Report to the Independent Expert on the Question of a draft optional protocol to the International Covenant on Economic Social and Cultural Rights

Submission by Non-Governmental Organisations, pursuant to Article 9(d) of Resolution 2002/24 of the Commission on Human Rights

I. Introduction

1. In response to the request issued by the Commission on Human Rights (hereinafter the *Commission*) in its Resolution 2002/24, paragraph 9(d), as motivated by our deep concern for the protection and promotion economic, social and cultural rights, we, the undersigned, in representation of non-governmental organisations and institutes, submit the following comments and views to the Independent Expert on the Question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter *Independent Expert*).

2. The undersigned understand that the *Commission*, in expressing the above-mentioned invitation for comments, seeks reflections and comments on the specific questions in Paragraph 9(c)(i)-(iii) of Resolution 2002/24. In the below text, the undersigned address each of the enumerated questions, hoping, in this manner, to assist with issue clarification so as to contribute to the further implementation of economic social and cultural rights.

II. The Nature and Scope of State Obligations Under the International Covenant on Economic Social and Cultural Rights

II.a. Minimum Core Obligations

3. The Committee on Economic Social Cultural Rights [hereinafter, *CESCR* or *Committee*], has clarified the content of State obligations under the International Covenant on Economic Social and Cultural Rights (hereinafter the *ICESCR* or the *Covenant*) in its General Comment No. 3. This General Comment has been relied upon by national and regional courts and tribunals. The Committee states that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party". They reason that "if the *Covenant* were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être."[1] The minimum obligation to ensure basic necessities has been litigated in a number of jurisdictions including Hungary, Germany and Switzerland.[2]

4. In the words of the *Committee*, where a State is failing to ensure basic necessities, "it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. …[E]ven where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."[3]" The *Committee* has also emphasised that severe resource constraints cannot justify taking no measures for the weakest groups in society. "[E]ven in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."[4] This is far different from suggesting that a simple reference to lack of resources can excuse or justify violations of economic social and cultural rights. Moreover, all States ratifying an international treaty, such as the *ICESCR*, in good faith, should expect real obligations to ensue.

II.b. The Obligation "To Take Steps" and "Progressive Achievement"

5. The obligation to diligently take steps to progressively realise the economic social and cultural rights has been the subject of extensive scholarship,[5] standard-setting and jurisprudence. The Limburg Principles and the General Comments of the *Committee* provide authoritative guidance as to the nature of the steps to be taken by States parties to the *Covenant*. The Limburg Principles and Maastricht Guidelines, which have been utilised by courts, provide guidelines and examples for determining violations of economic social and cultural rights.

6. Article 2, paragraph 1 of the *ICESCR* requires all States parties to take measures towards guaranteeing the full enjoyment of all *Covenant* rights for all individuals. In this connection, it is important to emphasise that States do not have unlimited discretion in their choice of policies and budgetary allocation. The Limburg Principles further clarify that the undertaking to take steps is of "immediate application",[6] and that "legislative measures alone are not sufficient to fulfil the obligations of the Covenant."[7] In evaluating individual States' progress towards the substantive fulfilment of *Covenant* based obligations, the *Committee* accords States a certain liberty in selecting the means by which their respective obligations under the *Covenant* are implemented. Thus, it is understood that the fulfilment of the obligations under the *Covenant* does not depend upon any specific economic or political system, provided only that it is democratic and that all human rights are respected.[8]

7. The requirement of "progressive achievement" reflects the fact that the full realisation of all economic social and cultural rights may not be possible in a short period of time.[9] The *Committee* has noted that "while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned" and must be "deliberate, concrete and targeted."[10] In the same manner, the Limburg Principles indicate that "under no circumstances shall [the notion of progressive achievement] be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization."[11] In the case of *Grootboom* the Constitutional Court of South Africa found that the failure to include some form of emergency housing relief within governmental housing policies violated the duty to progressively realise the right to housing.[12]

8. The "progressive obligation" component of the *Covenant* does not mean that only a State with a sufficiently high level of economic development must realise the rights established under the *Covenant.* The duty in question obliges all States parties, notwithstanding their level of national wealth, to move towards the realisation of economic social and cultural rights.

9. The *Covenant* imposes various obligations that are of immediate effect to bring about the realisation of economic social and cultural rights. Of these, two are of particular importance: the "undertaking to guarantee" that relevant rights "will be exercised without discrimination" and the undertaking, in Article 2(1) "to take steps". The concept of progressive realisation is not to be misinterpreted as depriving *Covenant* obligations of all meaningful content as economic social and cultural rights realisation objectives were designed to be flexible, reflecting the realities of the real world and attendant difficulties involved for countries in ensuring the full realisation of these rights. The progressive realisation concept thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. [13]

10. The *Committee*'s State party review procedures and concluding observations provide a rich source of jurisprudence with regard to the application of these principles in practice despite the difficulties inherent in the existing reporting system. For example, the *Committee*, in applying General Comment No. 4, in its concluding observations of the Philippines recommended the Government ensure forced evictions are only carried out in truly exceptional circumstances, promote greater security of

tenure in relation to housing, repeal various legislative instruments and ensured evicted or homeless persons have access to essential services in the areas to which they are relocated.[14]

