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Report of the Secretary-General in response to Commission resolution 2003/18

Summary

The present report is submitted by the Secretary-General in response to Commission on Human Rights resolutions 2002/24 and 2003/18. The report is a compilation of responses to notes verbales and letters sent by the Secretary-General on 26 June 2002 to Member States and intergovernmental and non-governmental organizations requesting information in relation to the following three questions:

- (a) The question of the nature and scope of States parties' obligations under the International Covenant on Economic, Social and Cultural Rights;
- (b) Conceptual issues on the justiciability of economic, social and cultural rights;
- (c) The question of the benefits and practicability of a complaint mechanism under the Covenant and the issue of complementarity between different mechanisms.

Responses were received from the Governments of Argentina, Burkina Faso, Cuba, the Czech Republic, the Islamic Republic of Iran, Italy, Mexico, the Netherlands, Portugal and Sweden. A group of non-governmental organizations also submitted a joint statement. Those responses are summarized in the present report.

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Introduction

1. The present report is submitted in response to Commission on Human Rights resolution 2003/18. Paragraph 14 of that resolution requests the Office of the High Commissioner for Human Rights (OHCHR) “to make available for the next session of the Working Group the comments and views that States and intergovernmental and non-governmental organizations have made concerning the three questions addressed to the independent expert in resolution 2002/24 of the Commission”.

2. Paragraph 9 of Commission on Human Rights resolution 2002/24 requested States, intergovernmental organizations, including United Nations specialized agencies and non-governmental organizations, to submit their comments and views on the following questions:

(a) The question of the nature and scope of States parties’ obligations under the International Covenant on Economic, Social and Cultural Rights;

(b) Conceptual issues on the justiciability of economic, social and cultural rights, with particular reference to the experience gained in recent years from the application of universal, regional and national human rights instruments and mechanisms;

(c) The question of the benefits and practicability of a complaint mechanism under the Covenant and the issue of complementarity between different mechanisms.

3. On 26 June 2002, in response to resolution 2002/24, the Secretary-General transmitted a note verbale to States and letters to intergovernmental and non-governmental organizations seeking their comments and views on these three questions. OHCHR received replies from the following States: Argentina, Burkina Faso, Cuba, the Czech Republic, Iran (Islamic Republic of), Italy, Mexico, the Netherlands, Portugal and Sweden. OHCHR also received a collective response from the following non-governmental organizations (only organizations in special consultative status with the Economic and Social Council or organizations on its roster list are mentioned): Centre for Economic and Social Rights, Center for Reproductive Law and Policy, Centre on Housing Rights and Evictions, Centro de la Mujer Peruana “Flora Tristán”, Coordinadora Nacional de Derechos Humanos, International Commission of Jurists, International Women’s Rights Action Watch - Asia Pacific, Maryknoll Fathers and Brothers, Maryknoll Sisters of St. Dominic, Inc., Organisation Mondiale Contre la Torture, Physicians for Human Rights-UK, Rural Reconstruction Nepal, Service, Peace and Justice in Latin America and Shirkat Gah Women’s Resource Centre.

4. In response to resolution 2003/18, OHCHR now compiles the comments received so that they are available to the working group for its first session. The full text of those replies will be available for review with the secretariat before and during the working group.

I. NATURE AND SCOPE OF STATES PARTIES’ OBLIGATIONS

5. The Government of Argentina notes that article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not create obligations of

immediate result but instead requires States to take steps using the maximum of available resources with a view to achieving the progressive realization of economic, social and cultural rights.

6. The Government of Burkina Faso underlines that the obligations undertaken by States under ICESCR are of the same nature as those undertaken under any legal instrument. However, the nature of ICESCR raises the question of the type of obligations and whether the Covenant imposes obligations of result or obligations of means. Indeed, in order to guarantee economic, social and cultural rights, the Government must have the means to do so, which is not the case for the Government of Burkina Faso. However, there are laws already enacted in Burkina Faso that have the aim of promoting economic, social and cultural rights. For example, Burkina Faso has adopted a law (No. 23/94/ADP of 19 May 1994) in relation to the Public Health Code which seeks to clarify the content of the right to health and a law (No. 13/96/ADP of 9 May 1996) which establishes a legal framework for access to education. However, there is still no legislation concerning all economic, social and cultural rights and there is no provision to bring violations of economic, social and cultural rights before a judge. To do so could be difficult for countries such as Burkina Faso, particularly given the financial difficulties the country is not in a position to resolve.

