

**Joint Submission presented by the Centre on Housing Rights and Evictions, the International Commission of Jurists, Foodfirst Information and Action Network and International Women's Rights Action Watch Asia-Pacific on behalf of the International Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**

December 2004

## **I. INTRODUCTION**

The sixtieth session of the UN Commission on Human Rights renewed the mandate of the inter-sessional open-ended working group to *consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or the *Covenant*) for a two years period. Motivated by a widespread concern for the protection and promotion of economic, social and cultural rights, the Centre on Housing Rights and Evictions (COHRE), the International Commission of Jurists (ICJ), Foodfirst Information and Action Network (FIAN) and International Women's Rights Action Watch Asia-Pacific (IWRAW Asia Pacific), in representation of the International Coalition for an Optional Protocol to the *ICESCR*<sup>1</sup>, submit the following views on: **the minimum core content of an Optional Protocol to the ICESCR, the benefits of an Optional Protocol, the question of justiciability, and key issues in relation to an Optional Protocol** for consideration during the deliberations of the working group that will meet in January 2005.

## **II. CONTEXT**

Guided by principles enshrined in the *United Nations Universal Declaration of Human Rights*, it is clear that undivided State party adherence to the *Covenant* is of considerable importance in protecting and promoting economic, social and cultural rights. It is recognised that, through their ratification of the *Covenant*, States parties bear responsibility to ensure that economic, social and cultural rights are protected and promoted. The ensuing need to assist in the realisation of these rights, through the provision of a comprehensive international remedial mechanism to intervene during and/or adjudicate over *ICESCR* rights violations, is thus of paramount importance.

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<sup>1</sup> The International Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is a loose affiliation of organisations supporting the elaboration of such instrument. The Coalition is composed by national, regional and international human rights NGOs, as well as individuals, and is led by an ad-hoc steering committee and operates through an e-mail list.

### III. MINIMUM CORE CONTENT OF AN OPTIONAL PROTOCOL TO THE *ICESCR*

The following minimum core elements are essential for an Optional Protocol to the *ICESCR* to fulfil its potential as an effective mechanism through which economic, social and cultural rights may be protected and promoted:

#### (a) Comprehensive Scope

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Given that the first Optional Protocol to the International Covenant on Civil and Political Rights, (hereinafter *ICCPR*), relates in a comprehensive manner to all of the rights embodied in that Covenant, 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.<sup>2</sup> For this reason, an Optional Protocol to the *ICESCR* should clearly address *all* of the rights and State obligations enshrined in the *Covenant*.

#### (b) State Obligations to Respect, Protect and Fulfil *Covenant* Rights

As with the first Optional Protocol to the *ICCPR*, an Optional Protocol to the *ICESCR* should address both negative and positive State obligations associated with the realisation of *Covenant* rights. In particular, an Optional Protocol to the *ICESCR* should entertain complaints and empower an inquiry procedure where States parties violate their obligations to respect, protect and fulfil-facilitate/fulfil-provide *Covenant* rights.

The obligation to *respect* requires States parties to refrain from interfering with the enjoyment of *Covenant* enshrined economic, social and cultural rights. This is a negative obligation that mandates States parties to act in a way that does not violate economic, social and cultural rights and/or impair the enjoyment of those rights. Within this context, States parties must “respect the freedom of the individuals to take

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<sup>2</sup> Arambulo, K., *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural Aspects*, Intersentia, Antwerpen: 1999 at 235. See also van Hoof, F., "Discussion on the Draft Optional Protocols" in van Hoof, F. and Coomans, F., eds., *The Right to Complain About Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, Utrecht: 1995 at 212. See also See United Nations reference document E/C.12/1992/WP.9, paragraph 37. Following a comprehensive approach in drafting an Optional Protocol to the *ICESCR* would not preclude the institution of procedural safeguards that would ensure that the instrument is not abused. By way of example, while a comprehensive approach was utilised in drafting the first Optional Protocol to the *ICCPR*, in interpreting Article 1 of this Covenant, the United Nations Human Rights Committee instituted procedural safeguards so as to prevent the right to self-determination from being the subject of communications. See the Human Rights Committee views on Communication No. 167/1984, *Ominayak v. Canada*, Official Records of the General Assembly, forty-fifth session, Supplement No. 40 (A/45/40), vol. II, annex IX, section A at 1-30.

