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Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights

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* The endnotes are circulated as received.

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Introduction

1. The present paper is submitted in response to paragraph 109 of the report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session (E/CN.4/2005/52), in which delegations invited me, as Chairperson-Rapporteur, to “draft a paper with elements for an optional protocol in order to facilitate a more focused discussion at the third session of the working group”. In this context, delegations “requested that the paper present a non-judgemental analysis of the various options for an optional protocol”. The paper is organized to take into account each of the 14 elements. However, the word limitation of 10,700 words imposed by the General Assembly for such a report necessarily restricts the depth of analysis of each of the elements.

2. Over the inter-sessional period, I elaborated a first draft of the present paper with a view to subjecting it to expert analysis prior to final submission. From 30 September to 2 October 2005, I hosted an expert consultation in Cascais, Portugal, with human rights experts from the different regions of the world to review the draft. The experts were: Philip Alston (Australia), Victor Dankwa (Ghana), Paula Escarameia (Portugal), Kamal Houssein (Bangladesh), Mónica Pinto (Argentina), Martin Scheinin (Finland). In addition, Colin Gonsalves (India) provided written comments on the draft paper. Virgínia Brás Gomes, Giorgio Malinverni and Eibe Riedel, experts of the Committee on Economic, Social and Cultural Rights, also attended the meeting or provided written comments. I am extremely grateful for their valuable assistance. I would also like to express my appreciation for the professional assistance of the staff of the Office of the High Commissioner for Human Rights (OHCHR).

I. COMMUNICATIONS PROCEDURE

A. Introduction

3. A communications procedure allows individuals and at times groups of individuals to bring claims of an alleged violation by a State of a provision of a human rights treaty for quasi-judicial examination by a human rights monitoring body. Within the United Nations human rights system, communications exist in respect of five out of the seven core human rights treaties.[1] In this context, all communications procedures are optional, which means that a separate declaration of acceptance of this mechanism is needed both in those cases where the communications procedure is foreseen in the convention itself (as is the case with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) or in an optional protocol (the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)). Consequently, ratification of a treaty does not imply an obligation that the State party is subject to the treaty’s communications procedure.

4. The examination of a communication is generally divided into the following phases: receipt of the communication, decision on its admissibility, consideration of the merits (alternatively, concurrent consideration of admissibility and merits), adoption of views and follow-up.

B. The scope of rights subject to a communications procedure

5. There are five main approaches for identifying which rights contained in the Covenant would be subject to a communications procedure. These are as follows:

(a) **The comprehensive approach** can take two forms. The first allows an author to bring a communication alleging a violation of any of the provisions of the Covenant. The second allows an author to bring a communication alleging a violation of any of the Part III provisions, read in conjunction with Parts I and II. All existing communications procedures under the international system have adopted the comprehensive approach;

(b) **The "à la carte" approach** allows States to limit the application of the communications procedure to certain provisions of the Covenant. The Revised European Social Charter allows each State party to consider itself bound by at least six of the nine articles of Part II of the Charter (the so-called "hard core" rights) as well as by an additional number of articles of Part II which it may select provided that the total number is not less than 16 articles.[2] It should be noted that it is the Charter and not its Additional Protocol that adopts the "à la carte" approach - in other words, the Charter, unlike the Covenant, establishes an internal hierarchy of social rights. This approach is also known as the "opt-in à la carte" approach;

(c) **The reservation approach** or the "opt-out à la carte" approach allows a State party to exclude the application of the communications procedure from one or several provisions of the Covenant. While the "opt-in à la carte" approach starts from the presumption that the communication procedure should apply only to a limited number of provisions of the Covenant, the "reservation" approach assumes that the communication procedure applies in principle to the entire treaty subject to certain exceptions;[3]

(d) **The time-limited approach** allows States to limit the application of the communications procedure to certain provisions of the Covenant while at the same time obliging States parties to increase the number of provisions subject to the procedure within set time limits with a view to achieving comprehensive coverage;[4]

(e) **The limited approach** allows an author to bring communications in relation to only some Parts of the Covenant or some provisions of the Covenant. For example, the communications procedure could apply to only Parts II and III of the Covenant or to particular provisions in Parts I, II and/or III. The San Salvador Protocol to the American Convention on Human Rights allows individual communications in relation to two articles of the Protocol.[5]

6. The working group may wish to consider which approach would be best suited in relation to an optional protocol taking the form of a communications procedure. Factors that participants might wish to consider include:

(a) The implications for each approach on the principles of indivisibility, interdependence and interrelatedness of all human rights;

(b) The views of the Committee on Economic, Social and Cultural Rights (CESCR) expressed in its draft optional protocol contained in document E/CN.4/1997/105;

(c) The approach that could promote rapid ratification of an optional protocol in the form of a communications procedure;

(d) The potential effects of excluding provisions from the application of a communications procedure, in particular in relation to communications concerning more than one provision of the Covenant;

(e) The relative importance of allowing States flexibility in relation to the application of a communications procedure;

(f) The effects of the different approaches on affirming justiciability and promoting the realization of economic, social and cultural rights at the national level;

(g) Whether the objectives pursued through "opting-in" or "opting-out" could be achieved by the entry of reservations to the optional protocol.

C. Admissibility criteria

7. All communications procedures contain a certain number of formal admissibility criteria which must be fulfilled in order to enable the expert body to receive and consider a communication. Criteria include:

(a) ***Ratione personae* or standing** - This criterion is analysed under section D;

(b) ***Ratione materiae*** - This criterion requires that the communication must contain allegations of a violation of rights recognized in the Covenant or alternatively, a provision that the State party has stipulated is subject to the procedure;

(c) ***Ratione loci*** - This criterion requires that that there is a connection between the alleged victim and the State party against which a communication is brought;

(d) ***Ratione temporis*** - This criterion deals with the issue of whether an author may bring communications concerning alleged violations which occurred before the entry into force of the procedure for the State party concerned. Many of the procedures do not address this question although the Optional Protocol (OP) to CEDAW clearly requires *ratione temporis*;[6]

(e) **Identification of a victim** - The communication must identify a victim or group of victims alleging harm;

(f) **Exclusion of anonymous communications** - Anonymous communications are not admissible under existing communications procedures. It should be noted that the exclusion of anonymous communications does not exclude the protection of the identity of the author from the State party, which can normally only occur with the petitioner's express consent;[7]

(g) **Abuse of right to submit a communication** - This criterion excludes those communications which the treaty body determines as contrary to the object and purpose of the respective convention;[8]

(h) **Non-duplication of procedures** - This criterion aims at ensuring that a given international or regional body will be precluded from examining a communication if the same matter is being (simultaneous procedures) and/or has already been (successive procedures) examined by another international procedure. The existing procedures either do not have any provision dealing with this issue, or they consider a communication inadmissible when: (i) the subject is being examined under another procedure of international investigation or settlement;[9] (ii) the same matter has been or is being examined under another procedure of international investigation or settlement;[10]

(i) **Exhaustion of domestic remedies** - This criterion requires that an author of a communication must have exhausted all available domestic remedies before bringing a communication under the international procedure.[11] This criterion is subject to an exception where the application of the remedies is unreasonably prolonged or useless.[12] The inter-American system establishes three exceptions to the rule, namely in those cases where: "(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.";[13]

