contended that an Optional Protocol will primarily concern itself with unstable irresponsible State action, one roundtable participant commented that States acting contrary to *Covenant* provisions may not ratify the proposed complaints mechanism and thus the procedure may overburden States already acting in a reasonable manner in attempting to implement *Covenant* rights.

14. In response, Dr. Craven commented that the Optional Protocol will provide guidance towards ensuring “good governance” and that all States, even the best intentioned, will benefit from the strengthened economic, social and cultural rights monitoring efforts that the proposed complaints mechanism can provide. The elaboration of such a procedure will, for example, promote the adoption of legislation, administrative, economic, financial, educational and social measures, the establishment of action programs, the creation of appropriate remedial bodies and the establishment of judicial procedures necessary to secure economic social and cultural rights in all nations. In the face of a complaint, should a State party be able to convincingly demonstrate its economic, social and cultural rights realisation efforts in question are reasonable and appropriately directed then a greater likelihood would exist that no violation would be found. For this reason, States responsibly attempting to implement *Covenant* rights would have no reason to fear the elaboration of an Optional Protocol.

II. THE EFFICACY AND NATURE OF AN INTERNATIONAL ECONOMIC, SOCIAL AND CULTURAL RIGHTS COMPLAINTS MECHANISM

15. **Professor Martin Scheinin**, Professor of Constitutional and International Law and Director of the Institute for Human Rights, Åbo Akademi University, Finland and a member of the United Nations Human Rights Committee introduced his discussion topic by advising that an Optional Protocol to the ICESCR will not place further substantive obligations on States parties as the procedure will simply strengthen the monitoring of *Covenant* obligation compliance. Through practice, the proposed complaints procedure would clarify substantive ICESCR State obligations and greatly enhance efforts to

³ See CCPR General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the *Covenant*” CESCR Adopted on 29 March 2004 (2187th meeting), UN Doc.: CCPR/C/21/Rev.1/Add.13.

determine, in specific terms, State actions and/or omissions that are encompassed by the terms of the *Covenant*.

16. While the current *ICESCR* State reporting mechanism serves a parallel function to the proposed complaints procedure in illustrating *potential* Covenant infringements and *possible* remedies, decisions as to concrete violations can only occur within the context of adjudicative consideration. Applying abstract principles to concrete situations, an Optional Protocol complaints mechanism would thus function as the paramount vehicle through which *ICESCR* conceptual and legal issues would be addressed.

17. It was reminded that the following factors will naturally operate to ensure that Optional Protocol adjudicative rulings both complement the work of the *ICESCR* reporting procedure and secure State endorsements:

(i) *Legality* - Decisions and recommendations rendered under the proposed adjudicative procedure must conform to the rule of law. As such, the complaints mechanism monitoring body would conduct its work within an international human rights law framework as focused on the terms of the *Covenant* and procedural requirements established by the instrument itself; and

(ii) *Legitimacy* - The decisions and recommendations of the Optional Protocol monitoring body must be viewed as legitimate in the eyes of States. The success of this procedure will thus largely depend on the ability of its decisions to include States in joining economic, social and cultural rights realisation efforts. Decisions viewed as patently unreasonable would neither assist in the enforcement of adjudicative recommendations, a sphere within the complete competence of States, nor with encouraging future State ratifications.

18. Through 25 years of practice, Human Rights Committee jurisprudence has evolved to a point where the Committee's recommendations as to the appropriate remedy for a violation of the *ICCPR* address both individual violations and focussed systemic measures, legislative or otherwise, to ensure that such violations do not occur in the future. Within this context, legality and legitimacy continue to guide remedies that both encourage maximum compliance while maximizing the credibility of the mechanism as a whole.

19. Based on the experience of the Human Rights Committee concerning the *ICCPR* State Reporting Procedure and first Optional Protocol, the *ICESCR* State Reporting Procedure, coupled with CESCR General Comments, would co-exist in a complementary manner with the proposed complaints procedure. Under the *ICCPR*, the complaints mechanism tends to focus on specific human rights violations, concretising the normative content of particular provisions whereas the State Reporting Procedure and General Comments address positive treaty obligations, an all but impossible task for the complaints mechanism to accomplish. The existence of these simultaneously operating mechanisms allows General Comments to reflect broad principles of complaint procedure practice while together, these devices serve to comprehensively promote *ICCPR* implementation.

20. The experience of the Human Rights Committee also demonstrates that the existence of an individual complaints procedure, concentrating on the concrete application of the treaty, results in the Committee employing a more focused and disciplined legal approach towards the issues in question through the reporting procedure.