the necessary actions and use the necessary resources – alone or in association with others.”<sup>3</sup>

The obligation to *protect* requires States parties to prevent *ICESCR* rights violations by states agents and abuses by third parties. In this, States parties must take “measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the infringement of his material resources.”<sup>4</sup>

The obligation to *fulfil* encompasses State party obligations to *facilitate* access to and/or *provide* for the full realisation of economic, social and cultural rights. This is a positive obligation. The obligation to *facilitate* 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. The obligation to *provide* requires States to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal.<sup>5</sup>

State obligations under the Optional Protocol to the *ICESCR* must encompass both negative and positive obligations, thereby reinforcing the universality interrelatedness and indivisibility of all human rights. Such an approach would also serve as a reminder to the international community, through the *ICESCR*/Optional Protocol working group, of the importance it attaches to economic, social and cultural rights issues and seriousness with which it now responds to violations.

### **(c) An Optional Protocol Complaint's and Inquiry Procedure**

Conceptualised as a complaint's mechanism 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 and the reinforcement of the international protection of this rights.

An Optional Protocol *complaint's mechanism* would provide individuals and groups with access to an international adjudicative procedure. Under this procedure, individuals and/or groups could submit communications directly to the United Nations Committee on Economic, Social and Cultural Rights, (hereinafter CESCR or the Committee), to seek and obtain remedies for specific violations of rights contained in the *Covenant*.

An Optional Protocol's inquiry procedure would empower the Committee to initiate an investigation into particularly grave or systematic violations and/or abuses of

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<sup>3</sup> Asbjørn Eide, "Realisation of Social and Economic Rights. The Minimum Threshold Approach", International Commission of Jurists The Review 1989, Issue 43, 40, 1989, p. 43. See also Maastricht Guidelines on Violations of Economic Social and Cultural Rights, January 1997, para. 6.

<sup>4</sup> *Ibid.*, (Eide) at 42.

<sup>5</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6. See also Committee on Economic, Social and Cultural Rights, General Comment 12, United Nations document reference, E/C.12/1999/5, para. 15.

*Covenant* rights. An inquiry procedure would reinforce an 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.<sup>6</sup>

#### **(d) Standing to Lodge an Optional Protocol Complaint**

At a minimum, parties who possess the ability to initiate a complaint, (standing), under an Optional Protocol to the *ICESCR*, should include:

- (i) Individuals and group of individuals<sup>7</sup> who have been victims of violations of *Covenant* rights by State parties;
- (ii) Representatives of individuals or groups of individuals empowered to initiate complaints *on behalf of* individual and collective victims.

The importance of expressly acknowledging the competence of representatives, particularly non-governmental organizations and national human rights institutions to launch complaints on behalf of individual and groups victims of *ICESCR* violations cannot be underestimated. Under existing instruments, complaints *on behalf of* individual and group victims have either been specifically included<sup>8</sup> or such representative standing has been provided through adjudicative interpretation.<sup>9</sup> The significance of allocating standing to such representatives is rooted in the fact that these types of communications play an essential role in initiating international

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<sup>6</sup> Inter-American Institute of Human Rights, *Optional Protocol, Convention on the Elimination of all Forms of Discrimination against Women*, Costa Rica: 2000 at 71-72. An Optional Protocol to the *ICESCR* inquiry procedure could be modelled after either Article 20 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Article 8 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women*, both of which authorise inquiry procedures in prescribed situations.