(j) **Written nature** - All communications procedures state either in the respective instrument or in the rules of procedure that the communications shall be in writing;

(k) **Substantiation** - The OP to CEDAW also determines the inadmissibility of a communication when it "is manifestly ill-founded or not sufficiently substantiated".[14]

8. At its second session, the working group discussed the addition of a new admissibility criterion, namely the exhaustion of regional remedies (see E/CN.4/2005/52). The working group might wish to discuss the advantages of this additional requirement. One issue to consider in this regard is whether the criterion of "non-duplication of procedures" would not, in fact, automatically exclude communications already subject to another procedure. Another issue to consider would be the fact that different regional procedures apply to different treaties and take different forms: the question thus arises whether it might be difficult to assess the extent to which regional remedies have in fact been exhausted. A further issue is whether the requirement of exhaustion of regional remedies could protract access to justice at the international level. The working group might wish to examine other ways of ensuring the involvement of regional mechanisms in the framework of a communication submitted to CESCR.

9. It is important to note that the choice of admissibility criteria determines the application of the communications procedure, avoiding its abuse and ensuring that the supervising body is not overburdened by excessive numbers of communications.

D. Standing

10. Standing under a communications procedure determines who may submit a communication. If an author of a communication does not have standing under the instrument, the committee will reject the communication on formal grounds, without consideration of the merits. Communications procedures allow communications from the following authors:

(a) **Individuals and groups of individuals** - The majority of the existing United Nations communications procedures expressly give standing only to individuals claiming to be victims, namely natural persons. ICERD and the OP to CEDAW allow groups of individuals as well as individuals to bring communications. The rules of procedure of the Human Rights Committee allow groups of individuals to bring communications under the Optional Protocol to ICCPR;

(b) **Authors on behalf of individuals or groups of individuals** - The existing international human rights communications procedures allow alleged victims to designate a representative to bring a communication, for example, a legal counsel or some other agent representing the alleged victim. The OP to CEDAW requires the designated representative to have the consent of the individual or group of individuals unless the author can justify acting on their behalf without consent.[15] Article 44 of the American Convention on Human Rights recognizes the standing of any person or group of persons or any non-governmental entity legally recognized in one or more member States of the Organization of American States. Sometimes communications presented from close relatives or people close to the alleged victim may be accepted, even without the alleged victim's express authorization, namely in those cases where the "individual in question is unable to submit the communication personally";[16]

(c) **Collectives, organizations and interest groups** - The communications procedures of the International Labour Organization (ILO) as well as the European system give standing to specified organizations rather than individuals or groups of individuals. For example, the Additional Protocol to the European Social Charter grants standing only to certain trade unions, employers' organizations and non-governmental organizations, as long as their statutory objective is related to the promotion of the rights referred to in the communication.[17] Given the specific tripartite nature of ILO, the ILO procedures give standing to States, employee groups and employer groups but not to individuals or to authors designated on behalf of individuals. None of the United Nations human rights mechanism foresees a collective communications procedure.

11. The identification of which potential authors would have standing under a communications procedure to the Covenant will have an effect on the focus of the instrument. The working group might wish to consider the following issues in relation to standing:

(a) The value of empowering individuals to bring communications on their own behalf through direct access to the communications procedure;

(b) The relative merits of focusing on individual communications (specific cases) and/or on collective communications (generalized cases);

(c) The effect of allowing designated representatives, particularly civil society groups, to bring communications, particularly where individuals or groups of individuals are unable, owing to poverty, to bring communications themselves.

E. Proceedings on the merits

12. The adjudicatory body considers the merits either after or simultaneously with the consideration of a communication's admissibility as follows:

(a) **Transmission** - The treaty body transmits the communication to the State party and the Secretary-General or treaty body may request clarifications from the author;[18]

(b) **State party response** - The State party is requested, normally within six months,[19] to submit written explanations or statements clarifying the matter and the remedy, if any, that the State might have provided;[20]

(c) **Transmission to the parties** - The rules of procedure of the five treaty bodies establish that the treaty body should transmit the information provided by the parties to the other parties and shall afford each party the opportunity to comment on submissions within fixed time limits;[21]

(d) **Consideration of the merits** - The consideration of the merits of a communication takes place in the light of all the information made available by the State party and the complainant.[22] Consideration of communications takes place in closed meetings.[23]

13. It is important to note that most international human rights communications procedures require proceedings on the basis of written submissions. The rules of procedure of the Committee on the Elimination of Racial Discrimination and the Committee against Torture do allow authors to appear in person, although this has never occurred. The rules of procedure of these two plus the Committee on the Elimination of Discrimination against Women allow the Committees to obtain, through the Secretary-General, additional information from United Nations bodies or specialized agencies provided the other parties have an opportunity to comment on the information.[24]

F. Friendly settlement of disputes

14. An additional step in the proceedings on the merits is that of the friendly settlement of disputes, which enables the parties to a communication to reach an agreement on a solution prior to a decision of the adjudicatory body. Friendly settlement of disputes is a basic principle of international law and has been incorporated in all other human rights mechanisms by implication, and expressly in some cases. The settlement achieved must always respect human rights. In the inter-American system, the Commission, after deciding that a communication is admissible, "shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement on the basis of respect for the human rights recognized in th[e] Convention".[25] A similar possibility exists in relation to the European Convention on Human Rights.[26] In the European context a formal friendly settlement has been reached in approximately 12.5 per cent of the cases declared admissible.[27]

15. The option of friendly settlement is not a requirement and if friendly settlement is not possible, the expert body proceeds with consideration of the merits. For example, in the inter-American system, when a friendly settlement is not reached the Commission has the power to refer the case to the Court or to publish its findings or recommendations. The Commission also has the discretion of denying the friendly settlement option when it finds either the nature of the case inappropriate for friendly settlement or the State lacks good faith.[28] Indeed, the potential success of a friendly settlement procedure depends on the continued possibility of resorting to the contentious procedure where a fair agreement cannot be reached.

16. The working group might wish to consider the following issues in relation to the proceedings on the merits:

(a) The option of expressly permitting the Committee to consider the admissibility and merits simultaneously;

(b) The need to explicitly consecrate in the text of a future optional protocol the possibility of friendly settlement of communications as a means of achieving a solution agreeable to both parties, given the fact that it is already a general principle of international law and also given the value of ensuring that any future optional protocol is concise and simple;

(c) The value of including safeguards in the procedure, such as allowing the Committee discretion to refuse friendly settlement of disputes in certain cases.

G. Interim measures

17. In urgent situations, a body which has received a communication alleging a human rights violation may, after receipt of a communication and before adopting its views, request a State party to take certain interim measures to avoid irreparable damage to the victim of the alleged violation. Interim measures are designed to respond to exceptional or life-threatening situations. For example, in the vast majority of cases under the Human Rights Committee, interim measures have been used in cases concerning the death penalty or deportation that risked violation of articles 6 or 7 of ICCPR. Where the Committee grants interim measures, the final decision may confirm or revoke them. The rules of procedure of the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination foresee such a possibility. The OP to CEDAW, however, expressly includes a provision on interim measures according to which the Committee may request a State party to take "such interim measure as may be necessary to avoid possible irreparable damage"[29] to the alleged victim or victims. The use of interim measures in the inter-American system has been significant in protecting the right to health of people living with HIV/AIDS seeking access to essential medicines.[30]

18. The working group may wish to consider the value of including an express reference to interim measures in a potential communications procedure.