11. National and regional adjudicatory bodies have been equally adept at determining whether governments have complied with their obligations of diligence. The Latvian Constitutional Court found that the proposed social security system was an inefficient means of implementing the right to social security since various beneficiaries were insufficiently protected in the event employers failed to pay social insurance premiums.[15] The European Committee on Social Rights held that the number of inspections made by Portugal's Labour Inspectorate to detect exploitation of children in the workforce was insufficient.[16] The Indian Supreme Court directed the government to complete the stalled construction of a road to a village noting the project has been approved, funding provided and a "slow application of energy in the action by the executive."[17]

II.c. The Obligation to Respect, Protect, and Fulfil

12. The *Committee* and the African Commission on Human Rights have explicitly adopted the typology that divides State obligations to take steps to progressively realise the Covenant rights into the necessity to respect, protect, and fulfil. The typology has been endorsed by international experts in the Maastricht guidelines.[18]

The obligation to ***respect*** requires the state "to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy the basic needs."[19] Specifically in the context of economic, social and cultural rights, states must at this level "respect the freedom of the individuals to take the necessary actions and use the necessary resources – alone or in association with others."[20] The High Court of South Africa for example found that the disconnection of water services by the municipality in the absence of a fair and equitable procedure was a *prima facie* breach of the duty to respect the right to access water.procedure.[21]

13. The obligation to ***protect*** requires from the state "the 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."[22] At this level, States are required to protect the freedom of action and the use of resources against violations by other subjects.[23] The European Court of Human Rights in *Lopez Ostra v Spain* and *Guerra v Italy* found that governmental bodies had failed to protect the right to private and family life by continuing to allow industries to emit toxic emissions and waste despite the environmental damages and associated health problems.[24]

14. "The obligation to ***fulfil*** requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts."[25] For example, the obligation to fulfil the right to food implies both assistance in order to provide opportunities and direct provisions of food or resources which can be used for food when no other possibility exists, due to e.g. unemployment, disadvantage or age, sudden crisis or disaster, or marginalisation.[26] In relation to the right to health, the National Court of Appeals in Argentina in the *Viceconte* case ordered the state to manufacture affordable vaccine for the treatment of Argentina Haemorrhagic Fever which had broken out in a particular province.[27]

II.d. Non-Discrimination and Equality Under the International Covenant on Economic Social and Cultural Rights

15. The *Covenant* contains many obligations of immediate effect such as those relating to the rights of non-discrimination and equality (Articles 2(2) and 3). These obligations will have resource implications. As obligations of immediate effect the lack of resources provides no excuse for non-compliance. This will occur when States ensure that groups who have traditionally faced discrimination are able to fully enjoy their economic, social and cultural rights. For example, the Supreme Court of Canada found that the failure to provide sign language interpretation to deaf patients in medical institutions deprived them of their ability to "benefit equally from services offered to the general public". When the government sought to justify this failure on the basis that it had insufficient resources, the court confirmed the longstanding position in Canadian Constitutional rights jurisprudence, "financial considerations alone may not justify Charter infringements".[28]

16. The right to non-discrimination in Article 2(2) and women's equal right to the enjoyment of *Covenant* rights in Article 3 are integrally connected. Article 2(2) of the *Covenant* states that States Parties"[G]uarantee the rights enunciated in the present *Covenant* will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 of the *Covenant* provides that the States Parties are to "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

17. Article 3 reinforces the obligation in Article 2(2) to ensure that *Covenant* rights are enjoyed without discrimination based on sex, by particularising and underlining States parties' obligations to ensure that women enjoy the equal benefit of their rights. Article 3 is a reaffirmation of the Article 2(2) commitment to sex non-discrimination, included in the *Covenant* in recognition of the fact that there are still many prejudices preventing women from enjoying their rights equally.[29]

18. Articles 2(2) and 3 require that *Covenant* rights be interpreted in a manner that ensures to all individuals substantively equal enjoyment of their rights. Formal equality, or same treatment of all individuals on the face of laws or policies, is now understood to be an incomplete, and often misleading, formula. While powerful as a critique of explicitly discriminatory laws, formal equality fails to address the underlying systemic conditions of sexism, racism, ageism, xenophobia, and other structural causes of discrimination. Because of this, an understanding of equality focussed solely on the establishment of formally neutral laws often results in the *status quo* of inequality being maintained between groups defined by their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or in increased harms being ignored.

