

COMMENTARY
on the Optional Protocol
to the International
Covenant on
**ECONOMIC,
SOCIAL AND
CULTURAL
RIGHTS**

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INTERNATIONAL
COMMISSION
OF JURISTS



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**Inter-American Institute
of Human Rights
International Commission
of Jurists**

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Foreword

On 10 December 2008, the 60th anniversary of the adoption of the Universal Declaration of Human Rights, the United Nations General Assembly adopted the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. This new treaty is enormously important for the protection of economic, social and cultural rights. The *Optional Protocol* rectifies a gap that has been pending for over 40 years, namely the absence of effective procedures for ensuring that the rights enshrined in the *International Covenant on Economic, Social and Cultural Rights* have international protection. To remedy that omission, the *Optional Protocol* establishes three international protection procedures: individual communications, inter-State communications and, lastly, an inquiry procedure for addressing grave or systematic violations of economic, social and cultural rights.

What is more, the adoption of the *Optional Protocol* could not have been more timely in a world convulsed by financial and economic crises, climate change and the relocation and deregulation of labour and in which poverty and social exclusion, far from diminishing, is on the increase in many regions. In its most recent Human Development Report, the United Nations Development Programme (UNDP) predicts an increase in

the section of the population living in extreme poverty.¹ And the Economic Commission for Latin America and the Caribbean (ECLAC) has pointed out that, according to the latest available estimates for the countries of Latin America, in 2007 “34.1% of the region’s population was living in poverty and 12.6% in extreme poverty or indigence. The total number of poor people stood at 184 million, of whom 68 million were indigent”.² CEPAL has also warned that the recent international financial crisis could cause an increase in both general and extreme poverty.³ According to the International Labour Organization, only 20% of the world’s population currently has social security.

It would, of course, be naïve to think that the *Optional Protocol*, like a “magic wand”, could be the answer to these huge challenges. Nevertheless, in establishing effective international protection procedures for economic, social and cultural rights, it will help to ensure that those rights are effectively enforced. That is why it is important that the 159 States parties to the *International Covenant on Economic, Social and Cultural Rights* sign and ratify the *Optional Protocol* and that the remaining States accede to both the Covenant and the Protocol.

Understanding the provisions, the nature, the legal and procedural implications of the *Optional Protocol*, as well as the process of its elaboration, is of utmost importance. It will help in understanding the importance of its ratification and, above all, of the international protection mechanism that this new treaty creates. In light of this, the Inter-American Institute of Human Rights elaborated in 2007 a working document about the new instrument. This document was endorsed by the Chairperson-Rapporteur of the *Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, Ms. Catarina Truninger de Albuquerque (Portugal). It was also distributed to all delega-

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- 1 United Nations Development Programme, *Human Development Report 2007-2008: Fighting climate change: Human solidarity in a divided world*, UNDP, New York, 2008.
 - 2 Economic Commission for Latin America and the Caribbean, *Social Panorama of Latin America, 2008*, LC/G.2402-P/E, December 2008, p. 5.
 - 3 *Ibid.*, Chapter I, p. 1.

tions as a resource material during the sessions of the Working Group. The working document was based on the draft optional protocol prepared by the Chairperson-Rapporteur and proposed an interpretation of a general character as well as a collection of legal sources from the Inter-american and universal systems related to the preamble and to each of the thirty-six articles being discussed at that time.

The Inter-American Institute of Human Rights and the International Commission of Jurists are jointly publishing this *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. In so doing, we hope to contribute to a better understanding of the Protocol and each of its clauses.

Roberto Cuéllar

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I. Introduction

On 10 December 2008, through resolution A/RES/63/117, the United Nations General Assembly adopted the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. The date could not have been more symbolic since it was on that day, 60 years earlier, that the *Universal Declaration of Human Rights* was adopted.

The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (from now on, the OP-ICESCR) is of particular importance for the effective international protection of the rights enshrined in the *International Covenant on Economic, Social and Cultural Rights*. In fact, the OP-ICESCR establishes three international protection procedures: a procedure involving individual communications, a procedure involving inter-State communications, and an inquiry procedure for investigating grave or systematic violations of economic, social and cultural rights.

The adoption of the OP-ICESCR was the culmination of several decades of ceaseless work to secure international procedural mechanisms to protect the victims of violations of economic, social and cultural rights. The international protection of economic, social and cultural rights became an issue from the moment the *Universal Declaration of Human Rights* was adopted. The resolution by which the *Universal Declaration* was adopted

provided for the drafting of an *International Covenant on Human Rights*.¹ Such a covenant was supposed to include both civil and political rights and economic, social and cultural rights as well as the recognition of gender equality.² The United Nations General Assembly specifically called for the establishment of a procedure based on communications from individuals.³ However, the covenant never came to fruition and was eventually split in two⁴ to become the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights*.

A similar discussion took place within the Inter-American system. The draft *Inter-American Convention on Human Rights*, prepared by the Inter-American Council of Jurists in 1959 at the request of the Fifth Meeting of Foreign Ministers, included both civil and political rights (Chapter I of the draft) and economic, social and cultural rights (Chapter II of the draft). Although the draft proposed by the Inter-American Council of Jurists did not envisage an individual complaints procedure for economic, social and cultural rights, a draft convention that included a “judicial procedure” for some of them was proposed by Chile.⁵ Uruguay also proposed a draft convention that included an individual communications procedure for some economic, social and cultural rights.⁶

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- 1 United Nations General Assembly Resolution N° 217 (III) of 10 December 1948, Letter E.
 - 2 United Nations General Assembly Resolution N° 421 of 4 December 1950, Letter E, paragraph 7.
 - 3 *Ibid.*, Letter F, paragraph 8.
 - 4 In Resolution 543 (V) of 5 February 1952, the United Nations General Assembly decided to draft two separate covenants.
 - 5 *Draft Convention on Human Rights* presented by the Chilean Government at the Second Special Inter-American Conference held in Rio de Janeiro in 1965. The draft document was published in the *Inter-American Yearbook on Human Rights – 1968*, General Secretariat of the Organization of American States, Washington, 1973, p. 275 and following pages.
 - 6 *Draft Convention on Human Rights* presented by the Uruguayan Government at the Second Special Inter-American Conference held in Rio de Janeiro in 1965. The draft document was published in the *Inter-American Yearbook on Human Rights – 1968*, *op. cit.*, p. 298 and following pages.

While the *International Covenant on Civil and Political Rights* established a monitoring body – the Human Rights Committee – and had an individual communications procedure,⁷ this was not the case for the ICESCR. In fact, in the beginning the ICESCR did not provide for the establishment of a treaty monitoring body. Such a body, the Committee on Economic, Social and Cultural Rights (the ESCR Committee), was later set up by the Economic and Social Council (ECOSOC) in 1985.⁸ The ESCR Committee was authorized to monitor implementation of the ICESCR by the States parties through a system of periodic reports and to make general recommendations. The level of international protection given to economic, social and cultural rights was therefore not as thorough as that given to civil and political rights. The disparity between the two “groups” of rights in this respect became more obvious with the adoption of new human rights treaties that established procedures for investigating cases involving the mass or systematic violation of human rights.⁹

Nevertheless, the need to broaden the threshold of international protection for violations of economic, social and cultural rights by establishing an individual communications procedure was tackled by the ESCR Committee and, in 1990, it began drawing up a draft protocol to the ICESCR. Its drafting work came to an end in December 1996 and in 1997 the draft protocol was submitted to the then Commission on Human Rights for examination and adoption.¹⁰ The then Sub-Commission on the Promotion and Protection of Human Rights supported the initiative to draw up a protocol.¹¹ The then Commission on Human Rights confined itself to transmitting the draft to States and inter-government and non-govern-

7 Through the *Optional Protocol to the International Covenant on Civil and Political Rights*.

8 ECOSOC Resolution N° 1985/17 of 28 May 1985.

9 See, for example, the 1984 *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 20 of which established an inquiry procedure – including *in situ* visits – for situations in which torture was being systematically practised.

10 See United Nations document E/CN.4/1997/105, annex.

11 See, among others, Resolution N° 1996/13 of 23 August 1996.

mental organizations for their comments and observations.¹² In 2001, the then Commission decided to appoint an independent Expert to examine “possible follow-up and future actions, including the establishment of an open-ended working group of the Commission to examine the question of a draft optional protocol to the Covenant”.¹³ In his 2002 report, the Expert recommended adopting an Optional Protocol to the Covenant, including a procedure for individual communications.¹⁴ That same year, the Commission decided to set up an *Open-ended Working Group* the initial mandate of which was to “consider [...] options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights”.¹⁵ Initially the group had no specific mandate to draft an optional protocol. That was because many States were reluctant to set up a procedure based on individual communications for economic, social and cultural rights since, although many Latin American and African countries, as well as some European ones, such as Portugal, Spain and France, supported the introduction of an optional protocol, others were frankly unconvinced about it or simply were actively hostile to the idea, such as the United States, Australia and some Scandinavian countries. After looking at various options, Portugal, as chair of the Working Group, focused the group’s attention on drafting a working document on what should be in any optional protocol, thereby setting the conceptual foundations of the future instrument.¹⁶ In 2006, the Human Rights Council, the successor to the Commission on Human Rights, expressly mandated the Working Group to draft and negotiate an optional protocol and the group’s name was thus changed to the *Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights* (from now on Working

12 Resolution 1997/17 of 11 April 1997 and Resolution 1998/33 of 17 April 1998.

13 Resolution N° 2001/30 of 20 April 2001.

14 *Report by Mr. Hatem Kotrane, independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights*, United Nations document E/CN.4/2003/53 of 13 January 2002.

15 Resolution 2002/24 of 22 April 2002.

16 See United Nations document E/CN.4/2006/WG.23/2 of 30 November 2005.

Group).¹⁷ The Working Group held five sessions¹⁸ and several informal consultations. On 4 April 2008, the Working Group adopted the draft OP-ICESCR and forwarded it to the Human Rights Council which adopted it at its June session of that year and sent it on to the General Assembly for adoption.

The process of negotiating the OP-ICESCR was not a self-explanatory isolated event. In order to understand the breadth of discussion to which its adoption gave rise, it is therefore important to describe its conceptual implications and some of the premises that were necessary.

One of the starting points that needs to be clarified is the relationship between the substantive clauses through which human rights are established in international treaties and their international control or monitoring mechanisms. Were the latter not to exist, the 'monitoring' of the substantive clauses would be under the control of the States parties, the actual duty-bearer would have the last word on compliance with the obligations assumed, thereby in practice leaving the victims of violations defenceless. Furthermore, a right that has been internationally recognized in a treaty but for which there is no international protection procedure or recourse can hardly be fully considered a right.¹⁹

The universal system of human rights protection has developed a series of procedures for monitoring States' compliance with their human rights obligations. These include: administrative control, namely examination by an international body of reports compiled by the States parties on the implementation of and compliance with the obligations laid down

17 Resolution N° 1/3 of 29 June 2006.

18 See United Nations documents E/CN.4/2004/44, E/CN.4/2005/52, E/CN.4/2006/47, A/HRC/6/WG.4/2, A/HRC/8/WG.4/2, A/HRC/8/WG.4/3 and A/HRC/6/8.