Such discipline results in the grounding of reporting procedure concluding observations and recommendations in specific treaty provisions and established adjudicative interpretation with a pronounced absence of ambiguous declarations.

21. In conclusion, Professor Scheinin noted that, as the drafting of an Optional Protocol complaints procedure rests in the hands of States, currently, it is difficult to discuss the relative merits and potential difficulties associated with such a procedure in the absence of a decision as to the proposed instrument's structure and modalities. Issues including the range of rights subject to the Optional Protocol, complaint admissibility criterion and remedies for violations thus remain open. Until States turn to the substantive elaboration of an Optional Protocol to the *ICESCR*, presumed outcomes associated with potential choices should not be allowed to derail the discussion process.

22. Addressing a participant question posed concerning available remedies for instances where an Optional Protocol monitoring body decision is unacceptable to a State party, Professor Scheinin reiterated that, through balanced decisions that respect legality and legitimacy, such decisions should be rare. Further support for this finding rests with the understanding that decisions under an Optional Protocol would not be concerned with differentiating stable socially responsible governments from unstable irresponsible governments, but rather, would focus on the provision of a measure of justice for the marginalised.

III. THE EFFECT OF AN OPTIONAL PROTOCOL ON STATE RESOURCE EXPENDITURES AND DOMESTIC POLICY PRIORITISATIONS

23. *Professor Eibe Riedel*, Co-Director of the Institute for Medical Law, Public Health and Bioethics of the Universities of Heidelberg and Mannheim and a member of the United Nations Committee on Economic Social and Cultural Rights, introduced his presentation by reminding that, despite the 1948 *Universal Declaration on Human Rights* affirmation as to the universality and indivisibility of all human rights, this unity was disrupted in 1954 as mirroring the ideological cleavage between East and West. Within this context, many Western nations, in continuing to prioritise civil and political rights, operate under the false assumptions that: **(i)** The realisation of civil and political rights are resource independent whereas the fulfilment of economic, social and cultural rights would require a massive dedication of State resources; **(ii)** While *ICCPR* rights are phrased in such a way that renders them directly applicable, i.e. they accord individuals immediate rights and entitlements, *ICESCR* rights are phrased in much more cautious language⁴ that reduces their meaning to a series of non-self-executing norms of purely programmatic content; and **(iii)** The adjudication of economic, social and cultural rights would unacceptably place national political policy choices into the hands of the judiciary.

24. Countering these contentions, Professor Riedel advised that since its inception, the Committee on Economic, Social and Cultural Rights (CESCR or the Committee) has adopted a very different view in recognising that all human rights realisation efforts involve State resource expenditures. Further, Committee practice has consistently interpreted the substantive provisions of the *ICESCR* in such a way that every right from articles 2(2), 3 and articles 6 through 15 contain at least some elements of obligations to respect, protect and fulfil which lend themselves to direct applicability, similar to the rights embodied in the *ICCPR*.

⁴ For example, "the parties recognise the right" or "undertake to ensure" or simply "recognise".

25. With regard to the *obligation to respect*, which 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, jurisprudence focusing on this obligation frequently pertains to non-discrimination or the equal entitlement to right realisation efforts. Principles of non-discrimination and equality cross the entire spectrum of binding human rights treaties, are directly enforceable and can thus be regarded as customary international human rights law. As such, remedies for *ICESCR* violations related to these principles are directly enforceable even if they involve resource expenditures to correct imbalances in access to wider societal benefits.

26. Principles of non-discrimination and equality also apply to the obligation to protect, which requires States parties to implement measures necessary to prevent other individuals or groups, (third parties), from violating the integrity, freedom of action, or other human rights of the individual in satisfying their basic economic, social and cultural needs. In ensuring that third parties do not infringe on *ICESCR* rights, State resources may be involved to support legislative/regulatory efforts, however, such costs would not, even for developing nations, be unbearable.

27. The *obligation to fulfil* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and means to ensure the realisation of *Covenant* rights. It also requires States parties to take measures necessary to ensure that each person within its jurisdiction obtains 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.

28. With regard to the State provision of material assistance, Professor Riedel commented that the CESCER has approached this area very cautiously, primarily highlighting the protection of societal minimums - the prevention of starvation and the provision of free elementary education and access to basic health services - those essentials necessary to human survival that are within the power of all nations, even least developing countries, to provide.