H. Views

19. The next stage in the consideration of a communication is the adoption by the treaty body of its decision or views on a communication. The existing procedures contain a provision that the treaty body shall forward its views and recommendations, if any, to the State party concerned and to the petitioner.[31] In the case of a violation, the treaty body requests the State party to take appropriate steps to remedy the violation. These steps might be limited to recommendations that a State party provide an “appropriate remedy”, or they might be more specific, such as recommending the review of policies or the repeal of a law, the payment of compensation or the prevention of future violations.

I. Follow-up procedures

20. All treaty bodies have developed a practice of following up on decisions taken with regard to a specific communication. The rules of procedure of both the Committee on the Elimination of Racial Discrimination and the Committee against Torture establish that the State party concerned shall be invited to inform the Committee of the action taken in conformity with the Committee’s views. In 1990, the Human Rights Committee established a procedure of monitoring the follow-up to its views. Under this procedure, the Committee indicates in its decisions a time limit for the receipt of information regarding the action taken by the State party with respect of the Committee’s views. The Committee also appoints a special rapporteur in charge of ascertaining the measures taken by the State party to give effect to the Committee’s views.

21. In relation to the OP to CEDAW, the Committee’s rules of procedure determine that a rapporteur or working group shall be designated to ascertain the measures taken by States parties as follow-up.[32] The rapporteur shall report to the Committee on follow-up activities on a regular basis.[33]

22. The various systems of complaints and representations under ILO also include follow-up mechanisms. For example, the Committee on Freedom of Association may make recommendations to member States on the basis of consideration of a complaint. Governments are subsequently requested to report on implementation of the recommendations. In its recommendations, the Committee may propose to the Government concerned a “direct contacts” mission to address the question directly with government officials and social partners through a process of dialogue. The Committee may also make recommendations to the ILO Governing Body that the latter recommend to the concerned Government that it seek technical assistance from ILO to help remedy the issue.

23. These procedures constitute an incentive for States promptly to adopt measures aimed at giving effect to Committee’s views, a way for States to report publicly on those measures, a source of best practices by States on their implementation of Committee’s views and therefore a crucial element in making the communications system more effective.

24. The working group might wish to consider the value of expressly including follow-up procedures within a potential communications procedure and the nature of those procedures.

J. Reservations

25. A reservation is a unilateral statement by a State "whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".[34] Generally, only reservations "incompatible with the object and purpose of the treaty" are prohibited.[35] However, in recognition that the optional protocol is in fact an optional instrument, the OP to CEDAW contains a provision which explicitly forbids reservations.[36]

26. The working group might wish to consider:

(a) The effect of permitting reservations in an instrument which is of an optional nature;

(b) The similarities between a communications procedure allowing reservations and an "opt-out" approach (outlined above), and whether the choice of one would preclude the use of the other;

(c) The applicability of the Vienna Convention on the Law of Treaties.

II. INQUIRY PROCEDURE

27. An inquiry procedure is a mechanism through which a treaty body may take the initiative in cases where it receives reliable information that appears to it to contain well-founded indications of grave or systematic human rights violations in the territory of a State party. The fundamental differences between an inquiry procedure and a complaints procedure are, first, that in the inquiry procedure the Committee does not have to receive a formal complaint and it is up to the Committee to decide to initiate the procedure (which may include a visit to the State party - subject to its consent); second, the examination of a situation by the treaty body is permitted only in cases indicating grave or systematic violations of the rights set forth in the treaty; third, there is no victim requirement.

28. CAT (art. 20) as well as the OP to CEDAW (arts. 8 and 9) contain inquiry procedures. Under the OP to CEDAW (art. 10), States may "opt-out" of the inquiry procedure at the time of signature, accession or ratification. Under CAT (art. 20), a State may enter a reservation declaring that it does not recognize the competence of the Committee to initiate inquiry procedures.

29. The main steps in an inquiry procedure are as follows:[37]

(a) **Receipt of information** - The treaty body receives information of grave or systematic violations of human rights;

(b) **Initial consideration of information** - The treaty body considers whether the information is reliable. It may seek further information;

(c) **Invitation to State party to cooperate** - If the treaty body finds that the information is reliable, the treaty body invites the State party to cooperate in the examination of the information, including through the submission of information to the treaty body;

(d) **Decision to proceed** - The treaty body considers the submission of the State party as well as any additional information provided by governmental organizations, the United Nations system, NGOs and individuals, and designates one or more members to conduct the inquiry. The treaty body must seek the cooperation of the State party at all stages if it decides to proceed;

(e) **Country visit** - Where warranted, the treaty body may conduct a visit to the territory concerned. Visits may, with the consent of the State party, include hearings;

(f) **Transmission of findings** - After the inquiry, the treaty body may transmit its findings to the State party;

(g) **Submission of State observations** - Within six months of transmission of the findings, the State party must submit its observations;

(h) **Follow-up** - The treaty body may invite the State party to include in its periodic report details of any measures taken to implement the findings. The treaty body may invite the State party to inform it of any measures taken to implement the findings. The treaty body includes a summary of the procedure in its annual report.

30. The inquiry procedure is confidential at all stages and all meetings of the Committee dealing with an inquiry procedure are closed. The results of the inquiry are published.

III. INTER-STATE PROCEDURES

31. The inter-State procedure enables a State party to a human rights treaty to present communications before a treaty body or supervisory mechanism in cases of alleged violations of the provisions of the treaty by another State. ICCPR, ICERD, CAT and CMW all include inter-State procedures; however, as of 5 September 2005, these had never been used.

32. ICCPR and ICERD set out a procedure for the resolution of disputes between States. A State party considering that another State party is not giving effect to the provisions of the treaty may bring the matter to the attention of the other State party and the treaty body, and the treaty body may make available its goods offices to the States parties concerned with a view to a friendly solution of the matter, which must always respect human rights. Where this does not succeed, the treaty body may establish an ad hoc Conciliation Commission consisting of five persons acceptable to the States parties concerned. In the case of ICERD this procedure normally applies to all parties to the Convention, and in the case of the ICCPR only applies to those States that have made a declaration accepting the competence of the Committee in this regard.

33. In the case of CAT (art. 21) and CMW (art. 76) the Committee may consider complaints from a State party which considers that another State party is not giving effect to the provisions of the Convention. The procedure only applies to those States that have declared that they accept the competence of the relevant Committee in this regard.

34. The working group may wish to consider the extent to which an inter-State procedure might be a means by which a treaty body could provide its goods offices in order to seek a friendly solution between States having made an appropriate declaration to accept such an instrument, in relation to concerns over international cooperation and assistance.

IV. CROSS-CUTTING ISSUES

A. An optional protocol and domestic decisions on resource allocation

35. An issue identified by the working group requiring particular attention is how the operation of an optional protocol might affect domestic decisions on resource allocation.