19 See, in general, International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights violations, Practitioners Guide*, Practitioners Guide Series N° 2, International Commission of Jurists, Geneva, 2006. On the right to a remedy and to obtain reparation specifically with regard to economic, social and cultural rights, see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series N° 2, International Commission of Jurists, Geneva, 2008.

in the treaty in question; quasi-judicial control, namely the ability for an international body, in the context of an adversarial procedure for the settlement of disputes, to examine complaints or communications, whether from individuals, groups of individuals or States, about alleged violations of the human rights or obligations established in a treaty and to rule on the State's liability in the case in question; and the ability of international bodies to react to alleged situations involving the grave or systematic violation of rights in a country by conducting an inquiry.²⁰

The main reason why adoption of an OP-ICESCR was necessary was that, despite on the one hand proclaiming the interdependence, indivisibility and interrelationship of all human rights, the international community had, on the other hand, confined protection of the economic, social and cultural rights enshrined in the ICESCR – despite being, together with the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, part of the so-called *International Charter of Human Rights* – to the State reports mechanism which gives international bodies no opportunity to intervene or consider the violation of the rights of victims in specific individual or group situations.

The reporting procedure requires information on a considerable number of rights – all of the rights established in the ICESCR – to be supplied at five-yearly intervals,²¹ although in practice the interval may be much longer. It is an extremely important procedure for evaluating the steps taken by States parties to implement the ICESCR and it allows the ESCR Committee to formulate recommendations, be they general or specific, for improving the protection of economic, social and cultural rights. However, this procedure, as currently defined, is not suitable for examining cases involving

20 The list is merely illustrative and does not pretend to be exhaustive. There are some supplementary procedures, such as regular visits *in situ*, visits provoked by gross or systematic violations, the forwarding of information to the United Nations General Assembly in cases where there is widespread or systematic violation of human rights and the so-called "humanitarian procedure". In this regard, see International Commission of Jurists, *Study on the Reform of the United Nations Human Rights Treaty Body System*, International Commission of Jurists, Geneva, 2008.

21 ECOSOC Resolution N° 1988/4 and the Rules of Procedure of the Committee on Economic, Social and Cultural Rights, Article 60 (1).

the individual or group violation of rights or for passing judgment on State liability. It has also been emphasized that the reporting procedure is a mechanism for “constructive dialogue” between the Committee and the State so that, by its very nature, it does not provide an appropriate framework for discussing specific cases of human rights violation in the way that a communications or complaints procedure about specific violations would allow, especially one in which the victims themselves are able to denounce an alleged violation by means of a communication.

Thus, in the context of the universal human rights system, while the victims of violations of the *International Covenant on Civil and Political Rights* and other treaties²² can – provided the State party to the treaty in question has recognized the jurisdiction of the treaty monitoring body to take cognizance of individual communications – submit communications to the respective Committees, the victims of violations of the rights established in the ICESCR had been deprived of that possibility. The same could be said with regard to the inquiry mechanism and inter-State communications.

Paradoxically, some violations of economic, social and cultural rights or some aspects of them could – and still can – be considered by various Committees by means of communications in which complaints concerning such violations are made indirectly. For example, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the

22 In some cases by including the mechanism in the substantive instrument itself and, in others, by means of an Optional Protocol. The instruments that allow communications to be submitted to the relevant Committee are the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* and the *Convention on the Rights of Persons with Disabilities*. Another instrument that was recently adopted but which is not yet in force, the *International Convention for the Protection of All Persons from Enforced Disappearance*, also provides mechanisms for the receipt and consideration of communications by the Committee in question.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the *Convention on the Rights of Persons with Disabilities* prohibit discrimination, including with regard to the enjoyment of economic, social and cultural rights, on grounds of race, gender or status as a migrant worker or person with disabilities, as the case may be. Consequently, where there is discrimination based on any of the above factors involving a social right (for example, deprivation or restriction of the right to health, the right to housing or the right to education), the respective Committees could rule on it in the context of a communication. Similarly, it is possible to use – and there are many precedents in the case law of the Human Rights Committee – Article 26 of the *International Covenant on Civil and Political Rights*, which prohibits discrimination and establishes the principle of equal protection of the law for all rights established in law, and not only those included in that particular treaty.²³ Given the interdependence, indivisibility and interrelationship of human rights, other rights included in the *International Covenant on Civil and Political Rights* can give rise to consideration of aspects of the economic, social and cultural rights established in the ICESCR.

The paradox that arose from this is that, while some aspects of violations of economic, social and cultural rights could be considered by other Committees within the context of individual communications, the ESCR Committee was unable to do the same in relation to alleged violations founded directly on the ICESCR. It is also worth pointing out that these other ways in which it is possible for economic, social and cultural rights to be considered by other Committees in the context of individual communi-

23 For example, the Human Rights Committee has considered situations relating to the right to property – a right not protected under the *International Covenant on Civil and Political Rights* – from the perspective of the principle of non-discrimination and the right to equal protection of the law. In this regard, see, among others: Views of 23 July 1996, Communication N° 586/1994, *Adam v. The Czech Republic*; Views of 12 July 2001, Communication N° 857/1999, *Blazek v. The Czech Republic*; Views of 26 July 2005, Communication N° 945/2000, *Marik v. The Czech Republic*; Views of 1 November 2005, Communication N° 1054/2002, *Kriz v. The Czech Republic*; and Views of 25 October 2007, Communication N° 1463/2006, *Gratzinger v. The Czech Republic*.

cations are only indirect, and also often incomplete, and do not cover the full content of the rights established by the ICESCR.

At least two main considerations need to be borne in mind when analyzing the OP-ICESCR. The first is the interdependence, indivisibility and equal worth of all human rights. The indivisibility and interdependence of human rights is one of the guiding principles of international human rights law. This principle, which was reiterated by the *World Conference on Human Rights* in Vienna in June 1993, means that States must protect and guarantee all human rights. The concept of the interdependence of human rights – namely that they are inter-related – has been cited in specific cases on which international protection bodies have ruled. The Inter-American Commission on Human Rights rightly recognized “the organic relationship between the violation of the rights to physical safety on the one hand, and neglect of economic and social rights and the suppression of political participation. Any distinctions drawn between civil and political rights and economic, social and cultural rights are categorical formulations that detract from the promotion and guarantees of human rights”.²⁴

The concept of the “inherent dignity of human beings”, enshrined in the *Universal Declaration of Human Rights* and a touchstone of human rights, is fundamental and the very basis of the principle of the indivisibility and interdependence of human rights. Thus it has been emphasized that “[t]he principle of the equal dignity of all human beings is the foundation stone of the human rights edifice. [...] Respect for the dignity of the person is the meeting point between civil and political rights, on the one hand, and economic, social and cultural rights, on the other”.²⁵ Of course, international law does not define what the “inherent dignity of human beings” means. Traditionally, it was reduced to a minimalist interpretation and equated, by one doctrinaire school of thought, to the non-derogable rights established in Article 4 of the *International Covenant on Civil and Politi-*

24 *Annual Report of the Inter-American Commission on Human Rights, 1993*, OEA/Ser.L/V/II-85, Doc. 9 rev., 11 February 1994, p. 521.

25 Mireille Delmas-Marty, *Criminalité économique et atteinte à la dignité de la personne*, Ed. Maison des Sciences de l’Homme, Paris, 1995, p. 133 (French original, free translation).

cal Rights, such as the right not to be arbitrarily deprived of life and the right not to be subjected to torture. However, for several decades now this interpretation has been superseded not only by theory but also by the way in which international human rights law has actually developed. An important element in this process has been the way in which the jurisprudence on the right to life has developed “because without it, it is not possible to enjoy the other rights”.²⁶ The evolution of international jurisprudence has led to a recognition that the right to life is not limited to the question of extrajudicial, arbitrary or summary executions. As pointed out by Antônio A. Cançado Trindade, the right to life must be assumed to be the right to live with the dignity inherent to human beings, which entails the enjoyment of economic, social and cultural rights.²⁷ The Human Rights Committee has confirmed that the right to life established in Article 6 of the *International Covenant on Civil and Political Rights* cannot be interpreted in an overly restrictive way and that, by virtue of their obligation to protect that right, States should take action to eliminate infant mortality, reduce malnutrition and increase life expectancy. This broad interpretation of the right to life – to a dignified life – has been reiterated by several different United Nations fora and bodies. For example, the *World Conference on Human Rights* reiterated that extreme poverty and social exclusion – both of which are an attack on economic and social rights – “constitute a violation of human dignity”.²⁸ The former United Nations Commission on Human Rights expressly recognized that “[t]he right to life includes within it existence in human dignity with the minimum necessities of life”.²⁹ The principle of the

26 Alejandro Artucio, “Universalidad, indivisibilidad e interdependencia de los derechos económicos sociales y culturales, y los derechos civiles y políticos. Breves nociones de los mecanismos de supervisión a nivel universal y regional” in *Seminario sobre Derechos Económicos, Sociales y Culturales – Bogotá, Colombia, Mayo de 1996*, International Commission of Jurists, Switzerland, 1996, p. 19. [Unofficial translation.]

27 Antônio A. Cançado Trindade, “A justiciabilidade dos direitos econômicos, sociais e culturais no plano internacional”, in *Presente y futuro de los derechos humanos – Ensayos en honor a Fernando Volio Jiménez*, Inter-American Institute of Human Rights, Costa Rica, 1998, p. 214.

28 *Vienna Declaration and Programme of Action*, June 1993, para. 25.

29 Commission on Human Rights, Resolution 2000/12, “Human rights and extreme pov-

indivisibility and interdependence of human rights therefore means that, where protection is concerned, economic, social and cultural rights should, at minimum, be given the same treatment as that already given to other human rights.

Within that framework, there are no legal grounds whatsoever for some human rights not to have international protection mechanisms while others do. This is all the more true when one considers that, given how treaty-monitoring bodies operate, it is possible for those that do not have such mechanisms to obtain international protection indirectly, namely by activating an international protection procedure that has been set up to safeguard other rights.

The second consideration has to do with the changing nature of international human rights law and the protection procedures provided by treaties. As far as the provision of international protection procedures within the universal human rights system is concerned, there has been a tendency over the past three decades to expand the range of human rights protection mechanisms available through the introduction of various procedures. Indeed, human rights treaties adopted by the universal system, particularly since the 1980s, have established communications and inquiry procedures in order to strengthen the scope of international protection³⁰ to the extent that, apart from the *Convention on the Rights of the Child*, all human rights treaties adopted by the United Nations in recent decades have included a procedure for individual communications or complaints.³¹ It is now forty years since the first two instruments that instituted an individual communications procedure were adopted, namely the *Optional Protocol to the International*

erty", adopted on 17 April 2000.

