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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**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 first session**

(Geneva, 23 February-5 March 2004)

Chairperson-Rapporteur: Ms. Catarina de Albuquerque (Portugal)

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Introduction

1. In paragraph 75 of its Declaration and Programme of Action, the World Conference on Human Rights, held in Vienna in 1993, encouraged “the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights”.
2. In 2003, the Commission on Human Rights, in paragraph 12 of its resolution 2003/18, recalled Economic and Social Council decision 2002/254 of 25 July 2002, in which the Council “endorsed the decision of the Commission to establish an open-ended working group with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights”.
3. The Commission requested the working group, in paragraph 13 of the same resolution, “to meet for a period of ten working days, prior to the sixtieth session of the Commission, with a view to considering options regarding the elaboration of an optional protocol, in the light, inter alia, of the report of the Committee on Economic, Social and Cultural Rights to the Commission on a draft optional protocol for the consideration of communications in relation to the Covenant (E/CN.4/1997/105, annex), comments and views submitted by States, intergovernmental organizations, including United Nations specialized agencies, and non-governmental organizations, and the reports of the independent expert (E/CN.4/2002/57 and E/CN.4/2003/53 and Corr.1 and 2)”. In paragraph 16 of the resolution, the Commission requested the working group “to report to the Commission on Human Rights at its sixtieth session and to make specific recommendations on its course of action concerning the question of an optional protocol to the International Covenant on Economic, Social and Cultural Rights”.
4. The present report is submitted to the Commission by the Chairperson-Rapporteur. The summary of proceedings in sections I-VII was adopted by consensus (ad referendum) by the Working Group at its final meeting on 5 March. The recommendations included in section VIII are the sole responsibility of the Chairperson-Rapporteur.

I. ORGANIZATION OF THE SESSION

A. Opening of the session and election of the Chairperson-Rapporteur

5. The session of the open-ended working group was opened by a representative of the Office of the United Nations High Commissioner for Human Rights (OHCHR). He welcomed the convening of the working group and provided a brief overview of its antecedents and of recent developments relevant to the deliberations of the working group, including two expert seminars on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) held in 2003 in Berlin and Dubrovnik. He informed the working group that, on the basis of the proposed timetable for the session discussed by State delegations at an informal consultation meeting on 22 January 2004, OHCHR had organized two expert panels in the context of the working group with members of human rights treaty monitoring bodies and Special Rapporteurs and expressed thanks to these experts for having made themselves available to the working group.

6. At its first meeting, the working group elected by acclamation Ms. Catarina de Albuquerque (Portugal) as its Chairperson-Rapporteur.

B. Participation

7. Representatives of the following States members of the Commission on Human Rights attended the meetings of the working group, which were open to all members of the Commission: Argentina, Austria, Australia, Brazil, Burkina Faso, Chile, China, Congo, Costa Rica, Croatia, Cuba, Dominican Republic, Egypt, Ethiopia, France, Germany, Guatemala, Hungary, India, Indonesia, Ireland, Italy, Japan, Mexico, Nepal, Netherlands, Nigeria, Paraguay, Peru, Republic of Korea, Russian Federation, Saudi Arabia, South Africa, Sweden, Togo, United Kingdom of Great Britain and Northern Ireland, and United States of America.

8. The following States, non-members of the Commission, were represented at the meetings of the working group: Albania, Algeria, Andorra, Angola, Bangladesh, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Canada, Cyprus, Czech Republic, Democratic People's Republic of Korea, Ecuador, El Salvador, Estonia, Finland, Greece, Haiti, Iran (Islamic Republic of), Israel, Kazakhstan, Latvia, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mauritius, New Zealand, Nicaragua, Norway, Poland, Portugal, Romania, Senegal, Serbia and Montenegro, Slovakia, Spain, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Uruguay and Venezuela.

9. The following non-member States of the United Nations were represented by observers: Holy See.

10. The following United Nations organizations, bodies, programmes and specialized agencies were represented at the meetings of the working group: International Labour Organization (ILO), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Joint Programme on HIV/AIDS (UNAIDS), World Food Programme (WFP) and World Health Organization (WHO).

11. The following intergovernmental organization was represented at the meetings of the working group: League of Arab States.

12. The following non-governmental organizations (NGOs) in general consultative status, special consultative status, and on the roster with the Economic and Social Council were represented: Amnesty International, Association of World Citizens, Center for Economic and Social Rights, Centre on Housing Rights and Evictions, Europe-Third World Centre, FIAN-Foodfirst Information and Action Network, International Commission of Jurists, International Women's Rights Action Watch, International Organisation for Development and Freedom of Education, New Humanity and Tupaj Amaru, World Organization Against Torture.

13. On 24 February 2004, Paul Hunt, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on the right to health), and Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (Special Rapporteur on adequate housing), addressed and engaged in an interactive dialogue with the working group. Eibe Riedel,

member of the Committee on Economic, Social and Cultural Rights (CESCR), Martin Scheinin, member of the Human Rights Committee (HRC), and Régis de Gouttes, member of the Committee on the Elimination of Racial Discrimination (CERD), also took part in an interactive dialogue with the working group on 25 February 2004.