7. The Government of Cuba emphasizes that, as with civil and political rights, States have obligations to promote and to guarantee economic, social and cultural rights. The obligations to protect and to guarantee economic, social and cultural rights require States to avoid acts that impede or obstruct individuals and groups from the enjoyment of their rights. The obligation to protect presupposes that States will adopt all the necessary means to prevent or put an end to violations by third parties, whether natural or legal, of economic, social and cultural rights. The obligation to guarantee economic, social and cultural rights requires States to adopt all relevant measures and policies to promote and ensure the full realization of economic, social and cultural rights through either the direct provision of essential public services or by creating the conditions to ensure universal access to quality services. Negligence in fulfilling any of these obligations constitutes a violation of human rights. Individuals, peoples, groups, communities and nations might all suffer violations of economic, social and cultural rights.

8. The Government of the Czech Republic views article 2, paragraph 1, of ICESCR as being crucial to understanding the nature and scope of States parties' obligations with respect to economic, social and cultural rights. Article 2 specifies the nature of these rights as obligations of conduct and obligations of result and provides for the progressive realization of these rights. However, apart from rights having a progressive character, economic, social and cultural rights are also rights of an immediate character. An example of the immediate nature of obligations is the obligation to take steps to implement those rights. Similarly, notwithstanding the progressive nature of economic, social and cultural rights, States must take measures to ensure their implementation within a reasonable time. Another example of the immediate obligations under ICESCR relates to the obligation to ensure non-discrimination in the exercise of economic, social and cultural rights. In terms of scope, States must take not only legal measures but also administrative, political, educational and other measures (including remedies). Notwithstanding the different scope of particular resources, States must undertake at least minimum low-cost measures. If core obligations under ICESCR are not met due to resource constraints, then international assistance and cooperation should be provided, in keeping with the Charter of the United Nations and article 2, paragraph 1, of ICESCR.

9. The Government of the Islamic Republic of Iran indicates that the nature and scope of the Government's obligations in relation to economic, social and cultural rights are explicitly articulated in chapter 3 of the national Constitution. Among the rights included under chapter 3 are the right to work, the protection of mothers and the family, the right to social security, the right to free education up to secondary school and the right to adequate housing. The Constitution also guarantees the provision of basic necessities for all citizens: housing, food, clothing, hygiene, medical treatment, education, the necessary facilities for the establishment of a family and the utilization of science and technology as well as the training of skilled personnel in accordance with the development needs of the country's economy. The provisions expressly protect all people.

10. The Government of Italy believes that there is a fundamental distinction between the nature of the obligations under the International Covenant on Civil and Political Rights and ICESCR. Obligations in relation to civil and political rights are binding in nature, while obligations in relation to economic, social and cultural rights are only declarations of intent that carry moral and political weight but do not constitute direct legal obligations for the State party. However, national legislation has, by and large, translated the provisions of ICESCR into binding internal law.

11. The Government of Mexico notes that the obligation of the progressive realization of economic, social and cultural rights compels States to take immediate steps to the maximum of their available resources. Under no circumstances can the obligation of progressive realization justify a failure by the State to take expeditious, constant and efficient action. Limitations on resources do not absolve the State of its obligations to ensure the widest possible enjoyment of these rights. In this way, Mexico underlines that the introduction of regressive measures is a violation of the provisions of ICESCR, unless it is justified on the basis of exceptional circumstances. Importantly, Mexico highlights the need to clarify the content of each economic, social and cultural right and the respective obligations incumbent on the State, bearing in mind that some State obligations are of immediate effect. Examples of violations of economic, social and cultural rights include the failure of the State to take political and legislative action; discrimination in relation to economic, social and cultural rights; failure to achieve the minimum level of implementation of ICESCR as indicated by the Committee; and action that results in regressions in the enjoyment of economic, social and cultural rights.

12. The Government of the Netherlands recognizes the importance of economic, social and cultural rights, as it perceives that all human rights are universal, indivisible, interdependent and interrelated. It, therefore, believes that article 2, paragraph 1, of ICESCR which requires States to achieve the progressive realization of economic, social and cultural rights does not diminish the value of those rights. Progressive realization means that States parties are required to show that they have taken steps to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. A distinction must be made between rights that are absolute and rights that require further legislative action or measures by Governments and which often depend on the prevailing economic situation. In general, rights relating to the principle of non-discrimination are absolute, whereas most other rights are more closely linked to the availability of resources.