30 The *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, the *International Convention for the Protection of All Persons from Enforced Disappearance*, the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.

31 In this regard, see International Commission of Jurists, *Study on the Reform of the United Nations Human Rights Treaty Body System*, International Commission of Jurists, Geneva, 2008.

Covenant on Civil and Political Rights and the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the experience of their respective monitoring bodies, as well as that of other bodies set up after them, in dealing with communications is now considerable. Any new instruments adopted cannot disregard that trend; on the contrary, in terms of the protection accorded to victims of human rights violations, they should be consistent with other similar instruments adopted previously.

II. General considerations

The process of drafting and adopting a new human rights protection instrument is an opportunity to broaden the threshold of international protection by means of procedural norms and mechanisms. It makes it possible for innovations to be introduced from at least two sources. The first is the considerable regulatory and practical evolution that other universal and regional bodies involved in monitoring human rights treaties have undergone with regard to procedural mechanisms for international protection, especially individual communications procedures and inquiry procedures. The adoption of a new instrument can benefit from ongoing regulatory innovations and practical developments in order to ensure that such improvements in the protection offered to victims are reflected in the text. A second potential source of innovation, on the other hand, are any particular features that the substantive instrument prompting adoption of an optional protocol – in this case, the ICESCR – has by comparison with other substantive instruments that already have a communications procedure. Indeed, if, when compared to substantive instruments that already have such a procedure, the ICESCR is found to contain important differences, then that could be grounds for introducing innovations into the Optional Protocol, while always bearing in mind the clauses contained in earlier instruments.

The grounds for introducing innovations, however, must, at minimum, respect the levels of protection already accorded to other human rights. Any innovations that effectively give less protection to economic, social and cultural rights than to other human rights would thus be unjustifiable.

In summary, the commentary that follows takes the following two key factors into consideration: the extent to which the new Optional Protocol is consistent with the levels of protection offered by earlier similar instruments and the extent to which it introduces innovations, prompted either by the codification of new elements in similar protection procedures or practices developed by other international bodies or by the particular features of the ICESCR itself when compared to other human rights treaties.

In any case, before going on to analyze each article, we will give a brief assessment of the document as a whole. First of all, the OP-ICESCR should be welcomed because it puts an end to the lack of international protection which historically economic, social and cultural rights have had to endure and makes it possible for a Committee – in this case, the ESCR Committee – to receive and examine both individual and inter-State communications and to conduct inquiries.

Generally speaking, it can be said that the OP-ICESCR has largely adhered to the guiding principles already laid down in similar instruments adopted recently, such as the *Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women*, the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* and the *International Convention for the Protection of All Persons against Enforced Disappearance*. In other words, the text adopted largely fulfils the requirement of providing equal protection for economic, social and cultural rights. However, this is not the case as far as the inquiry procedure is concerned. Thus, while other instruments adopt an opt-out approach, the OP-ICESCR has chosen an opt-in approach, requiring a specific declaration to be bound by the inquiry procedure.

The OP-ICESCR is in itself a major step forward in the protection of economic, social and cultural rights. Nevertheless, it has to be said that, by comparison with the communications and inquiry procedures that already

exist in the universal human rights system, the OP-ICESCR is not very innovative. It adheres fairly closely to the models for communications and inquiry procedures previously established within the universal human rights system. Any changes or innovations that have been introduced are minor and have mainly drawn inspiration from regional instruments. Although we will go on to comment on each of these innovations in detail, it is worth listing the most important ones here:

- the inclusion of two new criteria for admissibility, one of which is obligatory (Article 3.2.a) and the other an option for the Committee (Article 4);
- the provision of a procedural stage within the communications procedure for reaching a friendly settlement (Article 7);
- the possibility for the Committee to consult documentation emanating from other international and regional bodies (Article 8.3);
- the inclusion of a standard of review for considering communications (Article 8.4); and
- the inclusion of a clause allowing the communications procedure to be linked to international assistance and cooperation mechanisms, including the provision of a trust fund (Article 14).

The text makes no explicit reference to the possibility of making reservations to the OP-ICESCR. It is true that, as far as treaties or treaty provisions that establish international human rights protection procedures are concerned, the United Nations has not been at all consistent. Thus several treaties say nothing about the possibility of making reservations with regard to international protection procedures¹ while others, which contain both substantive and procedural provisions, include general clauses authorizing reservations.² However, several treaties have included clauses prohibiting reservations that might inhibit the operation of monitoring bodies or nullify the effectiveness of international monitoring and protection procedures.

1 See, for example, the *Optional Protocol to the International Covenant on Civil and Political Rights*.

2 See, for example, Article 28 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*.

These include the *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted in 1965, Article 20 (2) of which prohibits the formulation of reservations “which would inhibit the operation of any of the bodies established by this Convention”. The following new international instruments in which protection or monitoring procedures have been established have taken the same approach: the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*,³ the *Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*,⁴ and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.⁵

Unfortunately, the OP-ICESCR did not follow that trend with regard to the making of reservations to international protection procedures. Nevertheless, this omission is not a major obstacle because the provisions of the *Vienna Convention on the Law of Treaties* on the subject of reservations are applicable to the OP-ICESCR.⁶ Given that the OP-ICESCR does not prohibit reservations or specify that only certain reservations can be made, any reservations that are incompatible with the object and purpose of the instrument are prohibited. In any event, when considering the compatibility of reservations with the object and purpose of the Optional Protocol, Human Rights Committee General Comment N° 24 is of particular relevance, especially the paragraphs concerning reservations to the *Optional Protocol to the International Covenant on Civil and Political Rights*.⁷ The Human Rights Committee considered that reservations that seek to limit application of the Optional Protocol with regard to some of the rights protected under the *International Covenant on Civil and Political Rights*, as well as reservations to the procedures established in the Optional Protocol, were contrary to its object and purpose.

3 Article 17.

4 Article 30.

5 Article 14 (1).

6 *Vienna Convention on the Law of Treaties*, Article 19.

7 See Human Rights Committee, *General Comment N° 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, paras. 13 and 14.

III. Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

1. Commentary on the Preamble

The States Parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that the Universal Declaration of Human Rights and the International Covenants on Human Rights recognize that the ideal

of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Recalling that each State Party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures,

Considering that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

The Preamble to the OP-ICESCR is an important interpretative tool since it fulfills the purpose of indicating the reasons for and intention behind the adoption of this instrument.

In comparative terms, the Preamble combines aspects of the preambles to the *Optional Protocol to the International Covenant on Civil and Political Rights* and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. The Preamble to the former has a single dispositive paragraph stating that it would be appropriate, in order to further achieve the purposes of the *International Covenant on Civil and Political Rights*, to enable the Human Rights Committee to consider individual communications. For its part, the *Optional Protocol to the Con-*

vention on the Elimination of All Forms of Discrimination against Women adopts a more substantive model recalling the values that underpin the Convention in question. In the case of the Preamble to the OP-ICESCR, it was decided to include both the substantive and dispositive elements.

Indeed, the Preamble begins by underlining the pivotal role played by fundamental human rights and the notions of the value and dignity of human beings in the United Nations system. It goes on to recall that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights enshrined in the *Universal Declaration of Human Rights* which, it is worth remembering, makes no distinction between civil and political rights and economic, social and cultural rights. At this point it also recognizes the principle of equality and the prohibition of discrimination as being cornerstones.

While not specifically saying so, the third paragraph introduces the notion that all human rights are interdependent and indivisible. Adopting the same wording used in the Preambles to both the *International Covenant on Civil and Political Rights* and the ICESCR, it recognizes that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy all human rights – civil, political, economic, social and cultural.

The fourth paragraph refers back to the formula used in the *Vienna Declaration and Programme of Action* adopted at the *World Conference on Human Rights* in Vienna in 1993, which explicitly articulates the notion of the interdependence, indivisibility, universality and interrelatedness of all human rights.

Although not stated explicitly, it can be inferred from the Preamble that, if all human rights are indivisible, interdependent and interrelated, they should all be accorded at least a similar level of protection. Thus, if the international community – over 40 years ago now¹ – believed it advisable to protect civil and political rights by means of a quasi-judicial procedure

1 The *Optional Protocol to the International Covenant on Civil and Political Rights* was adopted simultaneously with the actual *International Covenant on Civil and Political Rights* on 16 December 1966.

that authorizes a body (the Human Rights Committee) to receive and consider communications concerning alleged violations of such rights, the notion that all human rights are indivisible and interdependent requires at minimum the same treatment for economic, social and cultural rights.

The fifth paragraph of the Preamble reproduces the wording of Article 2.1 of the ICESCR which establishes general obligations applicable to all the rights included in the Covenant. Some of the States who participated in the Working Group that drew up the draft OP-ICESCR stressed the advisability of including this paragraph in the Preamble as a reminder of the meaning of the general obligations established in the ICESCR, especially the idea of “progressive realization”. There is certainly no such clause in the *International Covenant on Civil and Political Rights*. However, reiterating the wording of Article 2.1 of the ICESCR also reminds States that they have *legal* obligations with regard to economic, social and cultural rights and not just moral ones. The ESCR Committee clarified the scope of these obligations in its General Comment N° 3.² The latter develops the content of the provisions laid down in Article 2.1 and reproduced in paragraph 5 of the Preamble and is thus an indispensable point of reference for its interpretation.

Starting from these premises – the importance of human rights and human dignity, the interdependence and indivisibility of all human rights and the legal nature of the obligations established by the ICESCR, the last paragraph of the Preamble concludes by pointing out that, in order to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the ESCR Committee to carry out the functions provided for in the Protocol, namely to receive and examine communications from individuals or groups of individuals, to receive and examine inter-State communications, and to conduct inquiries.

This meant that at last, as far as protection was concerned, all human rights would be given the equal consideration implicit in the notion that

2 See Committee on Economic, Social and Cultural Rights, *General Comment N° 3, “The nature of States parties’ obligations (Article 2, para. 1, of the Covenant)”*, in United Nations document HRI/GEN/1/Rev.7 of 12 May 2004.

they are indivisible and interdependent. With the adoption of this Optional Protocol, economic, social and cultural rights would no longer be rights subjected to a lesser level of international protection: States' compliance or non-compliance with the legal obligations arising from it would be considered on an individual or group basis, depending on the case, and in specific situations, and not only in the context of general situations as happens in the procedure for examining State reports.

During its sessions, the Working Group also discussed whether it was appropriate for matters to be referred to the ESCR Committee since this had not been established by means of a treaty but by a resolution of the Economic and Social Council.³ In the end, after considering several proposals, it decided that it was not necessary for the status of the Committee to be expressly clarified.