29. With regard to the obligation to substantively “fulfil” *Covenant* rights, Professor Riedel supported the CESCER position that States parties are obliged to either *provide or engage in a plan to provide* minimum essential levels for each *Covenant* right to the most vulnerable segments of society. In evaluating individual State party progress towards the substantive fulfilment of *Covenant* based obligations, however, it was reminded that the CESCER considers the means available to each State party and allows a certain “margin of discretion” through which States parties may select the concrete policies through which *Covenant* obligations are realized.

30. Professor Riedel speculated that, were the CESCER to oversee the Optional Protocol complaints procedure, it would likely adopt an approach to alleged violations that focused on four key questions:

(i) *Has the claimant been denied a right embodied in the Covenant?*

Such violations could be found, for example, where national socio-economic policies and/or programs prevented an individual or group from obtaining access to minimum basic levels of *ICESCR* rights for a prolonged period of time. Such an initial finding by the CESCER would amount to no more than a declaratory statement;

(ii) Has the government taken action to address the subject matter of a meritorious complaint?

In this regard, the CESCR could examine whether State measures, legislative or otherwise, addressed the subject matter of the complaint and if so, whether they were operative. The Committee could also question whether such measures were being implemented in the shortest possible time period and, where applicable, whether international technical assistance and cooperation had been sought. Most importantly, Professor Riedel reminded that the chosen means to address the problem area would always rest in the hands of the State as it would not be a function of an Optional Protocol adjudicative body to replace the ultimate policy making power of national governments;

(iii) Is a defence to the claim, based on resource considerations, open to the government?

The Committee would examine such defences quite carefully and, in cases of national economic crisis, natural disasters and/or other barriers impeding the full realisation of *Covenant* rights, may find such defences to be justified. Despite such a finding, however, the Committee would still probe steps that the State intended to take in order to ameliorate the problem area in the medium and term and request the State to report back to the Committee after a specified period of time with regard to designated follow-up actions. Again, the Committee would be quite reticent to require a State to take a particular measures to address a problem areas in favour of requesting that the national government investigate various avenues to redress the grievance; and

(iv) What adjudicative remedies are available to rectify ICESCR violations?

Remedies provided under an Optional Protocol would be designed to trigger a broader State policy debate focussed on the subject matter of the complaint as situated within a broader political context. This alone would represent a tremendous advance in raising public awareness and focusing State and civil society efforts on the realisation of economic, social and cultural rights on the national level.

31. Professor Riedel concluded that concerns over national resource allocations dedicated to the realization of economic, social and cultural rights should not be seen as a bar to an Optional Protocol procedure. As the practice of the *ICESCR* State reporting procedure has demonstrated, in the vast majority of cases, States have not objected to Committee reviews and frequently have followed its remedial suggestions and recommendations. There is no reason to believe that similar practice would not evolve under an Optional Protocol.

32. One roundtable participant considered that while an Optional Protocol adjudicative body would not formally exist as a Court, in practice, numerous States parties would respect its decisions/recommendations. As such, the complaint monitoring body would be perceived as an international Court capable of effecting a profound legal and policy effect at the national level. In response, Professor Riedel emphasised that, as supported by the functioning of the *ICESCR* State reporting procedure, a companion complaints procedure would not attempt to transfer the policy making function of sovereign States to an international body that resembles and speaks like a Court but is not identified as such. The inherent value associated with the adoption of an Optional Protocol would rest in its ability to *assist as opposed to supplanting* national efforts dedicated towards the realisation of economic, social and cultural rights throughout the world.

33. In addressing a participant query requesting information as to specific instances where State parties disagreed with CESCR reporting procedure concluding observations and recommendations, Professor Riedel cited two instances where States parties contended that, as *ICESCR* obligations are non-self executing, they have no direct effect at the national level. In response, Professor Riedel asserted the consistent Committee view that a minimum core obligation exists on all States parties to the *Covenant* to ensure the satisfaction of, at the very least, minimum essential levels of each *ICESCR* right. Immediately self-executing in this regard, if the *Covenant* were to be read in such a way as not establishing such minimum core obligations, it would be largely deprived of its *raison d'être*.

IV. THE PRACTICAL APPLICATION OF AN OPTIONAL PROTOCOL TO THE *ICESCR* IN RELATION TO COVENANT ARTICLE 2(1), "INTERNATIONAL CO-OPERATION AND ASSISTANCE"

34. In opening her address, Dr. Magdalena Sepúlveda Carmona, Co-Director of the Master's Degree Programme in Human Rights and International Law with the United Nations University for Peace, advised that as the *Convention on the Rights of the Child*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and recommendations of the Committee on the Elimination of Discrimination Against Women refer to international assistance and cooperation, the *ICESCR* is far from alone in this regard.