13. The Government of Portugal states that article 2 of ICESCR establishes the nature of the general legal obligations of States parties to the Covenant. Portugal notes that there are two

ways in which these obligations can be interpreted. The first way is to make a distinction between obligations of conduct and obligations of result and the second is to view the State obligations as duties to respect, protect and realize economic, social and cultural rights.

14. According to the first method, some have interpreted ICESCR as imposing obligations of result only; however, Portugal argues that such an interpretation strips the Covenant of any serious content. If States had a total discretion concerning the means to employ economic, social and cultural rights in a progressive manner, it would be impossible for a judge to determine whether the Government was acting in good faith. The Committee on Economic, Social and Cultural Rights has noted that article 2, paragraph 1, incorporates obligations of both conduct and result.

15. According to the second method, economic, social and cultural rights, as with all human rights, entail obligations to respect, protect and fulfil. The obligation to respect requires States to refrain from acts which would serve to deprive individuals of their rights under ICESCR. The obligation to protect refers to the duty of States to ensure the recognition of the horizontal effect of the rights set forth in ICESCR and the obligation to fulfil requires the State to take steps towards the realization of economic, social and cultural rights. This contains an obligation of conduct or an obligation of result according to the circumstances.

16. The Government of Portugal shares the view of the Committee on Economic, Social and Cultural Rights in its general comment No. 3 that States must take steps towards the goal of full realization within a reasonably short time after the Covenant's entry into force for the State concerned. A lack of resources does not allow States to delay taking the necessary measures to fulfil their obligations under the Covenant indefinitely. Portugal also agrees with the Committee on Economic, Social and Cultural Rights in its general comment No. 3 that the phrase "by all appropriate means" must be given its full meaning. While it is up to the State to decide for itself the "appropriateness" of measures to be undertaken this will not be self-evident and States, in reporting to the Committee, should indicate the basis upon which they consider those measures to be the most "appropriate".

17. The Government of Sweden indicates that ICESCR contains several unclear concepts such as the question arising from the principle of progressive realization of economic, social and cultural rights as well as the meaning of the words "to the maximum of its available resources". The Government of Sweden believes that clarity would be an important prerequisite for the consideration of an individual complaint mechanism.

18. The joint NGO statement notes that States have minimum core obligations to ensure basic necessities in relation to all economic, social and cultural rights, repeating the Committee's view that failure to acknowledge that the rights in the Covenant have a minimum core would largely deprive the Covenant of its *raison d'être*. Respect for the principle of non-discrimination in relation to economic, social and cultural rights is an example of an obligation of immediate effect. States also have obligations "to take steps" in order to achieve the "progressive realization" of economic, social and cultural rights. The statement notes that the obligation to "take steps" is of immediate application - in no way should the notion of progressive realization allow a State to defer the realization of economic, social and cultural rights indefinitely. The statement also notes that States have obligations to respect, protect and fulfil economic, social and cultural rights.

19. The obligation to respect requires the State “to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy basic needs”.

20. The obligation to protect requires the State “to take the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual - including the infringement of his or her material resources”.

21. The obligation to fulfil requires the State “to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts”.

22. Finally, the statement suggests that article 2, paragraph 1, of ICESCR would seem to contain an implicit obligation on States in a position to do so to provide international assistance to other States to help them realize progressively economic, social and cultural rights, and notes that the General Assembly has identified the allocation of 0.7 per cent of gross domestic product to overseas development aid as a target which, the statement notes, could be relevant to the implementation of that article.

II. JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

23. The Government of Argentina notes that the country’s Constitution guarantees the protection of economic, social and cultural rights and that there is no question concerning the possibility of invoking these rights before a judge in Argentina. However, the Government also notes that there is still difficulty in determining the exact content of economic, social and cultural rights, made more difficult by the terminology used in article 2 of ICESCR, in particular the reference to “the maximum of its available resources” and “to achieving progressively the full realization of the rights”. The question is how to determine what is meant by the “maximum” of available resources, bearing in mind the fact that there are many distinct political systems, each with its own mechanisms for allocating resources, which makes it difficult to adopt a common criterion for interpretation.