<sup>7</sup> Nowak, M., "The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" in International Commission of Jurists, *The Review: Economic, Social and Cultural Rights and the Role of Lawyers*, France: 1995 at 160. Limiting standing/ability to initiate complaints under an Optional Protocol to the *ICESCR* to individuals would be to prevent to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

<sup>8</sup> Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims of State party *ICESCR* rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* which states "Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent", Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 77 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

<sup>9</sup> *Supra* (Arambulo), note 1 at 223, 233-4. Through the practice of the United Nations Human Rights Committee, communications submitted *on behalf of* victims of State party *ICCPR* violations have been accepted.

complaint's procedures, particularly where victims face the risk of ill-treatment or other retaliation for directly engaging in the process.<sup>10</sup>

### (e) State Party Reservations Under an Optional Protocol

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

- (i) The *raison d'être* of an Optional Protocol would be to provide to people an international procedure to obtain protection for the enjoyment of their economic, social and cultural rights as enshrined in the ICESCR. As a tool to both complement and strengthen the *Covenant*, to allow State party reservations to an Optional Protocol would be to undermine its potential as a tool for the full realisation of economic, social and cultural rights;
- (ii) An Optional Protocol would by its very nature be optional and as such, reservations that curtailed its applicability would be unnecessary;
- (iii) An Optional Protocol would be a procedural instrument as it would neither introduce new nor expand present economic, social and cultural rights obligations that States parties accepted through their ratification of the *Covenant*. An Optional Protocol would thus merely serve as a means through which States parties would be encouraged to realise existing *ICESCR* obligations.
- (iv) An effective Optional Protocol must recognise the indivisible and interdependent relationship amongst all *Covenant* rights. To allow States parties to individually select the *ICESCR* rights subject to an Optional Protocol strike at the core this relationship and the instruments ability to protect and promote *Covenant* rights. Such a selective approach would open the door to arguments as to the hierarchy of and inequality between economic, social and cultural rights, thereby encroaching upon the universality, interdependence, indivisibility and interrelatedness of all human rights.<sup>12</sup> Further, permitting the selection of economic, social and cultural rights subject to the Optional Protocol mechanisms would risk that some States parties would enhance their international prestige, through ratification, while restricting the instrument's substantive application.

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<sup>10</sup> *Supra* note 3 at 43. See also *supra* note 4 at 161.

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

<sup>12</sup> The United Nations Division for the Advancement of Women Department of Economic and Social Affairs, *The Convention on the Elimination of All Forms of Discrimination Against Women, The Optional Protocol: Text and Materials*, United Nations: 2000, at 49-50. See also *supra*, note 3 at 98-99. See also *supra* note 1 at 236.

#### IV. THE BENEFITS OF AN OPTIONAL PROTOCOL

Motivated by widespread concern for the protection and promotion of economic, social and cultural rights, the Coalition for the Optional Protocol to the *ICESCR* urges this session working group to consider the *drafting* of this supplementary international instrument. The Coalition for the Optional Protocol to the *ICESCR* strongly believes the Optional Protocol will benefit individuals, States Parties and the international community through:

##### **BENEFIT ONE: Reinforcing the international protection of economic, social and cultural rights through an international remedy**

The Optional Protocol to the *ICESCR* will provide individuals and groups with access to international remedies where Covenant rights have been violated. A Right internationally recognized but without an international individual procedure of protection is an imperfect right. Ideally comprising of a complaint's mechanism and an inquiry procedure, the Optional Protocol to the *ICESCR* would possess the potential to significantly contribute towards the realisation of economic, social and cultural rights as enshrined in the *Covenant*. Whereas the Optional Protocol complaint's mechanism would provide individuals and groups with access to an international adjudicative procedure and remedies concerning specific *Covenant* violations, the inquiry procedure would empower the United Nations Committee on Economic, Social and Cultural Rights, (hereinafter CESCR or the Committee), to initiate an investigation into particularly grave *ICESCR* violations. The inquiry procedure would strengthen and compliment the proposed Optional Protocol complaint's procedure as it would: (i) Address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of the provisions of the *Covenant*; (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.<sup>13</sup>

