



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

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

RESPONSES TO STATES' CONCERNS WITH REGARD TO THE *INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS AND THE PROPOSED OPTIONAL PROTOCOL*

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I. ICESCR AND OPTIONAL PROTOCOL WORKING GROUP CONSIDERATIONS

I(A) THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE PROPOSED OPTIONAL PROTOCOL: THE MANDATE OF THE WORKING GROUP

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

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

THE MANDATE OF THE WORKING GROUP

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

(a) Focused Agenda

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

(i) The abundant experience and jurisprudence of national, regional and international bodies/instruments that employ adjudicative procedures related to violations of economic, social and cultural rights. In this regard, reference may be made to the United Nations Human Rights Committee, the European Court of Human Rights, the European Committee on Social Rights, the African Charter on Human and Peoples' Rights, the San Salvador Protocol, the Optional Protocol to the Covenant on the Elimination of Discrimination against Women, the United Nations Educational, Scientific and Cultural Organization Complaint's Procedure, the International Labour Organisation Committee on the Freedom of Association and an abundance of national jurisprudence;

(ii) A plethora of national and international conferences and instruments that have clarified the nature and scope of economic, social and cultural rights. Amongst these, the Declaration of Delhi (1959), the Law of Lagos (1961), the Limburg Principles on the Implementation of the ICESCR (1986), the World Conference on Human Rights (1993), the World Summit for Social

Development (1995), the Bangalore Plan of Action (1995), the Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights (1996) and United Nations/International Commission of Jurists' conferences on the optional protocol and economic, social and cultural rights, (1999), (2000), (2001) and (2002), amongst numerous others, may be instructive;

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

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

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

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

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

(viii) Two reports from the independent expert appointed by the Commission on Human Rights, (resolution 2001/30), to examine the question of a draft optional protocol to the ICESCR. The initial report of the independent expert engaged in an examination of general ICESCR and optional protocol issues whereas the second report is expected to provide an in-depth analysis of States parties' obligations under the ICESCR, the justiciability of economic, social and cultural rights, the benefits and practicability of an ICESCR complaint's mechanism and the complementarity between the proposed optional protocol and other complaints mechanisms;

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

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

Comprehensive Approach

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

Membership

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

Time Frame

Learning from the experience of other instruments that established optional protocols, the ICESCR/optional protocol working group should adopt a pragmatic yet determined approach towards the completion of its mandate. In empowering the working group, the 59th session of the Commission should bear in mind its decision of 26 April 2000, (E/CN.4/2000/112), which endorsed that,

(working group), (m)andates should always offer a clear prospect of an increased level of human rights protection and promotion, (and that), (i)n creating any standard-setting working group, the Commission should consider a specific time-frame within which the group would be called upon to complete its task. ... (I)n most instances, the established time-frame should not in principle exceed five years.

Resource Considerations, Accountability and Transparency

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

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

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

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

II. SPECIFIC ICESCR AND OPTIONAL PROTOCOL CONCERNS

II(a) THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

There is a widespread tendency to deem economic, social and cultural rights, (hereinafter ESC rights), as something "other" than civil and political rights as only the latter are perceived as justiciable. Posited as national and or international policy aspirations, ESC rights are thus said to fall below the justiciable threshold for individual legal enforcement. Counter-arguments to the aforementioned theorise that as the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*) and the *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), are both legally binding human rights instruments of equal power, ESC rights should be positioned on an equal footing with civil and political rights in terms of their justiciability. Here, as has been stressed time and again through numerous United Nations resolutions and pronouncements, if human rights are indeed indivisible, interrelated and interdependent, there is no substantive reason why the monitoring procedures under the *ICESCR* and the *ICCPR* should be different. Further, human rights do not derive stature from their justiciability and as such, although the absence of international remedies for ESC rights violations may weaken the full enjoyment of same, this does not derogate from their inherent quality as human rights proper.

That, relative to civil and political rights, ESC rights are less internationally justiciable may be explained through ideologically motivated political and economic arguments that historically contributed to the East vs. West Cold War and presently envelope the North vs. South economic divide. With regard to the latter, present opposition to the draft Optional Protocol, (hereinafter draft OP), seems, in part, to be informed by the implicit fear of imposing uncontrollable financial burdens upon individual states and the international community. Experiences with a wide range of international and domestic ESC rights complaint procedures, however, indicates that there is no basis for fears that the draft OP will result in either an avalanche of complaints or burdensome international/state financial obligations. These fears are especially irrelevant with regard to the draft OP as Article 8 clearly mandates that State parties retain the final decision as to the substantive measures enacted in response to any views proffered by the Committee on Economic, Social and Cultural Rights regarding the realisation of ESC rights.

The domestic jurisprudence of numerous nations including South Africa, Canada, France, and India has demonstrated the increasing acceptance of the ESC rights justiciability on the national level, an acceptance that has extended into the international arena through the collective complaints mechanism built into the Optional Protocol to the European Social Charter. It is thus substantively evidenced that ESC rights would be justiciable on the international level

II(b) THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*: ADDRESSING VAGUENESS ISSUES

The most legally technical argument against the international adjudication of economic social and cultural rights, (hereinafter ESC rights), posits that these rights are vague norms containing unclear state obligations which would render their justiciability problematic. Countering this argument is the fact that considerable efforts have been made by scholars and the Committee on Economic Social Cultural Rights, (hereinafter, the Committee), to clarify the content of the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR*) and the obligations this instrument entails. Here, the content of certain rights, *i.e.* the right to food, the right to education, the right to adequate housing and the right to the highest attainable standard of health have been elaborated on through numerous academic studies, reports of independent experts and the General Comments of the Committee. Such clarifications have included:

- i) a "minimum threshold" approach to the attainment of ESC rights. This approach aims at establishing a "bottom-line" beneath which concrete State compliance with ESC rights standards should not fall. Here, the minimum threshold is relative to national and or regional benchmarks and serves to assist in the formulation of State policy guidelines in securing domestic ICESCR compliance. The Committee introduced a similar concept in its General Comment no. 3, namely "the minimum core obligation", being the obligation to ensure the satisfaction of, at the very least, minimum essential levels for each enshrined right;

- ii) a typology for the fulfilment of ESC rights satisfaction has been developed in which States should "respect", "protect" and "fulfil" said rights. The obligation to respect requires the State to abstain from actions of commission or omission that violate the integrity of the individual, infringing on his or her freedom, including the freedom to use available material resources in the way the individual deems best to satisfy basic needs. The obligation to protect requires states to implement measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human right of the individual including the infringement on his or her material resources. Here, as far as ESC rights are concerned, States are required to protect individual freedom of action and the use of resources against other subjects. The obligation to fulfil requires the state to take measures necessary to ensure that each person within its jurisdiction is afforded the opportunity to obtain basic need satisfaction, as recognised in human rights instruments which cannot be secured through personal efforts. For example, with regard to the right to food, the obligation to fulfil implies both assistance in order to provide opportunities to obtain food and direct provisions of food or resources which can be accessed when no other possibility exists, due to e.g. unemployment, disadvantage or age, sudden crisis/disaster, or marginalisation. Finally, it must be recognised that, in evaluating individual States' progress towards the substantive fulfilment of *Covenant* based obligations, the Committee does take into account the means available to each state and in this regard accords states a certain "margin of discretion;"

- iii) a detailed list of what constitutes violations of ESC rights through acts of commission or omission;

Within the aforementioned context, the draft Optional Protocol, (hereinafter draft OP), would assist in clarifying the meaning behind and obligations concurrent with ESC rights and their realisation. Further, an international complaint procedure for ESC rights would offer the opportunity to build up a collection of relevant case law in which the justiciability and the content of the rights and state obligations could be further clarified. Finally the draft OP would also permit a more thorough understanding of ESC rights through the examination of specific cases.

Critics of the draft OP to the *ICESCR* contend that whereas the *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), seems precise, explicit and self evident, those found within the *ICESCR*, by their very nature, seem vague and less precise, eliciting only programmatic norms of intent as opposed to directly binding legal obligations. Proponents of the draft OP respond that all human rights treaty text formulations, including the *ICCPR*, are open and vague, this being linked to the human rights philosophy of formulating texts in the abstract to allow for future/unforeseen applications. In practice, this level of abstraction has been mitigated by decades of international human rights practice, governing treaty body jurisprudence and general comments that assist in elucidating the full meaning of various treaty provisions.

Critics of the draft OP further assert that the vague nature of *ICESCR* rights is demonstrated by the fact that the five other United Nations treaty bodies, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Human Rights Committee, currently possess complaints procedures while the Committee on Economic, Social and Cultural Rights, is merely a creation of ECOSOC and has not been endowed with its own complaints procedure. In response there is the fact that the *ICESCR* left it to ECOSOC to formulate rules for Committee establishment and governance does not demonstrate *ICESCR* vagueness and its unequal treatment when compared with civil and political rights.¹

¹ In any event, through resolution, ECOSOC ensured that, in practice, the Committee follows the model established by other treaty bodies in relation to State reporting thus making the Committee a treaty body in all but name.

II(c) CESCR ANALYSIS: MINIMUM CORE OBLIGATIONS AND THE MARGIN OF DISCRETION

The Committee on Economic Social Cultural Rights, (hereinafter, the Committee), has clarified that there is a “minimum core obligation” incumbent on States to ensure the satisfaction of, at the very least, minimum essential levels for each right guaranteed through the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*). Such obligations were formulated to not be unnecessarily onerous especially if developed nations provide co-operation and technical assistance under *Covenant* articles 2(1), 22 and 23. Should States fail to satisfy these minimum essential levels due to a lack of resources, they must demonstrate that every effort has been made to use all available resources to satisfy, as a matter of priority, said minimum obligations. 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,” (General Comment no. 3, § 12).

Finally, it must be recognised that, in evaluating individual States' progress towards the substantive fulfilment of *Covenant* based obligations, the Committee does take into account the means available to each state and in this regard accords states a certain "margin of discretion." Here, as in the case of civil and political rights, States enjoy a margin of discretion in selecting the means by which their respective obligations under the *Covenant* are implemented.

II(d) CESC ANALYSIS: THE OBLIGATION TO RESPECT, PROTECT AND FULFIL

The Committee on Economic Social Cultural Rights, (hereinafter, the Committee), has developed a typology for the fulfilment of economic social and cultural rights, (hereinafter ESC rights) wherein States should "respect", "protect" and "fulfil" said rights.

The obligation to respect requires the State to abstain from actions preventing an individual from using available material resources in the way the individual deems best to satisfy basic needs.

The obligation to protect requires states to implement measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human right of the individual including the infringement on his or her material resources. Here, as far as ESC rights are concerned, States are required to protect individual freedom of action and the use of resources against other subjects.

The obligation to fulfil requires the state to take measures necessary to ensure that each person within its jurisdiction is afforded the opportunity to obtain basic need satisfaction, as recognised in human rights instruments which cannot be secured through personal efforts. For example, with regard to the right to food, the obligation to fulfil implies both assistance in order to provide opportunities to obtain food and direct provisions of food or resources which can be accessed when no other possibility exists, due to e.g. unemployment, disadvantage or age, sudden crisis/disaster, or marginalisation. The chart below is illustrative of the aforementioned typology:

<p>I. RESPECT (Does not require a dedication of state resources)</p>
<p>II. PROTECT (Does not require a dedication of state resources)</p>
<p>III.(a) FULFIL Obligation to Promote and Inform (Does not require a dedication of state resources)</p> <p>-----</p> <p>-----</p> <p>III.(b) FULFIL Obligation to Provide</p>

II(e) CESC ANALYSIS: THE OBLIGATION “TO TAKE STEPS” AND “PROGRESSIVE ACHIEVEMENT”

Article 2, paragraph 1 of the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*) requires all States parties to take measures towards guaranteeing the full enjoyment of all *Covenant* rights for all individuals. Here, the adoption of legislation, administrative, economic, financial, educational and social measures, the establishment of action programs, the creation of appropriate bodies and the establishment of judicial procedures may be necessary to secure economic social and cultural rights, (hereinafter ESC rights), (General Comment no. 3, § 4).