36. It is important to state at the outset that communications relating to alleged violations of the Covenant would not necessarily concern decisions by public authorities on resource allocations. Examples of such cases include: many, if not most, communications alleging discrimination; communications seeking orders that an authority should desist from taking measures that would violate a right (for example in the case of forced and arbitrary evictions, house demolitions, or acts that obstruct access to essential medicines or to education); communications seeking orders requesting the State to enact legislation and other protections to ensure against violations of the Covenant by third parties; or communications seeking the implementation of a policy or programme which is already in existence (in this case, while there could be resource allocation questions, the decision to allocate those resources would already have been taken at the time the Government decided to adopt that programme or policy).

37. Nonetheless, communications could also request the Committee to consider the compatibility of certain policy decisions of public authorities with the provisions of the Covenant, in particular if a communication concerns the alleged non-fulfilment of the obligation to "take steps" under article 2 (1). The question arises whether treaty bodies face any new challenge to their role in relation to economic, social and cultural rights in comparison to other areas of law, including civil and political rights.

38. In understanding the role of a treaty body in such situations, an important starting point is the examination of the appropriate role of the judiciary in decision-making at the national level. Constitutionally, the judiciary has a role to uphold the balance of powers between the executive, the parliament and the courts, which sometimes requires judicial review of the acts and omissions of public authorities.[38] The judiciary makes such decisions according to established legal doctrine and principles. In South Africa, these matters were debated at the time it was decided to include socio-economic rights in the Bill of Rights. There, the Constitutional Court pronounced itself on the matter of the separation of powers doctrine and admitted that, when pronouncing itself on economic, social and cultural rights, a court could make orders with budgetary implications. However, in the Court's opinion, this was not fundamentally different from what already occurred in relation to adjudication of civil and political rights. The Constitutional Court then stated that "[a] court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within the bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers".[39]

39. In *Minister of Health and Others v. Treatment Action Campaign*, the South African Court of Appeal referred directly to this question of separation of powers between the judiciary and executive. After examining practice in Canada, Germany, India, the United Kingdom and the United States, the Court concluded its own position, noting that: "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy." The Court further noted that a dispute concerning socio-economic rights would thus be likely to require a court to evaluate State policy and to give judgement on whether it is consistent with the Constitution.[40]

40. In this context, it is relevant to examine the ways in which national courts have approached their role of judicial review of the actions of public authorities by reference to concrete examples. The following three cases illustrate how courts respect the margin of discretion of public authorities to take decisions on resource allocation:

(a) Case No. 590/2004 of the Portuguese Constitutional Court (Tribunal Constitucional, Processo No. 944/03) concerned a complaint that a government decision to revoke low interest rates for the purchase or construction of private housing for people under 30 years old violated constitutional guarantees for the promotion of well-being and quality of life as well as the right to housing. The Court concluded that the existence of the policy was not required by the Constitution and was not an indispensable measure to ensure access to housing. The Court held that "[t]he Constitution requires the existence of a policy for access to housing, which has to translate itself into the adoption of concrete measures, whose choice is exclusively the competence of the legislator". In making the decision, the Court acknowledged that the State might have to establish different times, degrees and ways of implementing specific rights, bearing in mind the scarcity of resources and the obligation to realize all economic, social and cultural rights. In the specific case, the Court noted that the State might employ alternative means of realizing the right to housing such as the creation of non-profit-making housing associations, the increase of the available constructions (which would result in a decrease of the prices), or the creation of mechanisms promoting public saving aimed at acquiring housing;

(b) *Soobramoney v. Minister of Health*[41] concerned a claim by a patient suffering from kidney failure who needed, but could not receive, regular renal dialysis due to a lack of resources that prevented all patients in need of dialysis from receiving it. However, the authorities had established a set of guidelines to determine which applicants could access treatment. In this context the Court stated that "[T]he provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters";

(c) In the case of *R. v. Cambridge Health Authority*,[42] the applicant was refused treatment of bone marrow transplant for her acute myeloid leukaemic condition because the National Health Service would not pay for it. Allowing the appeal of the Cambridge Health Authority and supporting the principle that NHS has finite resources, the Court concluded that the Court was not in a position to decide on the correctness of the difficult and agonizing judgements which Health Authorities had to make, as to how a limited budget was best allocated to the maximum advantage of the maximum number of patients.

41. Two further cases illustrate how courts and tribunals apply objective standards as a means of adjudicating the compatibility of resource-related decisions of public authorities with economic, social and cultural rights:

(a) The case of *The Government of South Africa v. Grootboom*[43] illustrates how courts adapt legal concepts such as the test of reasonableness to assess whether a policy with resource implications is compatible with constitutional rights. The case concerned Ms. Grootboom and others who were living in extremely poor conditions on illegally occupied private land earmarked for formal low-cost housing. The inhabitants were forcibly evicted from the land and their houses destroyed. The Court determined that, although there was comprehensive housing legislation in place aimed at the progressive realization of the right to housing, the legislation did not take into account the situation of people in desperate need. The Court applied a test of reasonableness to the housing policy and concluded that the housing policy did not meet this test, as a reasonable part of the national housing budget was not devoted to people in desperate need. The Court ordered that governments involved to "devise, fund, implement and supervise measures to provide relief to those in desperate need";

(b) The case of *STTK ry and Tehy ry v. Finland*[44] indicates how a treaty monitoring body based a decision using objectives standards it had previously applied in the reporting procedure. In that case, the State had, until 1998, granted additional paid leave for radiation-related work in the health sector. The State repealed the act granting the additional leave, providing evidence that there were no biological or medical grounds to suggest that additional leave would help prevent detriment caused by radiation. The Committee referred to its previous views under the reporting procedure, noting that it had always considered exposure to such radiation as a health risk to workers. While the elimination of workplace risks was the ultimate objective, until that was achieved, reduced working hours or additional holidays remained essential to workers' protection. Therefore, in the Committee's opinion workers in that sector should be entitled to additional paid holidays or reduced working hours, as had previously been the case.