C. Documentation and organization of work

14. The working group had before it the following documents:

E/CN.4/2004/WG.23/1	Provisional agenda
E/CN.4/2004/WG.23/2	Report of the Secretary-General in response to resolution 2003/18 of the Commission on Human Rights
E/CN.4/2004/WG.23/CRP.1	Background paper prepared by the secretariat: Selection of case law on economic, social and cultural rights
E/CN.4/2004/WG.23/ CRP.2	Information provided by the Government of Croatia: Report of the International Conference on Economic, Social and Cultural Rights, 2-4 September 2003, Cavtat-Dubrovnik, Croatia
E/CN.4/2004/WG.23/ CRP.3	Joint submission by non-governmental organizations, human rights institutions and civil society groups
E/CN.4/2004/WG.23/ CRP.4	Information provided by the Special Rapporteur on the right to education
E/CN.4/2004/WG.23/ CRP.5	Communication écrite du Centre Europe-Tiers Monde et de l'Association américaine de juristes
E/CN.4/2004/WG.23/ CRP.6	Joint written statement by the Europe-Third World Centre and the American Association of Jurists
E/CN.4/2004/WG.23/ CRP.7	Information provided by the Special Rapporteur on the right to food
E/CN.4/2003/53	Report by the independent expert to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

E/CN.4/2002/57	Report by the independent expert to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights
E/CN.4/1997/105	Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

15. At its first meeting, the working group adopted its agenda, as contained in document E/CN.4/2004/WG.23/1.

16. The Chairperson-Rapporteur underlined the importance of the task before the open-ended working group and encouraged all participants, including intergovernmental and non-governmental organizations to participate actively in the discussions. She went through the draft work plan and timetable which was endorsed by the working group.

II. OPENING STATEMENTS

17. At its first meeting, on 23 February 2004, States delegations and representatives of intergovernmental and non-governmental organizations made opening statements expressing their preliminary views on options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights and on the key issues to be addressed by the working group. Participants welcomed the convening of the working group, which was seen as an important step to strengthen the implementation of economic, social and cultural rights.

18. Some delegations referred to the reaffirmation at the 1993 World Conference on Human Rights in Vienna that all human rights are universal, indivisible and interdependent and interrelated. They said this was the natural starting point for the working group's deliberations. However, other delegations expressed different views as to the implications of these principles. Some delegations regretted the fact that, despite the international community's consensus on the universality and indivisibility of all human rights, it still did not give economic, social and cultural rights the same priority as civil and political rights. According to this view, the elaboration of an optional protocol would be a step towards rectifying this imbalance. Attention was drawn to the fact that, with the exception of the Convention on the Rights of the Child, optional complaints procedures had been established under all of the other main international human rights treaties. The opinion was also expressed that civil and political rights become solitary and meaningless without the realization of economic, social and cultural rights.

19. Other delegations maintained that the principle of indivisibility and interrelatedness of all human rights did not mean that the implementation of all human rights was alike. In particular, some delegations stated that the rights contained in the ICESCR were not as clearly defined as compared to those contained in the International Covenant on Civil and Political Rights (ICCPR). Similarly, some delegations suggested that most of the rights contained in the ICESCR were not absolute and were insufficiently precise to establish clear obligations, and that a complaints procedure would consequently be impracticable. Some delegations noted that it is

difficult for an adjudicatory body to determine whether an economic, social and cultural right has been violated because a large margin of discretion is left to States parties to make policy decisions. A number of delegations underlined that the matter required further careful study and analysis, particularly with regard to the nature of States parties' obligations and the criteria which would be used to determine whether a violation had occurred.

20. Some delegations believed that the provisions of the Covenant were insufficiently clear to lend themselves to a complaints procedure or to be justiciable. Other delegations referred to national and regional legislation and case law, arguing that experience shows that the vagueness of legal provisions of the Covenant can be clarified by courts. Some delegations stated that action by the legislature is sometimes necessary in order to clarify the scope of obligations. Several delegations underlined that States parties have an immediate obligation to take prompt and effective measures towards the implementation of the rights covered by the Covenant.

21. A number of delegations referred to the international dimension of economic, social and cultural rights and the duty of international cooperation and technical assistance. It was suggested that an optional protocol might give rise to complaints against poor countries, which are not able to implement fully all economic, social and cultural rights due to lack of the economic means. The opinion was expressed that lack of resources may be an obstacle to the realization of economic, social and cultural rights and that only the more affluent States were in a position to implement binding obligations in this field. One delegation stated that this issue should be seen in the context of the right to development. Other participants underlined that the principle of progressive realization, contained in article 2 of the Covenant, ensures that the realities and economic situation of each individual country are taken into account. Some delegations also highlighted the fact that economic, social and cultural rights are dealt with by courts in rich and poor countries alike.

22. The concern was expressed that a complaints procedure might unduly interfere in the democratic process and national policy-making with regard to political, economic and budgetary priorities. Responding to this concern, one delegation noted that the recommendations of the Committee would leave a large margin of appreciation for Governments. The opinion was also expressed that human rights were not merely a domestic issue and that recommendations of international treaty monitoring bodies did not constitute undue interference even if these had implications domestically.

23. Some delegations referred to the benefits of an optional protocol in their opening statements, noting that a complaints mechanism would: encourage States parties to ensure more effective local remedies; promote the development of international jurisprudence, which would in turn promote the development of domestic jurisprudence on economic, social and cultural rights; strengthen international accountability; enable the adjudicating body to study concrete cases and thus enable it to create a more concise jurisprudence. One delegation highlighted the fact that a complaints mechanism allowing for third parties to bring complaints before the Committee on Economic, Social and Cultural Rights (CESCR) under an optional protocol would help empower vulnerable and marginal groups.

24. With regard to the question of which rights should be covered by an optional protocol, some delegations argued that each State should be given the possibility of identifying the provisions under the Covenant to which the complaints procedure would apply (the “à la carte” approach). Other delegations argued that it would be better to adopt a comprehensive approach so that the complaints procedure would cover all substantive rights of the ICESCR.

25. One delegation emphasized that a comprehensive approach should include the right to self-determination. Another delegation envisaged that within the comprehensive approach only certain aspects of each right could form the basis of an individual complaint (for example, forced labour with respect to the right to work).