The requirement of “progressive achievement” reflects the fact that full realisation of all ESC rights will generally not be able to be achieved in a short period of time, (General Comment no. 3, § 9). The “progressive obligation” component of the *Covenant* does not mean that only once a State reaches a certain level of economic development must the rights established under the *Covenant* be realised. The duty in question obliges all States parties, notwithstanding their level of national wealth, to move towards the realisation of ESC rights. Here, countries who start from a relatively low level on the development scale will have to comply with a lower degree of ESC rights realisation than developed nations as the *Covenant* only requires what is possible under the “minimum core” doctrine.

The progressive realisation concept should never be interpreted as allowing States to defer indefinitely efforts to ensure the enjoyment of the rights laid down in the *Covenant* as certain obligations are intended to be implemented immediately. The immediate application stipulation would apply especially to *Covenant* non-discrimination provisions and the obligation of States parties to respect and protect ESC rights.

Through its General Comment 3, the Committee on Economic, Social and Cultural Rights has further elaborated on the concept of progressive achievement. General comment 3 advises that the *Covenant* provides for the progressive realization of ESC rights within the context of the constraints placed on States due to the limits of available resources. Despite these constraints however, the *Covenant* imposes various obligations that are of immediate effect to bring about ESC rights realization. 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 realization is not to be misinterpreted as depriving *Covenant* obligations of all meaningful content as ESC rights realization objectives were designed to be flexible, reflecting the realities of the real world and attendant difficulties involved for countries in ensuring the full realization of said rights. The progressive realization concept thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Steps to bring about the full realization of ESC rights should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the *Covenant*. States should use “all appropriate means, which include but are not limited to: the adoption of legislative measures; judicial remedies for ESC rights violations; and appropriate administrative, financial, educational and social measures. Finally, General Comment 3 advises that there exists a minimum core obligation for States to ensure the satisfaction of, at the very least, minimum essential levels of each *Covenant* right that should be achieved with individual state and international assistance and cooperation.

II(f) CESCR ANALYSIS: NON-DISCRIMINATION AND EQUALITY UNDER THE ICESCR

Non-discrimination and equality are integral elements of the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*). Article 2, paragraph 2, requires States parties to ensure the provision of judicial review and other recourse procedures should discrimination occur in relation to the augmentation of *ICESCR* economic, social and cultural rights. This provision not only obliges governments to desist from discriminatory behaviour and to alter laws and practices which allow discrimination, it also applies to the duty of States parties to prohibit private persons and bodies, (third parties), from practising discrimination in any field of public life. Importantly, the grounds of discrimination mentioned in this provision are not exhaustive and thus certain other forms of unfair discrimination negatively affecting the enjoyment of *Covenant* rights, (for instance, discrimination on the basis of sexual orientation), may also be prevented.

III. STATE OBLIGATIONS UNDER THE PROPOSED OPTIONAL PROTOCOL

III(a) CESCR ANALYSIS: INTERNATIONAL OBLIGATIONS UNDER THE ICESCR

The question arises whether, apart from the domestic obligations accepted under the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*), 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".

Although during the *ICESCR* drafting process it was recognised that developing States would require some form of international assistance in order to advance economic, social and cultural rights, (hereinafter ESC rights), no consensus was reached on the degree of responsibility developed countries would accept in providing such assistance. Therefore, from the *travaux préparatoires* it cannot be deduced that the commitment to international co-operation would imply a legally binding obligation upon States to provide any particular form of assistance.

The Committee on Economic Social Cultural Rights, (hereinafter, the Committee), has stressed that international co-operation for development and thus for the realisation of ESC 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, (General Comment no. 3, § 14). Here, when making an evaluation of individual state progress towards *ICESCR* ESC rights realisation, the Committee takes into account the lack of state resources and international assistance/cooperation in support of same.

With regard to the meaning of *ICESCR* article 2(1) "international assistance and co-operation" and whether a complaint could be brought against a State for not providing this to augment the substantive realisation of *Covenant* rights, the envisioned Optional Protocol, (hereinafter OP), complaints procedure would be between state and individual/group victims. Within this dynamic, the international co-operation and assistance dimension/obligation would have nothing to do with the state/victim dichotomy and thus could not be linked to the *ICESCR* OP complaints process. Here, one should read the *ICESCR* article 2(1) obligation of progressive realisation as an obligation of the State Party trying to fulfil the obligation rather than as an obligation of other States to assist. It would be unhelpful to the discussions of the OP to allow it to take on a character of somehow being a State to State issue on whether there had been international assistance or not. The obligation has to be perceived as one of States Parties taking steps to achieve the realisation of the *Covenant* rights and one method under which *ICESCR* rights may be realised is through collective assistance and co-operation. There should not be a justiciable obligation on other States to provide specific assistance, however, the lack of means, including the lack of assistance, could be used to indicate why certain measures could not be undertaken.