42. It is also relevant to refer to the practice of courts in relation to claims concerning civil and political rights that carry resource implications. In this context it is interesting to look at three examples of cases related to unreasonable delays in court proceedings and the conditions of detention:

(a) In *R. v. Askov*,[45] a delay of up to two years between the date of committal for trial and the trial itself was held to be in violation of an accused's right to be tried within a reasonable time, as guaranteed by the Canadian Charter of Rights and Freedoms. According to the Supreme Court, "[j]ustice so delayed is an affront to the individual, to the community and to the

very administration of justice. The lack of institutional facilities cannot in this case be accepted as a basis for justifying the delay". The Court added then that "[t]his conclusion should not be taken as a direction to build an expensive courthouse at a time of fiscal restraint. Rather, it is a recognition that this situation is unacceptable and can no longer be tolerated. Surely an imaginative solution could be found that would rectify the problem. For example, courtroom space might be found in other nearby government buildings. Or perhaps an interim solution could be achieved by the installation of portable structures similar to those used in the school system …". The Court noted that "the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate";[46]

(b) The European Court of Human Rights has examined several cases dealing with alleged violations of article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which recognizes that "everyone is entitled to a fair and public hearing within a reasonable time". The Court has distinguished between temporary backlogs and "organizationally in-built" backlogs. In cases of endemic backlog, it is implicit in several decisions taken by the Court that the State is under the duty to reorganize structurally its delivery of judicial services;[47]

(c) The Human Rights Committee has also considered communications that have implications on the allocation of resources. For example, in *Mukong v. Cameroon*,[48] the author had been detained in a cell at Police Headquarters, stripped of his clothes, and forced to sleep on a concrete floor. He was also detained at the Mbope camp where he allegedly was not allowed to see his lawyer, his wife or his friends, and he was also allegedly subject to intimidation, beatings, mental torture, heat exposure and confinement in a cell for 24 hours. The author claimed violation of his right to be free from torture and cruel, inhuman or degrading treatment. The Government argued that "the situation and comfort in the country's prisons must be linked to the state of economic and social development"[49] of the country. The Human Rights Committee observed "that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include … minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult."[50]

43. The above analysis is not intended to oversimplify the often difficult role facing judges at the national level or human rights treaty bodies in determining the compatibility of government decisions with legislation, constitutions and human rights treaties. The balance between judicial activism and judicial deference will alter over time and between countries, and tensions can arise. Most cases at the national and regional level require courts and quasi-judicial bodies to investigate a State act or omission and declare it compatible with the constitution or treaty. In some cases, it might be appropriate for the court or treaty body to advise public authorities of the nature of the course to be taken, for example by indicating the specific result required (without establishing the method to employ) or alternatively, where there is only one possible means of obtaining the required result, by describing the action to be taken.[51] The most important issue to

emphasize is that the judicial and quasi-judicial consideration of economic, social and cultural rights does not raise any judicial conundrums that are substantially different from others already dealt with in other areas of the law.

B. Relationship of an optional protocol with existing mechanisms

44. The nature of international human rights treaties and the indivisible and interdependent nature of human rights naturally result in specific human rights being protected under several treaties. Indeed, all human rights treaties include, in some way, respect for economic, social and cultural rights as they do civil and political rights. Given that most international human rights treaties also contain individual communications procedures, this naturally indicates that there are already communications procedures at the national level that treat some aspects of economic, social and cultural rights. The communications procedures of the ILO and the United Nations Educational Scientific and Cultural Organization (UNESCO) also relate to selected human rights, including some economic, social and cultural rights.

45. At the heart of the matter is the fact that the current protection of human rights provides only fragmented protection at the international level. While some categories of people are already protected in relation to some aspects of some economic, social and cultural rights, there are still many aspects of economic, social and cultural rights that are not subject to a quasi-judicial individual communications procedure, including:

(a) Instances of discrimination not covered by ICERD, CEDAW, CWM or ICCPR;

(b) Claims relating to rights of individual workers (articles 6-8 of the Covenant) - the ILO procedures protect workers' human rights only through representations by an employees' association, an employers' association or a Government (a collective complaints mechanism);

(c) Claims relating to other substantive rights in Part III of the Covenant (arts. 9-15) - while the right to education and cultural rights are subject to the UNESCO procedure, that procedure is expressly not a quasi-judicial procedure; it is confidential, and the supervising body is made up of government delegates, not independent experts;

(d) Supervision of the obligation to "take steps" (under article 2 (1) of the Covenant).

46. In this context, the adoption of an optional protocol could provide a means for individuals or groups of individuals to bring communications in relation to a range of human rights currently not subject to quasi-judicial adjudication at the international level. For example, there is currently no such protection in the case of: forced evictions; unjustified or disproportionate restrictions on access to essential medicines or health care; the denial of the right to education as a result of unaffordable fees for primary students; the arbitrary or unjustified restriction on parental choice of schools; the liberty to establish educational institutions; the failure to implement food distribution schemes resulting in unnecessary hunger; the lack of any steps to address malnutrition or homelessness, and so on.

47. The question remains, however, whether the adoption of an optional protocol to the Covenant would lead to duplication. In this regard, certain procedural measures can be helpful as a means of avoiding this. First, duplication can often be avoided through cooperation between

existing mechanisms. Importantly, there is already a joint expert group on the monitoring of the right to education between the UNESCO Committee on Conventions and Recommendations and the CESCR, which meets annually. CESCR also meets once a year with members of the ILO Committee of Experts on the Application of Conventions and Recommendations. Second, the inclusion in an optional protocol of restrictions on the same communication being admitted to two international mechanisms concurrently also provides guarantees against overlap. Third, OHCHR receives communications in relation to any alleged human rights violations, which provides a centralized means of ensuring that duplication does not occur and a means of coordinating between treaty bodies to ensure consistent interpretations of treaty provisions.

C. International cooperation and assistance

48. International cooperation is an undisputed central element in the implementation of the Covenant and the enjoyment of economic, social and cultural rights generally. The outcomes of various world summits and declarations of the General Assembly, such as the United Nations Millennium Declaration, the Monterrey Consensus and the outcome of the World Summit on Sustainable Development have all recognized the importance of international cooperation and identified the means of strengthening it. Only recently, the General Assembly welcomed the increased resources that will become available as a result of the establishment of timetables by many developed countries to achieve the target of 0.7 per cent of gross national product for official development assistance by 2015.[52]

49. However, consideration of international cooperation in the context of a possible optional protocol to the Covenant has to take place within the context of the Covenant's provisions. References to international cooperation appear in several articles of the Covenant. Importantly, under article 2 (1), each State party undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the provisions of the Covenant. International cooperation also appears in relation to the right to be free from hunger (art. 11 (2)) and the benefits derived from international cooperation are recognized in the scientific and cultural fields (art. 15 (4)). In order to implement the provisions on international cooperation, Part IV of the Covenant identifies a role for the Economic and Social Council: to bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies any matters arising out of State party reports under the Covenant to assist such bodies to decide on the advisability of international measures to implement the Covenant (art. 22).

50. Article 23 of the Covenant illustrates examples of international cooperation, which includes "such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned". It is relevant to note that references to international cooperation in the Covenant apply to States parties in general and do not fall on any one particular State. In its general comment No. 2 (1990) on international technical assistance measures, the Committee identifies relevant bodies for furnishing technical assistance as the Commission on Human Rights, the Commission on the Status of Women, other bodies such as UNDP, UNICEF and the Committee for Development Policy, agencies such as the World Bank and IMF, and the other specialized agencies such as ILO, FAO, UNESCO and WHO.

51. In its general comment No. 3 (1990) on the nature of States parties obligations, CESCR has considered international cooperation, noting that the phrase “to the maximum of its available resources” (art. 2) refers “to both resources existing within a State and those available from the international community through international cooperation and assistance” (para. 13). In this regard, the Committee in its general comment No. 2 (1990) has identified the importance of States parties’ identifying to the Committee areas where they might have particular needs for international cooperation and assistance.