24. The Government of Burkino Faso notes that it has no experience concerning the justiciability of economic, social and cultural rights. In principle, the national Constitution recognizes that when a treaty has been ratified, it obtains, upon publication, an authority superior to that of national laws. In other words, it could be said that the Constitution offers the possibility of bringing a complaint concerning economic, social and cultural rights before a judge. However, in general, the norms in ICESCR are too vague to be invoked before a court. Consequently, there is a need for an internal juridical instrument that sets out the contents of economic, social and cultural rights and the modalities for their implementation.

25. The Government of Cuba emphasizes that, contrary to some theories about the practical difficulties concerning the justiciability of economic, social and cultural rights, the norms and standards contained in ICESCR are clearly defined, without ambiguity. Indeed, several States and international organizations have for several decades developed and employed statistical indicators in this field. In Cuba, economic, social and cultural rights, their contents, the means of

realizing them and the obligations of the State to respect, protect and fulfil them are constitutionally guaranteed in chapter VII of the Constitution and through complementary laws such as the Penal and Civil Code, the Law on Criminal Procedure, and the Law on the Organization of the Judicial System. These laws not only recognize economic, social and cultural rights, but also permit complaints about violations of these rights and the award of an appropriate remedy. The Public Prosecutor, the Courts and the State administrative tribunals all have clear mandates in this regard.

26. The Government of the Czech Republic notes that, based on national experience in the justiciability of economic, social and cultural rights, the following provisions of ICESCR may be, inter alia, considered justiciable at the national level: articles 2 (2); 3; 4; 6; 7 (a) (i), (b) and (d); 8; 9; 10 (1), (2) and (3); 12 (c) and (d); 13 (2) (a), (2) (b), 2 (c), (2) (d), (3) and (4); 15 (1) (c) and (3). The justiciability of economic, social and cultural rights is based on the Bill of Fundamental Rights and Freedoms, and specific legal acts provide individuals with the right to institute proceedings in relation to economic, social and cultural rights. The Czech Republic refers to the Additional Protocol to the European Social Charter which provides for collective - but not individual - complaints about violation of economic, social and cultural rights. That system, in the Government's view, provides for an improvement in the effective enforcement of rights, and the number of complaints lodged so far indicates that the procedure will not be abused nor will it result in a heavy workload. The Czech Republic is party to international instruments with complaint mechanisms, namely, the Optional Protocol to the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 14); and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The Czech Republic welcomes the process of adjusting the different language providing for communication procedures as contained in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, employing the most comprehensive language which embraces complaints either by or on behalf of not only individuals but also representative groups.

27. The Government of the Islamic Republic of Iran indicates that articles 173 and 174 of the Constitution envisage the establishment of the Court of Administrative Justice and the National General Inspectorate. The Court of Administrative Justice has the power to investigate the complaints, grievances and objections of the people. The National General Inspectorate will supervise the proper conduct of public affairs and the correct implementation of laws.

28. In light of the view of the Government of Italy that economic, social and cultural rights do not constitute direct legal obligations, the Government notes that it is prevented from undertaking a full evaluation of the different aspects of the justiciability of economic, social and cultural rights in Italy.

29. The Government of Mexico underlines the importance of guaranteeing the possibility of having complaints concerning economic, social and cultural rights adjudicated. In this way, it is important to highlight that economic, social and cultural rights should be implemented in good faith by a State party to ICESCR, a legally binding international instrument.

30. The Government of the Netherlands notes that courts in the Netherlands do not regard most economic and social rights as self-executing in the national legal order. Therefore, no national case law with regard to the justiciability of these rights can be provided. At the international level, the Netherlands refers to the decision of the International Labour Organization (ILO) Committee of Experts and the ILO Committee on Freedom of Association concerning a complaint by Dutch trade unions challenging the Act of the Development of Labour Conditions for the National Insurance and Subsidized Sector. In light of the decision of the ILO Committees declaring the Act incompatible with ILO standards on freedom of association, the Government withdrew the Act.