III(b) COMPLAINTS UNDER AN *OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* AFFECTING STATES' RIGHT TO SELF-DETERMINATION / SOVEREIGNTY

Article 1 of the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*), sets forth the principle of "all peoples... right of self-determination." An area of concern questions whether a complaint under an Optional Protocol to the *ICESCR* could be validated regarding the enjoyment of the State's right to self-determination thereby politicising the role of the Committee on Economic Social Cultural Rights, (hereinafter, the Committee), should said body be appointed to adjudicate claims under this human rights mechanism. The possibility that a complaint affecting a State's right to self-determination would be validated under an OP to the *ICESCR* is unlikely as article 1 of the *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), is identical to article 1 of the *ICESCR*. Under the *ICCPR* article, the Human Rights Committee decided that there is no right of petition under its Optional Protocol because that article concerns a right of peoples whereas the Optional Protocol to the *ICCPR* concerns individuals. Here, it is logical to speculate that the same reasoning would be applied to a complaint lodged under *ICESCR* article 1 despite the fact that the Committee has previously acknowledged the possibility that ESC dimensions to the right of self determination could be the subject of a petitions procedure. Finally, it is possible that a Working Group discussing the draft Optional Protocol to the *ICESCR* could specify that there would be no right of petition with regard to a peoples' right of self-determination.

III(c) COMPLAINTS UNDER AN *OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* AS AFFECTING STATES' POLICY PRIORITIZATIONS

Questions have arisen concerning the possibility that a complaints procedure under the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter ICESCR or *Covenant*), coupled with the "immediate application" *Covenant* provision of article 2(1), could be used to question national public policy prioritisations. The aforesaid scenario is most unlikely under the envisaged Optional Protocol to the ICESCR, this contention being rooted in the general framework underpinning the resolution of international human rights complaints which employ three approaches in rectifying potential/actual human rights violations: political; quasi-judicial; and judicial. Under the ICESCR, the Committee on Economic Social Cultural Rights, (hereinafter, the Committee), is concerned with the provision of quasi-judicial remedies, however, the procedure employed is not judgment oriented, it is an extension of the political process highlighting constructive dialogue. *ICESCR* complaints concerning public policy would not lend themselves to the draft Optional Protocol remedial procedure as this is the classic area of the *ICESCR* State reporting system that builds a constructive and co-operative dialogue between States Parties and Committee members. Within this process, the Committee only urges that *Covenant* rights and obligations be utilised as checklists in deciding national priorities. It is thus not the function of the Committee to stand in the shoes of the State prognosticating on the appropriateness of national resource allocation as the Committee only focuses on irrational state policies that no reasonable political actor would condone. Here, while the Committee would want to offer a wide margin of appreciation, there would be flagrant cases, e.g. where there is State inaction in a particular regard or where the State is acting in a clearly discriminatory fashion, where the Committee could properly and confidently step in to offer remedial suggestions.

III(d) Positive Obligations Stemming From State Party Recognition Of Economic, Social And Cultural Rights

It is often claimed that economic social and cultural rights, (hereinafter ESC rights), are "relative rights" with a variable situational content whereas the rights guaranteed by the *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), are considered absolute. That this dichotomy is artificial receives support from the fact that the scope and content of the *ICCPR* is not self-evident and continues to be the subject of serious interpretative efforts. For example, with regard to the civil and political right to be free from torture, inhumane and degrading treatment, a universally accepted definition regarding the scope and content of this supposed "absolute" right remains elusive. Indeed, the scope and content of civil and political rights are constantly maturing in an effort to keep these constructs applicable to an ever-evolving global community.

As the realisation of ESC rights would require some degree of "positive" state action and resources, it is postulated that attendant enforcement costs would far exceed the costs incurred for the implementation and maintenance of civil and political rights. It is thus often submitted that ESC rights' realisation could only occur progressively. Support for this notion is also found in the contention that civil and political rights are absolute and fundamental with invariable content imposing negative state obligations that are satisfied relatively easily. This argument is countered by the fact that the implementation and maintenance of civil and political rights does require positive State action and resources. Indeed, the reality is that the full realisation of civil and political rights is heavily dependent both on the availability of resources and the development of necessary supportive State/societal structures. Here, for example, the right to a fair trial requires the establishment and maintenance of functioning judicial, law enforcement and penal systems. The European Court of Human Rights supported the contention that the implementation and maintenance of *ICPPR* rights does require positive State action and resources when it clarified a number of positive state obligations attendant on the civil and political rights guaranteed under the *European Convention on Human Rights*. Given this and the aforementioned examples, it is thus apparent that the difference in state obligations flowing from civil and political rights as opposed to ESC rights is more a matter of degree rather than a true difference in nature.

IV. REMEDIES FOR ICESCR VIOLATIONS

IV(a) THE DRAFT OPTIONAL PROTOCOL TO THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*: REMEDIES FOR COVENANT VIOLATIONS

Remedial possibilities under an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*), Optional Protocol, (hereinafter *OP*), could include:

(a) *Declaratory pronouncements.* Looking to the practice of bodies such as the European Social Charter Committee, the European Committee for Social Rights and/or the International Labour Organisation Freedom of Association Committee, these bodies remedy successful complaints by way of declaratory pronouncements which are left to the discretion of the accountable States in terms of their substantive redress. This remedial measure is also employed by the United Nations Human Rights Committee that employs a standard formula in calling upon *International Covenant on Civil and Political Rights*, (hereinafter *ICCPR*), offending States to take effective and enforceable remedial action which must be communicated to the Human Rights Committee within a certain time period, typically 90 days. As is also envisaged under an *ICESCR* Optional Protocol, the Human Rights Committee occasionally recommends specific remedial measures to for *ICCPR* violations.

(b) *Compensation.* One remedy that may be considered under an *ICESCR OP* is the recommendation that an accountable State pay victim(s) compensation as validated through the practice of the Human Rights Committee, the Committee Concerned with the Elimination of Racial Discrimination and the International Labour Organisation Freedom of Association Committee that have occasionally recommended State compensation to be paid to specific victims.