52. A challenge of an optional protocol in this context is to give effect to the procedure already established in the Covenant under article 22. In spite of its inclusion in the Covenant, the Economic and Social Council has rarely invoked the procedure. One reason for this might be due to the fact that the Committee’s recommendations under the periodic reporting procedure are so general that it has not been possible to recommend concrete steps aimed at achieving progressive implementation of particular provisions of the Covenant.

53. However, concrete and individualized cases under an optional protocol could provide an opportunity for the Committee to recommend tangible steps so that the Council could identify international measures to assist a State in need. Thus, for example, the Committee might find a violation of a provision of the Covenant in relation to a particular State, but at the same time recognize that the State is unable, on its own, to remedy the violation. On this basis, in consultation with relevant stakeholders, the Committee could include recommendations to the Council under article 22 in its views on the communication and in its annual report.

54. In order to achieve this, the working group might wish to consider how the terms of a possible optional protocol could give the Committee the specific role to activate the procedures under articles 22 and 23 in a meaningful and effective manner. The optional protocol could, for example, request the Committee, where appropriate, to transmit its views on “specific” or “concrete” requests for international cooperation and assistance that would be submitted by the Committee to the Council to “contribute to the effective progressive implementation of the … Covenant”. In this regard, the working group might also wish to consider the inclusion of modalities for consultation with relevant United Nations bodies, programmes and specialized agencies as well as the State party concerned in formulating such views.

55. In this regard, the working group might wish to consider the experience of the Committee on the Rights of the Child. Under article 45 of CRC, the Committee has explicit powers to invite specialized agencies, UNICEF and other competent bodies to consider the provision of expert advice and to submit reports and the Committee may transmit a request from a State party to those bodies and agencies for technical advice or assistance. The Committee may also recommend to the General Assembly that it request the Secretary-General to undertake studies. The Committee makes consistent use of these powers, benefiting in particular from its strong relationship with UNICEF and other specialized agencies. This experience could provide guidance to the working group.

56. A group of States has suggested the creation of a voluntary trust fund to finance the implementation of views adopted by the Committee under an optional protocol, in those cases where the State party would not have enough available resources to do so. The working group might wish to discuss this proposal, whether it duplicates or supplements the procedure under articles 22 and 23 of the Covenant, and whether any existing voluntary funds could also be used for this purpose.

D. Costs of an optional protocol

57. On information supplied by the OHCHR, an optional protocol to the Covenant would in all likelihood require the following resources:

(a) For the initial two years following the entry into force of the optional protocol, when few communications would be received and registered for consideration under the procedure: one Professional at P-3/P-4 level and one part-time General Service staff;

(b) For subsequent years once the procedure has become more established and the Committee is required to consider a larger number of communications: three Professionals at P-3/P-4 level and one full-time General Service staff.

58. As the number of complaints processed under a new optional protocol grows, provision of the necessary conference services and editing and translation services will be necessary.

59. A new inquiry procedure under an optional protocol to the Covenant would require one full-time Professional (at P-3 level) for the Committee's secretariat, assuming that inquiry missions will be serviced by at least two Professional staff and that the Committee's existing secretariat will contribute to inquiry servicing.

E. The option of having no optional protocol

60. The option of having no optional protocol suggests that implementation of the Covenant would continue along a similar course as at present. Not having an optional protocol would suggest that:

(a) It is sufficient that implementation of the Covenant is monitored through the review of States parties' reports on an average of once every seven to eight years;

(b) Unlike civil and political rights, economic, social and cultural rights are not justiciable at the international level and therefore not appropriate to any form of international adjudication;

(c) Economic, social and cultural rights are in fact different and have a nature distinct from civil and political rights;

(d) While civil and political rights are very explicitly spelled out, economic, social and cultural rights are essentially vague or aspirational;

(e) Unlike civil and political rights, which do not have any significant resource implications, economic, social and cultural rights are discretionary and costly;

(f) The interpretation of specific provisions of the Covenant would continue to rely on the constructive dialogue between the Committee and States parties and the Committee should not analyse provisions by reference to specific and individualized situations;

(g) There is insufficient justification to extend the human and financial resources at OHCHR to provide secretariat support for the implementation of an optional protocol.

F. Analysis and assessment of the impact of an optional protocol on improving implementation of economic, social and cultural rights at the national level

61. While it is not possible to assess the impact of an optional protocol prior to its coming into force, it is nonetheless possible to assess current trends in the legal enforcement of human rights as a means of indicating the possible impact of an optional protocol at the national level. Three trends are relevant.

62. The first trend is that there is growing acceptance at the national level of the appropriateness and effectiveness of considering economic, social and cultural rights in a judicial context. For example:

(a) In *Minister of Health v. Treatment Action Campaign*,[53] the Constitutional Court of South Africa made a number of orders to facilitate access to nevirapine, an HIV treatment used to prevent mother-to-child transmission of HIV. This has led to the institution of significant programmes for the prevention of mother-to-child transmission of HIV in South Africa, where it is among the highest in the world, and there has been very substantial compliance with the judgement, with the resultant saving of thousands of children's lives;[54]

(b) In *People's Union for Civil Liberties (PUCL) v. Union of India and Others*,[55] the Court made a set of interim orders to respond to the breakdown of the five-year food security and distribution schemes and the inadequacy of relief programmes in drought-affected areas of India which had led to deaths from starvation in some states while food stocks were left unused in other parts of the country. The interim orders have led to the introduction of programmes for mid-day meals at schools; the provision of cards to people living below the poverty line allowing them access to 35 kg of grain a month at subsidized prices; a more efficient implementation of the existing Integrated Child Development Scheme through Court monitoring of that scheme; and the introduction of work-for-food programmes;

(c) In *Marchisio José Bautista y Otras - AMPARO*,[56] the judge at first instance ordered the Municipality of Córdoba, Argentina, to adopt all necessary measures relative to the functioning of a sewage treatment facility in order to minimize the environmental impact. The judge also ordered the provincial government to provide 200 litres of safe drinking water daily until appropriate public works could be carried out to ensure full access to the public water service in accordance with an existing government decree. In implementing the order, the Municipality presented an "integral sewerage plan" which directed US$ 1.75 million investment for the rehabilitation of the existing infrastructure and US$ 6 million in order to increase the facilities' capacity. In December 2004, the provincial government commenced public works with a view to providing fresh and safe drinking water to the affected communities. The litigation has prompted the Municipality to take further action (not explicitly required by the judge's order), which has decreed that the executive branch will not authorize any new sewage connections until it has improved the capacity of the sewerage plant. Further, the Municipality has passed a law directing that all revenue from sewage and sanitation taxes (about US$ 10 million) should be invested exclusively in the sewage system.[57]

63. A second trend indicates that experience from regional communications systems has succeeded in stimulating attention to economic, social and cultural rights at the national level. For example:

(a) The use of interim measures by the Inter-American Commission has been successful in providing immediate relief to people whose rights are seriously threatened. In the case *Jorge Odir Miranda Córtez y Otros* (El Salvador),[58] the Commission considered a claim by the applicant and 26 other people suffering from HIV/AIDS that the State was not complying with its obligations in relation to the right to health and other rights for not providing triple therapy treatment. The Commission recommended interim measures of provision by the State of triple therapy as well as any necessary hospital, pharmaceutical and nutritional care. As a result, the State party authorized triple therapy for people suffering from HIV/AIDS in the country. Similar examples of the use of interim measures to protect the right to health exist in relation to other Latin American countries;[59]