Corresponding provisions and references

Charter of the United Nations (Preamble and Articles 1.3 and 55); *Universal Declaration of Human Rights* (Preamble and Articles 1 and 2); *International Covenant on Civil and Political Rights* (Preamble); *International Covenant on Economic, Social and Cultural Rights* (Preamble and Articles 2.1 and 2.2); *Vienna Declaration and Programme of Action* (paragraph 5); *Optional Protocol to the International Covenant on Civil and Political Rights* (Preamble); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Preamble); Committee on Economic, Social and Cultural Rights, *General Comment N° 3, "The nature of States parties' obligations"*.

3 See ECOSOC Resolution 1985/17.

2. Commentary on Article 1, "Competence of the Committee to receive and consider communications"

1. A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.
2. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 1 establishes the principle that informs the fundamental aim of the Optional Protocol: that the ESCR Committee be recognized as competent to receive and consider communications. As pointed out earlier, this simply extends to the ICESCR the type of protection already available to the rights established by the *International Covenant on Civil and Political Rights*, the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, the *Convention on the Rights of Persons with Disabilities* and the *International Convention for the Protection of All Persons from Enforced Disappearance*.

Since it is an optional instrument, the Committee can only receive communications from those States which, as parties to the ICESCR, become parties also to the Optional Protocol.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 1; *Convention on the Elimination of All Forms of Racial Discrimination*, Article 14.1; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 22.1; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 1; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 77.1; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 1; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 31.1.

3. Commentary on Article 2, “Communications”

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. 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.

This provision is the crucial feature of the Protocol and therefore worth analyzing in detail. It sets out the scope of the communications procedure at three different levels. Firstly, it defines the *subject matter jurisdiction* of the Committee, in other words the extent to which the purpose of a communication relates to the content of the ICESCR. Secondly, it defines the question of *locus standi* (*standing*) to present communications, in other words who is permitted to submit communications to the Committee. Thirdly, in referring to “individuals or groups of individuals, under the jurisdiction of a State Party”, it raises the issue of the territorial scope of the protection provided for in the communications procedure.

a) Subject matter jurisdiction

As far as the Committee's *subject matter jurisdiction* is concerned, Article 2 has taken a comprehensive approach that covers all the economic, social and cultural rights included in the ICESCR.

This solution emerged after lengthy debate in the Working Group sessions around two opposing positions. On the one hand, a "comprehensive" approach through which all the rights and obligations established in the ICESCR could be the subject of individual communications. On the other, so-called "limited approaches", through which only some of the rights or obligations established in the Covenant could be the subject of communications. During the Working Group sessions, the proponents of "limited approaches" in turn suggested two types of limitation. On one hand, the exclusion of Part I of the ICESCR – which includes the right of all peoples to self-determination – as a basis for presenting communications to the Committee. On the other, the so-called "*à la carte*" approach under which it would be left to the discretion of each State party to the Protocol to choose, by means of a declaration made at the time the instrument was ratified, which rights might or might not come under the subject matter jurisdiction of the Committee.

The "*à la carte*" approach was ruled out after the Working Group agreed a text by consensus. It was rejected on a number of different grounds put forward by many of the States involved in the Working Group as well as by the Coalition of Non-Governmental Organizations (NGO Coalition). One was the lack of precedent for such an approach in other United Nations human rights instruments. It was also argued that choosing some rights and not others to be protected under the communications procedure could lead to the establishment of a hierarchy of rights. It was further pointed out that such an approach would mean that economic, social and cultural rights, as rights that would allow discretionary protection, were weaker than civil and political rights, the Optional Protocol for which does not offer the possibility of choosing some rights and rejecting others. Several of the interventions made during the Working Group debates considered an "*à la carte*" approach to be incompatible with the notion that all human rights

are interdependent and indivisible in that it suggests that, while the protection of civil and political rights and other human rights does not allow exceptions, the protection of economic, social and cultural rights can be selective and left to the interests of the States parties.

Lastly, it was also pointed out that the pragmatic reasons given by some States for favouring the so-called “à la carte” option, including that it would initially give States the chance to test their commitment with a small number of rights in order to allow protection to be extended at a later stage, was not supported by empirical evidence regarding other instruments, such as the conventions of the ILO and the *European Social Charter*, which include such an option.⁴ And so, judging from the experience of systems that provide the “à la carte” option, the gradual expansion of protection that had been forecast in fact never happened.

As for the proposal to exclude Part I of the ICESCR, which includes the right of all peoples to self-determination, the text agreed by consensus in the Working Group and forwarded to the Human Rights Council for consideration tended to favour that position: its Article 2 referred to the rights set forth “in Parts II and III of the Covenant”. In doing so, the proposed text departed from the wording used in Article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights*, which does not exclude Part I of the *International Covenant on Civil and Political Rights*, which, it is worth remembering, is identical to Part I of the ICESCR. To justify its exclusion, it was pointed out that Human Rights Committee jurisprudence on the subject had rejected arguments based on Article 1 of the *International Covenant on Civil and Political Rights*⁵ and that the

4 In those systems also the justification for opting for the “à la carte” approach in the ILO Conventions and the *European Social Charter* was to allow the State the opportunity to gradually expand the list of protected rights. However, in practice, States have tended to stick to the rights they chose initially, showing no great interest in extending the list of recognized rights.

5 See, for example, Human Rights Committee, Views of 27 July 1988, *Kitok v. Sweden*, Communication N° 197/1985, para. 6.3. The Committee said that “the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in Article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, Article

communications mechanism was not appropriate for dealing with alleged violations of the right to self-determination because it was a collective right conferred upon peoples as such. The text the Working Group adopted provoked a variety of reactions. Several States reserved their position on the issue, saying that they were concerned that the right to self-determination was not included in the communications mechanism. Some non-governmental organizations (NGOs) had a similar reaction. The NGO Coalition for an Optional Protocol made an interpretative declaration arguing that exclusion of Part I of the Covenant should not mean the complete exclusion of claims based on invocation of the right to self-determination, given that it is a general obligation under the ICESCR, but in all cases should be understood to mean the exclusion of communications based *solely* on Part I: on the contrary, a communication that makes reference to the right to self-determination would be admissible provided that the author of the communication identified other rights under Parts II and III of the ICESCR as having been allegedly impaired.⁶

Their refusal to exclude Part I of the ICESCR from the communications procedure led some States to propose amendments to the text agreed by the Working Group during the informal preparatory sessions that took place prior to discussion of the draft Protocol in the Human Rights Council. In particular, they submitted to Portugal, the State leading negotiations on the OP-ICESCR, an amendment to Article 2, removing the reference to the rights set out in Parts II and III of the ICESCR and replacing it with the phrase “any of the economic, social and cultural rights set forth in the Covenant”. The proposal was taken up by Portugal and supported by the States co-sponsoring the Human Rights Council resolution that resulted in the adoption by consensus of the then draft OP-ICESCR by that body.

.....
1 of the Covenant deals with rights conferred upon peoples, as such”.

- 6 **The NGO Coalition made the following comment on Article 2 of the text agreed by the Working Group: “Throughout the process we have supported a comprehensive approach that includes all the Covenant rights, and we would have preferred Part I of the Covenant to be included. Our interpretation of the intention of Article 2 is that, although a communication would be inadmissible if it only alleged a breach of Article 1 (of the ICESCR), admissible communications can in any event be examined in the light of all parts of the Covenant, including Part I.”**

The intention to include Part I of the ICESCR in the communications mechanism can therefore be inferred from the preparatory work that led to the adoption of the OP-ICESCR, at least insofar as it is possible to argue that the right to self-determination is an economic, social and cultural right included in the ICESCR or that it has economic, social and cultural dimensions.

It is worth pointing out that the final wording of the OP-ICESCR and the reasons for it are practically identical to those used in the draft Optional Protocol submitted by the Committee on Social, Economic and Cultural Rights in 1996. The relevant part of the text proposed by the Committee at that time made the following provision:

Any individual or group claiming to be a victim of a violation by the State party concerned of any of the economic, social or cultural rights recognized in the Covenant, or any individual or group acting on behalf of such claimant(s), may submit a written communication to the Committee for examination.⁷

In particular, the Committee said the following with regard to the possibility of presenting communications for alleged violations of Article 1 of the Covenant:

The Committee recommends that the optional protocol should apply in relation to all of the economic, social and cultural rights set forth in the Covenant and that this would include all of the rights contained in Articles 1 to 15. The Committee noted, however, that the right to self-determination should be dealt with under this procedure only in so far as economic, social and cultural rights dimensions of that right are involved. It considered that the civil and political rights dimensions of the right should remain the preserve of the Human Rights Committee in connection with Article 1 of the International Covenant on Civil and Political Rights.⁸

7 See "Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights" in *Status of the International Covenants on Human Rights. Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, United Nations document E/CN.4/1997/105, Annex, 18 December 1996, para. 31.

8 *Ibid.*, para. 25.

In this sense, and in practical terms, the proposed interpretation put forward previously by the NGO Coalition may be useful if abstract discussions about the nature of the “right to self-determination” are to be avoided: when seeking to invoke that right, the authors of communications would facilitate the Committee’s work if they also indicated which rights from Parts II and III of the ICESCR had also been breached. For example, in their claims they could identify to what extent a violation of the right to self-determination breaches specific rights laid down in the ICESCR, such as the right to food or the right to health. This would also prevent repetition of the debate that took place in the Human Rights Committee about the suitability of the communications mechanism for dealing with violations of the right to self-determination on their own. In fact, although the Human Rights Committee has been reluctant to consider violations of the right to self-determination established in Article 1 of the *International Covenant on Civil and Political Rights* on their own, in several cases it has considered the same set of facts in the light of Articles 25,⁹ 26¹⁰ and 27¹¹ of the Covenant. The strategy we are suggesting here is similar: alleged violations of the right to self-determination should be linked to alleged violations of rights specifically established in Parts II and III of the ICESCR.

9 Article 27 of the Covenant establishes political rights. So, for example, although the Human Rights Committee has held that it does not have the competence under the Optional Protocol to examine communications relating to violations of the right to self-determination established in Article 1 of the Covenant, it has stressed that, where relevant, it can interpret Article 1 in determining whether the rights established in Parts II and III of the Covenant have been violated (see, for example, Views of 15 July 2002, *Marie-Hélène Gillot et al v. France*, Communication N° 932/2000, para. 13,4).

10 See, for example, Views of 7 July 2000, *J. G. A. Diergaardt et al v. Namibia*, Communication N° 760/1997.

11 Under Article 27 of the Covenant, members of ethnic, religious and linguistic minorities have the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. So, for example, in the aforementioned case of *Kitok v. Sweden*, the claim for possible violation of the right established in Article 27 of the Covenant was admitted and examined by the Committee.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 1; *International Covenant on Economic, Social and Cultural Rights*, Article 1; *International Covenant on Civil and Political Rights*, Articles 1, 25, 26 and 27.

b) Standing to submit communications

The second vitally important issue addressed in Article 2 is that of *locus standi* to submit communications. It is essentially a matter of defining who has the legal standing (*locus standi*) to submit a communication to the Committee. It has been the practice of the United Nations in this field to confer such standing solely on those who are the holders of the human right allegedly violated. That does not preclude others from instituting proceedings on behalf of a holder of the right allegedly violated.¹² There are two aspects to the question of who has standing to submit communications, which are all the more important in the case of economic, social and cultural rights: on the one hand, the individual or group nature of the rights and, on the other, the concept of individual victims and group victims.