##### **BENEFIT TWO: Identifying and Clarifying State Party *ICESCR* Obligations**

As demonstrated through the first Optional Protocol to the *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), an Optional Protocol to the *ICESCR* would contribute, through the development of international jurisprudence, to the further understanding of the rights contained in the *ICESCR*, to the identification of what constitutes a violation of these rights and to the definition of corresponding State party obligations. Further, the Optional Protocol would assist in transforming general *ICESCR* provisions into concrete, tangible and achievable norms. In focussing, through the communications procedure, on specific violations of the rights of the individual, the Committee would provide States parties with guidance as to their *Covenant* obligations in actual situations. These recommendations in turn could

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<sup>13</sup> Inter-American Institute of Human Rights, *Optional Protocol, Convention on the Elimination of all Forms of Discrimination against Women*, Costa Rica: 2000 at 71-72. An Optional Protocol to the *ICESCR* inquiry procedure could be modelled after either Article 20 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Article 8 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women*, both of which authorise inquiry procedures in prescribed situations.

constitute guidelines for the effective domestic implementation and promotion of economic, social and cultural rights as contained in the *Covenant*.

**BENEFIT THREE: Assisting States Parties in Protecting and Promoting *Covenant* Enshrined Rights**

The elaboration of an Optional Protocol to the *ICESCR* will encourage States parties to take steps towards the full implementation of all rights enshrined in the *Covenant*. This would mark an important step in strengthening the principle that, through ratification, States parties have committed themselves to progressively realise *Covenant* rights. Through the promotion of the Optional Protocol's complaint mechanism and inquiry procedure, States parties would be provided with further opportunities to develop the concept of economic, social and cultural rights at the national level, to increase understanding and awareness of these rights and to remedy any existing inequalities in their laws, policies or procedures. The Optional Protocol will encourage the implementation of all the rights enshrined in the *Covenant* through progressive changes in national law and policy. Such changes will, in turn, trigger an increased recognition of economic, social and cultural rights at all levels of society and assist all, including the most marginalized, to seek and access justice.

**BENEFIT FOUR: Encouraging the Development of Domestic Jurisprudence Concerning Economic, Social and Cultural Rights**

The Optional Protocol would provide States parties with a direct role in the development of international economic, social and cultural rights jurisprudence i.e. a body of case law that could be used by the Committee and others in interpreting the provisions of the *Covenant* and clarifying state obligations. In turn, international *ICESCR* jurisprudence would promote the development of domestic jurisprudence on economic, social and cultural rights issues. In deliberating on issues such as the right to health, housing and social security, national level Courts could take judicial notice of international Optional Protocol jurisprudence towards the further domestic recognition of economic, social and cultural rights. In essence, the concept of violations of economic, social and cultural rights, how they should be recognized and interpreted and how it might be remedied will be investigated and documented within national and international tribunals. Such documentation will in turn be vital in influencing the enactment, execution and interpretation of domestic laws or procedures to protect the rights as contained in the *Covenant*.

**BENEFIT FIVE: Strengthening International Enforcement of Economic, Social and Cultural Rights**

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

complaints mechanism dedicated to economic, social and cultural rights, this is of the utmost importance, both for the legal development of the rights at the international level, and for the progressive interpretation and enactment of law at the national level.

**BENEFIT SIX: Reinforcing the Universality, Indivisibility, Interrelatedness and Interdependence of All Human Rights**

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. The Vienna Declaration mentioned that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” Given the existence of an international complaint's procedure concerning the adjudication of *ICCPR* rights infractions, the creation of an Optional Protocol to the *ICESCR* would provide States Parties an excellent opportunity to reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights.

