

Joint NGO Submission presented by:

**Amnesty International
Centre on Housing Rights and Evictions (COHRE)
European Roma Rights Centre (ERRC)
Fédération internationale des ligues des droits de l'Homme (FIDH)
Foodfirst Information and Action Network (FIAN)
International Commission of Jurists (ICJ)
International Women's Rights Action Watch Asia-Pacific (IWRAW Asia-Pacific)**

On behalf of:

**The International Coalition for an Optional Protocol to the
International Covenant on Economic, Social and Cultural Rights**

**To the 2006 Open Ended Working Group to consider options for an Optional
Protocol to the International Covenant on Economic, Social and Cultural Rights**

January 2006

At the 2005 Open-Ended Working Group to consider options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the Covenant), the Chair of the Working Group was invited to prepare a paper addressing 'elements for an optional protocol' in order to facilitate a more focused discussion at the third session of the Working Group.¹ Motivated by widespread concern for the protection and promotion of economic, social and cultural rights (ESC rights), Amnesty International (AI), the Centre on Housing Rights and Evictions (COHRE), the European Roma Rights Centre (ERRC), Fédération internationale des ligues des droits de l'Homme (FIDH), Foodfirst Information and Action Network (FIAN), the International Commission of Jurists (ICJ), and the International Women's Rights Action Watch Asia-Pacific (IWRAW Asia Pacific), representing the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereafter the NGO Coalition)², submit the following views in response to the Analytical Paper presented by the Chairperson-Rapporteur in November 2005.³

Following the format of the Elements Paper, the elements addressed in this submission are:

¹ See "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", Chairperson-Rapporteur: Catarina de Albuquerque, 10 February 2005, UN Document E/CN.4/2005/52.

² The International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is a collection of organisations supporting the elaboration of such instrument. The NGO Coalition is composed of national, regional and international human rights NGOs, as well as interested individuals, and is led by a Steering Committee. Further information can be found at www.escrprotocolnow.org.

³ See "Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, 21 November 2005, UN Doc E/CN.4/2006/WG.23/2 (the "Elements Paper").

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A. Communications Procedure

1. The scope of rights subject to a communications procedure

The NGO Coalition unequivocally supports the first option mentioned in the Chair's Elements Paper – a comprehensive approach whereby all rights in the Covenant are subject to the procedures established by the Optional Protocol. The NGO Coalition believes that a comprehensive approach is an overarching fundamental requirement necessary for an effective Optional Protocol.

As such, the NGO Coalition considers that the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) should cover all the substantive rights contained in the Covenant (Articles 1-15). In this respect, we consider that other options, those which exclude some rights or some elements of rights, would not provide an effective protection to victims of violations of economic, social and cultural rights (ESC rights).

Rationale for a comprehensive approach

The OP-ICESCR does not create new substantive rights or obligations. It establishes complementary procedures for addressing and redressing violations of rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR). National and regional jurisprudence on ESC rights have not only highlighted that all Covenant rights are justiciable, but also that all levels of States' obligations – respect, protect and fulfill – can be subject to a complaint procedure. For this reason, all procedures relating to the Covenant should encompass all the rights contained in the Covenant, and thus the mechanisms created under an OP-ICESCR should be available

to victims of the wide range of ESC rights violations. In this respect, it would be inadequate to establish procedures by which victims of violations of the right to health can seek redress while victims of violations the right to food cannot.

The 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights.⁴ These well-recognised concepts reflect the reality that when human rights obligations are breached, many victims suffer from violations of a wide range of rights. It is not easy to isolate the violation of one right from another. A communication procedure excluding certain rights would negate the reality faced by victims and prevent them from obtaining full redress, reparation (including, *inter alia*, restitution, compensation and satisfaction) and the termination and non-repetition of the violations. This approach would also ignore the causal link that might exist between the violations of multiple rights.

Exclusions of rights or components of rights would seriously undermine the exercise of the right to a remedy for violations of human rights, which applies equally to all rights in the ICESCR, as noted in General Comment 9 of the Committee on Economic, Social and Cultural Rights (CESCR).⁵

Excluding some rights from a complaints procedure under the Covenant would also run counter to the existing communication and complaint mechanisms created through optional protocols to other major human rights conventions. Failure to adopt a similar comprehensive approach in drafting the OP-ICESCR would make this mechanism less effective and thus would weaken its impact. Further, it would undermine the standards already established across the board in relation to complaints mechanisms attached to other human rights treaties. Such an approach would not only endanger the perceived importance of ESC rights in comparison to other rights, but would also lead to a deprioritisation of some economic, social and cultural rights over others. A scenario where, for example, the right to education and the right to health are the only ones covered by a complaints procedure might well lead to the prioritisation of these rights to the detriment of other ESC rights.

In addition, an approach excluding some rights from the complaint procedure would also have an adverse impact for the work carried out at the national level. National courts frequently refer to international developments and international law in their deliberations and decisions. Excluding certain rights from an OP-ICESCR could imply, for national tribunals, that those ESC rights are not justiciable. Regardless of the actual practice and jurisprudence, courts might well decide, on the basis of an OP-ICESCR that does not embrace a comprehensive approach, that certain rights – i.e. those excluded from the Optional Protocol – cannot be subject to a judicial determination domestically.

The so-called comprehensive approach embraces Parts I, II and III of the Covenant. In paragraph 5(a) of the Elements Paper, it is suggested that an alternative form of OP-ICESCR would be one where only the provisions in Part III of the Covenant are subject to a complaint procedure.

⁴ UN Doc. A/CONF.157/23, 12 July 1993, para 5.

⁵ General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1998/24.

It is also important to note that given the fundamental importance of the articles in Part II of the Covenant (Articles 2-5), they too must be included under the Optional Protocol so as to be fully applicable in relation to the interpretation of the rights contained in Articles 6-15 of the Covenant (Part III). There is an important relationship between the Part II provisions and the substantive rights contained in Part III of the Covenant. The Part II provisions not only provide a framework for the interpretation of the Part III rights, but also impose obligations that States Parties must comply with in regard to each of the substantive rights.⁶ Excluding these articles from the OP-ICESCR would contrast with the inclusion of Part II provisions of the International Covenant on Civil and Political Rights (ICCPR) in the First Optional Protocol to the ICCPR, and the inclusion of Parts I and II of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) under its Optional Protocol (OP-CEDAW).

The NGO Coalition considers that an approach whereby only Part III of the Covenant is included in an Optional Protocol is generally untenable as it excludes consideration of the way in which a large number of ESC rights violations are linked to multiple forms of discrimination (for example, discrimination on the basis of identity, poverty or political exclusion,⁷ as well as economic status,⁸ or discrimination resulting from gender inequality⁹) and/or illegally expansive 'limitations' on rights¹⁰. To consider a communications procedure that only addresses Part III of the Covenant, without also including Part II, is unfeasible.