This issue was discussed at length during the Working Group sessions. One of the discussion points related to a specific feature of the draft protocol originally submitted to the Working Group by the Chairperson-Rapporteur. The draft in question provided for two kinds of communications, so-called “individual communications” and “collective communications”. In the wording of that original draft, “individual communications” corresponded to the model adopted in the communications procedures established in

12 This has been regularly demonstrated time and again in practice by all of the United Nations human rights treaty bodies. For example, the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Article 2), the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Article 1.1), the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (Article 77.1), and the *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 31.1) expressly give legal standing to third parties, provided that they are acting on behalf of and in representation of individuals whose rights have been violated.

other instruments from the universal human rights system. It took its inspiration from the wording used in the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. The so-called “collective communications” referred to in that original draft, on the other hand, followed the model adopted in the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Additional Protocol to the European Social Charter)*.¹³

It is useful to recall the differences between these models because some of the arguments concerning the scope of the entitlement eventually adopted in Article 2 of the Optional Protocol were directly linked to the idea that the proposal to include a procedure for “collective communications” should be rejected because it was unnecessary.

Under the “individual communications” model contained in the rest of the procedures laid down in other instruments from the universal human rights system, the alleged victims, be they individuals or a group of individuals, and the alleged violation need to be identified and domestic remedies have to have been exhausted. Standing to submit communications lies primarily with those alleged victims, as individuals if the violation is individual in nature, or jointly or as a group if there is more than one victim. Of course, the alleged individual victims or groups of victims can appoint representatives who are entitled to submit communications on behalf of those they are representing. Another possible scenario is that of submitting communications on behalf of the alleged victim(s) but without having their express consent – in other words, without the victim(s) having appointed a representative to submit a communication on their behalf. Under the “collective communications” model contained in the *Additional Protocol to the European Social Charter*, on the other hand, the specific victims do not have to be identified: there simply needs to be an allegation of an “unsatisfactory application of the Charter”, and domestic remedies do not need to have been exhausted. In this system, standing to submit communications or claims does not lie with the victims but with organizations which, a priori,

13 See *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, Articles 1 and 2.

have been granted special status.¹⁴ In the case of the *Additional Protocol to the European Social Charter*, it lies with the international organizations of employers and trade unions referred to in the *European Social Charter*, other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for that purpose, representative national organizations of employers and trade unions within the jurisdiction of the Contracting Party and, in the event of a specific declaration to that effect by the State concerned, other representative national non-governmental organizations. In the original draft proposed by the Chairperson-Rapporteur of the Working Group, entitlement to submit this kind of “collective communication” was assigned to “non-governmental organizations in consultative status with the Economic and Social Council of the United Nations”.

The proposal to establish a “collective communications” system based on the model used in the *Additional Protocol to the European Social Charter* was not well received by States. In addition to arguments concerning the lack of precedent in other instruments from the universal human rights system that have set up communications mechanisms and the undesirability of having two parallel mechanisms with different requirements for admissibility, several State delegations said that it was unnecessary to establish a new procedure to entitle non-governmental organizations to present communications since they were authorized to submit cases under the “individual communications” mechanism common to all the other instruments in the universal human rights system, provided that they did so in

14 The system and language used in the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* in turn took its inspiration from the complaints procedure established in Article 24 of the *Constitution of the International Labour Organization*, in which it is not the direct victims but employers’ or workers’ organizations who are entitled to submit claims. Article 24 of the ILO Constitution states that “[i]n the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.”

representation of or on behalf of the alleged victim(s). The reasons given for rejecting the proposal to have a “collective communications” mechanism in the Optional Protocol thus shed light on the extent of the standing established in Article 2 of the OP-ICESCR as it now reads.

It is worth remembering that the most important principle as far as entitlement is concerned is for victims to be able to be directly involved in submitting cases concerning them. As far as submitting claims is concerned, the principle that has guided the drafting of the Protocol is that the victims of violations of economic, social and cultural rights be placed at least on a par with victims of human rights violations that are already protected by communications mechanisms.¹⁵ In this regard, the clause should be welcomed: it allows victims, individually or jointly, to submit their own case by means of a communication. It also allows them to authorize others to submit cases on their behalf, in accordance with the traditional principles of voluntary or agreed representation. Lastly, in keeping with the most recently established instruments on the subject, it allows complaints to be submitted on behalf of the alleged victim(s), even without their consent, when there are appropriate grounds for doing so.

On the subject of standing, Article 2 of the OP-ICESCR follows the wording of Article 2 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. It thus states that communications may be submitted by:

individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. 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.

15 In this regard, see, for example, Article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights* which states that “[a] State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from *individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant*” (our emphasis).

Article 2 of the OP-ICESCR provides several standing scenarios, allowing communications to be submitted by:

- a. individuals who claim to be victims of violations of the Covenant;
- b. groups of individuals who claim to be victims of violations of the Covenant;
- c. others acting on behalf of those individuals or groups of individuals with their consent; and
- d. others acting on behalf of those individuals or groups of individuals without their consent but having a justification for doing so.

The range of available scenarios stems from the recognition that economic, social and cultural rights, like other human rights, can be subject to violations of both an individual and collective or group nature. The latter can be the result of accumulating individual violations, violations of rights that are collective in nature or which cannot be split, such as historical or cultural heritage, or rights that are necessary for the development of a given culture.

The simplest scenario is that in which the person submitting the communication is the alleged individual victim of a violation that is individual in its scope.

A second scenario is that in which the communication is submitted by groups of individuals when the rights under discussion in the communication correspond to the accumulation of the individual interests put forward, in other words, when the violation only concerns the alleged victims who are submitting the communication.

The third scenario is when the alleged victim or group of alleged victims is represented by others with the consent of those being represented, in other words, of the person or persons on whose behalf he or she is acting.

The last standing scenario, namely that in which another person or persons acts without a mandate from the alleged victim, is one that has been recognized in communications procedures established in other treaties under the universal human rights system, either within the relevant convention itself or in the rules of procedure of the relevant treaty-mon-

itorial body.¹⁶ It should be noted that communications and complaints procedures within the African and Inter-American systems of human rights protection do not require the person submitting the communication to necessarily have the consent of the people who are the alleged victims of the violation in question.¹⁷

The complexity of some cases involving the violation of human rights generally and economic, social and cultural rights in particular requires, however, the establishment of other safeguards that are capable of preventing impunity in cases where the victims cannot act for themselves or appoint representatives. Thus, for example, there needs to be a solution for cases in which, for some reason, it is difficult or impossible for all the individuals affected to agree a communication or give their express consent. For example, when the violation is collective or large-scale in nature,¹⁸ or when those affected have been subjected to threats and intimidation, or

16 In this connection, see Article 90 of the *Rules of Procedure of the Human Rights Committee*. It should be noted that the Committee's work has included various cases in which it considered communications concerning violations of the rights of victims who had not submitted the complaints themselves, were not represented and did not have a third party acting on their behalf. (See, for example, Human Rights Committee, Views of 27 October 2000, *Apirana Mahuika et al v. New Zealand*, Communication N° 547/1993, and Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication N° 612/1995.)

17 Article 56.1 of the *African Charter on Human and Peoples' Rights* simply requires that communications "[i]ndicate their authors even if the latter request anonymity". Article 44 of the *American Convention on Human Rights* stipulates that "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

18 See, for example, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the General Assembly in Resolution 40/34 of 29 November 1985, Principle 1, and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly through Resolution 60/147 of 16 December 2005 (Principle 8). In this regard, see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations. A Practitioner's Guide*, Practitioners' Guide Series N° 2, ICJ, Geneva, 2006, pp. 38-42 ("The notion of "collective victim"").

when submitting a communication might put them at risk. The submission of cases concerning harm to collective or indivisible goods also requires a specific solution since, by definition, no individual holds exclusive rights over these goods and it would be excessive to require that those submitting the communication should include everyone who jointly owns these goods.¹⁹ It should be noted that some of the most important jurisprudence on economic, social and cultural rights developed by regional human rights systems concerns these kinds of situation.²⁰

In cases such as those raised above, the relevant question is therefore to determine who is authorized or entitled to submit a communication when there are collective or group violations and circumstances that prevent or hinder obtaining the consent of all members of the affected group. Article 2 of the OP-ICESCR provides a solution for such cases by offering, as a fourth scenario, the possibility of someone submitting an individual com-

19 See, for example, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Principle 10. Collective resources that benefit groups of people include language, historical and cultural heritage, the environment, collective or community land ownership, etc. Let us suppose that a State party prohibits the use of a language. Such a measure could, *a priori*, be deemed a violation to the right to participate in cultural life (Article 15.1 of the ICESCR). Those affected would be all the users of that language but, for the purposes of analyzing the violation, it would be excessive to require all of them to submit a communication or to specifically consent to its submission.

20 See, for example, African Commission on Human and Peoples' Rights, decision of 13-27 October 2001, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication N° 155/96 (case presented by two NGOs on behalf of members of the Ogoni people in which the African Commission considered that the rights to health, food, housing and the environment, among others, had been violated); European Court of Human Rights, judgment of 13 November 2007, *D.H. v. The Czech Republic* (case presented by an NGO on behalf of some specific victims but which involved the situation of other unidentified victims, in which the European Court decided that there was a discriminatory denial of the right to education); Inter-American Court of Human Rights, judgment of 29 March 2006, *Sawhoyamaxa Indigenous Community v. Paraguay* (case originally presented by an NGO on behalf of an indigenous community and its members in which the Court found that there had been violations of the right to a decent life, including lack of access to health services, education, water and sanitation and food, and the right to collective ownership of the community's ancestral land).

munication on behalf of the alleged victim or group of victims without their consent provided that they are able to justify why they are doing so. Some of the reasons already mentioned – the fact that the victims are vulnerable or at risk or the impossibility of obtaining the consent of all the members affected because of the large-scale nature of the violation – can be sufficient grounds for submitting a communication without the express consent of the alleged victim or victims. In any event, the wording of the Article does not predetermine the grounds that are possible, assessment of which will be left to the Committee.