19. Guarantees of non-discrimination and equality in international human rights treaties mandate *de facto* equality, not simply *de jure* equality, that is, they require equality in real conditions, not simply formal equality on the face of laws. Thus, rights to non-discrimination and equality require that State conduct always be assessed against the background of the discriminated groups' and individuals' actual conditions and evaluated in the light of the effects of actions on these conditions. Exacerbating, failing to address, or perpetuating a *status quo* of inequality with respect to the enjoyment of economic, social and cultural rights will infringe the guarantees regardless of the apparently neutral character of the conduct. Indeed, achieving equal enjoyment of *Covenant* rights by all will often require States parties to redesign laws and policies which appear to be neutral, but which, in effect, are not. It will also require States parties to act in ways which are not neutral and which, instead, make explicit provision to alleviate the pre-existing economic, social and cultural disadvantages suffered by specific groups defined by their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Temporary, longer

term, or permanent differential treatment of groups that traditionally are discriminated against is consistent with the object and purpose of the *Covenant*, and of Articles 2(2) and 3 in particular, when this treatment is necessary to overcome the enduring effects of systemic discrimination, or to respond to distinct needs of certain groups, such as for example women.[30] Thus, equal enjoyment of *Covenant* rights entails the realisation of substantively equal results for women.

20. Articles 2(2) and 3, taken together, indicate that the diversity of women must be taken into account when considering sex based discrimination. Discrimination based on sex can intersect with other forms of discrimination and thus create particular constraints and vulnerabilities for certain groups of women in the enjoyment of their economic, social and cultural rights. Additional barriers are faced by many women due to such factors as their race, language, ethnicity, culture, religion, disability, or socio-economic class, or because they are indigenous women, migrants, displaced women or refugees.[31] Women may also confront barriers due to their age or occupation; family status, as single mothers or widows; health status, such as being HIV positive; sexuality, such as being lesbian; their socio-economic status, including living in rural, isolated or impoverished areas; or because they are engaged in prostitution. Because particular groups of women may be differently affected in their enjoyment of a right, the *Covenant* measures indicate that specific measures may need to be designed to ensure that diverse groups of women benefit equally.

II.e. International Obligations Under the International Covenant on Economic Social and Cultural Rights

21. The question arises whether, apart from the domestic obligations accepted under the *ICESCR,* Article 2 includes international obligations for State parties, as it mentions that States take steps "individually and through international assistance and co-operation, especially economic and technical". In Articles 11, (the right to an adequate standard of living and to the continuous improvement of living conditions), 22 and 23, mention is made of "international co-operation" and "international measures".

22. During the *ICESCR* drafting process it was recognised that developing States require some form of international assistance in order to advance economic social and cultural rights. Indeed, the *ICESCR* speaks of the reception of international co-operation as a duty of the State party: the State Parties "undertake[...] to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [the] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." [32] In order not to make an absurdity of the measure, this provision would seem to involve an implicit obligation to provide this assistance. Notwithstanding, the *travaux préparatoires* of the *Covenant* do not indicate a consensus in this regard, and, in particular, it is not clarified who exactly must receive and who provide the assistance.

23. The *Committee* has stressed that in accordance with Articles 55 and 56 of the United Nations Charter, with well-established principles of international law, and with the provisions of the *Covenant* itself, international co-operation for development and thus for the realisation of economic social and cultural rights is an obligation of all States and in particular it is incumbent upon those States which are in a position to assist others in this regard.[33] This notion is supported by the UN General Assembly, which, on several occasions, has established desirable goals in terms of the percentage of their Gross Domestic Product (GDP) developed countries ought to donate in aid to developing countries. Recently, the Monterrey Consensus Declaration reiterates the call to developed countries "to make concrete efforts towards the target of 0.7 percent of gross national product (GNP) as [Overseas Development Aid] ODA to developing countries."[34]

III. The Justiciability of Economic Social and Cultural Rights

III.a. Concepts of Justiciability

24. The most frequently heard objection to the judicial or-quasi-judicial enforcement of economic social and cultural rights is that are non-justiciable; that they are incapable of being adjudicated upon in a legal manner. The objection contains three dimensions, which often are grouped together.

25. The first objection is *legal:* the claim that economic social and cultural rights do not give rise to binding obligations. This claim has been addressed in the previous section which identifies a host of obligations that can be derived from the provisions contained in the *ICESCR*.

The second objection is *pragmatic*: the assertion that it is practically impossible to subject any obligations arising from economic social and cultural rights to adjudication, because courts and other similar bodies are not competent for the task. Commonly cited reasons include the vagueness of the rights and obligations, the complexity of social, economic and cultural issues, the difficulties in obtaining evidence and the lack of sensible and enforceable remedies. Theory and case law point to alternative conclusions as will be shown in section III.b. below. When provided the opportunity adjudicatory bodies have shown significant dexterity in judicialising socio-economic rights, providing clear and certain legal standards and decisions.

The third is objection *philosophical*: that economic social and cultural rights should not be adjudicated upon because of fears of illegitimate intrusion into policy-making and resource allocation. We will consider this argument in section III.c. below.

III.b. Pragmatism – Can economic social and cultural right be judicially enforced?