(c) *The enactment or enforcement of legislation.* There will be situations where the Committee on Economic Social Cultural Rights², (hereinafter, the Committee), will be asked to make recommendations with regard to individual State social policies to do with, for example, education, housing, social security or healthcare. Here, the Committee might recommend States enact or enforce legislation that, in very general terms, meets *Covenant* requirements. There is, however, a question as to how far Committee recommendations may go where they concern the allocation of finite State resources. In making such recommendations the Committee would no doubt follow the practice of the Human Rights Committee and the European Social Charter Committee that have advocated similar remedial actions while shying away from touching on States' resource allocation priorities. Finally, the Committee could make remedial recommendations with regard to bringing State administrative practices more in line with *ICESCR* obligations.

(d) *A public law judicial review approach.* Where *OP* complaints concern *Covenant* rights fulfilment obligations that involve large-scale amounts of money, the Committee cannot easily or comfortably investigate situations and advise States how to allocate their resources. This said, a public law judicial review approach could be adopted to look into the impugned area to determine whether the accountable State has a policy at all and if so, whether it is reasonable.

² For the purposes of this information sheet it is assumed that the Committee would be the *ICESCR* monitoring body under the *OP* if and when it comes into force.

Further, the Committee could examine the State policy to determine if it is fundamentally flawed on a point of substance. On the national level, the aforementioned process was utilised by the South African Constitutional Court in *Government of the Republic of South Africa v. Grootboom*. Here, through an examination of South African housing policy, the Court found that no provision had been directed at ameliorating the conditions faced by individuals in desperate need of basic housing. Flawed in a substantive regard, the housing policy was held to be unreasonable. Within the context of the right of access to housing, the Court held that State policy, in order to be reasonable, had to take account of the different socio-economic levels of the South African population and could not ignore those whose needs were most urgent.

(e) *An examination of regressive State financial measures.* The Committee could examine State regressive financial measures as they impact upon ESC rights domestic policies and comment on whether there was justification for the cutbacks.

(f) *Remedial actions.* There are numerous context oriented specific remedial actions that the Committee might avail itself of as seen through other international remedial mechanisms. For example the International Labour Organisation Freedom of Association Committee, in confronting the situation of the unjustified detention of trade union representatives, recommended their release.

(g) *Friendly settlement.* There could be OP remedial provisions concerning “friendly settlement” procedures. A friendly settlement procedure is used very successfully and with increasingly frequency by the European Court of Human Rights which avoids the need for a final decision on a complaint merits by the way of a recommendation.

V. GENERAL

V(a) THE DRAFT OPTIONAL PROTOCOL TO THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*: HISTORICAL ARGUMENTS FAVOURING ADOPTION

The draft Optional Protocol, to the *International Covenant on Economic Social and Cultural Rights*, (hereinafter *ICESCR*), proceeds from the view that the enhancement of human rights is necessary for the simultaneous promotion of domestic and international economic development. Traditionally, economists have argued that governments should allocate goods and services, so-called public goods, characterized by non-rival consumption or positive externalities, that the market could not. Education, environmental protection, the provision of information and safety and security are examples of these public goods whose absence characterizes impoverishment. Indeed, serious economic social and cultural deprivations have proven throughout history to be significant political destabilizing factors for concerned states. Within this context, development may be viewed as being dependent on economic and social policies that are conducive to the well-being of the population so as to address both market and State failures. The advancement of economic, social and cultural rights through an Optional Protocol to the *ICESCR* would add to a more widespread attainment of public goods and would thus further economic and political stability, especially with reference to fledgling democratic regimes. This approach focuses on problems such as the lack of human dignity and freedom which, if denied, lead to social, economic and political upheavals.

V(b) COMPLAINTS UNDER THE DRAFT *OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*: STANDING, TIMING AND ACCOUNTABILITY

Standing

Under the draft Optional Protocol, (hereinafter draft OP), to the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or *Covenant*), at a minimum it is theorised that individual and group victims of State *Covenant* violations would possess standing to lodge complaints. With regard to claims being brought by non-governmental organisations, (hereinafter NGO's), on behalf of group or individual victims, most members of the Committee on Economic Social Cultural Rights, (hereinafter, the Committee), support the position that, although *locus standi* questions should be interpreted broadly, there must be a specific individual or group victim as to open the Optional Protocol mechanism to victimless complaints could risk Committee politicisation.

Timing

Article 3(3)(a) of the draft OP provides that a complaint cannot be brought before the Committee until all domestic remedies have been exhausted. The "exhaustion of all domestic remedies" provision is standard in respect of international claims/communications procedures. Following the practice of the Human Rights Committee and the Inter-American Commission, complainants must proceed through national legal systems and avail themselves of domestic remedies before an international complaint is launched unless the provision of domestic remedies are mired in excessive delay. Where there is clearly an unreasonable delay, it is possible that an *ICESCR* Optional Protocol complainant could proceed.

Offending Parties Under the Covenant

It is theorised that complaints under an Optional Protocol to the *ICESCR* must be launched against the States Parties to the *Covenant* as they would be the only obligation holders under this international instrument. With regard to potential complaints against trans-national corporations and other non-state actors, as these entities are not *Covenant* signatories, they cannot be made directly liable. This said, trans-national corporations and other non-state actors may still be held *de facto* accountable under the *ICESCR* through the positive obligations that exist on States in respect of all non-state actors either wholly or partially within their jurisdictions.