(b) In the case *International Commission of Jurists v. Portugal*,[60] the European Committee of Social Rights considered a claim that the State party was not enforcing the prohibition on the employment of children below the age of 15 as required under the European Social Charter. The Committee found that the State party was not in compliance with the Charter as, although legislation prohibited child labour, the legislation was not effectively enforced. Subsequently, the State party reported that, due to improvements in the Labour Inspectorate's working methods to monitor respect for the prohibition on child labour, statistics on child labour had greatly decreased and was now of marginal importance. Further, the State party had taken legislative measures in relation to self-employed children and children engaged in light work, hazardous work and night work, and to child labour as a crime. Finally, the State party had introduced policy changes to eliminate child labour. The European Trade Union Council corroborated the evidence and conclusions of the State party.[61]

64. A third trend is that existing communications procedures indicate that international procedures have an important catalytic role at the national level. Experience of the Human Rights Committee indicates that the views of the Committee have led to immediate relief for victims as well as the implementation of legislation either outlawing particular acts or ameliorating the conditions that had led to the complaint before the Committee.[62] To give just one example, in the *Breadwinner* case the State party had amended social security legislation that discriminated against women who were neither breadwinners nor permanently separated from their husbands in relation to their eligibility to receive unemployment benefits. The amendments remedied the discrimination on the basis of sex with regard to the right to social security and guaranteed that it would not occur again.[63] Not only have communications procedures provided relief to authors in the case of violations, decisions have also given guidance to national judges in interpreting the scope of rights.

65. In this regard, it is relevant to note that even in the absence of a quasi-judicial communications procedure, human rights treaties and their general comments have had an impact at the national level. For example, case law from Argentina, Colombia, India, Latvia and other countries situate their interpretations of national constitutions within the context of legal obligations undertaken by the State under the Covenant.[64] For several States, ratification of the

Covenant gives it constitutional value, which has had an important role in promoting the justiciability of its provisions. Even in those cases where a certain Covenant right is not recognized or integrated in a country's constitution as such, it might nevertheless be justiciable at the national level, as long as the domestic legislation concretizes this particular right. In certain cases, national courts in South Africa and Argentina have also referred directly to the general comments of the Committee.[65] There is reason to believe that a communications procedure would have a multiplier effect on the Covenant's impact at the national level, particularly given the consideration of specific cases in communications and the possibility this affords for giving greater clarity to the Covenant rights.

66. It is impossible to be exhaustive in any analysis of the potential impact of an optional protocol or to draw definitive conclusions from this experience - there could well be different experiences between countries and between cases, and much depends on the willingness of States parties to respect the decisions adopted under an optional protocol. Nonetheless, there is evidence to suggest that an optional protocol would have a positive effect, not only dealing with the situation that is the subject of a communication, but further promoting the adoption of more general measures while at the same time consolidating understanding of economic, social and cultural rights. The positive experience of the Human Rights Committee in relation to the optional protocol to ICCPR suggests that international human rights mechanisms can be effective, and that this experience could be replicated or even improved upon in the case of an optional protocol to ICESCR, in particular through the inclusion of an effective follow-up procedure.

Notes

[1] Communications procedures exist in relation to the following international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) through its Optional Protocol; the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD, art. 14), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, art. 22), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) through its Optional Protocol, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (art. 76). At the regional level the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights and the European Social Charter all contain communications procedures.

[2] European Social Charter (revised), art. A, Part III.

[3] An example of an "opt-out" clause can, for example, be found in CEDAW, art. 29(2), according to which a "State Party may at the time of signature or ratification of the … Convention or accession thereto declare that it does not consider itself bound by" an obligation to refer, under certain circumstances, disputes between States parties, to the International Court of Justice.

[4] For example in the case of the UN Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) there is a provisions (article 3 of the Technical Annex) stating that "[i]n the event that a High Contracting Party determines that it cannot immediately comply with" some specific provisions of the Protocol "it may declare at the time of its notification of consent to be bound by [the] Protocol, that it will … defer compliance with [those provisions] for a period not to exceed 9 years from the entry into force of this Protocol".

[5] See Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador", art. 19(6).

[6] See OP to CEDAW, art. 4(2)(e), which establishes that a communication will be inadmissible when "[t]he facts that are the subject of the communication occurred prior to the entry into force of the … Protocol for the State Party concerned unless the facts continued after that date".

[7] See e.g. ICERD, art. 14(6)(a).

[8] See OP to ICCPR, art. 3; CAT, art. 22(2); CMW, art. 77(2); and OP to CEDAW, art. 4(2)(b).

[9] See OP to ICCPR, art. 5 (2)(a).

[10] See CAT, art. 22(5); CMW, art. 77(3)(a); and, OP to CEDAW, art. 4(2)(a).

[11] See CERD, art. 14(7)(a); CAT, art. 22(5)(b); OP to ICCPR arts. 2 and 5(2)(b); CMW, art. 77(3)(b); and, OP to CEDAW, art. 4(1).

[12] See CERD, art. 14(7)(a); OP to CEDAW, art. 4(1).

[13] See American Convention on Human Rights, art. 46(2).

[14] See OP to CEDAW art. 4(2)(c).

[15] Ibid., art. 2; Committee on the Elimination of Discrimination against Women, rules of procedure, rule 68(1) and (3).

[16] See Human Rights Committee, rules of procedure, rule 96.

[17] See the Additional Protocol, art. 1.

[18] See e.g. Committee against Torture, rules of procedure, rule 99(1) and Committee on the Elimination of Racial Discrimination, rules of procedure, rule 94(1).

[19] The exception to the rule is the case of communications under ICERD where the State party has a three-month time limit to submit the responses. See ICERD, art. 14(6)(b); Committee on the Elimination of Racial Discrimination, rules of procedure, rule 94(2).

[20] See e.g. OP to ICCPR, art. 4(2); CAT, art. 22(3), CERD, art. 14(6)(b); CMW, art. 77(4); and OP to CEDAW, art. 6(2).

[21] See, e.g. Human Rights Committee, rules of procedure, rule 99(2) and (3); Committee against Torture, rules of procedure, rule 111(2) and (3).

[22] For example, OP to CEDAW, art. 7(1), states that the Committee should consider all information made available to it by or on behalf of individuals or groups of individuals or the State party.

[23] OP to CEDAW, art. 7(2); Committee on the Elimination of Racial Discrimination, rules of procedure, rule 88; OP to ICCPR, art. 5(3); CAT, art. 22(6); and CMW, art. 77(6).

[24] See e.g. Committee on the Elimination of Discrimination against Women, rules of procedure, rule 72(2).

[25] American Convention on Human Rights, art. 48(1)(f).

[26] European Convention on Human Rights, art. 28(b).

[27] L. Pettiti, E. Decaux and P. Imbert, *La Convention Européenne des Droits de l'Homme. Commentaire article par article,* Ed. Economica, 1995, p. 662.

[28] Regulations of the Inter-American Commission on Human Rights, regulation 45(7).

[29] OP to CEDAW, art. 5(1).