35. It is well known that in 2002, under the auspices of the United Nations, the world's wealthiest nations reiterated their 1970 commitment to dedicate 0.7% of their gross national product to international development assistance. While the CESCR has noted that, "it is particularly incumbent on States Parties [...] in a position to assist, to provide 'international assistance and co-operation, especially economic and technical,'" ⁵ it has not interpreted *ICESCR* references to international assistance and co-operation as imposing a binding international legal obligation on such States to provide such international development assistance.

36. While the *ICESCR* recognises that developing nations may require international assistance and co-operation in augmenting economic, social and cultural rights realisation efforts, the CESCR has emphasised the duties of such nations to actively seek assistance and cooperation from other States and available "technical assistance" from the United Nations.

37. Dr. Sepúlveda Carmona noted that Committee pronouncements support the assertion that States in receipt of international assistance are obligated to:

(i) Utilise assistance received in a way that will contribute to the realisation of the object and purpose of the *Covenant*, giving priority to the satisfaction of minimum core obligations;

(ii) Give priority to fulfilling the needs of the most vulnerable group within society;

⁵ See CESCR General Comment No. 14, "The right to the highest attainable standard of health (Article 12)" CESCR Twenty-second session, Geneva, 25 April-12 May 2000, UN Doc.: E/C.12/2000/4.

(iii) Establish mechanisms to ensure an effective use of the international assistance received, facilitate the distribution same, ensure that the intended recipients receive the assistance and implement an effective monitoring regime; and

(iv) Establish benchmarks to measure national performance in promoting the realization of economic, social and cultural rights; and

(v) Refrain from obstructing international organisations in their legitimate efforts to gain access to individuals under the jurisdiction of the State in order to assist them in the enjoyment of economic, social and cultural rights.

38. For both donor and recipient nations, a further *ICESCR* obligation associated with the provision and receipt of international assistance and co-operation is the duty to formulate and implement such programmes in an efficient and transparent manner. Further, principles of equality, non-discrimination, participation and accountability should be accorded prominent focus as, according to the Committee, equality and non-discrimination are the crucial foundations upon which economic, social and cultural rights realisation efforts should be built. In this regard, while donor nations should not discriminate between recipient countries for geo-political reasons, assistance should also be targeted to the needs of least developed countries and within said nations, priority should be accorded to the needs of the most marginalized.

39. Through the *ICESCR* State reporting procedure, the CESCR undertakes, through general reference, monitoring activities concerning State compliance with *Covenant* Article 2(1), international cooperation and assistance. As such, no bar exists to furthering such supervision under an Optional Protocol complaints procedure that would empower the Committee to receive and examine communications alleging, for example, that a specific international co-operation and assistance programme violated the terms of the *ICESCR*.

40. International assistance and cooperation efforts could also be taken into account under Optional Protocol complaints procedure where the lack of such assistance and cooperation contributed to the non-fulfilment of *Covenant* obligations. In this, while the absence of a request for international assistance and cooperation could form a negative consideration concerning an alleged State violation of the *Covenant*, the non-provision of such assistance could be utilised by States to defend against claims. In this, while a justiciable obligation to provide specific international assistance and cooperation would not exist, the lack of means, including the lack of international support could be used to indicate why certain economic, social and cultural rights realisation efforts were not be undertaken.

41. Finally, an Optional Protocol complaints procedure could be effectively employed where a State either refused or did not properly implement international assistance and cooperation programmes to augment the realisation of economic, social and cultural rights at the national level. In such instances, the adjudicative body could evaluate whether a given programme was formulated/implemented in a manner that furthered the ability of individuals and groups to realise *Covenant* rights.

42. Concluding remarks offered by Dr. Sepúlveda Carmona concerned the systematic approach adopted by the CESCR, which has progressively clarified the complex

normative content of *ICESCR* article 2(1) as it pertains to international cooperation and assistance. Imposing obligations on both developing and developed nations participating in State to State support programs, an Optional Protocol complaints procedure would further enable this clarification process while offering constructive guidance to cooperative efforts that have a concrete impact on the realisation of economic, social and cultural rights throughout the world.