26. Some delegations questioned whether the Committee on Economic, Social and Cultural Rights would be competent to receive complaints under an optional protocol without amending the Covenant. It was noted that the Committee on Economic, Social and Cultural Rights was formally a subsidiary body of the Economic and Social Council and hence did not have the same legal status as the other United Nations human rights treaty monitoring bodies. Some delegations noted that a number of mechanisms exist for monitoring the implementation of economic, social and cultural rights and that there is a risk of inconsistency between the decisions of different organs and, above all, a risk of lowering the protection of these rights.

27. The representatives of UNESCO, WHO and ILO as well as NGOs welcomed the convening of the working group and expressed their willingness to assist in its deliberations, especially during the discussion on the complementarity of the proposed optional protocol with existing complaints mechanisms. All representatives of intergovernmental organizations highlighted the close and long-standing cooperation between their organizations and CESCR. Specific mention was made, in this regard, of the recent establishment of a Joint UNESCO/CESCR Expert Group on the Right to Education; the ongoing cooperation between WHO and CESCR in identifying right to health indicators; and the reports ILO submits to all sessions at which the Committee considers State reports.

III. INTERACTIVE DIALOGUE WITH SPECIAL RAPPORTEURS

28. During its second meeting, on 24 February 2004, the working group engaged in an interactive dialogue with Special Rapporteurs of the Commission whose mandates address economic, social and cultural rights. Following the invitation by the Commission for its Special Rapporteurs with relevant mandates to share their views on an optional protocol to the ICESCR, Jean Ziegler, Special Rapporteur on the right to food and Katarina Tomasevski, Special Rapporteur on the right to education, provided written contributions to the working group. Oral presentations were made by Paul Hunt, Special Rapporteur on the right to health and Miloon Kothari, Special Rapporteur on adequate housing.

29. In addressing the question of justiciability, the Special Rapporteur on the right to health drew attention to the study on economic, social and cultural rights prepared by Danilo Türk for the then-Sub-Commission on the Prevention of Discrimination and Protection of Minorities between 1989 and 1992. He noted that the justiciability of economic, social and cultural rights has been confirmed and clarified by the Sub-Commission study and through decisions by national courts and by regional human rights systems in Europe, the Americas and Africa, as well as through the work of the Committee on Economic, Social and Cultural Rights. The nature

and scope of States' parties obligations under the Covenant are defined in article 2, paragraph 1, of the Covenant, which requires States to "take steps" towards the progressive realization of economic, social and cultural rights. Considering the provisions of article 2, paragraph 1, the Special Rapporteur argued that the Covenant does not impose an onerous burden on States parties: it requires them simply to show that they have taken some reasonable action towards the realization of the rights contained therein. Further, Mr. Hunt pointed out the fact that civil and political rights norms can also be described as imprecise - for example, freedom from torture, the right to privacy and freedom of expression - which does not hinder the International Covenant on Civil and Political Rights (ICCPR) from having an individual complaints mechanism.

30. The Special Rapporteur emphasized that an optional protocol to ICESCR would be an important tool to assist States in better implementing their existing obligations under the Covenant. Since the national, regional and international experience suggested that the general legal issue of justiciability of economic, social and cultural rights, including those contained in ICESCR, had now been resolved, he encouraged the working group to focus on specific legal questions that still need attention, such as who should be able to bring complaints and whether an optional protocol should include both a complaints and enquiry procedures.

31. The Special Rapporteur on adequate housing drew on lessons learned from his experience in undertaking country missions. He noted the importance of national case law in helping to clarify the contours and content of economic, social and cultural rights, and suggested that international human rights law has a key role to play in providing guidance to national courts. An optional protocol to the Covenant would be one important element in the process of strengthening economic, social and cultural rights. The Special Rapporteur stressed the importance of implementing the right to adequate housing and other economic, social and cultural rights in general, and noted the need to redress the gap between recognition and implementation of these rights, in particular for women. He argued that core elements - such as non-discrimination and the right to protection against forced evictions - demonstrate the inherent justiciability of the right to adequate housing. He noted the need for coherence in economic and human rights policy and suggested that questions related to budget are legitimate issues for review in light of the minimum core obligations of States parties to the Covenant.

32. In his concluding remarks, the Special Rapporteur on adequate housing reasoned that an optional protocol to ICESCR would contribute to the process of defining the right to adequate housing and other economic, social and cultural rights; reaffirm the indivisibility of these rights from other human rights, such as freedom of movement and security of the person; and help to address the systematic violations of housing and land rights, as well as other economic, social and cultural rights.

33. In response to concerns related to the cost of implementation of economic, social and cultural rights, the Special Rapporteurs noted that the obligations to respect, protect, fulfil apply to all human rights - civil, cultural, economic, political and social. Certain elements of all human rights have financial implications and the protection of other elements of human rights norms do not incur costs.

34. Several examples were given in response to a question on appropriate remedies for violations of economic, social and cultural rights. The Special Rapporteur on the right to health suggested that a State may be asked, for example, to cease certain activities or refrain from doing

something (such as conducting forced evictions); to reformulate a policy to address the needs of vulnerable and marginalized populations; or to provide compensation. Redress for violations of economic, social and cultural rights may require a reorientation (rather than an additional allocation) of financial and other resources.

35. Questions were raised with regard to the meaning of the various elements reflected in article 2, paragraph 1, of the Covenant. On the definition of “maximum available resources”, it was suggested that an adjudicating body may consider factors such as whether there has been a growth in income disparity and whether resources are being used in a judicious manner. Reference was made to recent case law in one country which defined the obligation to fulfil as an obligation “to facilitate access and to provide” through a series of measures. The court used the concept of “reasonableness” to assess whether a State has met its obligation to realize economic, social and cultural rights progressively and noted, for example, that a programme that excludes a segment of society cannot be said to be reasonable and that policy adjustments would therefore have to be made.