26. Over the preceding three decades, a global jurisprudence surrounding economic, social and cultural rights has gradually emerged. Courts and others have provided justiciable substance to individual complaints concerning social and economic issues. In some cases this has arisen in disputes over civil and political rights. One commentator notes that in the United States "judicial activity has extended to welfare administration, prison administration, and mental hospital administration, to education policy and employment policy, to road building and bridge building …"[35] In other jurisdictions economic social and cultural rights are directly justiciable and courts have developed standards and methods of adjudication. Indeed, in many of these jurisdictions courts are utilising the standards set by the *Committee*.[36]

27. The *Committee* considers "that a number of [...] provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3 [non-discrimination], 7 (a) (i) [fair wages and equal remuneration], 8 [union rights], 10 (3) [special protection of children], 13 (2) (a) [free and compulsory primary education], (3) [freedom to choose children's schools] and (4) [freedom to establish schools] and 15 (3) [freedom of scientific research and artistic creation] [...are] capable of immediate application by judicial and other organs in many national legal systems." Indeed, the *Committee* continues: "Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain."[37]

28. It is important in this regard to distinguish between justiciability, referring to those matters which are appropriately resolved by the courts, and self-executing norms, referring to those matters that may be applied directly by the courts without further elaboration. When the *Committee* refers to a non-exhaustive list of *Covenant* rights as "provisions capable of immediate application," it means to establish these rights as self-executing norms. All *Covenant* rights are justiciable.

29. It is often assumed that economic social and cultural rights are not justiciable because they require prescriptive directions from courts, and orders for the

governments to do something. On the other hand civil and political rights are said to require restraint by governments. Prescriptive directions are said to defy judicialisation because there are a multitude of possible options for remedying a situation and, in the case of economic social and cultural rights, such options involve re-allocation of resources. These assumptions are misplaced.[38] First, realisation of economic social and cultural rights does require restraint by government. Second, positive obligations relating to economic social and cultural rights can be given sensible judicial content.

30. Negative obligations require *restraint* by governments in interfering with economic social and cultural rights. They present a relatively simple case for adjudication. Such violations are often treated in a similar way to civil and political rights violations: i.e., a determination is made as to whether the action is lawful, arbitrary and reasonable, due process was followed and adequate reparation was provided. Indeed, many of the decisions have occurred under the umbrella of civil and political rights: e.g., interference with the home, family life, minority cultures and labour rights.

The seminal case in this regard is the U.S. Supreme Court case of Goldberg v Kelly 397 U.S. 254 (1970) which concerned the right to be heard. The case concerned the termination of social security benefits to a number of New York residents. The Court recalled that:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue…"[39]

The Court noted the importance of the benefits in questions, that "welfare provides the means to obtain essential food, clothing, housing, and medical care". The Supreme Court of India came to a similar conclusion in *Olga v Tellis*.[40]

31. The *Committee* has termed this 'negative obligation' as the obligation to respect (see above paragraph 6). Compliance with this obligation to respect has been challenged in South Africa. For example, the High Court, in a case concerning the disconnection of water, found that the onus was upon the State to justify the interference. The conditions under which water services may be discontinued and the procedures for discontinuing water services must be "fair and equitable". This includes" reasonable notice of termination and for an opportunity to make representations. They must not result in a person being denied access to basic water services for non-payment where the person proves … that he or she is unable to pay for basic services."

32. Prohibitions on discrimination are likewise easily susceptible to judicialisation. Courts and committees regularly determine whether there has been an unreasonable distinction on prohibited grounds (e.g., race, sex, age etc) in the deprivation or provision of social and economic guarantees. For example, the UN Human Rights Committee in *Zwaan de Wries* found that:

"The circumstances in which Mrs. Zwaan-de Vries found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of Article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men." [41]

33. A *prescriptive* court order that a government do something is often perceived as problematic because this "may be beyond their capabilities, or may require major societal readjustments."[42] Generally a "worst case scenario" is assumed – for example, a poor country is ordered to devote all its resources to one particular policy. However, a number of judicial techniques have been developed to provide a justiciable element to

obligations that require positive action by governments. The techniques chosen are legal not political. They generally revolve around asking whether the government can demonstrate that it is complying with its obligation to progressively take steps to realise economic social and cultural rights.

34. First, the obligation to *protect* requires a government to take steps to prevent third parties from interfering with rights (see above). Such steps usually require legislation and enforcement mechanisms. The outer boundaries of this obligation have been tested in civil and political rights cases. For example, the Inter-American Court of Human Rights in *Velasquez-Rodriguez v Honduras* held that States have a duty of due diligence to investigate and prosecute human rights violations committed by any person within its jurisdiction.[43] In such cases the onus is placed on the State to demonstrate it has taken sufficient steps to ensure enjoyment of economic social and cultural rights.

35. Second, the obligation to devise a strategy to realise economic social and cultural rights (in pursuance of the obligation to fulfil the rights through progressive realisation) can be subjected to the judicial torch. Adjudication bodies have the capacity to broadly determine whether a strategy is lacking in the first place or is deficient in places. For example, in the case of *Grootboom* the Constitutional Court of South Africa found that legislative framework for housing omitted to include a reasonable mechanism for emergency relief. The Court commented that:

"The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable."[44]

The three tiers of government were ordered to "include reasonable measures" in their programmes "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations".