31. The Government of Portugal points out that, as with civil and political rights, both individuals and groups can suffer violations of their economic, social and cultural rights, usually imputed against the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to remedy such violations. In particular, articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4), and 15 (3) of ICESCR appear to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non self-executing would seem difficult to sustain. Within the Council of Europe, the European Social Charter sets out economic, social and cultural rights and freedoms and establishes a supervisory mechanism guaranteeing respect by the States parties, of which Portugal is one. Under the mechanism, complaints may be lodged with the European Committee of Social Rights. Different organizations such as NGOs in consultative status with the Council, may lodge complaints with employers' organizations and trade unions. The Committee makes a declaration on the admissibility of the complaint, an exchange of pleadings takes place between the parties and the Committee may decide to hold a public hearing. The Committee then makes a decision on the merits of the complaint which it forwards to the parties and the Committee of Ministers, and which is made public within four months of being forwarded. Finally, the Committee of Ministers adopts a resolution which, if deemed appropriate, might recommend that the State take specific measures to remedy the situation. The first complaint was brought against Portugal by the International Commission of Jurists alleging violation of article 7 of the Charter (prohibition of employment under the age of 15). The European Committee concluded that there had been a violation and the Committee of Ministers adopted resolution ChS (99) 4 on 15 December 1999.

32. The NGO joint statement identifies legal, pragmatic and philosophical reasons to demonstrate that economic, social and cultural rights are justiciable. Legally, the identification of clear State obligations to respect, protect and fulfil economic, social and cultural rights indicates that ICESCR does give rise to binding obligations. Pragmatically, the statement refers to case law from the United States of America, India, the Human Rights Committee, the Inter-American Court of Human Rights, South Africa and Bangladesh to illustrate how courts and other tribunals have provided justiciable substance to individual complaints concerning social and economic issues and each of the obligations of States to respect, protect and fulfil economic, social and cultural rights. Finally, philosophically, the statement notes that the question is not whether economic, social and cultural rights *can* be justiciable but whether they *should* be - often based on the fear of the judiciary making decisions on policy and budgetary matters. However, the statement highlights, first, that the formulation of legal obligations provides significant discretion to Governments as to how they fulfil those obligations; second, that the courts are already involved in adjudicating matters including policy issues; third, that it is increasingly acknowledged that judicial protection of human rights is important because

majority-based democracies are not always well suited to protect the human rights of individuals; fourth, judges and committee members are appointed by Governments; therefore, arguments of a democratic deficiency of courts are difficult to sustain; and finally, Governments have supported the justiciability of economic, social and cultural rights in other forums such as the African Charter of Human and Peoples' Rights, the Collective Complaints Procedure under the European Social Charter, and the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador").

III. BENEFITS, PRACTICABILITY AND COMPLEMENTARITY OF A COMPLAINT MECHANISM

33. The Government of Argentina notes the existing mechanisms able to receive complaints in relation to economic, social and cultural rights as follows: the 1503 procedure; the ILO treaty monitoring and implementation mechanisms although the ILO procedures do not allow individual communications; the UNESCO mechanism created to consider violations of the right to education; the Optional Protocol to the Convention on the Elimination of Discrimination against Women which allows both individual and group communications; the collective complaints mechanism under the European Social Charter which allows only communications made by specific organizations; and the complaints mechanism created by the Protocol of San Salvador which allows communications in relation to the right to education and the right to work. Argentina refers to the doctrine of indivisibility of human rights and considers opportune the proposal to create a complaint mechanism analogous to the individual complaints mechanism under the International Covenant on Civil and Political Rights. The fact that economic, social and cultural rights are obligations subject to means does not mean that they are not justiciable. However, difficulties do still exist in relation to economic, social and cultural rights. In particular, there is a lack of clarity as to their content; many Governments are ambivalent about these rights; there are some ideological biases against economic, social and cultural rights; there is often a lack of national institutions dedicated to economic, social and cultural rights; the rights need complex and detailed information to ensure effective supervision; aspects of these rights are programmatic; there is a lack of legal texts and decisions concerning economic, social and cultural rights; and NGOs working in this field are scarce. Importantly, the creation of such a mechanism in the form of an optional protocol to ICESCR could reduce some of these difficulties and help give greater clarity to the content and meaning of economic, social and cultural rights. However, given the difficulties in relation to economic, social and cultural rights, it might be advisable to limit the complaints mechanisms to certain rights set out in ICESCR with a view to broadening the scope of the mechanisms at a later date. Argentina concludes by emphasizing the need to continue discussing these questions with a view to proposing an effective and adequate optional protocol.

34. The Government of Burkina Faso believes that a complaint mechanism for economic, social and cultural rights could be highly useful even though it might seem utopic for a heavily indebted country such as Burkina Faso. Such a mechanism could be used to allow social control over the options and policies of Governments in the social sector. It would also serve to reinforce the rule of law generally in relation to human rights. While Burkina Faso does not yet have a mechanism for receiving such complaints, with the establishment of the Ministry for the Promotion of Human Rights and the adoption in 2001 of the National Human Rights Plan of

Action, the modalities to introduce such a mechanism could seriously be considered by the new Ministry, particularly given that the National Plan of Action foresees a special programme to reinforce and consolidate economic, social and cultural rights.