36. The experience of countries where the Covenant has been made justiciable through its direct translation into national legislation was noted. With regard to the justiciability of economic, social and cultural rights at the international level, it was suggested that national and regional cases would likely be used by an international body to guide the interpretation of the rights contained in the Covenant. In the light of the experience of CESCR and other treaty monitoring bodies, it is reasonable to expect that the international adjudicative body under the optional protocol would defer a broad margin of discretion to States. On the issue of whether matters related to budget are legitimate for review by a treaty monitoring body considering the implementation of economic, social and cultural rights, it was suggested that treaty monitoring bodies have a role to play in ensuring that national policies are in conformity with States’ international obligations.

37. On the issue of the “value-added” of a new accountability mechanism for economic, social and cultural rights in the light of the existing States reporting procedure under the Covenant, it was suggested that the two procedures would be complementary. The process of reviewing periodic State reports, which involves consideration of a vast number of issues over a period of a few hours every five years, can only address generalities. Drawing on the experience at the national level, it was noted that a consideration of individual cases may assist a State in better understanding the nature and scope of its obligations by focusing on a specific situation or problem, rather than a broad range of issues. Individual cases also have merit as test cases and may help to raise the profile of economic, social and cultural rights.

38. The risk of conflict between decisions adopted by the Committee and those adopted by other bodies seized with economic, social and cultural rights was addressed. It was noted that CESCR has endeavoured throughout its work to ensure consistency with jurisprudence adopted in other forums. For example, in adopting general comment No. 13 on the right to education, the Committee made efforts to ensure consistency with relevant decisions, concluding observations and general comments of the Human Rights Committee and the Committee on the Rights of the Child. In response to concerns raised in relation to the possible dual role of the Committee (reviewing periodic reports and considering complaints), the experience of other treaty monitoring bodies which have both a periodic reporting and a complaints function was recalled. With regard to a concern about the influence of jurisprudence on States that have not ratified the

protocol, it was suggested that such views and recommendations would help all States to better understand their obligations imposed by the Covenant. The Special Rapporteurs highlighted that the Committee is not a judicial mechanism but rather a body of international experts which provides recommendations to assist States in better implementing their obligations under the Covenant. They further stated that an optional protocol is a procedural tool which would not generate new substantive obligations for States.

IV. INTERACTIVE DIALOGUE WITH COMMITTEE EXPERTS

39. The third meeting of the working group, on 25 February 2004, was devoted to an interactive dialogue with a panel of experts from three Committees: Eibe Riedel, a member of the Committee on Economic, Social and Cultural Rights; Martin Scheinin, a member of the Human Rights Committee (HRC); and Régis de Gouttes, member of the Committee on the Elimination of Racial Discrimination (CERD).

40. In his presentation, Mr. Riedel addressed the question of the justiciability of economic, social and cultural rights and underlined that the proposed optional protocol was different from procedures under national courts. Importantly, the Committee would not hand down sentences, but would provide views akin to the recommendations adopted under the State reporting procedure. The procedure would not introduce new obligations, but only a new supervision mechanism for individual and collective complaints. He advocated a comprehensive approach, allowing for complaints on all substantive rights, and strongly advised the working group against embarking on an article-by-article discussion of which rights should be subject to a complaints procedure. In this respect the working group was advised to follow the examples set by other treaty complaints procedures, such as the optional protocols to ICCPR and the Convention on the Elimination of Discrimination against Women (CEDAW).

41. Mr. Riedel rejected the view that economic, social and cultural rights are mere aspirations and policy guidelines. As he underlined, the Covenant is a legally binding instrument under international law, highlighting the fact that the absence of remedies may weaken the real enjoyment of rights, but did not derogate them from their quality as rights. He rejected the argument that economic, social and cultural rights are essentially different from civil and political rights. Both sets of rights contribute equally to the protection of human dignity. He also argued against the view that economic, social and cultural rights imply much higher financial costs than civil and political rights. He underlined that the principle of progressive realization, stipulated in article 2, paragraph 1, of the Covenant, does not diminish the status of economic, social and cultural rights, but merely allows for a flexible country-by-country approach. He also argued against the perception that the Covenant's provisions are imprecise, noting that the provisions of other human rights treaties are no less so, and that human rights provisions are formulated in general terms so as to allow for interpretation and clarification in the light of experience and the adjudication of concrete cases.

42. Mr. Scheinin described the more than 25 years' experience of the Human Rights Committee (HRC) with an individual complaints procedure, which to date had been accepted by more than two thirds of States parties. He pointed out that the procedure had not led to a flood of complaints, due to strict admissibility requirements, and that complaints were brought against developed and developing countries alike. In response to a question that complaints are often brought against countries that are most respectful of human rights, Mr. Scheinin replied that,

while many complaints had been brought against developed countries, only a small percentage of these complaints had resulted in findings of violations. Mr. Scheinin defined the views adopted under the optional protocol as “authoritative legal interpretations of the Covenant”, and noted that States by and large comply with these views.

43. On the basis of the experience of HRC, Mr. Scheinin advised that the proposed optional protocol should include a provision on interim measures and argued for a comprehensive approach, although he noted that article 1 (the right to self-determination) might be omitted if the optional protocol were to allow groups to bring complaints. On the issue of justiciability, he drew attention to the fact that HRC has defined several justiciable elements of economic, social and cultural rights. Describing how complaints were processed, he noted as a defect that HRC is restricted to reviewing written information submitted by the two parties and is unable to seek additional information.