36. Third, the obligation to *implement* such strategies and policies has proven justiciable. If a government claims compliance with international obligations by reference to certain policies and programmes it is perfectly reasonable for those affected to be able to complain that this is not the case.

37. Fourth, courts have on occasion directly intervened to order that specific programme or policy be implemented. In most cases, the orders have given a wide degree of discretion to the government to devise the appropriate responses. For example, the Bangladesh High Court noted in 1999 that, in order to fulfil the basic rights of equality, life, and livelihoods, 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.[45]

38. Where there is a clear and direct connection between the right and the claimed entitlement, courts have been more likely to intervene. In such cases, the balancing of different policy values and options is unnecessary, as would be the case, for example, with regard to the failure of a government to ensure that salt is iodised despite having made an international commitment to this effect and despite clear access to international technical assistance. Where resources are relatively abundant this is more likely to be the case.

39. It is sometimes feared that the complexity of social-economic issues means that proper evidence cannot be brought to bear in any given case. In most cases this is not an issue –legalisation of a dispute will generally narrow the issues and evidence will only be submitted on the facts in contention. Courts are to complexity and have

devised various means of obtaining or narrowing the type of evidence elicited. As noted in relation to the Supreme Court of India: "The facts upon which the courts rely are made available to the concerned parties and an opportunity is given to them to respond. Affidavits may be challenged, additional reports commissioned and new evidence entered."[46]

40. The question arises of whether adjudicatory bodies can devise effective and appropriate remedies, and in particular if they can devise remedies, provide finality to the matter, and avoid ongoing supervision of compliance with orders. Finality is not a problem limited to economic social and cultural rights cases: enforcement of court orders in any dispute can be time and resource-consuming. In any case, where a court order concerns the ongoing implementation of policies and programmes courts have shown flexibility in devising appropriate solutions, such as for example recommending a certain policy be adopted or nominating a specific body or persons to monitor compliance with the court's orders.

III.c. Philosophical Considerations

41. Philosophical considerations often colour perceptions of the justiciability of economic social and cultural rights; in this sense, the question is not whether economic social and cultural rights *can* be judicially enforceable but rather whether they *should* be. The objection is frequently couched in terms of opposition to judicial intrusion into policy-making, said to be the exclusive domain of democratically elected governments. At the domestic level this concern arises in the context of separation of powers, and at the international level in the context of intrusion into sovereignty.

42. First, it is important to remember that that the formulation of legal obligations provides significant discretion to governments. Economic social and cultural rights are usually phrased as obligations of conduct not result. An obligation of result requires a specific objective outcome while an obligation of conduct only requires steps taken towards the achievement of a subjective result: e.g. access to food. The steps to be taken under the *ICESCR* for example have only been defined by the *Committee* in very general terms.

43. Second, courts are involved in policy matters already. The adjudication of civil and political rights, as well as many other legal rules (e.g., trade), regularly impinges upon the policy options of governments. One court, after reviewing foreign jurisprudence concerning the issue of injunctive orders or exercise of supervisory jurisdiction, concluded:

"What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the state's obligations are not performed diligently and without delay".[47]

44. Third, it is increasingly acknowledged that judicial protection of human rights is important because majoritan democracies are not always well-suited to protect the human rights of all individuals. The *Committee* comments that the lack of an effective remedy would: "drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."[48] In this way individuals are able to participate in democracies by being able to voice their complaints about violations of human rights. The judicialisation of economic social and cultural rights can be properly viewed as a hallmark of a mature democracy – where citizens, particularly those in the minority, are able to assert their fundamental rights that may be overlooked or ignored by the established social or economic system.

45. Fourth, concerns are expressed about the democratic legitimacy of courts or Committees. This argument is of limited value since many courts and Committee

members are appointed by governments. Where courts are given power to adjudicate economic social and cultural rights they are sensitive to these concerns, indeed the least dangerous branch of government as one commentator has noted.

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

47. These arguments have been summarised by the *Committee* as follows:

"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 which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent."[49]

IV. The Benefits and Practicability of an Optional Protocol, Including the Question of Complementarity

IV.a. Benefits of an Optional Protocol to the ICESCR

48. The obligations ensuing from the *ICESCR* have been clarified in doctrine, in the general observations adopted by the *Committee*, and by Special Rapporteurs. Moreover, much regional and domestic case-law exists bearing witness to the direct justiciability of the rights. Further clarification can only take place on a case-to-case basis which is precisely why a complaints procedure is needed.