**BENEFIT SEVEN: Increase Public Awareness of Economic, Social and Cultural Rights**

The Optional Protocol to the *ICESCR* would place a renewed emphasis on economic, social and cultural rights nationally and internationally. The publication of communications, inquiries and views of the ESCR Committee would serve to promote public awareness, nationally and internationally, of the human rights standards enshrined in the *ICESCR*.<sup>14</sup>

## V. THE QUESTION OF JUSTICIABILITY

Can courts enforce economic, social and cultural (ESC) rights? Should UN treaty committees be able to give an opinion that a State has violated such rights and recommend appropriate action to remedy the violation? These questions are frequently raised during discussions on establishing a complaints mechanism through an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (*ICESCR*).

A number of common myths reflect misunderstandings of both the nature of economic, social and cultural rights and of the role of courts and other bodies in adjudicating them.

**Myth:** Adjudicating ESC rights is not an appropriate or legitimate role for courts or other bodies since it involves making policy decisions that are properly the function of democratically elected parliaments.

**Reality:** Adjudicating ESC rights claims does not require courts to take over policy making from governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases, courts and other

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<sup>14</sup> This has been the case with communications submitted under existing complaints procedures and in particular, communications under the first Optional Protocol to the *ICCPR*.



bodies adjudicating ESC rights review government decision-making, to ensure consistency with fundamental human rights. Holding governments accountable to human rights enhances democracy. It does not undermine it. In reality, a great number of States have legislation, even at constitutional level that protects ESC rights and establishes procedures for its protection before the courts of justice or other state bodies. It has not affected the competency of the other public powers, although it can have an influence in the design, implementation and correction of laws and policies that are not in conformity with the international obligations of the State.

**Myth:** ESC rights require governments to ‘give everyone houses’ to comply with the right to housing or ‘buy everyone expensive medicines’ to comply with the right to health. Making these rights justiciable will bankrupt governments.

**Reality:** Under the ICESCR, governments have accepted obligations to progressively realise these rights within their maximum available resources (Article 2.1). This requires that States only demonstrate in good faith the fulfillment of the rights over time within their capacities. Where courts and other bodies have adjudicated ESCR claims, they have shown considerable deference to governments’ decisions about resource allocation, and intervened only to ensure that governments take reasonable steps, without discrimination, and subject to available resources, to respect, protect and fulfill the rights.

**Myth:** Courts or similar bodies are incapable of adjudicating ESCR because these rights are too vague or complex and involve many different economic and social policies.

**Reality:** In a great number of countries, National Courts regularly order remedies for unjustified interference with or the denying of ESC rights (for example, dismissal from employment, forced evictions, discrimination in the rights to education) and have increasingly demonstrated their capacity to contribute to a best understanding about the reach, nature and extension of these rights, through their jurisprudence and decisions, and to contribute to the progressive realization of ESC rights. They play a critical role, especially in protecting the rights of vulnerable groups or persons who may be overlooked or treated unfairly in ways which deny them equal enjoyment of economic, social and cultural rights.

“To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.”<sup>15</sup>

*Justice Beverly McLachlin, now Chief Justice of the Supreme Court of Canada*

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<sup>15</sup>*RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 at paragraph 136.

## **VI. KEY ISSUES IN RELATION TO AN OPTIONAL PROTOCOL TO THE ICESCR**

### **ISSUE ONE: Economic, social and cultural (ESC) rights are not capable of being applied by judicial bodies. They are not justiciable.**

One of the major arguments used against an OP to the ICESCR is that ESC rights are not justiciable and, as a result, cannot be the object of an individual complaint procedure. Developments at the domestic and regional levels show, on the contrary, that ESC rights can be subjected to the scrutiny of a court of law or another judicial or quasi-judicial entity.

