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Intervention of the International Commission of Jurists

The Realization of Economic, Social and Cultural Rights

Mr Chairman,

Over the years the Sub-Commission has contributed to establishing that economic, social and cultural rights are on equal footing to civil and political rights. It is therefore with considerable concern that the ICJ notes the approach adopted by the Special Rapporteur in the Preliminary Report on Non-discrimination as enshrined in article 2, paragraph 2, of the *International Covenant on Economic, Social and Cultural Rights*. Of particular concern is the way in which this Preliminary Report addresses the legal nature of economic, social and cultural rights, and the grounds of discrimination.

The Legal Nature of Economic, Social and Cultural Rights

In the past, the *ICESCR* has suffered from an assumption that it places no real and legal obligations on states and that the instrument is merely a statement of aspirations. This erroneous notion has been dispelled many times since the Covenant was adopted in 1966, not only in expansive academic writings that extend well beyond those canvassed in the Preliminary Report, but also in the persuasive legal instruments drafted to help identify the nature and scope of state obligations with regard to economic, social and cultural rights, such as the *Limburg Principles* of 1986 and the *Maastricht Guidelines* of 1996.

The consensus of 170 states at the Vienna World Conference on Human Rights more than 10 years ago should have dispelled the vestiges of any historical political or ideological reasons for dividing economic, social and cultural rights from civil and political rights. The Vienna Declaration unequivocally confirmed the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Nevertheless, in comparison to civil and political rights, the precise legal meaning and content of economic, social and cultural rights is less well developed and understood. This is not because these rights are inherently more complex or difficult to understand and define, but because the human rights movement, the academic community and national governments have, until recently devoted little time and attention to understanding and protecting economic, social and cultural rights. Some say that unlike civil and political rights, economic and social rights are not suitable for judicial consideration because of a perceived uncertainty surrounding the precise content of the rights and the effective means of achieving the ends in question. Thus economic, social and cultural rights

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have been positioned as merely policy aspirations which are not suited to individual legal enforcement.

However, the justiciability of these rights has been proven many times over the last five decades in jurisdictions around the world. The experiences of Argentina, Bangladesh, Canada, Colombia, Costa Rica, Finland, France, Germany, Guyana, Hungary, India, Japan, Latvia, Mauritius, Mexico, New Zealand, Nigeria, the Philippines, Poland, Portugal, Spain, South Africa, Switzerland, Venezuela and numerous other nations in adjudicating economic, social and cultural rights demonstrates the leading role adjudicative procedures may play towards the further realisation of such rights.

A leading example of this comes from South Africa whose 1996 Constitution encompassed a wide range of economic, social and cultural rights on an equal footing with civil and political rights. With such recognition, South African Courts have created a foundation of jurisprudence moving towards the improved protection of economic, social and cultural rights. In cases such as *Grootboom*[1] and *Soobramamy*[2] the Constitutional Court of South Africa decided that the justiciability of economic, social and cultural rights cannot be determined in the abstract, but must be given real force. In these cases the Court confirmed the interdependence and indivisibility of all rights, and developed a test of 'reasonableness' as a method of asking whether the state was doing enough to implement its obligation to progressively realise the right in question given the socio-economic context and the capacity of institutions to implement national programmes. In the *Grootboom* case the Court found the State had failed in its obligation to ensure that everybody was entitled to have access to at least basic shelter, due to the way in which the national housing programme was implemented (it failed to provide a mechanism for emergency relief for those in desperate need). However, in the case of *Soobramany*, regarding the provision of renal dialysis treatment at a state hospital, the guidelines for treatment were found to be reasonable and applied fairly and rationally in the context. In looking at these cases it is clear that when adjudicating economic, social and cultural rights a balance can be struck between the role of the courts to oversee the state's compliance with its duties and the role of both parliament and executive to make and implement laws and policies: courts cannot make decisions on economic, social and cultural rights in a vacuum.

These experiences of building on broad constitutional protection of all human rights to create a framework of justiciability for economic, social and cultural rights, have been mirrored in numerous other countries in both the developed and developing world, for example Finland and Colombia. Most, if not all, nations throughout the world have recognized that certain aspects of economic, social and cultural rights are justiciable before national Courts and Tribunals.

Economic, social and cultural rights, like civil and political rights, encompass both negative and positive state obligations. This is clear from decades of state practice and practical experience in the implementation of economic, social and cultural rights. Both sets of rights contain positive and negative obligations; including obligations to respect, protect and fulfil-facilitate and fulfil-provide.