V(c) THE DRAFT OPTIONAL PROTOCOL TO THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*: DEVELOPING NATION CONCERNS

A point of concern over an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter ICESCR or *Covenant*), emanates from developing nations that have either explicitly or implicitly voiced opposition to this draft international instrument rooted in the fear that a directly applicable fully binding ICESCR could lead to a human rights imbalance wherein developing nations would be singled out for non-fulfilment of economic social and cultural rights, (hereinafter ESC rights), criticism due to their financial inability to guarantee the full realisation of *Covenant* rights. In response, it must be pointed out that the ICESCR concerns itself with the basic satisfaction of certain individual/group core rights that are well within the means of developing nations to satisfy. Coupling State discretion with the international communities' obligation to provide technical assistance and co-operation in the "progressive realisation" of ESC rights means that developing nations would not be lead into a human rights imbalance wherein they would be singled out for the non-fulfilment of ESC rights.

V(d) THE CESCR: PROGRESSING WITH STATE PARTIES TOWARDS THE RECOGNITION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Introduction

The primary function of the Committee on Economic, Social and Cultural Rights, (hereinafter the Committee), is to monitor the implementation of *the International Covenant on Economic, Social and Cultural Rights*, (hereinafter *Covenant*) by States. Here, the Committee strives to maintain a constructive dialogue and seeks to determine, through a variety of means, whether or not the norms contained in the *Covenant* are being adequately applied by States and how the implementation and enforcement of this instrument may be improved in order that all people can enjoy *Covenant* enshrined rights.

Drawing on the legal and practical expertise of its members, the Committee examines reports and submissions of States parties and, through concluding observations, provides suggestions and recommendations such that economic, social and cultural rights may be more effectively secured.

The following non-exhaustive examples illustrate the positive effect that both the *Covenant* and Committee suggestions and recommendations may have in influencing various States parties to practically implement their *Covenant*-based obligations.

Canada

In keeping with Committee recommendations, the Federal Government reinstated the Court Challenges Program which provides funding for Constitutional test cases promoting the rights of official language minorities and equality-seeking groups. See document no.: E/1994/104/Add.17, State Party Third Periodic Report: Canada, 20/01/98.

Cyprus

Most of the economic, social and cultural rights embodied in *Part II* of the *Covenant* are now safeguarded by the *Constitution of Cyprus*. Further, the *Covenant* forms part of the municipal law of Cyprus and has thus acquired superior force to any other municipal law. See document no.: E/1994/104/Add.12, State Party Third Periodic Report: Cyprus, 06/06/96.

Egypt

The Constitutional Court of Egypt invoked the provisions of the *Covenant* to acquit rail workers who were prosecuted for going on strike in 1986 and declared that the Penal Code should be amended to allow the right to strike. See document no.: E/C.12/1/Add.44, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, 23/05/2000.

Finland

In keeping with Committee recommendations, an important legislative initiative was introduced whereby provisions relating to principal economic, social and cultural rights were incorporated into the Constitution of Finland. In June 1999, these fundamental rights provisions were transferred nearly unaltered from the *Covenant* to the Constitution, becoming effective on 1

March 2000. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99.

Committee recommendations may have also assisted in ensuring that human rights issues are one of the standard subject matters in judges' further training courses which have included economic, social and cultural rights and the administration of justice. Further, in 1995, a separate fundamental rights and human rights section comprising the texts of the principal human rights agreements was included in the Laws of Finland. Prior to this innovation, international agreements ratified by Finland were published only in a separate Treaty Series of the Statute Book. Thanks to this change, it has become easier for both civil servants and lawyers to take note in their work of human rights agreements which are a part of legislation applied in Finland. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99.

Also in keeping with Committee recommendations, The Ministry of Labour has undertaken to develop the principle of gender mainstreaming in its own branch of the administration, particularly in its employment policy. The gender perspective is taken into account, for example, in the development of labour legislation, vocational guidance and projects related to the European Union (EU) structural funds. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99.

Finally, the Committee recommended that Finland consider the introduction of a general minimum wage system which would also cover employees who are not protected by collective agreements. In response, a Finish Tripartite Contracts of Employment Act Committee is currently preparing a proposal for a general reform of the *Contracts of Employment Act*. See document no.: E/C.12/4/Add.1, State Party Fourth Periodic Report: Finland, 09/12/99..

Germany

Germany is at present actively promoting economic, social and cultural rights both nationally and internationally through recent positive developments concerning said rights, such as: the March 2001 consultation organized by the State on the right to food; the State party's efforts at the United Nations Commission on Human Rights to establish the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; and its revised and more favourable position on a draft Optional Protocol to the *Covenant*. See document no.: E/1994/104/Add.14, State Party Third Periodic Report: Germany, 17/10/96.

In keeping with Committee recommendations, departing from its previous practice, the Federal Government involved the NGO forum "World Summit for Social Development" in the preparation for its fourth periodic report to the Committee on the implementation of the *Covenant*. See document no.: E/1994/104/Add.14, State Party Third Periodic Report: Germany, 17/10/96.

Finally, the reintroduction of the continuation of full wage payments in the event of sickness announced in November 1998 is mentioned as a positive example of the new Federal Government's policy to implement *Covenant* obligations. See document no.: E/1994/104/Add.14, State Party Third Periodic Report: Germany, 17/10/96.

Portugal

Portugal has extended efforts to implement Committee recommendations in particular through legislative measures to promote equality between men and women. See document no.: E/1990/6/Add.6, State Party Second Periodic Report: Portugal, 22/07/94.

Sweden

In its concluding observations the Committee expressed its concern over the problem of child pornography and the lack of information on this issue in Sweden. It urged the government to intensify its efforts to combat child pornography and increase measures for monitoring and the registration of all such cases. It also referred to the need to ensure that appropriate penalties are imposed for such offences. Further to Committee recommendations, on 1 January 1999, new Swedish legislation extending criminal liability for association with child pornography came into force. Here, virtually all association with child pornography images, including possession, constitutes a criminal offence. The legislation applies to media of all kinds including the electronic environment. See document no.: E/C.12/4/Add.4, State Party Fourth Periodic Report: Sweden, 08/08/2000.