This option also leaves aside the right to self-determination recognized in Article 1 of the ICESCR. The NGO Coalition considers that option is neither necessary nor desirable. The right to self-determination is recognized in exactly the same terms in Article 1 of the ICCPR and is not excluded from the scope of the first Optional Protocol to that Covenant (OP1-ICCPR). However, the Human Rights Committee (HRC) has, in its practice, adopted a restrictive approach to its application in relation to the communications procedure. The OP-ICESCR should not be drafted to exclude self-determination. The possibility of hearing communications related to violations of this right should be left open to the Committee on Economic, Social and Cultural Rights to determine, in accordance with the Covenant and the procedural rules of the Optional Protocol.

The right to self-determination is central to the promotion and protection of human rights of peoples. Indigenous peoples, for instance, routinely experience violations of their ESC rights in combination with the denial of their rights to civil, cultural, economic, political and social self-determination guaranteed under the international covenants on human rights. Excluding Article 1 from the Optional Protocol altogether would undermine the value and integrity of the communications procedure for these and other groups.

⁶ Including the obligation of non-discrimination and obligations regarding non-limitation and non-derogation.

⁷ Article 2(2).

⁸ Article 2(2).

⁹ Article 3.

¹⁰ Article 4.

The impracticability and impact of the so-called “à la carte” approaches

During the debates at both sessions of the Open-Ended Working Group and at other inter-sessional forums, there appears to have been little or no agreement as to the meaning of a so-called “à la carte” approach. Rather, many variations of “à la carte” approaches to an Optional Protocol have been suggested, some of which are briefly described in the Elements Paper.

This section addresses the NGO Coalition’s views in relation to all proposed “à la carte” approaches, including those mentioned in the Elements Paper (the “opt-in à la carte approach”, the “opt-out à la carte approach” (or “reservation approach”), and the “limited approach”), along with others raised in discussion either at the previous Working Groups or in inter-sessional meetings.

The NGO Coalition considers that any *à la carte* formula would undermine the indivisibility of human rights and would be extremely detrimental to the realisation of ESC rights. Any of the proposed *à la carte* approaches would represent serious assaults on the integrity and interdependence of Covenant rights, and on the principle that the OP-ICESCR should enhance the implementation of the Covenant and promote access to effective remedies, rather than restricting the scope or application of any aspects of the Covenant.

Most, if not all, of the rights contained in the Covenant have already proven to be justiciable and many are routinely enforced or considered at the domestic, regional and international level. A failure to recognise the justiciability of all of the ESC rights in the ICESCR would send an unfortunate signal from the international level which could result in an inconsistent “rolling back of remedies” for victims of ESC rights violations at the national level.

An *à la carte* approach would also seriously undermine the integrity and effectiveness of the jurisprudence developed under the OP-ICESCR itself, as it would be unclear to what extent decisions and reasoning was affected by the particular constellation of rights chosen by the State Party, and the Committee would be forced to treat rights in compartmentalized fashion, rather than as interdependent and integrated into the Covenant as a whole.

Any attempt to divide ESC rights into ‘justiciable’ and ‘non-justiciable’ components would undermine the integrity and inter-dependence of all human rights, endanger developments in understanding at the domestic and regional levels and create unworkable distinctions as to the admissibility of communications. Further, it would prevent victims of certain types of rights violations from receiving restitution, compensation and other remedies, and limit the ability of victims to seek remedies for the full range of violations they may suffer.

The difficulty and confusion of an *à la carte* approach is evident in the way in which there is little or no agreement as to what such an approach would entail at the outset. A so-called “à la carte approach” might take different forms. Not only may the various approaches be categorised as per in the Elements Paper, but even further distinctions could be made. For example:

(A) One approach could require States Parties to indicate which provisions of the Covenant *would not* be covered by the procedure they have accepted by becoming a party to the Optional Protocol. Each State would thus have to “opt out” in relation to specified provisions if it wishes to avoid the application of the Optional Protocol in relation to all of the rights recognized in the Covenant.

(B) A second approach could require States to “opt in” to the procedure in relation to provisions of the Covenant which they would specify upon becoming a party to the Optional Protocol. This selective approach might also take two forms (i) States may be able to select the *rights* included in the Covenant in relation to which a communication would be accepted &/or (ii) States may be able to identify the *elements* of the rights in relation to which it would accept the communications procedure. For example, in regard to Article 11 the State could accept the procedure only in relation to the right to an adequate food.

(C) A third approach could be one whereby the Optional Protocol itself indicates the rights or the elements of the rights for which it would be possible to submit communications.

(D) A fourth approach could restrict the Optional Protocol to complaints alleging “grave and systematic violations”.

(E) A fifth approach could involve the Committee assessing violations of only the “minimum core obligations”

(F) A sixth approach could frame an Optional Protocol that only addressed violations of economic, social and cultural rights through a discrimination framework (i.e. only violations of ESCR on the basis of discrimination would be subject to review).

(G) A seventh approach could involve an Optional Protocol being established to address only some levels of obligations (for instance only the respect level, and not the protect or fulfil levels).

No doubt more approaches could be added to this list, but what remains clear is that the so-called “*à la carte* approach” is not one option, but many. The NGO Coalition considers that all of these options are unacceptable.

None of the “*à la carte*” options are workable. For example, the approach of considering options which restrict the OP-ICESCR to complaints alleging “grave and systematic violations”, or which involve the Committee assessing violations of only the “minimum core obligations”, is untenable. Determinations as to what constitutes ‘grave or systematic violations’ or ‘minimum core obligations’, if made into determinations of admissibility of complaints, are fraught with difficulty and imprecision. Such restrictions would almost certainly have discriminatory consequences, and create arbitrary exclusions from the complaints process. Complaints alleging violations in more affluent countries would be less likely to meet admissibility standards under either a “grave and systematic violations” approach or a “minimum core obligations” approach, simply because resources are more readily available to satisfy Covenant obligations. Many of the situations in which remedies may be more readily achievable

through available resources would thus be excluded, seriously undermining the effectiveness of the procedure.

Furthermore, the question of whether a ‘core minimum obligation’ has been violated would require, in most cases, an even greater level of analysis on the part of the Committee than would the determination of whether a right has been violated.

Likewise, an approach that would limit the OP-ICESCR to violations of some levels of obligations, for example the obligation to protect, makes no practical sense from the perspective of victims. While the typology of “respect, protect and fulfil” is useful for interpretation, it has little relevance to real victims of violations of ESC rights.

Any use of the “respect, protect, fulfil” typology of obligations developed by the CESCR to clarify general dimensions of obligations to deny access to the OP-ICESCR complaints procedure would exclude important aspects of claims. It would also be to ignore judicial experience related to the protection of ESC rights illustrating the importance of maintaining the typology as a unitary and indivisible framework of obligation. The different dimensions of obligation are by no means exclusive, and it would be virtually impossible to make determinations of admissibility on this basis without creating appearances of arbitrariness. A consideration of the complex claims that have been adjudicated at the domestic level, for example, dealing with access to HIV-AIDS medication or housing programs that do not attend adequately to the needs of the homeless, demonstrates that most ESC rights claims often span all three dimensions of obligations. Thus, the result may be that most complaints would be admissible, but the consideration of the complaint and of appropriate remedies would be distorted by restrictions in the scope of the OP-ICESCR.