44. Mr. de Gouttes, sharing his experience from CERD, highlighted that three important benefits of a complaints procedure were that it provides an additional avenue of legal redress, assists States in implementing the Convention, and helps the Committee develop jurisprudence. He noted that of 169 States parties, 43 had so far accepted the Committee’s competence to receive individual complaints, a majority of which are members of the Council of Europe. In line with the other Committee experts, he underlined that CERD does not hand down sentences, but adopts opinions. He noted that the procedure had not given rise to a large number of complaints, as the Committee had so far only received 33 communications, and that a number of the cases involved economic, social and cultural rights, such as discrimination in access to housing, and in employment and public spaces. He noted that, even when no violation was found or a case was declared inadmissible, CERD often took advantage of the communication process to make general recommendations and suggestions to States.

45. Responding to questions and comments from delegations, the Committee members specified that with regard to the issue of historical violations the principle of *ratione temporis* would apply, rendering admissible only complaints concerning violations which continues to have an effect on the present. On the issue of whether an optional protocol should cover the international dimension of States’ obligations including the issue of international cooperation, Committee experts noted that in theory such cases might arise. With regard to the right to self-determination, it was clarified that the Committee in its practice only considered this right indirectly by examining how the denial of this right has affected the enjoyment of specific economic, social and cultural rights - for example, the situation of an indigenous group that had been evicted from its lands and deprived of its livelihood. Similarly, the Committee deals with the issue of poverty through looking at its adverse effects on the realization of specific rights covered by ICESCR and the vulnerability of specific groups.

46. Responding to a concern about the cost of implementing economic, social and cultural rights and possible undue interference with States’ policy-making, it was clarified that not all social service policies raise human rights questions. It was also noted that a complaints procedure would deal with cases where the minimum requirements essential to lead a life in dignity were not fulfilled, and that States always retain the final decision as to the measures they will take in response to views adopted by the Committee.

47. On the question of whether an optional protocol should include either a comprehensive or “à la carte” approach, Mr. Riedel underscored that the Committee was unanimous in its view that all economic, social and cultural rights have justiciable elements. He noted that, while an “à la carte” approach might facilitate ratification, it would be at the expense of settling for a lesser procedure which might negatively affect the protocol’s synergy with the Covenant as a whole.

48. Responding to a concern raised about possible overlap and inconsistencies between the different treaty body procedures, professionalism within the secretariat servicing the Committees was highlighted as of key importance, to ensure that all human rights concerns and existing jurisprudence of other treaty monitoring bodies are taken into account. The representative of ILO noted in this regard that coherence is facilitated by the close cooperation between ILO and the Committee. Committee members also pointed to the coordinating function of regular inter-Committee meetings and meetings of Committee Chairpersons.

49. Responding to a question about the added value of an optional protocol, it was argued that the optional protocol had been a lifeline for the Human Rights Committee, enabling it to define its position on various legal issues. Similarly, an optional protocol to ICESCR would allow the Committee to develop more concise jurisprudence, through an in-depth analysis of individual cases, which would be easier for domestic courts to follow. It was pointed out that, while a complaints procedure cannot realistically be expected to render justice to everybody, the case law which it will generate will assist national courts in applying the rights of ICESCR.

50. Responding to comments, Committee members noted that an optional protocol would complement measures already taken by the Committee to enhance the monitoring system. It was also noted that a complaints procedure would raise awareness about the Covenant, as individual cases were more appealing to the media.

51. On the issue of whether the Committee would be competent to receive complaints under an optional protocol given its status of a subsidiary body of ECOSOC, Committee experts noted that, in their views, it would be possible for ECOSOC to assign this new task to the present Committee. It was indicated that the optional protocol offered an opportunity to give the Committee a treaty basis and give it the same legal status as the other human rights treaty bodies. Responding to those delegations who had reservations about the benefits of an optional protocol, the experts underlined that the protocol was optional.

V. DISCUSSION ON THE NATURE AND SCOPE OF STATES PARTIES’ OBLIGATIONS UNDER THE ICESCR

52. During its fourth day of discussion, the working group focused on a discussion of issues related to the nature and scope of States parties’ obligations under ICESCR. The secretariat provided the working group with a briefing on the process leading up to the adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women as background information. The presentation focused on the content of the optional protocol, which contains both a complaints procedure and an inquiry procedure, and on the issues that were addressed in the course of the negotiations leading to its adoption in 2000. These issues included: who should have the legal standing to bring a complaint; whether an inquiry procedure should be included in the Optional Protocol in addition to a complaints procedure; whether the Optional Protocol should include a prohibition on reservations; whether

an Optional Protocol would lead to overlap or duplication of procedures, and/or compromise efforts to mainstream the rights of women and gender perspective into human rights activities; the justiciability of the provisions of the Convention; implications for the workload of the Committee; and financial implications. These issues were ultimately resolved and a consensus text was adopted.

53. The working group then engaged in a discussion on the nature and scope of States parties' obligations under ICESCR. Some delegations recalled that the Vienna Declaration and Programme of Action confirmed the universality, interdependence and indivisibility of all human rights and noted that the Covenant is an international legal instrument which contains obligations binding on all States parties. With regard to the nature of the rights contained in the Covenant, some delegations pointed out that certain provisions of the Covenant are drafted in imprecise terms and suggested that there could be a lack of predictability in the Committee's views and interpretations. Other delegations noted, however, that in this regard the Covenant does not differ fundamentally from civil and political rights treaties. They stated that it is for interpreters of the treaty to apply particular provisions of the Covenant to concrete situations, as is the current practice of the Committee in its review of periodic States Parties' reports. Other delegations questioned this view. Some delegations noted that civil and political rights have benefited from years of interpretation at the international, regional and national levels, and underscored the importance of individual complaints procedures to this process. An optional protocol on economic, social and cultural rights would contribute to a similar process of clarifying the nature and scope of these rights.