As far as standing for non-governmental organizations to submit communications is concerned, Article 2 does not restrict their ability to submit communications on behalf of an alleged victim or groups of victims, with or without their consent (as long as, in the case of the latter, there are adequate grounds). Thus communications can be submitted on behalf of alleged victims or groups of victims by both natural persons and legal entities, including non-governmental organizations.²¹ That is what several of the States participating in the Working Group meant when they said that it was not necessary to establish a “collective communications” mechanism, since non-governmental organizations may also submit communications that follow the model of other instruments from the universal human rights system. The solution provided in the text is not only reasonable; it may in many cases be essential since, in situations that are very complex or where there is large-scale harm, it is extremely difficult for the group of victims concerned to act in a coordinated fashion. In such cases, given their knowledge and

21 In this connection, the Committee on the Elimination of Racial Discrimination found a communication submitted by non-governmental organizations admissible in a case involving a complaint about the use of racist expressions against an ethnic minority. The Committee took the view that, bearing in mind the nature of the activities of the organizations concerned, and the groups of individuals they were representing, both were entitled to submit a communication without having to obtain the consent of all members of such groups or of all members of the ethnic community that had been wronged. See, for example, Committee on the Elimination of Racial Discrimination, opinion of 22 February 2008, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Communication N° 038/2007, in particular para. 7.2.

expertise, non-governmental organizations can ensure that the communication is better presented and processed.

Another indication that the States participating in the Working Group recognized the wide range of situations that can be involved in violations of economic, social and cultural rights, including those of a group or collective nature, is the fact that a proposal was made to amend the title originally proposed for Article 2, namely "Individual communications", and call it simply "Communications". This generic heading includes both individual and group or collective violations and better reflects the different standing scenarios contained in the Article.

c) Spatial scope of protection

The third aspect of the communications procedure established in Article 2 is the spatial or territorial scope of the protection it can provide. Article 2 refers to "individuals or groups of individuals, *under the jurisdiction of a State Party*, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party" (our emphasis). The language used is taken from other similar instruments.²² It is true that it might have been better to take account of the fact that the wording of the ICESCR differed from that of other human rights instruments. For example, while Article 2.1 of the *International Covenant on Civil and Political Rights* contains a specific reference to the jurisdiction of

22 See, for example, the *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 1; *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 14; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 22.1; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 2; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 77.1; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 1.1; and the *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 31.1.

the State party,²³ that is not the case for Article 2.1 of the ICESCR.²⁴ In fact, Article 2.1 of the ICESCR not only makes no mention whatsoever of the territorial or jurisdictional limits of its application but establishes international assistance and cooperation obligations that are absent from the equivalent clause of the *International Covenant on Civil and Political Rights*.

There was therefore no reason to include a jurisdictional limitation in the Optional Protocol when the ICESCR itself makes no mention of one. However, given that international jurisprudence has repeatedly recognized the extraterritorial scope of human rights treaties, this provision does not preclude the extraterritorial application of the international protection provided under the communications procedure. The International Court of Justice has taken the view that the *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights* and *Convention on the Rights of the Child* are extraterritorially applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.²⁵ The Human Rights Committee has recognized the extraterritorial application of the *International Covenant on Civil and Political Rights* in the case of acts that have taken place outside of national territory, both in its general comments²⁶ and observations concerning

23 *International Covenant on Civil and Political Rights*, Article 2.1: “Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (our emphasis).

24 ICESCR, Article 2.1: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

25 International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paragraphs 111, 112 and 113.

26 Human Rights Committee, *General Comment N° 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 10, in United Nations document CCPR/C/21/Rev.1/Add.13, 26 May 2004.

countries²⁷ and in the views it has taken on individual cases in the context of the communications procedure.²⁸ The Committee against Torture²⁹ and the Committee on Economic, Social and Cultural Rights have also reiterated the extraterritorial scope of their respective treaties.³⁰ This is also the case for the European Court of Human Rights.³¹

Corresponding provisions and references

International Covenant on Economic, Social and Cultural Rights, Article 2.1; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 1; *International Covenant on Civil and Political Rights*, Article 2.1; *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 14; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 22.1; *Optional*

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- 27 See, for example, the *Concluding Observations of the Human Rights Committee on: United States of America* (CCPR/C/79/Add.50, A/50/40, 3 November 1995, paragraphs 266-304, and CCPR/C/USA/CO/3/Rev.1, 18 December 2006, paragraph 10) and *Israel* (CCPR/CO/78/ISR, 21 August 2003, paragraph 11, and CCPR/C/79/Add.93, 18 August 1998, paragraph 10). Extraterritorial application of the Covenant should also be extended to all individuals who are subject to the jurisdiction of a State when the troops of that State are serving abroad, particularly in the context of peacekeeping and peace-restoration missions, NATO military missions or belligerent occupation (see, among others, *Concluding observations of the Human Rights Committee on: Poland*, CCPR/CO/82/POL, 2 December 2004, paragraph 3; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, paragraph 6; *Germany*, CCPR/CO/80/DE, 4 May 2004, paragraph 11; and *Iraq*, A/46/40, 1991, paragraph 652, and CCPR/C/SR.1080-1082).
- 28 Views of 29 July 1981, *López Burgos v. Uruguay*, Communication N° 52/1979; Views of 29 July 1981, *Lilían Celiberti de Casariego v. Uruguay*, Communication N° 56/79; Views of 31 March 1983, *Mabel Pereira Montero v. Uruguay*, Communication N° 106/81.
- 29 Committee against Torture, *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Crown Dependencies and Overseas Territories*, CAT/C/CR/33/3, 10 December 2004, paragraph 4 (b), and *General Comment N° 2: Implementation of Article 2 by States Parties*, in UN Doc. CAT/C/GC/2 of 24 January 2008.
- 30 See the *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, E/C.12/1/Add.90, 26 June 2003, paragraph 15, and E/C.12/1/Add.27, paragraph 11.
- 31 See the European Court of Human Rights, Judgment of 23 March 1995, *Loizidou v. Turkey (Preliminary Objections)*, paragraph 60.

Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 77.1; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1.1; International Convention for the Protection of All Persons from Enforced Disappearance, Article 31.1; Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Articles 1 and 2; Constitution of the International Labour Organization, Article 24; African Charter on Human and Peoples' Rights, Article 56.1; American Convention on Human Rights, Article 44; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 1 and 10; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 8; Rules of Procedure of the Human Rights Committee, Article 90; Human Rights Committee, General Comment N° 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant

4. Commentary on Article 3, "Admissibility"

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.
2. The Committee shall declare a communication inadmissible when:
 - a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;

- b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;**
- c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;**
- d) It is incompatible with the provisions of the Covenant;**
- e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;**
- f) It is an abuse of the right to submit a communication; or when**
- g) It is anonymous or not in writing.**

The admissibility requirements contained in the OP-ICESCR make no innovations in terms of substance compared to those laid down in other communications procedures within the universal or regional systems of human rights protection. However, Article 3.2 (a) and Article 4 both introduce procedural elements which, up till now, have not featured in other communications procedures established by United Nations human rights treaties.

For a communication to be deemed admissible, domestic remedies must have been exhausted (though there are exceptions which will be examined below), the communication must have been submitted within one year following the exhaustion of domestic remedies, and there must be no case pending concerning the same matter in the Committee itself or under another procedure of international investigation or settlement.

Also inadmissible are communications based on facts that occurred prior to the entry into force of the present Protocol for the State Party concerned, anonymous communications, communications that are not submitted in writing, and communications that do not comply with the minimum substantive requirements (i.e. they are incompatible with the provisions of the ICESCR, manifestly ill-founded or not sufficiently substantiated).

a) Exhaustion of domestic remedies

The need for domestic remedies to have been exhausted has been set as a requirement under all communications procedures established in respect of human rights treaties in the universal system because of the subsidiary nature of international protection. As an exception to that principle and as already specifically established in the *Optional Protocol to the International Covenant on Civil and Political Rights*,³² the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*³³ and the *International Convention for the Protection of All Persons from Enforced Disappearance*³⁴ as well as in regional instruments,³⁵ express provision has been made for situations where the application of such remedies has been unreasonably prolonged. The wording of the OP-ICESCR on this point adheres closely to that used in the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*³⁶ and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.³⁷

However, during discussion of the draft Optional Protocol in the Working Group, it was decided to omit one of the other exceptions included

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- 32 See Article 5.2 (b) of the Protocol which refers to the unreasonable prolongation of the application of remedies.
- 33 See Article 22.5 (b) of the Convention which states that “this shall not be the rule where the application of the remedies is unreasonably prolonged or *is unlikely to bring effective relief to the person who is the victim of the violation of this Convention*” (our emphasis).
- 34 See Article 31.2 (d) of the Convention which states: “All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged”.
- 35 *American Convention on Human Rights*, Article 46.2; *African Charter on Human and Peoples’ Rights*, Article 56.5.
- 36 Article 4.1 of the Protocol states that: “The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted *unless the application of such remedies is unreasonably prolonged* or unlikely to bring effective relief” (our emphasis).
- 37 Article 2 (d) of the Protocol states that: “All available domestic remedies have not been exhausted. *This shall not be the rule where the application of the remedies is unreasonably prolonged* or unlikely to bring effective relief” (our emphasis).

in some of the aforementioned instruments, namely the unlikelihood of such remedies bringing effective relief. This decision is flawed: there was no reason to introduce such a change when the interpretative standards of other treaty bodies within the universal human rights system and of the judicial organs of regional systems with regard to this same requirement are sufficiently well-established. However, the removal of this requirement cannot mean that alleged victims are under an absurd obligation, namely the need to exhaust domestic remedies even if they are not effective. It is unreasonable and contrary to the very effectiveness of the communications mechanism to require that remedies that are known to be ineffective should be exhausted: the omission of that particular exception from the text does not, therefore, prevent the interpretation being made that, in any event, the remedies that have to be exhausted are those which are effective, and not just any existing remedy. In order to establish this, it is useful to look at the standards on the subject developed by other committees and regional human rights courts: remedies are not effective when they are unlikely to properly rectify the violation being denounced.³⁸ The Human

38 See, for example, among others, the Committee against Torture, decision of 9 November 1999, *Josu Arkauz Arana v. France*, Communication N° 063/1997, para. 6.1; decision of 16 May 2000, *T.P.S. v. Canada*, Communication N° 099/1997, para. 10.1; decision of 23 November 2004, *Enrique Falcon Rios v. Canada*, Communication N° 133/1999, paras. 7.3-7.5; decision of 3 May 2005, *Jovica Dimitrov v. Serbia and Montenegro*, Communication N° 171/2000, para. 6.1. See also the Committee against Racial Discrimination: decision of 8 August 2000, *Anna Koptova v. Slovak Republic*, Communication N° 13/1998, para. 6.4; decision of 9 August 2001, *Miroslav Lacko v. Slovak Republic*, Communication N° 11/1998, para. 6.2; decision of 22 February 2008, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Communication N° 038/2007, para. 7.3. See also the Inter-American Court of Human Rights, *Advisory Opinion OC-9/87, "Judicial Guarantees in States of Emergency"*, 9 October 1987, para. 24 ("for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective"). Also the European Court of Human Rights: judgment of 9 October 1979, *Airey v. Ireland*, para. 24 (the right of access to a court must be practical and effective and not theoretical or illusory); judgment of 25 March 1983, *Silver and Others v. United Kingdom*, para. 113 ("where an individual has an arguable

Rights Committee reached the same conclusion, although Article 5.2 (a) of the *Optional Protocol to the International Covenant on Civil and Political Rights* does not explicitly refer to the effectiveness of remedies, saying only that any available effective remedies should be exhausted, in other words those that have a reasonable chance of prospering and of suitably protecting the right that has been infringed or remedying the harm caused by the violation in question.³⁹

It only remains to add that, during the Working Group discussions, some States suggested that it should be necessary for regional remedies to be exhausted, an extremely unwise proposal which in the end did not feature in the text submitted by the Chairperson-Rapporteur.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 4.1; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 2 (d); Optional Protocol to the International Covenant on Civil and Political Rights, Article 5.2 (a) and (b); Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 22.5 (b); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 77.3; International Convention for the Protection of All Persons from Enforced Disappearance, Article 31.2; African Charter on Human and Peoples' Rights, Article 56.5; American Convention on Human Rights, Article 46.2.

claim to be the victim of a violation of the rights set forth in the [European] Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress").