To adopt another approach, whereby an OP-ICESCR is restricted to allegations of discrimination or to severe deprivations that threaten or undermine the right to life, would add little to procedures already available under the ICCPR and other Covenants. Jurisprudence emerging from such restrictive admissibility requirements would provide little or no guidance to States Parties about how to provide effective remedies to other aspects of Covenant rights.

Finally, the proposal of giving States a fixed time frame to allow for a comprehensive scope of the OP-ICESCR would have several negative consequences for the protection of ESC rights. This approach would mean that States might permit communications related to only a limited number of Covenant rights with the obligation to eventually permit the OP-ICESCR procedures to consider communications related to all Covenant rights by the set deadline. Such an approach would make the OP-ICESCR mechanisms less transparent and accessible to potential petitioners. This form of ‘opt in’ approach has not proven effective in the context of the European Social Charter, where it has been clear that States are reluctant to gradually aggregate their obligations. Finally, this approach would maintain the unequal treatment of ESC rights in comparison to other rights, at least in the mid-term.

The only acceptable option is therefore to adopt an Optional Protocol that is comprehensive in scope in terms of the rights and levels of obligations that are subject to it. Restricting the scope and application of the OP-ICESCR would indirectly give validity to attempts by State Parties to the ICESCR to limit their accountability to

certain rights or components of the Covenant. It would permit the continued exclusion of the most disadvantaged victims of human rights violations from any complaints procedure and institutionalise a second class status for ESC rights. The NGO Coalition emphasizes that any of the range of options that have been discussed under the heading of the so-called *à la carte* approach would compromise basic principles of human rights and undermine the equal status of ESC rights in the UN system.

2. Admissibility Criteria

The NGO Coalition submits its views in relation to the following admissibility rules:

Ratione personae

See Part A (3) below.

Ratione materiae

See Part A (2) above.

Ratione loci

The practice of the various treaty bodies has highlighted that States have the obligation to guarantee the enjoyment of the rights enshrined in a given treaty not only within their territory but also under their jurisdiction and effective control, and in their international cooperation. Using the principle of effective control, it has been highlighted that, in some instances, a State's jurisdiction is actually larger than a State's territory. The CESCR has clarified the jurisdictional and territorial nature of States obligations under the ICESCR while reviewing States reports and in its General Comments.¹¹

No further limitations upon the territorial and jurisdictional application of the Covenant should be imposed via the Optional Protocol. This extraterritorial scope of the Covenant has been upheld by the CESCR in Concluding Observations and its approach to reviewing State reports,¹² as well as by the International Court of Justice.¹³ As noted above, an Optional Protocol would not create "new" rights or obligations. It would simply strengthen monitoring of States' compliance with their existing obligations under the Covenant.

Ratione temporis

No time limits should be imposed in the Optional Protocol.¹⁴ Due to the nature of violations of ESC rights,¹⁵ temporal restrictions upon communications could exclude consideration of important issues.¹⁶ However, safeguards against retroactivity should

¹¹ See for example the Concluding Observations on Ireland (UN Doc. E/C.12/1/Add.77), UK (E/C.12/1/Add.79), France (E/C.12/1/Add.72), Sweden (E/C.12/1/Add.70), Japan (E/C.12/1/Add.67), Germany (E/C.12/1/Add.68) and Finland (E/C.12/1/Add.52).

¹² See for example the Concluding Observations on Israel (UN Doc. E/C.12/1/Add.90)

¹³ *Advisory Opinion on "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory"*, 9 July 2004, at paragraph 112.

¹⁴ Currently only one human rights complaints mechanism contains a reference to a *ratione temporis*: OP-CEDAW, Article 4(e).

¹⁵ for example, the possibility of permanent and/or continuing violations.

¹⁶ in particular, the consideration of situations where violations commence before the entry into force of the Optional Protocol but continue after its use, or where the grave consequences of such violations persist.

be included, and the OP-ICESCR would be subject to the general principle of international law according to which any violation occurring before the entry into force of the OP-ICESCR or its ratification by a given State would not be admissible.¹⁷

Identification of a victim and exclusion of anonymous communications

This is a standard admissibility requirement.¹⁸ However, provision should be made to allow individuals to request to the Committee that their identity be kept confidential and not be made known to the State Party concerned. In certain instances, the individual lodging the complaint might be at risk and this measure would guarantee the physical and psychological integrity of the complainant and his/her family. This request for confidentiality however does not represent a violation of the prohibition of anonymity.

Duplication of procedures

In the Elements Paper, it is recognised that one criterion for precluding admissibility is that the “same matter has been or is being examined under another procedure of international investigation or settlement”. The NGO Coalition acknowledges that such a criterion is established under some other international procedures. Nonetheless, it considers that this requirement must be examined carefully.

Due to the very nature and features of ESC rights violations, a communication mechanism should make sure that the examining body has the possibility to address the cases in their complexity. For instance, in a situation of forced eviction, the victims will often face violations of their right to housing, food, education, water, health, to family protection, etc. Other existing procedures may fail to address this complexity and to provide for the holistic approach needed.

The NGO Coalition also observes that the International Labour Organisation (ILO) or United Nations Educational, Scientific and Cultural Organisation (UNESCO) procedures cannot be seen as being of the same nature as a mechanism under an OP-ICESCR. The substantive areas covered by the ILO and UNESCO procedures are not concurrent with those of the ICESCR and these procedures do not provide a like form of redress for victims.. With regards to proceedings before other United Nations human rights treaty bodies, the NGO Coalition notes that they are either not concerned directly with ESC rights, and thus cannot apply the specific approach and expertise, or they are limited to addressing merely the concerns and violations related to certain affected groups (such as women). Thus, they are not adapted to the protection of ESC rights as enshrined in the ICESCR, be it for communications lodged by individuals or for communications emerging from groups. Therefore, examination of a claim under the ILO, UNESCO or other treaty bodies should not, *per se*, preclude admissibility.

For all of these reasons, the Committee should be left to decide on the admissibility of a communication which has already been examined under another similar procedure and should not be restricted in that capacity through a provision in the Optional Protocol.

Exhaustion of domestic remedies

The OP-ICESCR could require that domestic remedies be exhausted for a communication to be admissible, except if the application of such remedies is “unreasonably prolonged or unlikely to bring effective relief”. Therefore, if the

¹⁷ Vienna Convention on the Law of Treaties, article 4.

¹⁸ See, for example, Article 3 of the OP1-ICCPR, and Article 22(2) of CAT.

exhaustion of domestic remedies is unduly protracted, or plainly ineffective or otherwise unavailable to the victim (owing for example, to denial of legal aid) the individual may not be required to exhaust domestic remedies.