[30] See e.g., *Jorge Odir Miranda Cortez y Otros* (El Salvador), Report No. 29/01 of 2000. The American Convention on Human Rights expressly stipulates that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission." See American Convention on Human Rights, art. 63(2).

[31] OP to CEDAW, art. 7(3); OP to ICCPR, art. 5(4); CAT, art. 22(7); CERD, art. 14(7); and, CMW, art. 77(7).

[32] Rule 73(4).

[33] Rule 73(6).

[34] Vienna Convention on the Law of Treaties, art. 2(1)(d).

[35] Ibid., art. 19(c).

[36] OP to CEDAW, art. 17.

[37] See e.g. ibid., arts. 8 and 9 and Committee on the Elimination of Discrimination against Women, rules of procedure, rules 76-91.

[38] Ida Elisabeth Koch, "The Justiciability of Indivisible Rights", in *Nordic Journal of International Law*, 72:3-39, 2003, p. 29.

[39] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), paras. 76-78.

[40] South African Court of Appeal 2002 (5) SA 721, 2002 10 BCLR 1033.

[41] Constitutional Court of South Africa, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696.

[42] Court of Appeal of the United Kingdom, Ex Parte B [1995] Vol. 2 129.

[43] Constitutional Court of South Africa, 2000 ICHRL 72.

[44] European Committee of Social Rights**,** *STTK ry and Tehy ry against Finland,* complaint No. 10/2000, decision on the merits.

[45] Supreme Court of Canada, [1990] 2 S.C.R. 1199, 1990 CanLII 45 (S.C.C.).

[46] See *Schachter v Canada* [1992] 2 S.C.R. 679, 1992 CanLII 74 (S.C.C). In this context see also *Tétrault-Gadoury v. Canada (Employment and Immigration Commission),* where the Constitutional Court of Canada decided that persons over 65 should be able to receive benefits that had been explicitly restricted to persons under 65. "This is also a case in which the group to be added was much smaller than the group already benefited. Where the group to be added is smaller than the group originally benefited, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefited, this could indicate that the assumption is not safe. This is not because of the numbers *per se*. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion. In some contexts, the fact that the group to be added is much larger than the original group will not lead to these conclusions," quoted in *Schachter v. Canada*.

[47] See for example *Zimmermann and Steiner v. Switzerland*, application No. 8737/79, A66, 13 July 1983 and *Martins Moreira v. Portugal*, application No. 11371/85, A143, 26 October 1988.

[48] Communication No. 458/1991, decision adopted on 21 July 1994 (CCPR/C/51/D/458/1991).

[49] Ibid., para. 6.2.

[50] Ibid., para. 9.3.

[51] See V. Abramovich, Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies, in *SUR - International Journal on Human Rights*, Year 2, Number 2, pp. 189-223; and M. Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights”, Part 3 (2004) 20 *South African Journal on Human Rights*, pp. 383-417.

[52] Resolution 60/1 of 16 September 2005, para. 23 (d).

[53] Constitutional Court of South Africa, Case CCT 9/02.

[54] G. Budlender, Advocate of the High Court of South Africa and member of the Cape Town Bar, interview of 25 July 2005.

[55] Supreme Court of India, Writ Petition [Civil] No. 196 of 2001.

[56] Expediente No. 500004/36.

[57] R. Picolotti, “The right to safe drinking water as a human right”, *Housing and ESCR Rights Law Quarterly*, vol 2, No. 1, Centre on Housing Rights and Evictions.

[58] Report No. 29/01 of 2000.

[59] See Cristián Courtis, D. Hauser and G. Rodríguez Huerta, *Protección Internacional de Derechos Humanos: Nuevos Desafíos*, Editorial Porrúa and Instituto Techológico Autónomo de México, Mexico, 2005, pp. 347, 364-366.

[60] Complaint No. 1/1998.

[61] See Governmental Committee of the European Social Charter, 15th report (II), Strasbourg, 13 December 2001 (T-SG (2001) 21), paras. 36-42. See also information provided by the Government of Portugal - Inspection visits in enterprises were carried out in the regions and sectors where the problem of child labour was most acute. The number of unannounced inspection visits that specifically targeted at child labour increased considerably from 1997. Whereas the number of visits carried out in 1997 was 4,736 they amounted to 7,100 in 2001 and 11,043 in 2002. The number of cases of illegal child employment detected by the General Labour Inspection during this period constantly and considerably decreased. The number of children in illegal employment per 1000 visits carried out was 49.2 in 1999, 22.4 in 2000, 12.8 in 2001 and 3.8 in 2002. The number of children under the age of 16 illegally employed in enterprises visited decreased from 233 in 1999 to 42 in 2002.

[62] For examples of some successful follow-up to the views of the Human Rights Committee, see e.g. *Bautista v. Colombia*, case No 563/1993 (payment of 36,935,300 pesos to the family of a victim who disappeared and then murdered as well as the adoption of legislation making genocide, torture and enforced disappearances criminal offences pursuant to a finding by the Committee of a violation of the Covenant); *Galazauskas v Lithuania*, case No. 836/1998 (release of the author of a complaint of unfair trial prior to completion of the sentence due to a finding by the Committee of an unfair trial and adoption of a law guaranteeing the right to review of a conviction and sentence by a higher tribunal); *Filipovich v. Lithunania*, case No. 875/1999

(release of the author prior to serving a heavy retroactive sentence on finding by Committee of an unfair trial due to unduly prolonged proceedings, as well as amendments to the Law on Compensation and introduction of effective domestic remedies in future cases of prolonged pre-trial investigations); *Muller and Engelhard v. Namibia*, case No. 919/2000 (removal of legislative discrimination in the assumption of a spouse's surname, publishing of Committee's views on a national website); *Jansen-Gielen v. The Netherlands*, case No. 846/1999 (payment of compensation as well as legal fees upon finding of inequality in judicial proceedings as well as adoption of legislation preventing future similar violations); *Ignatane v. Latvia*, Case No. 884/1999 (establishment of a working group at the Cabinet level on measures taken to give effect to the Committee's views that the State party arbitrarily denied a candidate eligibility on the basis of language, adoption of two legislative amendments to ensure compliance in the future).

63 Human Rights Committee, communication No. 182/1984, *FH Zwaan-de Vries v. The Netherlands* , views adopted on 9 April 1987 (CCPR/C/29/D/182/1984).

64 See e.g. *Expediente No EXP-6985/0: María Delia Cerrudo y otras c. Gobierno de la Ciudad de Buenos Aires*; *Campodónico de Beviacqua, Ana Carina c. Ministerio de Salud y Acción Social*; *Case No.2000-03-0109 on Compliance of Item 1 of the Transiational Provision of the Law "On Social Insurance" with arts. 1 and 109 of the Satversme (Constitution)*; *PUCL v Union of India and Others,* op cit. at note 55.

65 This was the case in *The Government of South África v Grootboom* (see para. 41 (a)) where the Court referred to general comment No. 3 on Status parties' obligations under the Covenant; in *Marchisio José Bautista y Otras - AMPARO* (see para. 62 (c)), the judge referred to general comment No. 15 on the right to water.