Tunisia

Many new laws and modifications of existing laws were inspired by the obligations assumed under the *Covenant* as the enshrined rights form part of Tunisian law by virtue of the Constitutional provision that an international treaty ratified by Tunisia becomes part of domestic law. See document no.: E/C.12/1/Add.36, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Tunisia, 14/05/99.

V(e) THE CESCR: SUMMARY OF GENERAL COMMENTS ONE THROUGH FOURTEEN

General Comment 1 - Reporting by States Parties - Part IV, ICESCR

General Comment 1 advises that the *International Covenant on Economic, Social and Cultural Rights*, (hereinafter ICESCR or the *Covenant*), State reporting obligations are designed to assist nations in fulfilling their *Covenant* obligations and to provide a basis on which *Covenant* compliance can be monitored in the aim of procuring the substantive fulfillment of economic, social and cultural rights, (hereinafter ESC rights). Further, State reporting mandates that comprehensive reviews are undertaken with respect to national legislation and administrative rules/procedures/practice. Coupled with the result of opening government ESC rights policies to public scrutiny, State reports should also provide a basis on which nations, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of *Covenant* obligations. This in turn will enable the aforementioned parties to facilitate an exchange of information so as to develop a better understanding of the individual domestic and common problems faced by States and measures that might promote ESC right realization.

General Comment 2 - International Technical Assistance Measures - Art. 22, ICESCR

General Comment 2 advises that article 22 of the ICESCR establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies, any matters arising out of State reports submitted under the *Covenant* "which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the ... *Covenant*" which could lead either to general or specific recommendations in addressing pertinent ESC rights realization issues. General Comment 2 thus recognizes that civil, political, economic, social and cultural rights are indivisible and interdependent and therefore efforts to promote one set of rights should also take full account of related human rights. Further, recognition is given to the importance of integrating human rights concerns into development activities and the intimate relationship that should be established between development activities and efforts to promote respect for human rights in general, and ESC rights in particular.

Comment 3 - The Nature of States Parties Obligations - Art. 2, ICESCR

General comment 3 advises that the *Covenant* provides for the progressive realization of ESC rights within the context of the constraints placed on States due to the limits of available resources. Despite these constraints however, the *Covenant* imposes various obligations which are of immediate effect to bring about ESC rights realization. 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 realization is not to be misinterpreted as depriving *Covenant* obligations of all meaningful content as ESC rights realization objectives were designed to be flexible, reflecting the realities of the real world and attendant difficulties involved for countries in ensuring the full realization of said rights. The progressive realization concept thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Steps to bring about the full realization of ESC rights should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the *Covenant*. States should use "all appropriate

means, which include but are not limited to: the adoption of legislative measures; judicial remedies for ESC rights violations; and appropriate administrative, financial, educational and social measures. Finally, General Comment 3 advises that there exists a minimum core obligation for States to ensure the satisfaction of, at the very least, minimum essential levels of each *Covenant* right that should be achieved with individual state and international assistance and cooperation.

General Comment 4 - The Right to Adequate Housing - Art. 11(1), ICESCR

General Comment 4 advises that the human right to adequate housing, as derived from the right to an adequate standard of living, is of central importance for the enjoyment of all ESC rights and cannot be viewed in isolation from other human rights contained in the ICESCR, the *International Covenant on Civil and Political Rights*, (hereinafter ICCPR), and other applicable international instruments. Here, the right to housing should not be interpreted in a narrow or restrictive sense but rather it should be seen as the right to live somewhere in security, peace and dignity, the concept of adequacy being particularly significant in relation to this right. Certain aspects of the right to housing that must be taken into account in any particular context are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

Regardless of the state of development of any given nation, General Comment 4 advises that certain immediate steps should be taken to promote the right to housing, the most important of which would require the abstention by Governments from certain negative housing practices. This abstention should be coupled with a commitment to the facilitation of self-help measures directed at social groups living in the most unfavourable conditions. The aforementioned will almost invariably require the adoption of a national housing strategy which "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals, the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of necessary measures". Within this, General Comment 4 advises that there exists a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of adequate housing incumbent upon every State and that this should be secured through individual state efforts and international cooperation.

General Comment 5 - Persons with Disabilities

General Comment 5 advises that *Covenant* provisions apply to persons with disabilities as this instrument applies fully to "all" members of society. The obligation of States towards this group is to take positive action to reduce public/private sector structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required. Methods to be used by States in seeking to implement their obligations under the *Covenant* towards persons with disabilities include: the need to ascertain, through regular monitoring, the nature and scope of the problems currently faced by persons with disabilities; the need to adopt appropriately tailored policies and programs to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or, where necessary, seek international cooperation and assistance. Here, policy-making and program implementation should be undertaken on the basis of close consultation with, and the involvement of representative groups of the persons concerned. In the case of persons with

disabilities, everything possible should be done to enable such persons, when they so wish, to live with their families, maintain employment, obtain medical care/support services, have access to adequate food, accessible housing, basic material needs and the benefits of scientific progress and its applications.

General Comment 6 - The Economic, Social and Cultural Rights of Older Persons

General Comment 6 advises that the *Covenant* applies to the elderly through analogy with "the right of everyone to social security, including social insurance" and through the fact that the *Covenant's* provisions apply fully to "all" members of society. This General Comment notes that State parties to the *Covenant* are obligated to pay particular attention to the promotion and protection of the ESC rights of older persons as they are an extremely vulnerable group. The methods States are to employ in fulfilling the obligations they have assumed under the *Covenant* in respect of older persons are basically the same as those for the fulfillment of other obligations and include: the need to determine the nature and scope of the problems faced by the elderly through regular monitoring; the need to adopt properly designed policies and programs to meet targeted deficiencies; the need to enact legislation when necessary and to eliminate any discriminatory legislation; and the need to ensure the relevant budgetary support or, as appropriate, to request international cooperation. Finally, General Comment 6 advises that States must take appropriate steps to safeguard the rights of the aged to: employment and safe working conditions until their retirement; social security; family access and support; an adequate standard of living; access to proper medical care; education; and access the benefits of scientific progress and its applications.