The NGO Coalition considers that, as is the case in the Rules of Procedure for the OP-CEDAW, the burden of proof should be on the State. Thus, if a State Party disputes the author's contention that all available domestic remedies have been exhausted, the State Party shall give details of the remedies available in the particular circumstances.¹⁹

Exhaustion of regional remedies

As mentioned at paragraph 8 of the Elements Paper, one issue that has been raised during the Working-Group discussions is that of the so-called "exhaustion of regional remedies". No such procedural requirement exists under either international law, under any current mechanisms, or in international legal practice. The NGO Coalition considers that the exhaustion of regional remedies should not be included as an admissibility requirement. This requirement would establish a hitherto unknown tripartite hierarchy between domestic, regional and universal law. Such a suggestion, besides establishing a false sense that remedies at the UN level could or should provide a forum for review of regional decisions, fails to recognise that the regional human rights systems each differ substantially in the way in which they protect ESC rights, and regional human rights systems do not exist in all regions of the world. Such a provision would result in a perversion of international jurisprudence whereby the interpretation of rights differs according to the region of 'original' jurisdiction. This should not be confused with the question of the application of the non-duplication rule in these circumstances (see further below).

3. Standing

The NGO Coalition believes that due to the nature of violations of ESC rights, the capacity to submit communications under an OP-ICESCR should remain as broad as possible. In particular, it is our collective experience that the poor and marginalised tend to form a disproportionate number of the victims of ESC rights violations. As these same people tend to have the least access to justice to exercise their right to a remedy, it is of the utmost importance to ensure standing for agents to act on their behalf.

At a minimum, parties with competency to initiate a communication (standing) under an OP-ICESCR should include:

- (i) Individuals and groups of individuals who have been victims of violations of Covenant rights by State Parties;
- (ii) Representatives of individuals or groups of individuals empowered to initiate communications *on behalf of* individual and group victims.

Individuals and groups of individuals who are victims of violations

All existing communications procedures under the UN human rights treaties provide standing for individual victims of human rights violations. In addition, both the

¹⁹ OP-CEDAW Rules of Procedure 69 (6).

Covenant on the Elimination of Racial Discrimination (CERD) and the OP-CEDAW provide for the ability for communications to be brought by groups of individuals who are victims of rights violations. In practice the Human Rights Committee also extends standing to “groups of individuals”, as demonstrated in the communication related to the *Lubicon Lake Band*²⁰, where the Committee stated:

“The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who can claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.”

Building upon these precedents, the NGO Coalition believes that standing, under an OP-ICESCR, should be open to individuals and groups of individuals. Limiting standing, and thus the ability to initiate complaints under an OP-ICESCR, to individuals would be to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

Representatives of individual and group victims bringing claims on their behalf

The importance of expressly acknowledging the competence of representatives, particularly from non-governmental organizations and national human rights institutions, to initiate communications *on behalf of individual and group victims* of ESC rights violations cannot be underestimated. Under existing instruments, communications *on behalf of* individual and group victims have either been specifically included,²¹ or such representative standing has been provided through adjudicative interpretation or practice.²²

These types of communications play an essential role in international complaints procedures, particularly where victims face the risk of ill-treatment or other retaliation for directly engaging in the process. Further, victims of ESC rights violations are often extremely poor and would thus often not be in a position to make use of the international procedure.

Third parties with a legitimate interest

Including provisions for standing for individuals, groups of individuals and representatives of individual and group victims would provide for the bare minimum required to enable the OP-ICESCR to be an effective forum for adjudicating ESC rights victims’ complaints. This could also be enhanced by allowing third parties (such as NGOs) who have a legitimate interest in bringing a communication to claim international protection for ESC rights.

²⁰ *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at para. 32.1.

²¹ Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims ESC rights violations follows the precedents of Article 2 of the OP-CEDAW which states “Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent”, Article 22 of the CAT and Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

²² See Rule 96(b) of the Rules of Procedure of the Human Rights Committee (UN Doc. CCPR/C/3/Rev.8).

4. Proceedings on the merits

The NGO Coalition is of the view that the Committee could decide to consider the question of admissibility and the merits of a communication either separately or together – this matter should be left to the Rules of Procedure and would depend, in each case, upon the nature and gravity of the human rights violations and the urgency of the situation.

Furthermore, the NGO Coalition supports the possibility for victims and/or their representatives to be personally heard by the Committee. It is crucial for the Committee to seek information and clarity by all means at its disposal, and especially by having hearings with the victims themselves or their representatives. In the case of ESC rights, the complexity of the situations in which violations occur supports the importance of this additional opportunity for clarification of the facts underlying the complaint.

Due to the fact that the victims of ESC rights are typically marginalised and poor individuals and groups, the written submissions could be complemented by testimonies given by the petitioners and/or victims to the Committee. This would provide the Committee with a direct insight into the real scope and implications of the alleged violations. From the perspective of the victims, it would significantly increase the legitimacy of the procedure and of the Committee, making the procedure accessible and transparent even to victims who are illiterate (which is not rare in the case of ESC rights violations).

Two other treaty bodies are able to hear from complainants directly, and the practice has shown that this process has been helpful.²³ The possibility of hearing from the petitioners should be available in the OP-ICESCR as well.

5. Friendly settlement of disputes

The NGO Coalition does not preclude the possibility that the OP-ICESCR may include provision for the parties to reach a friendly solution on the issue, based on the respect of human rights and the requirements of the ICESCR. Attempts to achieve a friendly settlement between the parties, however, should not be permitted to thwart the broader purposes of the Covenant. In addition, attempts to promote amicable settlement must not be allowed to prejudice the subsequent consideration of a communication/complaint should mediation fail. In light of these concerns, mediation and settlement procedures should comply with the following minimum requirements. They must:

- (a) be an optional, non-mandatory procedural step;
- (b) be limited in time;
- (c) be without prejudice to future adjudication of the dispute;
- (d) be disclosed only to designated staff or members of the Committee, and

²³ The two treaty bodies already allowing this are the Committee on the Elimination of All Forms of Racial Discrimination (under Rule 94(5) of its Rules of Procedure) and the Committee Against Torture (under Rule 111(4) of its Rules of Procedure).

not placed before the same members of the Committee who may later review the communication if the mediation should fail;

- (e) not defeat the object or purpose of the Covenant;
- (f) not serve to endorse or otherwise condone a breach of an ESCR violation or result in a continuation of such a breach; and
- (g) the terms of settlement should be subject to review and approval by the Committee, and must also be subject to follow-up procedures in order to monitor its implementation. This is essential to ensure that the settlement reached is in accordance with the Covenant and properly implemented.

Should mediation or friendly settlement provisions be included within the Optional Protocol, it is vital that this be included only as part of a broader communication procedure, and not viewed as an alternative to a complaint/communication mechanism. A friendly settlement mechanism on its own, without allowing for the possibility of resorting to a “full communication” should the mediation fail, establishes a system whereby there is little or no incentive for States to enter into such negotiations in good faith or with the intention of providing appropriate redress for the violation in question.

The prompt implementation of any friendly settlement and its monitoring by the Committee is essential, particularly to ensure that the friendly settlement procedure is not used to delay *sine die* the case. Experience of friendly settlement procedures in other forums, such as the Inter-American Commission on Human Rights, demonstrates the need to have strict limitations upon the time taken to implement friendly settlement, and for the importance of close monitoring by the supervisory body. Crucially, the supervisory body, *ex officio* or upon request from one of the parties, must be empowered to end the friendly settlement and continue the adjudicatory process in the case of undue delay or incomplete implementation of the friendly settlement.