39 See, for example, the Human Rights Committee, Views of 25 March 2002, *Luis Asdrúbal Jiménez Vaca v. Colombia*, Communication N° 859/1999, para. 6.3; Decision on admissibility, 14 October 1993, *Lansman et al. v. Finland*, Communication N° 511/1992, para. 6.3; Views of 28 October 2002, *C. v. Australia*, Communication N° 900/1999, para. 7.3; Views of 22 July 2005, *Bernardino Gomariz Valera v. Spain*, Communication N° 1095/2002, para. 6.4; Decision of 31 October 2007, *Zdenek Ondracka et al. v. Czech Republic*, Communication 1533/2006, para. 6.3.

b) Time limit for submitting communications

The OP-ICESCR adds a requirement not found in other treaties from the universal system:⁴⁰ the need for communications to be submitted within one year of the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to do so within that time limit. This requirement is, however, stipulated in regional human rights systems.⁴¹ Although adding further admissibility requirements that make it harder to submit an individual communication should always be approached with caution, the interest that justifies its inclusion here, namely ensuring that the situation to be examined is current and that the submission is serious, is acceptable and the time limit imposed does not seem excessive.

The time limit originally envisaged in the draft OP-ICESCR presented by the Chairperson-Rapporteur was six months. Several State delegations and the NGO Coalition considered it inappropriate on the grounds that it was too short. Several alternatives, including that of referring simply to a reasonable period, were discussed and, in the end, it was decided to extend the time limit to one year.

Corresponding provisions and references

African Charter on Human and Peoples' Rights, Article 56.6; *American Convention on Human Rights*, Article 46.1.b; *European Convention on Human Rights*, Article 35.1; *Rules of Procedure of the Committee against Racial Discrimination*, Article 91 f).

40 It is, nevertheless, stipulated in Article 91 (f) of the *Rules of Procedure of the Committee against Racial Discrimination*.

41 *American Convention on Human Rights*, Article 46.1 b (which sets a time limit of six months); *European Convention on Human Rights*, Article 35.1 (which also sets a time limit of six months); *African Charter on Human and Peoples' Rights*, Article 56.6 (which talks about a reasonable time period after the exhaustion of domestic remedies).

c) Temporal jurisdiction for the examination of communications

The temporal jurisdiction of the Committee is confined to events that take place after the entry into force of the Protocol for the State party in question. This provision of the OP-ICESCR, Article 3.2 (b), reflects the procedural standard that has been generally established, through either rules of procedure or jurisprudence, in other individual communications procedures relating to human rights treaties in the universal system. Nevertheless, this limitation has caused controversy in the case of human rights violations that are ongoing or continuous in nature, such as enforced disappearances. Thus, for example, complaints relating to cases of enforced disappearance that began before the *Optional Protocol to the International Covenant on Civil and Political Rights* came into force but which continued after the Protocol entered into force for the State party concerned have been declared inadmissible *rationae temporis* by the Human Rights Committee.⁴²

However, paragraph 2 (b) of Article 3 of the OP-ICESCR authorizes the Committee to hear cases in which “those facts continued after that date”. The Committee can therefore examine cases involving violations of economic, social and cultural rights which, although they began prior to the entry into force of the OP-ICESCR for the State party, have continued thereafter. The wording is similar to that used in the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 4.2 (e), and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 2 (f), which formulate this exception in the following way: “unless those facts continued after that date”.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 4.2 (e); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 2 (f).

42 See, for example, Decision on admissibility of 2 November 2005, *Norma Yurich v. Chile*, Communication N° 1078/2002.

d) The absence of litispendence

The requirement that there be no litispendence is also not new.⁴³ It is important to stress here that “another procedure of international investigation or settlement” should be understood as meaning quasi-judicial or judicial proceedings of a similar nature or scope, namely proceedings the object of which is to rule on a State’s international responsibility for violating a right protected by a treaty or for failing to comply with a treaty obligation. Thus, and as United Nations treaty-monitoring bodies have extensively confirmed in practice, the requirement for there to be no litispendence does not apply when a case is simultaneously submitted under an individual communications procedure established in a human rights treaty and under a special procedure of the United Nations Human Rights Council. This practice is widespread, the legal foundation of which stems from the fact that individual communications procedures relating to human rights treaties and the special procedures established by extra-conventional bodies, such as the United Nations Human Rights Council, are different in nature.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 5.2 (a); Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 22.5 (a); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 4.2 (a); Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 2 (c); International Convention on the Protection of the Rights of All Migrant Workers and Members

43 It can be found in Article 5.2 (a) of the *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 22.5 (a) of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 4.2 (a) of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 2 (c) of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 31.2 (c) of the *International Convention for the Protection of All Persons from Enforced Disappearance*, and Article 77.3 (a) of the *Convention for Protection of All Migrant Workers*.

of their Families, Article 77.3 (a); International Convention for the Protection of All Persons from Enforced Disappearance, Article 31.2 (c).

e) Other admissibility requirements

The remaining subsections of paragraph 2 establish formal requirements (such as the need for communications to be in writing and the prohibition of anonymous communications) and other stipulations that will enable the Committee to reject unreasonable or insufficiently substantiated communications. All of these formulations were already established in earlier instruments and do not break much new ground by comparison with existing communications mechanisms.⁴⁴

44 For example, the requirement relating to the rejection of communications that are incompatible with the provisions of the treaty in question is laid down in Article 3 of the *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 22.2 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 4.2 (b) of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 2 (b) of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, and Article 31.2 (b) of the *International Convention for the Protection of All Persons from Enforced Disappearance*. The inadmissibility of manifestly ill-founded or insufficiently substantiated communications appears in Article 4.2 (c) of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* and Article 2 (e) of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*. The inadmissibility of communications that constitute an abuse of the right to submit a communication is contained in Article 3 of the *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 22.2 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 4.2 (d) of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 2 (b) of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, and Article 30.2 (b) of the *International Convention for the Protection of All Persons from Enforced Disappearance*. For their part, Articles 2 (communications in writing) and 3 (the inadmissibility of anonymous communications) of the *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 22.2 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (the inadmissibility of anonymous communications), Article 3 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, and Article 2 (a) of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* establish the inadmissibility of anonymous communications and the requirement for communications to be submitted in writing.

The only innovation is subsection (e) which stipulates that communications “exclusively based on reports disseminated by mass media” are inadmissible. In reality, its addition was not necessary since a submission that only supplies evidence based on reports disseminated by mass media can fall into the category of “manifestly ill-founded” or “insufficiently substantiated” communications established in the same subsection. In any event, it is hard to imagine a communication submitted by the alleged victims or groups of victims of a rights violation in which their grievance would be based solely on media reports when, by definition, they themselves had suffered the alleged violation. The purpose of this addition therefore seems to be to ensure that communications submitted on behalf of victims or groups of victims without their consent comply with a minimum standard of proof. Although such a specific addition was not necessary, it should be stressed that the requirement that the alleged violation be sufficiently substantiated clearly means that all submissions to international mechanisms should meet a minimum degree of reliability, especially when being made on behalf of the alleged victims.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Articles 2 and 3; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 22.2; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Articles 3 and 4.2 (b), (c) and (d); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 2 (a), (b) and (e); *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 31.2.

5. Commentary on Article 4, “Communications not revealing a clear disadvantage”

The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

This clause is new to communications procedures established under human rights treaties within the universal system. The wording was proposed by a number of States which based it on that used in Article 12 of *Protocol N° 14 to the European Convention on Human Rights*,⁴⁵ which amended the European Convention in order to try and ease the excessive workload of the European Court of Human Rights. In particular, Article 12 of Protocol N° 14 amends paragraph 3 of Article 35 of the European Convention, establishing, in the relevant part, that the European Court of Human Rights shall declare any petition inadmissible if it deems that “the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal”.⁴⁶

The justification given for its inclusion by the States who proposed it was to allow the Committee a certain degree of discretion to declare inadmissible cases in which the alleged violation of ICESCR rights is not very

45 Protocol N° 14 has not yet entered into force.

46 The English version of Article 12 of *Protocol N° 14 to the European Convention on Human Rights* talks of “significant disadvantage” while the French version uses “significant harm” (*préjudice important*). Since the negotiating language of the Working Group on the Optional Protocol to the ICESCR was English, the wording proposed for Article 4 was based on the English version of Article 12 of *Protocol N° 14 to the European Convention*.

significant. Although, when discussing this point in the Working Group, the States proposing it refrained from referring to the “importance” of the violation, it seems evident that, in the wording adopted, a threshold has been established below which communications concerning alleged violations could be declared inadmissible.

In any case, it should be underlined that declaring such cases inadmissible is *optional* and not obligatory; in other words, it is left to the discretion of the Committee. The provision also includes possible grounds for justifying admission of the case by the Committee, namely that the communication raises a serious issue of general importance even if the author of the communication has not suffered a “clear disadvantage”.

The proposal to add this provision came from the States who were least enthusiastic about the desirability of setting up a communications mechanism for economic, social and cultural rights and it was accepted as part of the efforts to reach a consensus on the text, in particular as a trade-off for accepting the comprehensive approach taken with regard to the Committee’s subject-matter jurisdiction.

Comparatively speaking, when considering other instruments from the universal human rights system that have established communications procedures, the addition of this new ground for inadmissibility was not necessary. The scenarios already envisaged involving “manifestly ill-founded” or “insufficiently substantiated” communications or “abuse of the right to submit a communication” are sufficiently flexible for submissions in which, from the start, there is clearly little substance to the alleged violation to be declared inadmissible by the Committee.