Over the preceding decades, a jurisprudence surrounding ESC rights has gradually emerged. Domestic and regional courts have, in many instances, adjudicated issues related to the enjoyment of ESC rights, offering an adequate remedy to the victims. As a result, a wide range of case law related, among others, to food, health, shelter and education, etc. has emerged. In dealing with economic, social and cultural rights courts have also developed innovations in procedures to deal with economic, social and cultural rights. As such, the existence of domestic and regional case law related to ESC rights bear witness to the direct justiciability of these rights.

Indeed, today, an increasing number of countries, across all continents and legal systems, have incorporated judicial review of economic, social and cultural rights. These include South Africa, Finland, Argentina, Colombia, Mexico, Costa Rica, Venezuela, Spain, Mauritius, Canada, Latvia, France, India, Bangladesh, Nigeria, and most countries in Central and Eastern Europe.

Moreover, governments have increasingly supported the justiciability of ESC rights in numerous fora. Complaint procedures for violations of ESC rights have been developed at the regional level (i.e. African Charter of Human and Peoples' Rights and Duties, Collective Complaints Procedure under the European Social Charter and the Inter-American San Salvador Protocol).

### **ISSUE TWO: ESC rights are too vague to be applicable to a case-based complaint procedure**

It is often claimed that ESC rights are not rights but political aims, alleging that they represent too vague provisions to be enforceable. This perception has been overcome by different developments related, notably, to the nature, content and scope of ESC rights, as well as to related State obligations.

General Comments of the Committee on Economic, Social and Cultural Rights (CESCR), work of UN Special Rapporteurs, experts, academics and NGOs, as well as national and regional case-law have all significantly contributed to refute this assertion and clarify State obligations ensuing from the ICESCR.

CESCR's General Comments, along with the doctrine and existing jurisprudence offer precise descriptions of ESC rights' content and scope, as well as of the respective State obligations to respect, protect and fulfil. In addition, that same sources also offer a clear description of how the concepts of "progressive realisation" and "available resources" apply to such obligations. As such, a certain degree of interpretative certainty and predictability can be expected.

In this respect, further clarification can only take place on a case-to-case basis, which is precisely why a complaint procedure is needed.

### **ISSUE THREE: ESC rights involve questions of resources allocation and public policy that should not be dealt with by courts**

It is sometimes suggested that matters involving the allocation of resources and public policy questions should be left to the political authorities rather than the courts. These objections relate to the concern that the judiciary should not intervene in such fields, which are said to be the exclusive domain of governments. At the national level, these objections are related to the question of separation of powers, while at the international one they are raised in the context of intrusion into sovereignty.

First, it is important to remember that, as it is the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. In this respect, when national courts have intervened to order that specific programme or policy be implemented, the orders have, in most cases, given a wide degree of discretion to the government to devise the appropriate response. For instance, the Bangladesh High Court noted in 1999 that in order to fulfil the basic rights of equality, life and livelihood, the government had to complement its project to demolish slum-dwellings in Dhaka with a plan to rehabilitate the dwellers and that the project needed to be carried out in stages with reasonable notice given to evict.<sup>16</sup> With regard to the progressive realisation of ESC rights, courts have shown the capacity to set boundaries for their intervention. For instance, the Swiss Federal Court has said it lacked the "competence to set priorities in allocating resources" but would intervene if the legislative framework failed to ensure constitutional entitlements.<sup>17</sup>

Secondly, while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters with important resource implications. The adjudication of civil and political rights, as well as many other legal rules such as trade law, regularly impinges upon the political options of governments, notably with regard to the allocation of resources. Indeed, while judges should respect the division of competences between the various branches of government, it is important to recognise that their decisions frequently have budgetary consequences.<sup>18</sup> For instance, the right to a fair trial necessitates significant financial investments in court systems,

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<sup>16</sup> *Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors*

<sup>17</sup> Judgment of the Second Public-Law Division of 27 October 1995 *in re V. v Resident Municipality X. and Bern Canton Government Council (Constitutional Complaint)*.