6. Interim measures

Many allegations of violations of Covenant rights involve measures which may irreparably set back the enjoyment of Covenant rights or do irreparable damage to groups or individuals. The NGO Coalition believes that interim measures should be possible, for example, to prevent irreparable physical or mental damage to the victim, irreversible impact on the victim’s rights or serious retrogressive measures that would be difficult to remedy at a later time, if the Committee subsequently determines on the merits that a violation has occurred, or when it is necessary to preserve the integrity and effectiveness of the future decision of the Committee.

Therefore, the OP-ICESCR should include a specific provision allowing for interim measures which will enable the CESCR to require a State Party to take measures to avoid irreparable damage to the victim of the alleged violation. This possibility should be explicitly included in the OP-ICESCR itself to clarify the legal commitment of States Parties to the principle of interim measures, and to minimize the likelihood of non-compliance which would cause irreparable harm. This would be in keeping with the

developments made in negotiating the OP-CEDAW which includes the possibility for interim measures in Article 5, and the Draft International Convention for the Protection of All Persons from Enforced Disappearance which provides for interim measures in Articles 30 and 31.

The irreversible nature of certain violations of ESC rights highlights the need for such measures, e.g. in the case of a State act or omission that impairs access to sufficient food and drinking water, or in the case of the denial of basic health care. In those cases, damages are most likely to be extremely severe or even irreparable for the victims themselves and may also extend to other individuals.

7. Views

It should be left to the Committee to determine the content and scope of its views regarding the merit of the communication. Furthermore, in each instance it should be left to the Committee to determine what kind of measures the State should take to remedy any violation found.

The recommendations adopted by the Committee, in the framework of quasi-judicial decisions in cases of individual communications, must be implemented, in good faith, by a State Party in compliance with the object and purpose of the Optional Protocol, which is an instrument offering to the victim of violations of ESC rights an international procedural remedy for the protection of their rights and reparation. In line with the practice of other treaty bodies, the recommendations issued by the CESCR could include any number (or combination) of possibilities such as those listed below, or any other remedy which the Committee found to be appropriate. No limitations should be placed on the Committee in relation to such recommendations.

General pronouncements

Looking to the practice of bodies such as the European Social Charter Committee, the European Committee for Social Rights and/or the ILO Freedom of Association Committee, views issued by these bodies take the form of declaratory announcements which are left to the discretion of the accountable States in terms of substantive redress. This remedial measure is also utilised by the Human Rights Committee, which, when a violation is found, will call on States offending the ICCPR to take effective and enforceable remedial action which must be communicated to the Human Rights Committee within a certain time period, typically 90 days. However, the Human Rights Committee can also include within its recommendations concrete measures or steps to be taken by States in order to redress the situation (some such steps are outlined further below).

Reparation, including restitution, compensation and satisfaction

One remedy that may be considered under the OP-ICESCR is the recommendation that an accountable State pay victim(s) reparation, including restitution, compensation or satisfaction. This remedy is notably recommended by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture and the ILO Freedom of Association Committee.

Specific recommendations

There will be situations under the OP-ICESCR where the Committee could make specific recommendations to guarantee full redress, reparation and the termination and non-repetition of the violations. These recommendations could address, for instance, social policies dealing with education, housing, social security or health-care. In other instances, the Committee might recommend States to enact or enforce legislation that meets ICESCR requirements, or to amend or repeal legislation which is inconsistent with the ICESCR. Finally, the Committee could make remedial recommendations with regard to bringing State administrative practices more in line with ICESCR obligations.

There will also be situations under the OP-ICESCR where the Committee will assess whether legislation, administrative rules and practices are discriminatory or have any discriminatory impact. If the Committee concludes that the legislation or practice has or may have a discriminatory impact, it will recommend that the State in question repeal, abolish or amend it.

Specific remedial actions

In certain instances, the Committee could request specific remedial actions to guarantee the cessation of the violation and adequate redress and restitution.

8. Follow-up Procedures

A follow-up procedure would enable the CDESCR to monitor and act upon the implementation of its decisions and recommendations. Under a follow-up procedure, the Committee would be empowered to liaise with the State Party, beyond the regular reporting process, to discuss problems that could arise regarding the implementation of a particular decision. A follow-up procedure would reinforce an Optional Protocol's complaints procedure as it would: (i) open an avenue to address problems States might face in implementing a particular decision; (ii) provide guidance and support to those States in order to give full effect to a Committee's decision; and (iii) guarantee that the Committee's decisions are actually implemented. Follow-up procedures could include the possibility of the Committee taking further action (including, for example, issuing new recommendations) in the case of partial or non-implementation, or requesting information to be included in the States' regular reports regarding the observance and implementation of the decision.

9. Reservations

The NGO Coalition considers that to uphold the integrity of the procedures to be established under the OP-ICESCR no reservations should be allowed.

The *raison d'être* of an Optional Protocol is to provide to victims of ESC rights violations an international procedure to obtain protection and redress. As a tool to both complement and strengthen the Covenant, as well as the realisation of ESC rights, State Party reservations to an Optional Protocol would undermine such potential, as well as the purpose of an OP-ICESCR.

An Optional Protocol is a procedural instrument that would neither introduce new nor expand present ESC rights obligations that States Parties accepted through their ratification of the Covenant. An Optional Protocol would thus merely serve as a means through which States Parties would be encouraged to realise existing Covenant obligations. In addition, the Optional Protocol would by its very nature be optional, and, as such, reservations that curtailed its applicability would be unnecessary.

An effective Optional Protocol must recognise the indivisible and interdependent relationship amongst all Covenant rights. To allow States Parties to individually select the ICESCR rights subject to an Optional Protocol strike at the core of this relationship and of the instrument's ability to protect and promote Covenant rights. Such a selective approach would open the door to arguments as to the hierarchy of and inequality between ESC rights, thereby encroaching upon the universality, interdependence, indivisibility and interrelatedness of all human rights. Further, permitting the selection of ESC rights subject to the Optional Protocol mechanisms would risk that some States Parties would enhance their international prestige, through ratification, while restricting the instrument's substantive application.

It is important to bear in mind the comments made by the Human Rights Committee on the issue of reservations made upon ratification or accession to the ICCPR or its Optional Protocols, in its General Comment No. 24²⁴, where it addressed the issue of whether reservations are permissible under the OP1-ICCPR, and if so, whether such reservations are contrary to the object and purpose of the Covenant or of the OP1-ICCPR itself. In this regard, the Committee stated:

“It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State Party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.”

²⁴ CCPR/C/21/Rev.1/Add.6.

Further, the Committee stated that “reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose”.

Accepting reservations to the Optional Protocol to the ICESCR would depart from existing practice where neither the OP-CEDAW, the OP1-ICCPR, nor the OP-CAT accept reservations.

B. Inquiry Procedure

The NGO Coalition considers that the Optional Protocol should include an inquiry procedure. This procedure would reinforce a communications procedure, allowing the Committee to initiate an inquiry if it receives reliable information indicating grave or systematic violations by a State Party of the Covenant. Individuals, groups, NGOs, or any other entity should be able to submit information regarding the need for an inquiry.