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[1] *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC)

[2] *Soobramoney v Minister of Health, KwaZulu-Natal*, 1997 (12) BCLR 1696 (CC)

The obligation to *respect* requires States parties to refrain from interfering with the enjoyment of *Covenant* enshrined economic, social and cultural rights. It requires State parties to abstain from actions that prevent persons from using available material resources in the way they deem best to satisfy basic needs. In the same way, civil and political rights are respected when States comply with their obligation to abstain from interfering with their enjoyment. The obligation to *respect* is violated when rights are taken away or interfered without justification, in an improper manner, or without the provision of compensation or other suitable alternatives: for example in the context of economic, social and cultural rights, a violation of the obligation to *respect* would be the forced eviction of slum-dwellers without notice and without attempts to find alternative accommodation; in the context of civil and political rights, a violation would be a discriminatory or unjustifiable interference with the right to freedom of expression and assembly.

The obligation to *protect* requires States parties to prevent *ICESCR* rights abuses by third parties. It requires States to implement measures necessary to prevent other individuals or groups, (third parties), from violating the integrity, freedom of action, or other human rights of the individual including the infringement on his or her material resources. Here, as far as economic social and cultural rights are concerned, States parties are required to protect individual freedom of action. For instance, a government may be required to intervene if the implementation of a particular legislative framework resulted in an infringement of economic, social and cultural rights and entitlements. Also, if the activities of private actors, individuals or corporations, impede or deny access to economic, social and cultural rights there arises an obligation to *protect*. For example, a failure to prevent a company from polluting the environment and contaminating the surrounding areas can result in a breach of the duty to protect the right to food and water. If one is to compare this with civil and political rights, it is similar to the requirement that states implement measures to prevent actions that infringe upon a person's ability to exercise their civil or political freedoms. For example, a homeless person's right to vote can be infringed by legislative provisions requiring a fixed address for entry on the electoral role. Failure of the state to take adequate measures to provide alternative solutions to this problem would be in violation of their obligation to *protect* the right to vote.

The obligation to *fulfil-facilitate* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and means to ensure the realisation of *Covenant* rights. Finally, the obligation to *fulfil-provide* requires States to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal. For example, with regard to the right to food, the obligation to *fulfil-facilitate* suggests State party assistance to provide informational and other opportunities for persons to obtain food whereas the obligation to *fulfil-provide* implies the direct provision of food or resources when no other alternatives exist due to unemployment, disadvantage, age, sudden crisis/disaster, marginalisation etc. Again, these obligations mirror similar obligations in the realm of civil and political rights, where States are positively obliged to facilitate the realisation of rights, for example through franchisement, as well as being obliged to directly provide the resources required to fulfil rights, for example through investment in a properly functioning legal system.

It is not only economic, social and cultural rights which may require significant resource allocation by states in order to fulfil these obligations. Civil and political rights, far from being

limited to containing merely negative obligations, involve positive obligations and a requirement on the part of the state to make policy decisions regarding resource allocation. For example, the prohibition against torture and the obligations contained in the *Convention Against Torture* can only be fulfilled if positive steps are taken to implement the measures deemed essential to fulfilment. Article 11 of the *Convention Against Torture* requires states to undertake systematic review of interrogation rules, instructions, methods and practices. Article 10 imposes upon parties an obligation to conduct education and training for law enforcement personnel, and Article 12 requires investigation in possible cases of torture. Thus in order to fulfil the prohibition against torture as set out in Article 7 of the *International Covenant on Civil and Political Rights*, it is not sufficient to simply issue instructions directed towards the eradication of torture or to enact legislation prohibiting its use, but rather expenditure by the state is required to fulfil these positive obligations such as training, systematic reviews and investigations. These resource allocation requirements can be significant, for example the building of adequate prison facilities.

In this way civil and political rights, with all the positive obligations they contain, are similar to economic, social and cultural rights. However, the ability to define the scope and content of these rights and their justiciability is not in question, and nor should it be any different with economic, social and cultural rights. Article 2, paragraph 1 of both Covenants require all States parties to take measures to guarantee the full enjoyment of all *Covenant* rights for all individuals. Both need governments to adopt legislation, take administrative, economic, financial, educational and social measures, establish action programs, create appropriate bodies and establish of judicial procedures.

The progressive realisation concept set out in Article 2 paragraph 1 should never be interpreted as allowing States to defer indefinitely efforts to ensure the enjoyment of the rights. Certain obligations are intended to be implemented immediately. This is especially true in relation to *Covenant* non-discrimination provisions and the obligation of States parties to respect and protect economic, social and cultural rights. The concept of progressive realization should not be misinterpreted as depriving *Covenant* obligations of all meaningful content.

The ICJ believes that the assertions in the Preliminary Report that economic, social and cultural rights are normatively different to civil and political rights in that they are not justiciable or enforceable is flawed. The assertion that economic, social and cultural rights contain only positive obligations in contrast to civil and political rights which contain only negative State obligations is false and has been recognised to be so for many years. A belief that the progressive nature of economic, social and cultural rights diminishes their legal status and undermines their value as real and realisable rights is erroneous. In the opinion of the International Commission of Jurists, the endorsement of such claims is detrimental to the promotion and protection of the principles of universality, interdependence, indivisibility and interrelatedness of all human rights. It is on this basis that we strongly encourage the Sub-Commission to ensure that future reports on this topic more thoroughly reflect the depth and extent of contemporary views regarding economic, social and cultural rights.