49. The world community confirmed the interrelatedness and interdependence of all human rights at the 1993 World Conference on Human Rights. However, individuals and groups whose economic, social, and cultural rights have been violated still have no recourse globally, leading to a continuing situation of impunity with regard to these rights, in clear violation of the spirit of the United Nations Charter, and the letter of the 1993 Vienna Declaration and Programme of Action. Indeed, economic social and cultural rights have historically been neglected in the global context, even though they, are amongst the most commonly violated rights in the current context of commercial liberalisation and globalisation.[50] The adoption of a complaint mechanism under the *ICESCR* would mark a critical step in the right direction to overcome this impunity, and would strengthen the principle of progressive realisation to which all States Parties to the *ICESCR* have committed themselves.

50. The individual complaint mechanism will also support the *Committee* in its supervisory tasks with regard to the implementation of the *ICESCR*. First, the mere existence of the mechanism will lead to a new and more involved relationship between the *Committee* and States Parties. Scholars have noted that one of the major constraints of the Committee in the development of its working practices has derived from the absence of a provision that requires State co-operation beyond the submission of periodic reports.[51] Secondly, the treatment of cases relating to the specific violation of Covenant rights will contribute to the further clarification of the nature and scope of these rights, and thus to their justiciability.[52] Indeed, the experience gained from the Optional Protocol to the International Covenant on Civil and Political Rights confirms that a complaint mechanism contributes to the development of a more specific legal content of international norms."[53] Moreover, it would seem unreasonable to demand clarification of the normative contents of the *Covenant* rights *a priori* for the Optional Protocol to the *ICESCR* to be accepted.[54]

51. On the occasion of the 1993 World Conference on Human Rights, the *Committee* detailed the manners in which it considers that an Optional Protocol – and in particular an individual complaint mechanism – will contribute to the understanding of economic social and cultural rights in general, and to the status and practical relevance of the *Covenant* in particular. In this connection, the *Committee* emphasised the benefits deriving from treating the *Covenant* rights in a concrete context; the detailed research that necessarily accompanies the treatment of specific cases; the positive aspects in forcing the *Committee* to confront more complex matters than those deriving directly from the *Covenant*; the impetus created by the mere existence of the mechanism in terms of effective national implementation of the rights; the impact the mechanism will have on individuals and groups that will feel encouraged to articulate their economic, social, and cultural rights claims in more concrete and specific terms; and the "human interest" impact generated by the cases that will lead to a deeper understanding and awareness around the *Covenant* in general.[55]

52. The benefits of an Optional Protocol to the *ICESCR* have been noted in the report product of the workshop mentioned by the Commission on Human Rights in its Resolution 2002/24 preambular paragraph 5, which states that the Optional Protocol could provide enhanced legality, uniformity, justice, and stability to balance the volatile economic and political forces at play at the international level.[56] This would be of great benefit to States Parties to the *Covenant*, to agencies and institutions working nationally or regionally on the implementation of economic social and cultural rights, as well as to the international community as a whole, as it would contribute to a coherent in-depth understanding of the rights.

IV.b. Complementarity

53. 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.

54. 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. In the following, we shall treat these questions in turn.

IV.c. When One Right is Covered by Several Mechanisms

55. When one specific right is covered by several mechanisms, the question arises of whether or not there is a situation of overlap between the work of the different mechanisms that have been established to supervise the implementation of international human rights treaties.

56. With respect to the Draft Optional Protocol 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).[57] We believe these concerns are exaggerated. For example, we must ask whether the ILO and UNESCO bodies mentioned are experts on economic, social and cultural rights issues, regardless their unquestionable expertise in their area of focus. In fact, in drawing the attention to the fact that only procedures exist for the right to freedom of association and educational rights, the *Independent Expert* implicitly creates a strong argument for the urgent need for a specialised human rights body competent to deal with violations of any economic social and cultural rights.

57. 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 seems 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 (hereinafter *CEDAW*) and the Convention on the Elimination of all Forms of Racial Discrimination (hereinafter *CERD*).

58. The fact that potential duplication of work between these different mechanisms has not created problems or raised potential concerns can be explained by the fact that 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.[58] Therefore, the issue is more a question of co-ordination and rationalisation of the work between the different mechanisms, as highlighted by the creation, within the Office of the High Commissioner for Human Rights (OHCHR), of a new Petition Unit. The Draft Optional Protocol to the *ICESCR* is no exception to this rule, stipulating in its Article 3(3)(b) that the Committee shall declare a communication inadmissible if it is being examined under another procedure of international investigation or settlement, such as, for instance, the Optional Protocol to the *ICCPR*.

59. 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,[59] requires that the same standards be applied equally to economic, social and cultural rights and civil and political rights. In this respect, the Draft Optional Protocol 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. Accordingly, and following the same logic, any concern with respect to the potential overlap between individual complaint procedures dealing with economic, social and cultural rights is unsustainable.

60. While the examination clause guarantees that there would be no overlap in the examination of individual complaints, the related question of access definitely waives the concerns according to which an Optional Protocol to the *ICESCR* would duplicate the work carried out by other bodies such as the Human Rights Committee, the Convention on the Elimination of Discrimination against Women, as well as the ILO and UNESCO.

IV.d. Access to Several Mechanisms

61. When examining the issue of access to complaint procedures, there are important differences between the various existing individual complaint procedures related to economic, social and cultural rights.