54. The working group discussed the need to improve the implementation of economic, social and cultural rights, and considered whether the elaboration of an optional protocol would be the most effective means for achieving this objective. Some delegations raised the question of whether an optional protocol would result in an improper reinterpretation of the Covenant, given that the Covenant contains specific procedures for amendment. While some delegations emphasized that the optional protocol would be a quasi-judicial procedure and that the Committee, like other human rights treaty monitoring bodies, would only make recommendations, some delegations questioned the nature of the Committee's decisions on individual cases and suggested that "quasi-judicial" recommendations by a treaty body may be interpreted in practice as "judicial" decisions. Other delegations drew attention to the fact that an optional protocol would be a procedural tool to enable an individual or group to present a complaint based on the existing provisions of the Covenant. As a procedural tool, it would not generate new obligations on States parties, nor would it change the nature of existing obligations.

55. The working group discussed the obligations on States parties to respect, protect and fulfil economic, social and cultural rights. The obligation to respect requires States parties to refrain from certain practices, whereas the obligation to protect requires them to take steps to protect individuals' economic, social and cultural rights from interference by third parties. Some delegations noted that the obligations to respect and protect are generally of immediate application and require few, if any, resources. Other delegations highlighted that the implementation of economic, social and cultural rights require significant resources. The obligation to fulfil requires States parties to actively work towards the realization of economic, social and cultural rights. Some delegations emphasized that there were difficulties in interpreting the scope of the obligation to fulfil economic, social and cultural rights.

56. Several delegations noted that the concept of progressive realization reflected in article 2 of the Covenant is fundamental to the implementation of economic, social and cultural rights, particularly in the light of resource constraints. Some delegations noted, however, that this concept has at times been misunderstood to mean that the Covenant is not strictly binding and that States are able to decide how and when to implement their treaty obligations. In this regard, it was noted that the ultimate objective of progressive realization is the full implementation of economic, social and cultural rights. Some delegations drew attention to the fact that certain elements of these rights are subject to immediate implementation. Immediate steps may include ensuring that national legislation is in conformity with the Covenant; the right to an effective remedy for violations of economic, social and cultural rights; and resources for minimum essential levels for economic, social and cultural rights. Some delegations further noted that States parties are required to give due priority to the realization of economic, social and cultural rights when deciding how to use available resources and that they should avoid deliberately retrogressive measures. In this regard, some delegations raised the question of whether the Covenant prohibited all retrogressive measures.

57. Several delegations discussed the potential cost implications of the implementation of the provisions of the Covenant. Reference was made in particular to the obligation reflected in article 2 for States parties to take steps “to the maximum of its available resources”. Several delegations raised questions over whether allocation of resources was a legitimate issue for review by a treaty body under an individual complaints mechanism and, if so, what criteria would be used in deciding on the appropriate allocation of resources. Some delegations suggested that any assessment of whether a State party has discharged its minimum core obligations must take into account the extent of resources available to the State party. One delegation queried what the threshold would be for interpreting the meaning of the “maximum available resources”.

VI. DISCUSSION ON THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

58. At its fifth meeting, on 27 February 2004, the working group discussed in more detail the question of the justiciability of economic, social and cultural rights. The discussions focused on the question of whether and to what extent economic, social and cultural rights are able to be adjudicated under a complaints procedure to ICESCR, and whether the proposed optional protocol would enhance the protection of economic, social and cultural rights. A number of delegations made reference to case law from national and regional courts and argued that the fact that economic, social and cultural rights were already adjudicated upon by some courts demonstrated that these rights could in principle also be subject to a complaints procedure under ICESCR. Conversely, other delegations argued that a complaints procedure would be inappropriate because of the particular character of economic, social and cultural rights.

59. The working group considered the nature of the provisions of ICESCR. A number of delegations argued that the provisions of ICESCR were imprecise and consequently did not lend themselves to adjudication under a complaints procedure. Other delegations maintained that the provisions were sufficiently precise to allow for a complaints procedure, arguing that the provisions of ICESCR cannot be spelled out in more detail as they are context-dependent and subject to interpretation in the light of particular situations. Some delegations referred to examples to show that provisions of ICCPR were also imprecise, and that these rights were only

given more concrete meaning when invoked in particular contexts. Several delegations argued that the rights in ICESCR had been sufficiently elaborated already by the Committee. Some delegations noted that States should be involved in the definition of the rights in order to reach consensus prior to the development of an optional protocol. One delegation expressed the view that, through interpretation of these rights, the Committee may in fact expand the rights guaranteed by ICESCR.

60. Several delegations cited case law of national and regional courts involving various economic, social and cultural rights. One example concerned the adjudication of the question whether a State had progressively realized a particular economic, social and cultural right under the Constitution (the right of access to adequate housing). Another example was a case noting that the State had an obligation to ensure efficient mechanisms for the implementation by employers of social security schemes under the right to social security. The secretariat submitted a background document containing a selection of case law on economic, social and cultural rights.

61. The issue of how the Committee would exercise its mandate under an optional protocol was also discussed. In particular, it was noted that it would be useful to know more about the criteria that would be used in determining whether a violation had occurred. Some delegations noted that views expressed by the Committee under an optional protocol might lead to division among States, as some States might not accept the Committee's interpretations and contest its interpretive authority. A number of delegations expressed concerns that the Committee's views concerning States' social policies and resource allocations might unduly interfere with the policy-making powers of legislatures.