Grounds of Discrimination

The ICJ expresses its disappointment that the Preliminary Report on Non-discrimination as enshrined in article 2, paragraph 2, of the *ICESCR* shuns the question of grounds of

discrimination. In the light of the unfortunate debate at last year's session of the Sub-Commission around sexual orientation, the ICJ had hoped that the study of the prohibition of discrimination would have clearly reaffirmed the prohibition of discrimination on the ground of sexual orientation. It is not encouraging to see that the report avoids the issue, while the Committee on Economic, Social and Cultural Rights has repeatedly and explicitly included sexual orientation in the prohibited grounds.[3] Similarly, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child and many special procedures of the Commission have denounced discrimination and other human violations committed against gay, lesbian, bisexual and transgender persons. These acts of states are not a matter of culture. They constitute violations of human rights as accepted by the expert bodies of the UN human rights system.

An Optional Protocol to the Covenant

The ICJ believes that effective protection against discrimination on any grounds can only occur if non-discrimination is secured through a mechanism which will ensure full enforceability of these justiciable principles.

Since 1992 the clear view of the Sub-Commission that an Optional Protocol to the *ICESCR* should be drafted has made a difference. In 1996 the Sub-Commission called for the elaboration of an Optional Protocol, and in each of the years 2000, 2001, 2002 and 2003 the Sub-Commission urged the Commission on Human Rights to mandate an open-ended working group to draft the substantive text of an Optional Protocol. In 2003 the Commission on Human Rights established a working group to examine the elaboration of an Optional Protocol to the *ICESCR*. This was an important step as it signaled the beginning of serious discussion amongst states about an Optional Protocol.

The ICJ considers that an Optional Protocol will be an indispensable tool in further specifying the legal content and scope of *Covenant* enshrined rights to assist with their implementation. As a complaints mechanism and an inquiry procedure, an Optional Protocol to the *ICESCR* could significantly contribute towards the realisation of *Covenant* enshrined economic, social and cultural rights. It would enable individuals and groups to access an international adjudicative procedure and remedies as a last resort. The inquiry procedure would empower the United Nations Committee on Economic, Social and Cultural Rights to initiate an investigation into particularly grave *ICESCR* abuses.

It is central to underline that the main objective of an Optional Protocol to the *ICESCR* would be to enhance the supervisory machinery that is currently based only on national reports. It would build on the practice of the Committee on Economic, Social and Cultural Rights and other similar organs. It would complement the *First Optional Protocol* to the *International Covenant on Civil and Political Rights*. Indeed, to not adopt a similar approach to the comprehensive nature of the *First Optional Protocol* to the *ICCPR* in drafting an Optional Protocol to the *ICESCR* would be to directly challenge the universality, interdependence, indivisibility and interrelatedness of all human rights.

[3] Committee on Economic, Social and Cultural Rights General Comment No 15, paragraph 13; Committee on Economic, Social and Cultural Rights General Comment No 14, paragraph 18.

The International Commission of Jurists welcomes the substantial progress made by the most recent Open Ended Working Group of January 2005 where momentum towards the adoption of an Optional Protocol was clearly evident. Both the African Group and the Group of Latin America and the Caribbean voiced their support for a comprehensive individual and collective complaints mechanism. At the end of the session a large majority of states expressed support for the adoption of an Optional Protocol, some calling for a swift move towards drafting such an instrument. We welcome these developments. In particular, we welcome that the huge majority of members of the Working Group asked the Chair to prepare an Elements Paper to focus discussions during the next session of the Working Group. We believe that the constructive manner in which many states debated procedural issues, such as "admissibility" and *"locus standi"*, during the most recent session augurs well for discussions at the next session. In this respect, we will continue to call for the adoption of what we see as the only option: an Optional Protocol which establishes a comprehensive complaint and inquiry procedure, which permits individuals and groups of individuals who claim to be victim of a violation of the economic, social and cultural rights guaranteed in the Covenant to submit a complaint, or for representatives to submit communications on their behalf.

In view of the growing support for the adoption of an Optional Protocol, the International Commission of Jurists urges the Sub-Commission to communicate clearly to the Commission on Human Rights that the working group's mandate should be extended and expanded, and that it should now begin to draft the Optional Protocol. This would represent genuine progress towards the instrument's adoption, and the drafting process itself will enable State and civil society representatives to discuss fundamental Optional Protocol and *ICESCR* issues more efficiently and concretely than through theoretical discussions.

Thank you, Mr Chairman.

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