62. The existing complaint procedures at the international and regional levels dealing with alleged violations of economic social and cultural rights include the following:
- The Optional Protocol to the *ICCPR* under Articles 8 and 22 of the *ICCPR*;

- The Optional Protocol to the *CEDAW*;
- The ILO special procedure with respect to the freedom of association;[60]
- The UNESCO Complaints Procedure in the field of any of the rights which fall within UNESCO'S field of competence, that is education, science, culture and information;[61]
- The Collective Complaints Procedure adopted as a Protocol to the European Social Charter in 1995;[62]
- The Inter-American Commission and the Inter-American Court on Human Rights.

63. Given their specific focus or regional dimension, access to these procedures is limited either in term of the rights covered by the procedure or in term of the victims who can lodge a complaint.

64. It is, for example, questionable to what extent the work of the Committee on Freedom of Association at the International Labour Organisation and the UNESCO procedures mentioned can really be defined as complaints procedures open to all victims of violations of human rights. As an example, the ILO procedure is only open to trade union representatives, and the scope of the rights covered by the UNESCO procedure is limited to alleged human rights violations related to education, science, culture and information.

65. Similarly, the scope of the economic, social and cultural rights covered by the Optional Protocol to the *ICCPR* is limited to issue related to freedom of association and slavery. Finally, limitations regarding a complaint under the Optional Protocol to the *CEDAW* and regional mechanisms respond respectively to the gender and the regional criteria preventing, in both cases, universal accesses to these procedures.

V. Conclusions

66. We have in this report reviewed some of the insights gained by the *Committee* and the Special Rapporteurs with regard to the questions posed by the *Commission* in Reso. 2002/24. We have also included jurisprudence from the national, regional, and international level, and taken up concerns raised by international scholars. We hope the *Independent Expert* finds this report useful in his endeavours to fulfil the mandate contained in Res. 2002/24, and remain at his service for a more in-depth dialogue and exchange of views.

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End Notes:

[1] Committee on Economic Social and Cultural Rights, General Comment No. 3, The Nature of States Parties Obligations, 14 December 1990, para 10.

[2] See Constitutional Court of Hungary, Case No. 42/2000 (XI.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany); and V v Einwohrnergemeine X und Regierunsgrat des Kantons Bern (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995).

[3] *CESCR*, General Comment No. 3, op.cit. note 1, paras 10-11.

[4] *CESCR*, General Comment No. 3, op.cit. note 1, para. 12.

[5] See in particular Philip Alston and Gerald Quinn, "The Nature and Scope of State Parties's Obligations under the International Covenant on Economic, Social and Cultural Rights", 9 Human Rights Quarterly (1987), pp. 156-229.

[6] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17 (hereinafter by number only), June 1986, Principle No. 16.

[7] UN. Doc. E/CN.4/1987/17, op.cit. note 6, Principle No. 18.

[8] *CESCR*, General Comment No. 3, op.cit. note 1, para. 8.

[9] *CESCR*, General Comment No. 3, op.cit. note 1, para. 9.

[10] *CESCR*, General Comment No. 3, op.cit. note 1, para 2.

[11] UN. Doc. E/CN.4/1987/17, op.cit. note 6, Principle No. 21.

[12] *Grootboom v Ostenberg Municipality et al.* Constitutional Court of South Africa, Case CCT 11/00, 4 October 2000.

[13] *CESCR*, General Comment No. 3, op.cit. note 1, para 2.

[14] Concluding Remarks of the Committee on Economic Social and Cultural Rights: Philippines, E/C.12/1995/7, 7 June 1995, para. 31.

[15] Case No. 2000-08-0109, Constitutional Court of Latvia, 2001.

[16] The International Commission of Jurists v Portugal, Complaint No.1/1998 (European Committee of Social Rights).

[17] State of Himachal Pradesh v Umed Ram Sharmas, AIR.

[18] Maastricht Guidelines on Violations of Economic Social and Cultural Rights, January 1997.

[19] Asbjørn Eide, "Realisation of Social and Economic Rights. The Minimum Threshold Approach", International Commission of Jurists The Review 1989, Issue 43, 40, 1989, pp. 41-42.

[20] Eide, op.cit. note 19, p. 43. See also Maastricht Guidelines, op.cit. note 18, para. 6.

[21] *Residents of Bon Vista Mansions v SMLC* (High Court of South, unreported decision 2001, Case No. No.12312).

[22] Eide, op.cit. note 19, p. 42.

[23] Id., p. 44.

[24] See *Lopez v Ostra v Spain*, judgment of 9 December 1994, Publications of the European Court of Human Rights, Series A, No. 303-C; Guerra and Others v Italy, judgment of 19 February 1998, European Courtof Human Rights, Reports of Judgments and Decisions 1998-I, No. 64.

[25] Eide, op.cit. note 19, p. 42.

[26] Eide, op.cit. note 19, p. 44; see also Committee on Economic Social and Cultural Rights, General Comment No. 12, The Right to Adequate Food, 12 May 1999, para. 15.