<sup>18</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant, E/C.12/1998/24, at para. 10.

and frequently legal aid.<sup>19</sup> Similarly, the protection against torture and other forms of cruel, inhuman or degrading treatments also requires financial prioritization in terms of police training, construction of prison facilities, protection of the victims, etc. While it is obvious that the realisation of civil and political rights involve allocation of resources, the related costs are often not considered because the institutions are already in place.

Thirdly, in many cases, the realisation of ESC rights will only require a government to refrain from certain behaviour or to regulate the actions of third parties. For instance, State Parties to the ICESCR have to ensure that there are not arbitrary restrictions on the right to work or that no forcible evictions are carried out in the absence of adequate compensation and resettlement. In such cases, the realisation of ESC rights does not involve questions of resource allocation and does not require the adoption and implementation of policies, programmes or measures.

Fourthly, while issues of social and economic policy involve complex questions that are difficult to resolve on a case-by-case basis, courts frequently deal with many questions concerning the public interest. For instance, judgments on the right to freedom of expression will involve certain contested interests. As a result, the judges will have to balance the notion of public or national interest with the restrictions put to the enjoyment of the right to freedom of expression. Such balancing act between contested interests can be easily applied within the realm of ESC rights.

Finally, concerns expressed about the democratic legitimacy of courts are often raised in relation to the suggestion that they should not get involved in matters related to the allocation of resources and public policy issues. In this regard, while judicial officers are not elected by popular vote, governments appoint many court members. In addition, judicial bodies have shown a capacity to uphold the rights of individuals and groups in the face of hostile or negligent State.

#### **ISSUE FOUR: Judicial remedies are not effective in realising ESC rights**

It is sometimes argued that judicial or quasi-judicial remedies alone cannot bring about systemic changes necessary for the complete realisation of ESC rights.

The first object of judicial or quasi-judicial remedies, at the national or international levels, is to provide adequate redress and compensation to victims of human rights violations, as well as to guarantee the cessation and non-repetition of the violation. Such objective remains the same across the whole human rights spectrum and applies in cases of civil and political rights, as well as economic, social and cultural rights.

As judicial or quasi-judicial entities look at specific cases of human rights violations, judicial or quasi-judicial remedies will always be limited in terms of their ability to address or change a whole country situation. In this regard, such limitation applies irrespectively to civil and political rights, as well as to economic, social and cultural rights. For instance, it is unlikely that a decision of the Human Rights Committee on a torture case in a given country will be effective in putting a stop to an institutionalised

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<sup>19</sup> See for example *Airey v Ireland* [1979] 2 E.H.R.R. 305. The European Court of Human Rights held that the lack of legal assistance for complex divorce proceedings violated the right to a fair trial and right to respect for family life. Ireland subsequently enacted a civil legal aid system.

practice that is taking place throughout the country in question. Indeed, it is more the conjunction of different actions and factors that can trigger change in a given situation and can prove effective in realising economic, social and cultural rights as well as civil and political rights. Judicial or quasi-judicial remedies play, in this respect, a crucial role.

Indeed, litigation can spur legislative changes, attend to individuals or group complaints and provide a constant and watchful accountability mechanism over legislative and administrative spheres. Litigation can also play a useful educative and transformative role in the dissemination and understanding of human rights principles.

#### **ISSUE FIVE: A complaint procedure for ESC rights would imply a huge financial burden for States**

An argument that is sometimes put forward against an OP to the ICESCR is that a complaint procedure for ESC rights at the international level would have huge financial implications for States. This argument relates to the assumption that ESC rights only require action by governments with important financial implications.

However, in many instances, the realisation of ESC rights does require restraint by governments, i.e. refraining from certain behaviour or regulating the actions of third parties. As mentioned in General Comment No. 12 of the CESCR, the International Covenant on ESC rights impose three different types of obligations on States: the obligations to respect, protect and fulfil.<sup>20</sup> Under the obligations to respect and protect States have to refrain from interfering with the enjoyment of ESC rights and to prevent violations of these rights by states agents or abuses by third parties.<sup>21</sup> In both cases, the realisation of ESC rights does not impose huge financial burden upon States, as it does not imply the adoption and implementation of expensive programme or measures.