In general, inquiry mechanisms are important as they allow the supervisory bodies to respond, in a timely fashion, to grave or systematic violations that are in progress, instead of waiting until the next State report is examined. This is particularly relevant to violations that are continuing in nature. In addition, the procedure offers a means of addressing situations in which individual communications do not adequately reflect the gravity or systematic nature of violations of Covenant provisions. This type of mechanism also addresses the situations in which individuals or groups are unable to utilise the communications mechanism because of practical constraints, for example, or fear of reprisals.

The NGO Coalition supports the inclusion of an inquiry procedure that would enable the Committee to launch, on its own initiative, and on the basis of reliable information, inquiries into grave or systematic violations of rights enshrined in the ICESCR. An inquiry procedure included in the OP-ICESCR could be modelled after either Article 20 of the CAT, Article 8 of the OP-CEDAW, or Article 32 of the Draft International Convention for the Protection of All Persons Against Enforced Disappearances, all of which authorise inquiry procedures in prescribed situations.

As well as conducting investigations under a stand-alone inquiry procedure to analyse situations of grave or systematic violations, the Committee should also be empowered to conduct inquiries within the framework of the procedural operation of an individual communications procedure. In this instance, the ability to conduct an inquiry (including field visits) should be available in relation to all individual communications and used whenever the Committee deems it appropriate or useful for a full and proper investigation of the communication (i.e. not limited only to situations of “grave or systematic” violations).

C. Inter-State Procedures

The possibility of an inter-State complaints mechanism is not excluded by the NGO Coalition, however priority should be given to drafting an *inquiry procedure* and a *communications procedure* for individuals and groups of individuals.

D. Cross-Cutting Issues

1. An optional protocol and domestic decisions on resource allocation

It has been suggested by some States that matters involving the allocation of resources and public policy questions should be left to the political authorities. It has been suggested that the judiciary should not intervene in such fields, which are said to be the exclusive domain of governments. As the case law highlighted in the Elements Paper clearly demonstrates, judicial and quasi-judicial bodies do and should play a role in adjudicating ESC rights. As in the case of civil and political rights, such adjudication may involve issues of resource allocation.

First, it is important to remember that, as with civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. In this respect, when national courts have intervened to order that specific programmes or policies be implemented, the orders have, in most cases, given a wide degree of discretion to the government to devise the appropriate response. For instance, the Bangladesh High Court noted in 1999 that in order to fulfil the basic rights of equality, life and livelihood, the government had to complement its project to demolish slum-dwellings in Dhaka with a plan to rehabilitate the dwellers and that the project needed to be carried out in stages with reasonable notice given prior to eviction.²⁵ With regard to the progressive realisation of ESC rights, courts have consistently shown recognition of the respective roles of courts and legislatures. Courts have restricted their role to measuring programs against constitutional entitlements, leaving the design and implementation of programs to legislatures.

Secondly, while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters with important resource implications. The adjudication of civil and political rights, as well as many other legal rules such as trade law, regularly impinges upon the political options of governments, notably with regard to the allocation of resources. Indeed, while judges should respect the division of competences between the various branches of government, it is important to recognise that their decisions frequently have budgetary consequences.²⁶ For instance, the right to a fair trial necessitates significant financial investments in court systems, and frequently legal aid.²⁷ Similarly, the protection against torture and other forms of cruel, inhuman or degrading treatments also requires financial prioritization in term of police training, construction of prison facilities, protection of the victims, etc. While it is obvious that the realisation of civil and political rights involves allocation of resources, the related costs are often not considered because the institutions are already in place.

Thirdly, in many cases, the realisation of ESC rights will only require a government to refrain from certain behaviour or to regulate the actions of third parties. For instance, State Parties to the ICESCR have to ensure that there are not arbitrary restrictions on the

²⁵ *Ain O Salish Kendra V Government of Bangladesh* (Supreme Court 1999).

²⁶ See UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant, E/C.12/1998/24, at para. 10.

²⁷ See for example *Airey v Ireland* [1979] 2 EHR 305. The European Court of Human Rights held that the lack of legal assistance for complex divorce proceedings violated the right to a fair trial and right to respect for family life. Ireland subsequently enacted a civil legal aid system.

right to work or that no forcible evictions are carried out in the absence of adequate compensation and resettlement. In such cases, the realisation of ESC rights does not involve questions of resource allocation and does not require the adoption and implementation of policies, programme or measures.

Fourthly, courts frequently deal with many questions concerning the public interest both in social and economic rights claims and in civil and political claims. While it is important that courts be cognisant of the complexities involved, courts have also recognized that it is important that they not abandon their responsibility to protect fundamental rights in all areas. Balancing the rights of accused with the rights of victims, or the rights of those vulnerable to hate speech with the right to freedom of expression, are complex matters. Human rights adjudication is, by its very nature, complicated by these types of competing concerns. In many cases, courts may be better placed than legislatures to consider evidence as to the effect of policies or programs on vulnerable groups that were not properly considered in the legislative process. It is by developing and demonstrating competence in adjudicating these types of disputes, and exercising appropriate institutional restraint, that courts and other human rights institutions are able to enhance democratic governance.

Further, concerns expressed about the democratic legitimacy of courts are often raised in relation to the suggestion that they should not get involved in matters related to the allocation of resources and public policy issues. In this regard, while judicial officers are not elected by popular vote, governments appoint many courts members. In addition, judicial bodies have shown a capacity to uphold the rights of individuals and groups in the face of hostile or negligent State. Where courts adjudicate social and economic rights related to resource allocation, they are usually acting to ensure that the fundamental rights of vulnerable or marginalized groups are not neglected.

While ESC rights may often involve significant issues of resource allocation, over-emphasizing this aspect of ESC rights may sometimes serve to obscure the serious issues of injustice which leave large segments of society without access to work, education or adequate food, clothing and housing. It is often only from the standpoint of dominant groups that ESC rights claims appear as demands that governments “provide” for particular needs rather than as demands that government decision-making conform with the recognition of the equal dignity and worth of all members of society.

For example, a demand by people with disabilities that resources are allocated for the provision of wheelchair ramps in public buildings is only necessary when buildings have been designed as if people with disabilities did not exist. Any attempt in the OP-ICESCR to weaken remedies or exclude rights that involve resource allocation is likely to exclude the most disadvantaged groups and the most critical aspects of injustice from effective review.

Because of their important implications for human rights, resource allocation decisions have never been excluded from human rights review, either domestically or internationally. No category of government decision-making ought to be exempt from review from the requirements of fundamental human rights, particularly when the rights and survival of so many are at stake in these decisions.

There are considerations in human rights review of resource allocation to which courts and other adjudicative bodies must be, and have been sensitive. These relate primarily to polycentricity and competing rights, in a context of limited resources. If, for example, in the consideration of a complaint on the right to education under the OP-ICESCR, the Committee would recommend that significant resources be allocated to fulfilling that right, without considering competing needs for resources to fulfil the right to adequate food, clothing, housing and medical care, the decisions of the Committee would have little credibility.