[27] *Viceconte v El Ministerio de Salud y Accion Social* 2/6/1998: LA LEY, Suplemento de Derecho Constitucional 5/11/1998 No. 98.096.

[28] Eldridge v. British Columbia (Attorney General) [1997] 2 S.C.R. 624 at para. 85.

[29] The *Travaux Preparatoires* reveal that in discussion of Article 3, drafters of the *ICESCR* commented that the UN Charter principle of equality of rights between men and women 'must be constantly emphasized, especially as there were still many prejudices preventing its full application.' See *Draft International Covenants on Human Rights: report of the Third Committee*, A/5365, para. 85 (17 December 1962).

[30] See *Convention on the Elimination of All Forms of Discrimination Against Women*, Articles 10, 11, 12, and 13, adopted 18 Dec. 1979, entered into force 2 Sept. 1981, G.A. Res. 34/180, 34 UN GAOR, Supp. (No. 46), UN Doc. A/34/46, at 193, reprinted in 19 ILM 33 (1980), Article 4.

[31] The *Report of the Fourth World Conference on Women: Platform for Action,* A/Conf. 177/20, 17 October 1995, at par. 225.

[32] 1966 International Covenant on Economic Social and Cultural Rights, Article 2(1).

[33] *CESCR*, General Comment No. 3, op.cit. note 1, para. 14.

[34] Report on the International Conference on Financing for Development, Monterrey Mexico [*Monterrey Consensus Declaration*], UN Doc. A/CONF/198/11, 18-22 March 2002, para. 42.

[35] D.L. Horowitz "The Courts and Social Policy", (The Brookings Institution, Washington D.C., 1977) at p.4.

[36] See for example, case of *Grootboom* (2000), op.cit. note 12; and Case No. 2000-08-0109, Constitutional Court of Latvia, 2001.

[37] *CESCR*, General Comment No. 3, op.cit. note 1, para. 5.

[38] The *Committee* analyses the assumptions as follows: In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant *Covenant* provisions. The *Committee* has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 (1990), op.cit. note 1, it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3… While the general approach of each legal system needs to be taken into account, there is no *Covenant* right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.

[39] Case of Goldberg v Kelly, U.S. Supreme Court, 397 U.S. 254 (1970).

[40] Olga Tellis and Ors. v. Bombay Municipal Corporation, AIR 1986 SC 180

[41] UN. Doc. CCPR/C/29/D/182/1984, 9 April 1987.

[42] Seymour Rubin, Economic and social rights and the New International Economic Order quoted in Schwartz, Do Economic and Social Rights belong in a constitution? Am. U. J. int'l & Policy 10(4) (1995) 1235.

[43] Inter American Court of Human Rights, *Velázquez-Rodríguez vs. Honduras*, SERIES C NO. 4 , paras. 174-5, Judgement of July 29 1988.

[44] Case of *Grootboom* (2000), op.cit. note 12.

[45] Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors

[46] Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *The American Journal of Comparative Law* Vol. 37 (1989) 495 at 507.

[47] Constitutional Court of South Africa, TAC v Minister of Health, Case CCT 8/02, 5 July 2002, para. 112.

[48] *CESCR*, General Comment No. 3, op.cit. note 1, para. 10.

[49] Committee on Economic Social and Cultural Rights, General Comment No. 9, The Domestic Application of the Covenant, 3 December 1998, para. 10.

[50] *The Justiciability of Economic Social and Cultural Rights*, Report on the Workshop on the Justiciability of Economic Social and Cultural Rights, with particular reference to the draft Optional Protocol to the International Covenant on Economic Social and Cultural Rights (2001), [hereinafter *ESCR Workshop Report*], para. 19.

[51] Matthew Craven, "The UN Committee on Economic Social and Cultural Rights," in Asbjørn Eide et al. (Eds), *Economic, Social and Cultural Rights*, p. 461.

[52] Kitty Arambulo, "Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects", Hart Publishing (1999), p. 176.

[53] Graefrath, quoted in Kitty Arambulo, op.cit. note 52, p. 176.

[54] *ESCR Workshop Report*, op.cit. note 50, para. 23.

[55] Comments by the Committee on Economic Social and Cultural Rights, UN. Doc. A/CONF.157/PC/62/Add.5, 26 March 1993, paras. 32-38.

[56] *ESCR Workshop Report*, op.cit. note 50para. 28.

[57] UN. Doc. E/CN.4/2002/57, 12 February 2002, paras. 28-32.

[58] See for instance article 22(5)(a) of the CAT, article 5(2)(a) of the Optional Protocol to the *ICCPR*, article 4(2)(a) of the Optional Protocol to the *CEDAW*.

[59] 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."

[60] Constitution of the International Labour Organisation, Article 24.

[61] UNESCO Doc. 104 EX/Decision 3.3, adopted in 1978 by the Executive Board of UNESCO.

[62] Entered into force on 1 July 1998.