V. THE PROTECTION AND PROMOTION OF ECONOMIC AND SOCIAL RIGHTS UNDER THE *EUROPEAN SOCIAL CHARTER*

43. **Maria Josefina Leitão**, President of the Portuguese Commission for Equality in Employment and Work and a representative of the Portuguese Government to the Governmental Committee of the *European Social Charter*, outlined efforts within the Council of Europe dedicated to furthering the protection of economic and social rights. It was recalled that, as the regional equivalent of the *ICESCR*, the 1961 *European Social Charter* (hereinafter *Charter*) was designed to serve as the guardian of basic economic and social rights within the Council of Europe. Enumerating only non-legally binding economic and social rights policy objectives while allowing member States to designate the articles to which they are bound, (provided that certain minimum obligations are undertaken) the ability of the *Charter* to augment economic and social rights in Europe has been further humbled by an inadequate enforcement mechanism.

44. The *Charter* is monitored through the mandatory submission and examination of Council of Europe member State reports. The absence of a legally binding complaints mechanism featuring judicially enforceable sanctions for *Charter* violations, however, contributed to progressively strengthening calls for reform. Culminating in 1995 with the enactment of the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (hereinafter *Collective Complaints Protocol*), a quasi-judicial monitoring mechanism was introduced whereby a restricted class of plaintiffs⁶ are now able to lodge complaints against member States⁷ concerning alleged *Charter* non-compliance.

45. Economic and social rights within the Council of Europe received further protection through the enactment of the 1996 *European Social Charter (Revised)*, which both consolidated and extended economic and social rights protections.⁸

46. As a direct result of the protections granted to Council of Europe member States under the *European Social Charter*, *European Social Charter (Revised)* and the *Collective Complaints Protocol*, national legislation and administrative policies have been modified to further mainstream economic and social rights protections. Such progress has been assisted through the implementation of an enhanced *European Social Charter* compliance mechanism, which has developed an extensive catalogue of quasi-

⁶ Under Article 1 of the *Collective Complaints Protocol*, parties granted standing to submit complaints are restricted to certain international organizations of employers and trade unions, other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee and representative national organizations of employers and trade unions within the jurisdiction of the contracting State party against which they have lodged a complaint.

⁷ Those ratifying the *Collective Complaints Protocol*.

⁸ Subject to State ratification, the *European Social Charter (Revised)* is also subject to the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*.

judicial jurisprudence concerning the interpretation and application of regional economic and social rights standards. Signalling a clear movement towards the further strengthening of economic and social rights throughout the region, Ms. Leitão could find no discernable reason why Council of Europe member States would not further aspire to grant similar protections throughout the world in the name of preserving the indivisible, interdependent and interrelated character of all human rights.

47. Citing the existence of the *European Social Charter*, *European Social Charter (Revised)* and the *Collective Complaints Protocol*, one roundtable participant questioned the added value that an Optional Protocol to the *ICESCR* would provide to Council of Europe member States. In response, it was reminded that the *Covenant* is a human rights oriented treaty whereas the *European Social Charter*, while revised, retains the legacy of its origin as a workers rights instrument. Further, the *Collective Complaints Protocol* is limited in terms of the economic, social and cultural rights that it is competent to deal with while only a restricted class of complainants are qualified to utilise it.

48. As the *ICESCR* is much broader in scope than the *European Social Charter* and the *European Social Charter (Revised)*, particularly in the field of cultural rights, an Optional Protocol would open up further human rights protections, apply to a broader class of individuals and, as especially relevant to the European experience, would offer protection to foreigners residing within Council of Europe member States. Further, as key provisions of the *European Social Charter* and *European Social Charter (Revised)* are sufficiently complied with if protection is offered to a “great majority” of individuals, an Optional Protocol would better address the economic, social and cultural right entitlements of the marginalized.

49. The elaboration of an Optional Protocol would also stimulate European States parties to take further steps towards *Covenant* implementation, marking an important step in strengthening the principle that, through ratification, nations dedicate themselves towards the progressive realisation of *Covenant* rights.

50. Finally, through active participation in the Optional Protocol complaint's mechanism, European States parties would be provided with further remedial opportunities to defuse national socio-political complexities and would be assisted in placing a renewed emphasis on economic, social and cultural rights throughout the region.

VI. AN ASSESSMENT OF THE COMMUNICATIONS PROCEDURE UNDER THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

51. *Maria Regina Tavares da Silva*, a member of the United Nations Committee on the Elimination of Discrimination against Women commenced her presentation by affirming that the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter *CEDAW* or *Convention*), is the primary international human rights instrument dedicated to the realization of equality between women and men through the end of gender based discrimination that "hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of

women in the service of their countries and of humanity."⁹ To that end, the *CEDAW* provides a universal definition of discrimination against women and establishes an agenda for action to prevent such discrimination while protecting a broad range of civil, cultural, economic, political and social rights.

52. Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights supported the quick development a *CEDAW* Optional Protocol complaints mechanism to strengthen national *CEDAW* implementation and monitoring efforts.

53. Dedicated international political resolve coupled with adept drafting efforts ensured that a *CEDAW* Optional Protocol complaints and inquiry mechanism received United Nations General Assembly approval in 1999 and entered into force in 2000. Currently functioning with seventy-five signatories and sixty-two States parties, the Optional Protocol to *CEDAW* applies, in a comprehensive manner, to all rights enshrined under the *Convention*. The instrument contains two procedures: a complaints procedure which allows individual women, or groups of women, to submit *CEDAW* rights violation claims for adjudication by the United Nations Committee on the Elimination of Discrimination against Women; and an inquiry procedure that enables the Committee to initiate inquiries into situations of grave or systematic violations of women's rights under the *Convention*.

54. Acknowledging the important contribution that an Optional Protocol complaints procedure will make towards protecting and promoting the *CEDAW* recognized rights, Ms. Tavares da Silva recognized that, at this time, a true assessment as to the effectiveness of the procedure is premature as it has yet to adjudicate over specific communications.

55. Turning to lessons learned from the adoption of an Optional Protocol to *CEDAW* as applied to the current debate over an Optional Protocol to the *ICESCR*, it was recalled that the Vienna World Conference on Human Rights was also unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights and supported the continued examination of Optional Protocols to the *ICESCR*. Given the precedent set by the Optional Protocol to *CEDAW*,¹⁰ a procedure that pertains to all of the rights embodied in the *Convention* in a comprehensive manner, not to adopt a similar approach in drafting an Optional Protocol to the *ICESCR* would be to directly challenge the universality, interdependence, indivisibility and interrelatedness of all human rights.

56. With regard to the *ICESCR* Optional Protocol modalities, based on the inclusion of both a complaints procedure and an inquiry procedure under the Optional Protocol to *CEDAW*, Ms. Tavares da Silva highlighted that, conceptualised as a complaint's procedure and an inquiry procedure, an Optional Protocol to the *ICESCR* would possess the potential to significantly contribute towards the realisation of *Covenant* enshrined economic, social and cultural rights.

⁹ Preamble of the *Convention on the Elimination of All Forms of Discrimination against Women*, adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

¹⁰ In this regard, reference can also be made to the first Optional Protocol to the *ICCPR*.

57. An Optional Protocol complaint's mechanism would provide individuals and groups with access to an international adjudicative procedure. Under the procedure, individuals and/or groups could communicate directly with the CESCR to seek and obtain remedies for specific violations of rights contained in the *Covenant*.

58. An Optional Protocol's inquiry procedure would empower the Committee to initiate an investigation into particularly grave or systematic abuses of *Covenant* rights. An inquiry procedure would also reinforce the Optional Protocol's complaints procedure as it would: **(i)** Open an avenue to address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of *Covenant* provisions; **(ii)** Allow grave and/or systematic *Covenant* violations to be investigated where individuals or groups were unable to utilise the complaint's mechanism for reasons including fear of reprisals; and **(iii)** Enable a more-timely response to grave and/or systematic violations of the provisions of the *Covenant*, and to continuing violations in particular.

CONCLUSION

59. The *Honourable João Mota de Campos*, Deputy Minister of Justice of the Government of Portugal, concluded the European Roundtable on Economic, Social and Cultural Rights by extending appreciation to expert and participant contributions and to *Ms. Virginia Brás Gomes*, *Simon Walker* and *Edwin Berry* for moderating roundtable discussions.

60. Recalling that the roundtable conference was designed to address the need for further discussions and clarifications concerning economic, social and cultural rights and the proposed Optional Protocol to the *ICESCR*, it was noted that the high level of State and civil society conference attendance was indicative of a strengthened State and civil society momentum behind efforts dedicated to the realisation of economic, social and cultural rights. In this regard, the Honourable Deputy Minister reiterated his government's firm support for the drafting of an Optional Protocol to the *ICESCR* as a measure reinforcing the universality, interdependence, indivisibility and interrelatedness of all civil, cultural, economic, political and social rights, one that would provide further security and justice to the most vulnerable throughout the globe.