35. The Government of Cuba notes that it would be regressive for the promotion and protection of economic, social and cultural rights not to adopt an optional protocol to ICESCR. It would be inconceivable to limit the monitoring of ICESCR to a list of recommendations that lack a normative focus. In this context, Cuba refers also to article 1 of ICESCR as well as the right to development. The Government of Cuba underlines the importance of defining the responsibilities for violations of economic, social and cultural rights as, in the context of a globalizing world, there are various duty-bearers with regard to economic, social and cultural rights. Even though it detracts from States as the primary duty-bearers of economic, social and cultural rights, it is impossible to overlook the responsibility of other actors such as multilateral financial and trade institutions and transnational corporations. Their responsibility is relevant in several ways. One example is the imposition by these actors of conditions and programmes which impede Governments from promoting economic, social and cultural rights. Given the relative weakness of some Governments in the context of globalization and their dependence, most such Governments are unable to resist such conditions. Unilateral coercive measures also work against the right to self-determination and deny the right to development. Further, the optional protocol should include a procedure for State-to-State complaints as is the case under the International Covenant on Civil and Political Rights. Cuba also underlines the importance of international financial and technical cooperation in relation to economic, social and cultural rights. Cuba concludes that the establishment of a complaint mechanism under ICESCR is not only viable, but also necessary in order to realize the full enjoyment of all human rights. Given the interrelatedness, indivisibility and interdependence of all human rights, the adoption of an optional protocol will contribute to the realization not only of economic, social and cultural rights but also of civil and political rights.

36. The Government of the Czech Republic states that the basic justification for an optional protocol to ICESCR stems from the interdependence, indivisibility and interrelatedness of economic, social and cultural rights and civil and political rights. The inherent dignity and equal and inalienable rights of all members of the human family are a foundation for freedom, justice, social stability and security. For the full enjoyment of human rights, monitoring mechanisms are necessary. The combination of a general monitoring mechanism with an individual complaints procedure has proved to be efficient. Further, an individual complaint mechanism will contribute to the development of jurisprudence on economic, social and cultural rights and help refine the content of these rights as well as increase the accountability of States parties and the international community with regard to these rights. On the other hand, the absence of a complaints procedure places significant limits on the protection of human rights. In terms of the form and scope of an optional protocol the Czech Republic supports: a quasi-judicial procedure where the final decision as to what should be done in response to a view adopted by the Committee should rest with the State; the replacement of references to “violations” with “failure to ensure the satisfactory application” of the Covenant or “non-compliance with the rights” in the Covenant; both individual and limited group communications but not inter-State communications; communications brought by third parties on behalf of alleged victims but only with the knowledge and consent of the alleged victim; a comprehensive optional protocol covering all substantive rights recognized in ICESCR although this needs further analysis; with

regard to admissibility, the exhaustion of domestic remedies (unless the application of domestic remedies is unreasonably prolonged); and the inadmissibility of a communication which raises essentially the same issues of fact and law that are being examined under another international investigation procedure.

37. The Government of Mexico supports the introduction of an individual complaint mechanism under ICESCR which it believes is not only viable but also necessary. Mexico also agrees generally with the draft optional protocol formulated by the Committee on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex) although the Government notes that the draft is very wide. Nonetheless, Mexico believes the draft would provide a useful starting point for discussions. Specifically, Mexico believes that the optional protocol should include at least the following minimum aspects: a system of individual communications including the possibility of communications from individuals, non-governmental organizations or groups on behalf of alleged victims; the admissibility of collective communications; the admissibility of communications on any of the substantive rights contained in ICESCR, including the obligation to take steps to realize economic, social and cultural rights; the inclusion of exceptions to the requirement of exhaustion of local remedies; the setting of dates and terms in the case of interim remedies; the provision for the possibility of amicable solutions to communications; and the inclusion of provisions to monitor the implementation of the Committee's views on a communication other than through its annual report.