#### **ISSUE SIX: A complaint procedure for ESC rights would create new ESC rights and corresponding obligations for States**

It is sometimes suggested that an OP to the ICESCR would create new obligations for State parties to the ICESCR.

First of all, as indicated by its name, the OP to the ICESCR will remain an option for States. In other words, States will not be obliged to ratify such instrument. Secondly, the OP to the ICESCR will not create new ESC rights and corresponding obligations for States but a new complaint procedure for rights and corresponding obligations that already exist under the ICESCR. In this regard, the procedure created by an OP to the ICESCR will not be different that the ones existing under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Racial Discrimination or the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

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<sup>20</sup> See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 6,

<sup>21</sup> *Ibid.*

## **ISSUE SEVEN: A complaint procedure for ESC rights would compete or conflict with other complaint procedures**

Complementarity in the human rights framework is not a new issue. Indeed, complementarity between different human rights mechanisms can be found at the regional and international levels and with respect to conventional and non-conventional mechanisms. It results from the development of human rights law, along with the identified need to bring special protection to vulnerable groups, address particular subjects of concern or respond to regional specificities. Within the human rights framework and with respect to individual complaint mechanisms, complementarity can be understood from two different perspectives: one specific right may be covered by several instruments or mechanisms and one particular individual may have access to several mechanisms.

With respect to the OP to the ICESCR, concerns have been raised that such a mechanism would duplicate, to a certain extent, the work carried out by other bodies such as the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, as well as the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

Complementarity, or overlap between the rights covered by different individual complaint mechanisms is common in the realm of civil and political rights and does not seem to create problems or to raise concerns. For instance, the Committee Against Torture is authorised, under Article 22 of the Convention against Torture (CAT), to receive complaints from individuals who claim to be victims of a violation of the provisions of this Convention by a State party that has made a declaration under this Article. This provision does not prevent the Human Rights Committee from receiving individual complaints regarding alleged violations of Article 7 of the International Covenant on Civil and Political Rights (hereinafter *ICCPR*), under the Optional Protocol to this Covenant. Neither does it prevent the Inter-American Commission, the Inter-American Court or the European Court on Human Rights to look at individual complaints related to torture and other cruel, inhuman or degrading treatment. Moreover, the right to freedom of association, covered by the Optional Protocol to the ICCPR, has not been excluded from the individual complaint procedure on the grounds of overlap with the ILO Committee on Freedom of Association. Similar examples could be given with respect to other individual complaints mechanisms, including the Convention on the Elimination of Discrimination against Women (*CEDAW*) and the Convention on the Elimination of all Forms of Racial Discrimination (*CERD*).

Potential duplication of work between these different mechanisms has not created problems or raised potential concerns because all these procedures contain clauses preventing the examination of a case that would be, at the same time, under consideration by another procedure of international or regional settlement or investigation.

The interdependence, indivisibility and interrelatedness of all human rights, reiterated in the Vienna Declaration and Programme of Action adopted by the Second World Conference on Human Rights in 1993, requires that the same standards be applied

equally to economic, social and cultural rights and civil and political rights.<sup>22</sup> In this respect, the Draft OP to the ICESCR follows the same approach as its civil and political rights predecessors concerning the ‘examination clause’, stipulating that an individual complaint cannot be examined concurrently by more than one mechanism. The interdependence, indivisibility and interrelatedness of all human rights also highlights the need that a complaint procedure for ESC rights be able to look at the full range of economic, social and cultural rights.

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<sup>22</sup> UN. Doc. A/CONF.157/23, para. 5. Paragraph 5 adds: “The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”