62. With regard to the criteria that would be used by the Committee, a number of delegations pointed out that complaints should be subject to strict admissibility criteria, similar to those adopted by other complaints procedures. It was also noted that it did not fall within the Committee's purview to engage in policy-making as had also been underlined by Committee experts, and that States always enjoy a margin of discretion in deciding on the means for implementing their obligations. One delegation noted that the balanced approach demonstrated by the Committee in its general comments and recommendations under the State reporting procedure should help to address concerns over how the Committee would carry out its mandate under the proposed optional protocol. It was also pointed out that States have already accepted complaints procedures to five other human rights monitoring bodies, without questioning how these would carry out their respective mandates.

63. A number of delegations suggested that economic, social and cultural rights are less absolute than civil and political rights, given that the criteria for establishing infringements of ICESCR varied with the resources available to a State. It was argued that economic, social and cultural rights are complex and must be considered in light of the national context, the implementation and adjudication of these rights were best left to courts at the national level. As it was noted, it would be difficult for a Geneva-based treaty monitoring body to acquire a complete and adequate understanding of the local context.

64. Other delegations believed that the rights of ICESCR were not less absolute as compared to those of ICCPR. The fact that the monitoring of the implementation of ICESCR requires a country-by-country approach and that the primary responsibility for the implementation of

economic, social and cultural rights rests with domestic courts and local authorities was not seen as a valid argument against international treaty monitoring. A number of delegations pointed out that States parties to ICESCR had already accepted international monitoring of economic, social and cultural rights under the State reporting procedure and that complaints under an optional protocol would only be admissible if all domestic remedies have been exhausted. Furthermore, concerning the argument that the Committee would not have an adequate understanding of the local context, it was pointed out that the Committee would rely on information provided to it by States and that States would be responsible for ensuring the adequacy of this information.

65. In the exchange of views on the question of justiciability, different views were expressed on whether the proposed optional protocol should cover all substantive articles of the Covenant or only a selection of these. Some delegations expressed doubts as to whether all economic, social and cultural rights were equally justiciable. Others questioned whether all provisions were susceptible to an individual complaints procedure, and noted that this issue needed to be studied further. One delegation argued that the main question is not whether economic, social and cultural rights were justiciable, but whether an international human rights committee was the appropriate body to adjudicate upon these rights or if their interpretation should be left to adjudication at national level. Several delegations referred to the tripartite typology of obligations, according to which States parties have an obligation to respect, protect and fulfil economic, social and cultural rights. Some delegations expressed doubts as to whether a failure to “fulfil” and “take steps to the maximum of available resources” could reasonably constitute a violation. A number of delegations suggested that an “à la carte” approach might be appropriate as it would allow each State to select only those rights that are already justiciable under domestic legislation. Other delegations favoured a limited approach whereby only a selected number of provisions of ICESCR would be covered by an optional protocol.

66. Other delegations favoured a comprehensive approach arguing that an optional protocol should cover all substantive rights contained in the Covenant. A number of delegations underlined in this regard that an optional protocol would merely be an additional monitoring mechanism, complementing the existing reporting procedure, and that it should therefore adopt the same comprehensive approach as the State reporting procedure. It was also pointed out that it would be difficult to separate the provisions of the Covenant into justiciable and non-justiciable rights, given their interrelatedness and interdependence.

VII. DISCUSSION ON THE BENEFITS OF AN OPTIONAL PROTOCOL TO THE ICESCR AND ITS COMPLEMENTARITY WITH OTHER MECHANISMS, AS WELL AS ITS PRACTICABILITY

67. The sixth meeting of the working group was devoted to a discussion on the benefits of an optional protocol to ICESCR and its complementarity with other mechanisms.

68. The representative of UNESCO noted the need to raise the status of economic, social and cultural rights, and welcomed the timeliness of a discussion on options for the elaboration of an optional protocol to ICESCR. The representative described the reporting and communication procedures within UNESCO’s competence and demonstrated how these differed from the complaints procedure envisaged under an optional protocol. In particular, he noted that UNESCO’s communication procedure was not a judicial or quasi-judicial procedure, but rather a confidential procedure aimed at finding friendly solutions to concrete cases. He further noted

that the Committee on Conventions and Recommendations (CRE), which receives and considers communications, is not an independent expert body but is composed of State representatives. He suggested that an optional protocol to ICESCR would be complementary to UNESCO procedures and noted that the long-standing cooperation between UNESCO and the Committee on Economic, Social and Cultural Rights had recently been further strengthened by the establishment of a Joint CRE/CESCR Expert Group on the Rights to Education.

69. The representative of the International Labour Office commented on the complementarity that has long existed between the work of the Committee on Economic, Social and Cultural Rights and ILO supervisory bodies. The representative noted that the Covenant builds on pre-existing standards of ILO and that subsequent ILO instruments have drawn on provisions contained in the Covenant. ILO also referred to the complaints mechanism under article 26 of the ILO Constitution and to the ILO Committee on Freedom of Association. Under article 26, States, delegates to the International Labour Conference or the ILO Governing Body may lodge complaints against another State which is not securing the effective observance of an ILO convention. The Committee on Freedom of Association receives complaints lodged by workers' and employers' associations. These associations can also lodge representations under article 24 of ILO Constitutions concerning the observance of a ratified convention. There is no individual complaints mechanism within the ILO framework. The representative of ILO highlighted the fact that ILO regularly submits information to and engages in a dialogue with the Committee, and that its supervisory bodies refer to the general comments and concluding observations of the Committee in their work. On the issue of the standards used in deciding on the compliance of a State with its obligations under international law, the representative noted that ILO supervisory mechanisms consider whether the country is making good faith efforts to comply with ILO treaties. In response to a question from a delegation, the representative of ILO noted that there had been no discrepancies between ILO Conventions and ICESCR.