38. The Government of the Netherlands has not reached any conclusion with regard to the desirability of a complaint mechanism under ICESCR. However, the Netherlands does favour in-depth discussion of possible modalities and scope of any mechanism. In particular, the Netherlands highlights the need to deepen understanding of the optional protocol in the following ways: to determine which rights should be included in the optional protocol; to clarify and further specify the elements of the Independent Expert's proposition that the complaints mechanism should be restricted to gross violations of the rights enshrined in ICESCR; and to clarify the scope for individuals or groups to lodge complaints. In relation to the last issue, the Netherlands suggests clarification of the advantages and disadvantages of an individual as opposed to a group complaint mechanism. Finally, the Netherlands identifies a need to consider the question of the accessibility of complaint mechanisms to the poor and raises the possibility that an individual complaint mechanism might run the risk of being primarily accessible to citizens of wealthier countries, thus creating some form of indirect discrimination.

39. The Government of Portugal notes that a complaint mechanism under ICESCR will allow individuals and groups to submit communications to the Committee in relation to allegations of failure by a State party to comply with its obligations under the Covenant. The adoption of such a mechanism will promote a more complete understanding and a more precise definition of economic, social and cultural rights. Further, it will definitely put economic, social and cultural rights on the same level as civil and political rights. It will also encourage States to adopt legislative measures to comply with obligations arising out of the Covenant. It will provide an opportunity to tackle the frequently raised arguments of the non-justiciability of economic, social and cultural rights and the inability of States to implement these rights without adequate resources.

40. The Government of Sweden is not convinced that an individual complaint mechanism under ICESCR would sufficiently illuminate problems or deficiencies when it comes to steps taken by a State to realize a particular right and thereby lead to an actual improvement in the realization of economic, social and cultural rights. Sweden is also of the opinion that the establishment of an international mechanism entrusted with the task of monitoring compliance by States with economic, social and cultural rights might not necessarily involve an individual complaints procedure even though economic, social and cultural rights are individual rights. In this context, attention should also be drawn to the report of the Secretary-General entitled "Strengthening of the United Nations: an agenda for further change" (A/57/387) which emphasizes the need to reform the current system of human rights treaty bodies and questions the benefits of the current system. The present system should, therefore, be corrected before new mechanisms are put in place. Further, Sweden is seriously concerned about the lack of resources to serve the human rights treaty bodies, including in handling individual complaints which requires enhanced professional secretariat resources. In addition, Sweden emphasizes the importance of including a human rights approach to development assistance as a means of promoting economic, social and cultural rights.

41. The joint NGO statement indicates the benefits of an optional protocol to ICESCR as follows:

- (a) Further clarification on a case-by-case basis of economic, social and cultural rights beyond what has been done to elaborate the rights contained in ICESCR by the Committee and the special rapporteurs;
- (b) The implementation of the Vienna Declaration and Programme of Action that confirmed the interrelatedness and interdependence of human rights in 1993 by guaranteeing that victims of violations of economic, social and cultural rights have a right to a remedy at the international level;
- (c) The existence of a complaints mechanism will lead to a new and closer relationship between the Committee and States;
- (d) The mechanism will force the Committee to confront more concrete situations related to the implementation of ICESCR;
- (e) The mechanism will promote more concerted implementation of ICESCR at the national level;
- (f) The existence of the mechanism will encourage rights holders and civil society to articulate their claims in relation to economic, social and cultural rights more concretely and specifically;
- (g) The "human interest" dimension of cases will create wider recognition of ICESCR;
- (h) The mechanism could provide enhanced legality, uniformity, justice and stability to balance the volatile economic and political forces at play at the international level.

42. In terms of complementarity within the human rights framework and with respect to individual complaints mechanisms, the term “complementarity” can be understood from two different perspectives. First, the question of complementarity might come into play when one specific right is covered by several instruments or mechanisms. Here the question arises in relation to overlap between the work of different mechanisms. However, there is currently no international body specialized in economic, social and cultural rights that deals with complaints about violations of these rights. Further, the overlap between rights covered by individual complaints mechanisms in relation to civil and political rights (for example the Committee against Torture and the Human Rights Committee) has not raised concerns partly because of the inclusion of provisions that prevent the examination of cases already under settlement or investigation. A second situation where the question of the complementarity between an optional protocol and other mechanisms might arise is where one particular individual might have access to several mechanisms. Yet each of the existing mechanisms that have some relevance to economic, social and cultural rights has a different scope (in terms of rights as well as complainants) from that of an optional protocol to ICESCR. For example, the ILO mechanisms do not allow individual complaints and relate only to workers’ rights.