With increasing numbers of jurisdictions making ESC rights enforceable at the domestic level, courts have shown that they are capable of developing meaningful standards by which to review resource allocation decisions against the requirements of ESC rights, without usurping the role of legislatures or ignoring the importance of the many competing demands on resources that are faced by governments.

If the OP-ICESCR were to suggest that resource allocation decisions are inherently 'political' and on this account exempted this category of decision-making from complaints of violations of rights, the restriction would represent an unprecedented attack on the supremacy of human rights and the rule of law, and would discriminate against groups that are most in need of the protection of the ICESCR.

2. Relationship of an optional protocol with other mechanisms

Complementarity in the human rights framework is not a new issue. Indeed, complementarity between different human rights mechanisms can be found at the regional and universal levels and with respect to conventional and non-conventional mechanisms. It results from the development of human rights law, along with the identified need to bring special protection to vulnerable groups, address particular subjects of concern or respond to regional specificities. Within the human rights framework and with respect to individual complaint mechanisms, complementarity can be understood from two different perspectives: one specific right may be covered by several instruments or mechanisms and one particular individual may have access to several mechanisms.

With respect to the OP to the ICESCR, concerns have been raised that such a mechanism may duplicate, to a certain extent, the work carried out by other bodies such as the Human Rights Committee, the CEDAW Committee, as well as the ILO and UNESCO.

In examining the issue of complementarity between the proposed Optional Protocol and other international and regional complaint's mechanisms adjudicating over ESC rights violations, it is acknowledged that some degree of overlap exists between the proposed instrument and existing regional and international complaints procedures, in the same way as overlap also exists in the realm of civil and political rights. That said, existing international and regional ESC rights complaint's mechanisms are limited in terms of the subject matter that they are competent to adjudicate over and/or the complainants provided with standing (the capacity to submit a communication). Here, for example, the ILO mechanism primarily confines itself to communications from governments, workers' and employers' organizations concerning allegations that member States are

not respecting basic freedom of association principles. The UNESCO complaints procedure entertains only a narrowly defined class of complainants and the process is confidential. Given the structural constraints of existing ESC rights complaints mechanisms, access to these procedures is limited, either in terms of the ESC rights covered and/or in terms of the individuals/groups competent to lodge a complaint.

The potential overlap between the future operation of an OP-ICESCR and other procedures, such as the existing human rights treaty bodies complaints mechanisms, regional mechanisms and the ILO or UNESCO procedures could be addressed through the well-established principle of non-duplicity. Under this principle of international law, a case can be brought to various bodies, if the State is a party to the different treaties (and has consented to the complaints system) and if these treaties protect the rights implicated in the case. In each instance it is the choice of the victim regarding the treaty body (or universal or regional mechanism) to lodge his/her complaint with. However, in the application of the principle of non-duplication, he/she can submit his/her case only to one treaty body or mechanism.²⁸ For example, a victim of torture (inflicted for reasons based on discrimination) by a State which is party to the ICCPR (and the OP1-ICCPR), the CAT (and its declaration on individual communications), the CERD, and the American Convention on Human Rights, has the choice of lodging a complaint with either the Human Rights Committee, Committee Against Torture, Committee on the Elimination of Racial Discrimination or the IACHR. However it is not possible for that person to submit a simultaneous communication on the same legal basis to two or more bodies. This being said, the jurisprudence of the HRC and the IACHR recognises that a factual case can be submitted to both bodies, if separated legal and factual issues are being raised before each body. Under this approach, a victim could submit his/her case before two different procedures, if the legal and factual issues differ (for further discussions on this, see part 2).

Rather than duplicating or overlapping with existing procedures, the OP-ICESCR will come as a needed complementary procedure to other existing mechanisms. At the moment, existing procedure fail to cover all ESC rights in all regions of the world. Existing regional mechanisms do not cover Asia and the Pacific, while the Inter-American system only provides for individual communications in relation to the right to education and the right to join and form trade unions. In Europe the *à la carte* system does not cover all ESC rights and does not provide for individual communications. At the UN level, the OP1-ICCPR, with the exception of freedom of association and non-discrimination in relation to ESC rights, mainly addresses civil and political rights. While the OP-CEDAW does encompass the possibility of bringing complaints for ESC rights violations, it does so only within a gender discrimination framework. Additionally, if an OP-ICESCR were to be adopted, it will complement the existing procedures within specialised agencies. Indeed it would deepen the existing cooperation between the CESCR and UNESCO and ILO.

²⁸ There is the possibility of an exception whereby matters which involved the same factual basis, but where different legal rights are affected, may be addressed by different bodies without breaching the rule of non-duplication.

3. International cooperation and assistance

International cooperation and assistance is extremely important in facilitating the full realisation of ESC rights. The NGO Coalition considers that the issue of international cooperation and assistance could be relevant either under an inter-State complaint mechanism or under a communications and inquiry mechanism.

International cooperation and assistance, as provided for in Article 2(1) of the Covenant, could become relevant under a communications or inquiry procedure primarily in the following circumstances:

- Where a communication is brought against a State Party (or an inquiry is initiated in relation to a State Party), and the provision (or lack of provision) of international cooperation and assistance is a relevant factor in relation to the State Party's ability to progressively realise the obligations contained in the Covenant.
- Where a communication is brought against a State Party (or an inquiry is initiated in relation to a State Party) on the basis that their provision (or lack of provision) of international cooperation and assistance led directly to a violation of ESC rights.

In relation to the first scenario mentioned above, the Committee would consider issues related to international cooperation and assistance as being relevant factors in the consideration of the individual or group communication, or in the inquiry. Analysis of international cooperation and assistance may form part of the determination of the "maximum available resources" available when assessing whether a violation has occurred, or as a mitigating factor to be taken into consideration by the Committee when formulating the views and recommendations on the particular communication or inquiry. The Committee would need to consider the impact of international cooperation and assistance upon the State's ability to realise its Covenant obligations and upon the violation of the victim's ESC rights, as well as considering the State's compliance with its duty contained in Article 2(1) to seek international cooperation and assistance.

Under both a communications procedure and an inquiry procedure, there must always be a clear causal link between the State action and the violation of the victim's rights. Under a communications mechanism, the Committee would need to assess if, in a concrete case, the alleged victim(s) has suffered a violation of his/her Covenant rights due to an act or omission, within the framework of international cooperation, which can be attributed to a State Party to the Covenant within the framework of international cooperation. In other words, in the second scenario above, the Committee would have to consider whether the actions or omissions of a State have clearly led to the violation of this victim's ESC rights, such as the right to health, the right to housing or the right to food. In doing so, the Committee will have to look very carefully whether a clear causal link can be shown between the actions of the State Party and the violation of the victim's rights. This would include consideration of the degree of due diligence conducted by the State in question, as well as its responsibility for private acts which impair the enjoyment of rights. The Committee could also evaluate the responsibilities of other States in the violations of the victim's ESC rights, for example the responsibility of the State receiving the international cooperation and assistance.

Another possibility for addressing international cooperation under an OP-ICESCR is the one proposed by the Chairperson-Rapporteur in her Elements Paper, whereby the Committee could refer the international cooperation and assistance aspect of an individual or group communication to ECOSOC for consideration and further action. The NGO Coalition believes that this proposal could also be linked to a follow-up procedure, international cooperation constituting, in this case, an important element of the follow-up.