70. On the question of the benefits of an optional protocol, several delegations recalled the Vienna Declaration and Programme of Action reaffirmation of the universality, interdependence and indivisibility of all human rights and suggested that there was a need to correct the historical asymmetry between civil and political rights, on the one hand, and economic, social and cultural rights on the other. An optional protocol to ICESCR would further the realization of economic, social and cultural rights. It would help to clarify the nature of States parties' obligations and provide a more precise understanding of economic, social and cultural rights by reference to specific situations involving individuals and help increase knowledge on economic, social and cultural rights. Some delegations noted that an optional protocol would give economic, social and cultural rights clarity, it would combat arguments against the justiciability of economic, social and cultural rights and would provide a remedy for victims of violations of those rights. Further, an optional protocol would make up for the lack of information before the Committee. Given that other international human rights instruments have complaints mechanisms, one delegation noted that a higher burden of proof should be placed on States to prove that there are no benefits to adopting an optional protocol under ICESCR.

71. However, some delegations expressed concern over the cost of an additional human rights procedure in light of the overstretched resources of the United Nations human rights system and believed that the benefits of an optional protocol should justify the additional cost. Some delegations referred to the various existing individual complaints mechanisms which deal with aspects of economic, social and cultural rights (HRC, CERD, CEDAW). Another

delegation suggested that individual complaints would mostly be brought against countries most respectful of human rights. One delegation indicated that the inclusion of a complaints mechanism could have a negative effect on the ability of the Committee to undertake its existing functions. Another delegation noted that spending resources on litigation might not be the best way to promote these rights. Some delegations suggested measures for improving respect for economic, social and cultural rights through existing procedures, including reform of current Committee procedures, improvement of treaty body procedures and allocation of additional resources to the Committee and the CESCR secretariat. Other delegations warned against the proliferation of mechanisms under human rights treaties.

72. One delegation emphasized the importance of judging the benefits of an optional protocol on its potential to help victims. Some delegations suggested that efforts should focus on improving implementation at the local level and strengthening national mechanisms for overseeing the implementation of economic, social and cultural rights rather than on international supervisory mechanisms. Others noted that the two are complementary in nature and that an individual complaints mechanism at the international level would assist the development of jurisprudence at the national level. They also stated that the Committee regularly draws on national and regional jurisprudence related to economic, social and cultural rights in its deliberations. Some delegations further noted that an optional protocol would be an important means for addressing situations where there is no effective system at national level for monitoring the implementation of economic, social and cultural rights. Some delegations indicated that there were still questions concerning the benefit of an optional protocol that did not yet have an answer while other delegations stated that they were convinced of the benefits.

73. Several delegations linked the benefits of an optional protocol to procedural issues. For example, some delegations emphasized the importance of including a provision on the exhaustion of domestic remedies as a requirement for admissibility. Some delegations raised the possibility of the same complaint being submitted to several complaints mechanisms at the same time, which could lead to inconsistencies in interpretation. Other delegations suggested that an optional protocol should include a provision on the inadmissibility of complaints already under adjudication before another body. One delegation called for an updated report from the secretariat on the report provided to the working group on an optional protocol to CEDAW, which compared existing communications and enquiry procedures under international human rights instruments.

74. A number of delegations questioned whether an optional protocol would overlap with existing supervisory mechanisms at the international level, including ILO, UNESCO as well as mechanisms under human rights treaties, and queried whether this overlap detracted from the benefits of an optional protocol. Other delegations noted that none of the existing mechanisms address the provisions of the Covenant in a comprehensive way, and that they are limited either by subject matter, geographic scope or the groups and individuals with standing to bring a complaint. Some delegations noted the need for predictability in relation to economic, social and cultural rights, and expressed concern that an optional protocol may lead to conflicting interpretations of the norms and standards contained in the Covenant. Other delegations suggested that the risk of such conflict already exists in relation to civil and political rights, and that this concern would not outweigh the benefits of an optional protocol. Some delegations suggested the need for increased communication and cooperation between such bodies as a means for avoiding discrepancies.

VIII. RECOMMENDATIONS OF THE CHAIRPERSON-RAPPORTEUR

75. The Chairperson-Rapporteur takes the sole responsibility for the following recommendations. During its final sessions, the working group considered a wide range of options for its future mandate. In the opinion of the Chairperson-Rapporteur, widest support in the working group was registered for the recommendations in the following paragraphs. On this basis, the Chairperson-Rapporteur forwards these for consideration by the Commission.

76. The working group met for two weeks to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights with the participation of experts. The working group did not reach consensus on whether to start drafting an optional protocol. Consequently, the Chairperson-Rapporteur recommends a deepening of the rich debate of its first session. Accordingly, the Chairperson-Rapporteur recommends that the Commission:

(a) Renew the mandate of the open-ended working group for a period of two years to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights;

(b) Authorize the working group to meet for periods of 10 working days prior to the sixty-first and sixty-second sessions of the Commission on Human Rights;

(c) Invite a representative of the Committee on Economic, Social and Cultural Rights to attend these meetings as a resource person.

77. The Chairperson-Rapporteur also recommends that the Commission:

(a) Identify experts who could be invited to future sessions of the working group including:

- Representatives of three human rights committees with communications procedures, in particular a representative of the Committee on the Elimination of Discrimination against Women;
- Representatives of regional human rights mechanisms;
- Representatives of ILO and UNESCO in relation to complaints mechanisms within the mandates of these organizations;
- Special procedures of the Commission on Human Rights; and

(b) Request as background documentation for its next session a report of the Secretary-General providing the working group at its second session a comparative summary of existing communications and enquiry procedures and practices under international human rights instruments and under the United Nations system.