General Comment 7 - The Right to Adequate Housing: Forced Evictions - Art. 11.1, ICESCR

General Comment 7 advises that forced evictions are *prima facie* incompatible with the *Covenant* as all persons should possess a degree of security of domicile tenure which guarantees legal protection against evictions, harassment and other threats. States must refrain from this practice and ensure that the law is enforced against agents or third parties who carry out forced evictions. Legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which provide the greatest possible security of tenure to occupiers of houses/land and are designed to strictly control the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Particular care should be taken with regard to women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups who all suffer disproportionately from the practice of forced evictions. Finally, where there are forced evictions which result in homelessness, General Comment 7 advises that States must take all appropriate measures, to the maximum of available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

General Comment 8 - The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights

General Comment 8 recognizes that economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally. It advises that no matter the circumstances, such sanctions should always take full account of the provisions of the *Covenant*. In considering sanctions, it is essential to distinguish between the basic objective of applying

political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. General Comment 7 further advises that two sets of obligations flow from these considerations. First, the State affected by the imposition of sanctions must not nullify or diminish its relevant obligations under the *Covenant*. Second, the party or parties responsible for the imposition, maintenance or implementation of sanctions must take fully take ESC rights into account when designing an appropriate sanctions regime. Further, effective monitoring, which is always required under the terms of the *Covenant*, should be undertaken throughout the period that sanctions are in force. Finally, the sanction imposing body/bodies have an obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

General Comment 9 - The Domestic Application of the Covenant

General Comment 9 advises that the central obligation in relation to the *Covenant* is for States parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the *Covenant* adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account. This flexibility however, coexists with the obligation upon each State party to use all means at its disposal to give effect to *Covenant* rights. Here, States should modify their domestic legal orders as necessary to both give effect to their treaty obligations and to provide effective domestic judicial remedies for violations of ESC rights. Whatever the preferred methodology for domestic implementation, several principles follow from the duty to give effect to the *Covenant* and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfillment of *Covenant* obligations. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Third, while the *Covenant* does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable.

General Comment 10 - The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights

Article 2, para. 1, of the *Covenant* obligates each State party "to take steps ... with a view to achieving progressively the full realization of the (*Covenant*) rights ... by all appropriate means". General Comment 10 advises that one of the means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights. Here, it is acknowledged that national human rights institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. The types of activities that can be undertaken in relation to these rights are said to be: (a) the promotion of educational and information programs designed to enhance awareness and understanding of ESC rights; (b) the scrutinizing of existing laws and administrative acts, as well as draft Bills and other proposals to ensure that they are consistent with the requirements of the *Covenant*; (c) the provision of technical advice; (d) the identification of national-level benchmarks against which the realization of *Covenant* obligations can be measured; (e) conducting research to ascertain the extent to which particular ESC rights are being realized, (f) monitoring compliance with specific *Covenant* rights; and (g) the examination of complaints alleging infringements of applicable ESC rights standards within States.

General Comment 11 - Plans of Action for Primary Education - Art. 14, ICESCR

Article 14 of the ICESCR requires each State party which has not been able to secure compulsory primary education, free of charge, to work out and adopt, within two years, a detailed plan of action for the progressive implementation, within a reasonable number of years of the principle of compulsory primary education free of charge for all. General Comment 11 deems this right as being one of vital. State plans to implement compulsory primary education, free of charge to all, must specifically set out a series of targeted implementation dates for exchange of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question.

International assistance and cooperation and action are of particular relevance in this situation as where a State party is clearly lacking the financial resources and/or expertise required to "work out and adopt a detailed plan, the international community has a clear obligation to assist.

General Comment 12 - The Right to Adequate Food - Art. 11, ICESCR

General Comment 12 affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels. The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or the means for its procurement. It shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and/or other specific nutrients. General Comment 12 proceeds to note that the right to adequate food will have to be realized progressively. This imposes an obligation to move as expeditiously as possible towards that goal. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger even in times of natural or other disasters. The core content of the right to adequate food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time frame for the implementation of necessary measures and States should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food. Especially for this right, international assistance is a priority as States have a joint and individual responsibility to cooperate in providing assistance in accordance with ability.

General Comment 13 - The Right to Education - Art. 13 and Art. 14, ICESCR

General Comment 13 advises that education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. It plays a vital role in empowering women, safeguarding children from exploitative and/or hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. This said, the importance of education is not just practical: a

well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence. While the precise and appropriate application of the terms will depend upon the conditions prevailing in each particular State, General Comment 13 advises that education in all its forms and at all levels should exhibit the following interrelated and essential features: availability; accessibility; acceptability; and adaptability. Here, the progressive introduction of free education means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. Finally, the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.

General Comment 14 - The Right to the Highest Attainable Standard of Health - Art. 12 ICESCR

General Comment 14 advises that health is a fundamental human right indispensable for the exercise of other human rights. The realization of the right to health may be pursued through numerous complementary approaches, such as the formulation of health policies, or the implementation of health programs developed by the World Health Organization, (WHO), or the adoption of specific legal instruments. Here, the right to health is closely related to and dependent upon the realization of other human rights. The notion of "the highest attainable standard of health takes into account both the individual's biological and socioeconomic preconditions and a State's available resources. General Comment 14 interprets the right to health as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and drinkable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including information on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in particular States: availability; accessibility; acceptability; and quality.

State parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind and the obligation to take steps towards full right realization. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health. Here, States have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the *Covenant*, including essential primary health care.