Finally, an inter-State mechanism could be used to address international cooperation and assistance outside of the framework of communications by individuals or groups who are victims of Covenant rights.

4. Costs of an optional protocol

The NGO Coalition has no input to make on this issue.

5. The option of having no optional protocol

For the NGO Coalition the option of “no Optional Protocol” is not an option. It perpetuates a historic hierarchy of rights, wrought in a different political age. It fosters an inequality of review procedures within the human-rights monitoring mechanisms. It ignores the broad-ranging implementation of ESC rights in all regions of the world. It denies the growing, and global, jurisprudence on these rights, which has derived in large part from the increasingly comprehensive domestic and regional mechanisms to address ESC rights. And it ignores the needs of our shared constituents, those who suffer violations of their ESC rights. Their right to access to justice is the imperative which drives these discussions and our participation in this process, both at the UN and in our own work at the national level.

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

An OP-ICESCR would greatly contribute to the development of effective remedies for victims of human rights violations around the world. The mere fact of its adoption would encourage the development of more effective domestic remedies, and the views adopted through individual communications would add coherence increase legal certainty regarding the justiciability of ESC rights across the board. The International Law Association has noted the significance of views adopted under existing international complaints mechanisms for the development of domestic jurisprudence, and a similar boon to justiciability of ESC rights is much needed and long overdue for the poor and marginalised, who form the majority of those affected by violations of Covenant rights.

This mechanism will provide an important check on instances where domestic systems are failing to effectively protect ESC rights obligations. Moreover, because the CESCR

recognises that both judicial and programmatic responses are required to implement ICESCR rights, the CESCR would make recommendations in both areas.

The NGO Coalition strongly believes the OP will benefit individuals, States Parties and the international community through:

BENEFIT ONE: Providing an International Remedial Mechanism for the Infringement of ICESCR Rights

The OP-ICESCR will provide individuals and groups with access to international remedies where Covenant rights have been violated. Ideally comprising of a communication's mechanism and an inquiry procedure, the Optional Protocol to the ICESCR would possess the potential to significantly contribute towards the realisation of economic, social and cultural rights as enshrined in the Covenant.

Whereas the Optional Protocol communication's mechanism would provide individuals and groups with access to an international adjudicative procedure and remedies concerning specific Covenant violations, the inquiry procedure would empower the CESCR to initiate an investigation into particularly grave ICESCR abuses. The inquiry procedure would strengthen and compliment the proposed Optional Protocol communication's procedure as it would:

- (i) Address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of the provisions of the Covenant;
- (ii) Allow grave and/or systematic Covenant violations to be investigated where individuals or groups were unable to utilise the communication's mechanism for reasons including fear of reprisals; and
- (iii) Enable a more-timely response to grave and/or systematic violations of the provisions of the Covenant, and to continuing violations in particular.

BENEFIT TWO: Identifying and Clarifying State Party ICESCR Obligations

As demonstrated through the first Optional Protocol to the ICCPR, an OP-ICESCR would contribute, through the development of international jurisprudence, to the further understanding of the rights contained in the ICESCR, to the identification of what constitutes a violation of these rights and to the definition of corresponding State Party obligations.

Further, the Optional Protocol would assist in transforming general ICESCR provisions into concrete, tangible and achievable norms. In focussing, through the communications procedure, on specific violations of the rights of the individual, the Committee would provide States Parties with guidance as to their Covenant obligations in actual situations. These recommendations in turn could constitute guidelines for the effective domestic implementation and promotion of economic, social and cultural rights as contained in the Covenant.

BENEFIT THREE: Assisting States Parties in Protecting and Promoting Covenant Enshrined Rights

The elaboration of an OP-ICESCR will encourage States Parties to take steps towards the full implementation of all rights enshrined in the Covenant. This would mark an important step in strengthening the principle that, through ratification, States Parties have committed themselves to progressively realise Covenant rights. Through the promotion of the Optional Protocol's communication mechanism and inquiry procedure, States Parties would be provided with further opportunities to develop the concept of economic, social and cultural rights at the national level, to increase understanding and awareness of these rights and to remedy any existing inequalities in their laws, policies or procedures. The Optional Protocol will encourage the implementation of all the rights enshrined in the Covenant through progressive changes in national law and policy. Such changes will, in turn, trigger an increased recognition of economic, social and cultural rights at all levels of society and assist all, including the most marginalized, to seek and access justice.

BENEFIT FOUR: Encouraging the Development of Domestic Jurisprudence Concerning Economic, Social and Cultural Rights

The Optional Protocol would provide States Parties with a direct role in the development of international economic, social and cultural rights jurisprudence i.e. a body of case law that could be used by the Committee and others in interpreting the provisions of the Covenant and clarifying State obligations. In turn, international ICESCR jurisprudence would promote the development of domestic jurisprudence on economic, social and cultural rights issues. In deliberating on issues such as the right to health, housing and social security, national level Courts could take judicial notice of international Optional Protocol jurisprudence towards the further domestic recognition of economic, social and cultural rights. In essence, the concept of violations of economic, social and cultural rights, how they should be recognized and interpreted and how it might be remedied will be investigated and documented within national and international tribunals. Such documentation will in turn be vital in influencing the enactment, execution and interpretation of domestic laws or procedures to protect the rights as contained in the Covenant.

BENEFIT FIVE: Strengthening International Enforcement of Economic, Social and Cultural Rights

The OP-ICESCR will serve to strengthen the relationship between States Parties and the Committee by creating an impetus, at the national level, for States to promote the effective national implementation of ICESCR rights. Through this instrument, States Parties will be furnished with incentives to provide detailed information to the Optional Protocol adjudicative body that would serve to strengthen the institutional knowledge of the ICESCR reporting mechanism. Scholars and non-governmental organisations have long noted that one of the major constraints faced by the Committee, in the development of its working practices, has derived from the absence of a provision that requires State Party co-operation beyond the submission of periodic reports. The Optional Protocol would thus lead to a new and more involved relationship between the Committee and States Parties. Given that the Covenant and its Optional Protocol would comprise the sole specific international communications mechanism dedicated to economic, social

and cultural rights, this is of the utmost importance, both for the legal development of the rights at the international level, and for the progressive interpretation and enactment of law at the national level.

BENEFIT SIX: Reinforcing the Universality, Indivisibility, Interrelatedness and Interdependence of All Human Rights

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. The Vienna Declaration mentioned that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” Given the existence of an international communication's procedure concerning the adjudication of ICCPR rights infractions, the creation of an OP-ICESCR would provide States Parties an excellent opportunity to reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights.

BENEFIT SEVEN: Increase Public Awareness of Economic, Social and Cultural Rights

The OP-ICESCR would place a renewed emphasis on economic, social and cultural rights nationally and internationally. The publication of communications, inquiries and views of the CESCR would serve to promote public awareness, nationally and internationally, of the human rights standards enshrined in the ICESCR. This has been the case with communications submitted under existing complaints procedures and in particular, communications under the OP1- ICCPR.