The formula chosen is rather unfortunate since the notion of “disadvantage” that has emerged in the context of standards on discrimination implies making a comparison between the person alleging the violation and the situation of others.⁴⁷ If read literally, this formula could give the impression that all allegations require a comparative judgment when,

47 This criticism also applies to the English version of Article 12 of *Protocol N° 14 to the European Convention on Human Rights* though not to the French version since the notion of harm does not depend on comparing it to the harm suffered by others.

in reality, the latter is only relevant in cases in which a violation to the principle of equal protection or the prohibition of discrimination is being argued and not in others. For example, allegations that the substantive obligations stemming from the right to education or the right to health do not depend on a comparison being made with the situation of other right-holders; it is sufficient to demonstrate that the actual victim has suffered harm. However, given the context in which this provision has emerged, it is clear that there was no intention of altering the substantive standards that define States' obligations or the Committee's subject-matter jurisdiction for considering communications and the notion of "disadvantage" should therefore be understood to mean "harm".

It is also striking that it was argued that a new category of inadmissibility was necessary for an instrument allowing consideration of violations of economic, social and cultural rights when the source for it was an amendment to the *European Convention on Human Rights*, an instrument that essentially establishes civil and political rights. In fact, this contradicts the position taken by some of the countries pushing for the inclusion of the new category, namely that litigation on economic, social and cultural rights is fundamentally different to litigation on civil and political rights. The justification for incorporating this new ground for inadmissibility into the European human rights system, namely the need to find solutions to ease the workload of the European Court of Human Rights, was of little relevance in this case where the communications mechanism was not yet even in operation and so to assume that the Committee would be overburdened with communications was nothing more than speculation.

In any event, it is important to point out that this provision cannot be viewed as placing a new burden on the author of a communication because the latter already has to describe the alleged violation and show evidence that it was committed. It will be the Committee's task to assess whether the alleged violation amounted to a "clear disadvantage". Anyway, its inclusion in the OP-ICESCR makes it possible for the State against which the communication is directed to put forward arguments on that basis and that means that the author of the communication will, in turn, be given the

chance to contest the State's arguments or to claim that the case "raises a serious issue of general importance".

Corresponding provisions and references

Protocol N° 14 of the European Convention on Human Rights, Article 12.

6. Commentary on Article 5, "Interim measures"

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.
2. Where the Committee exercises its discretion under paragraph 1 of the present Article, this does not imply a determination on admissibility or on the merits of the communication.

The possibility of adopting interim measures is a fundamental guarantee designed to ensure that the rights established in the ICESCR are not irreparably damaged while the communication is being processed and the ESCR Committee is reaching its decision. Timely preventive intervention is clearly preferable to intervention *a posteriori*, once the harm that was avoidable has already occurred. In this regard, the practice adopted by the Inter-American human rights system with regard to threats to economic, social and cultural rights is relevant and worth taking into consideration in order to underline the importance of interim measures. Within the framework of international litigation, the purpose and aim of such measures is to preserve the rights of the parties, guarantee the integrity and effectiveness of judgments on the merits of cases and prevent proceedings from

being ineffective.⁴⁸ As emphasized by Dr. Asdrúbal Aguiar, a former judge at the Inter-American Court of Human Rights, when referring to the preventive measures taken by the Inter-American Commission on Human Rights, “preventive measures [...] are the concrete expression of a principle of procedural law that requires balance to be ensured between the parties in any legal proceedings and allows the court to ascertain, in practice, the consequences of the responsibility that is the subject of the adversarial process.”⁴⁹

The legal institution of interim measures is widely known in communications procedures relating to treaties from both the universal system and regional systems.⁵⁰ However, within the universal system, interim measures are traditionally provided for in the rules of procedure of treaty-monitoring bodies.⁵¹ The fact that interim measures have their regulatory origins in the

48 See Héctor Fix-Zamudio, “Prólogo del Presidente de la Corte Interamericana de Derechos Humanos”, in *Serie E: Medidas Provisionales N° 1 Compendio: 1987-1996*, Organization of American States – Inter-American Court of Human Rights, San José, Costa Rica, 1996, p. iii, and Antônio Augusto Cançado Trindade, “Prólogo del Presidente de la Corte Interamericana de Derechos Humanos”, in *Serie E: Medidas Provisionales N° 2 – Compendio: Julio 1996 -2000*, Organization of American States – Inter-American Court of Human Rights, San José, Costa Rica, 2000, p. ix, para. 7.

49 Asdrúbal Aguiar, “Apuntes sobre las medidas cautelares en la Convención Americana sobre Derechos Humanos”, in *La Corte y el Sistema Interamericano de Derechos Humanos*, Rafael Nieto Navia Editor, 1st Edition, San José, Costa Rica, 1994, p. 19. [Unofficial translation.]

50 For example, within the Inter-American human rights system they are provided for the Inter-American Court in Article 63 of the *American Convention on Human Rights* and for the Inter-American Commission in its rules of procedure. In the African system, interim measures are provided in Rule 111 of the *Rules of Procedure of the African Commission on Human and Peoples’ Rights*. In the European system, they are provided in Article 39 of the Rules of Procedure of the European Court of Human Rights.

51 They are thus provided in the rules of the respective Committees concerning communications procedures in the case of the *International Covenant on Civil and Political Rights* (Article 86 of the *Rules of Procedure of the Human Rights Committee*), the *International Convention on the Elimination of All Forms of Racial Discrimination* (Article 94.3 of the Rules of Procedure of the Committee for the Elimination of Racial Discrimination), and the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (Article 108 of the *Rules of Procedure of the Committee against Torture*).

internal rules of procedure of monitoring bodies and not in a treaty-based norm has frequently been used by some States as an argument for non-complying with them. The Human Rights Committee⁵² and the Committee against Torture⁵³ have faced this type of situation on several occasions. For example, in 1994, the Human Rights Committee examined the first case in which a State refused to comply with interim measures requiring enforcement of the death penalty to be suspended. The Committee adopted a formal decision on this situation, in which it expressed its indignation at the failure of the State party to comply with the request made to it pursuant to Article 86 of the rules of procedure and called on the State to take the necessary steps to ensure that such a situation would not recur in the future. In its decision, the Committee recalled that the “State party, upon ratifying the Optional Protocol, undertook to cooperate with the Committee under the procedure [set out in the Protocol]” and “emphasizes that the State party has failed to comply with its obligations, both under the Optional Protocol and under the Covenant.”⁵⁴ In another case, the Human Rights Committee specified the legally-binding scope of interim measures in the following terms: “By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Ar-

52 See, among others, the decision of 26 July 1994, *Glen Ashby v. Trinidad and Tobago*, Communication No 580/1994; decision of 4 November 1998, *Gilbert Samuth Kandu-Bo and others v. Sierra Leone*, Communications Nos 839, 840 and 841/1998; decision of 4 April 1995, *Lincoln Guerra and Brian Wallen v. Trinidad and Tobago*, Communication N° 575 and 576/1994; decision of 7 January 1994, *Charles Chitat Ng v. Canada*, Communication N° 469/1991; decision of 19 July 1994, *Peter Bradshaw v. Barbados*, Communication N° 489/92; decision of 19 July 1994, Communication N° 504/992, *Denzil Roberts v. Barbados*; and decision of 19 October 2000, *Dante Piandiong, Jesus Morillos and Archie Bulan v. Philippines*, Communication N° 869/1999.

53 See, among others, decision of 10 November 1998, *Rosana Nuñez Chipana v. Venezuela*, Communication N° 110/1998, and decision of 16 May 2000, *T.P.S. v. Canada*, Communication N° 99/1997.

54 Decision of 26 July 1994, *Glen Ashby v. Trinidad and Tobago*, Communication No 580/1994, in United Nations document *Supplement No 40 (A/49/40)*, New York, 1994, para. 441.

title 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views."⁵⁵

Now, as a result of these situations, when new instruments containing communications procedures are being drafted, interim measures are included within the text of the treaty itself, thus allowing the legal character and nature of interim measures to be reaffirmed and any arguments concerning their observance to be cleared up. Thus, the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*,⁵⁶ the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*,⁵⁷ and the *International Convention for the Protection of All Persons from Enforced Disappearance*⁵⁸ are all conventions in which interim measures have been incorporated into the treaty instrument itself.

In line with this trend towards increasing the threshold of protection, in the case of the OP-ICESCR interim measures have been introduced into the actual instrument. The wording of Article 5 of the OP-ICESCR takes its inspiration from the wording of Article 5 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. The procedural mechanism for interim measures contained in the OP-ICESCR contains the following features:

- It enables the Committee to require the State to take interim measures *after it has received a communication and before it has determined its admissibility*. The suggestion made by the NGO Coalition that the

55 *Communication No 841/1998: Sierra Leone. 30/07/2001. CCPR/C/72/D/841/1998. (Jurisprudence)*, para. 5.1, concerning Communications No 839, 840 and 841/1998, *Gilbert Samuth Kandu-Bo et al. v. Sierra Leone*.

56 Article 5.1.

57 Article 4.1.

58 Article 31.4.

Committee should be able to require interim measures to be taken even before receiving a communication, as permitted in the Inter-American human rights system, was therefore rejected.

- Requests for interim measures transmitted to States parties by the Committee require their *urgent consideration*.⁵⁹
- It is appropriate for interim measures to be requested if they are *necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations*.

Although the rest of the text follows almost word for word the provisions of Article 5.1 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 4.1 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* and Article 31.4 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, the phrase “*in exceptional circumstances*” has been added in this case. Its addition, however, does not seem to have significantly changed the meaning of the provision: the purpose of such interim measures is to avoid irreparable damage. Given the need for domestic remedies to be exhausted before being able to submit a communication to the Committee, it could be understood that cases in which it is necessary to call for interim measures to be taken in order to prevent irreparable damage are the exception and not the rule and maybe that was why the phrase “*in exceptional circumstances*” was added. In any event, it should also be noted that, although there is no such phrase in their respective treaties, the practice of other Committees within the universal human rights system, such as the Human Rights Committee and the Committee against Torture, with regard to interim measures has been particularly cautious: requests for interim measures to be taken have been largely confined to calling for a stay of execution in death penalty cases or the halting of deportations or extradition in cases in which there was

⁵⁹ See also Article 5.1 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 4.1 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, and Article 31.4 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

a well-founded fear that the alleged victim would be subjected to torture in the country of destination. Judging from the jurisprudence developed by their peers in the universal system, the ESCR Committee will probably exercise similar caution and so the addition of the phrase “*in exceptional circumstances*” is unlikely to have much effect.

As in other relevant instruments, the text further adds that, in cases in which interim measures are requested while a communication is being processed, the adoption of such measures does not imply that any kind of judgment has been made on the admissibility or merits of the communication.⁶⁰ This stems precisely from the preventive nature of such measures which, since it does not replace examination of the merits of the case, introduces a different and stricter standard for determining their appropriateness.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 5; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 4; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 31.4; *Rules of Procedure of the Human Rights Committee*, Article 86; *Rules of Procedure of the Committee for the Elimination of Racial Discrimination*, Article 94.3; *Rules of Procedure of the Committee against Torture*, Article 108.

⁶⁰ See also Article 5.2 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 4.2 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, and Article 31.4 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

7. Commentary on Article 6, “Transmission of the communication”

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 6 regulates the transmission of communications. The issue did not cause much controversy or discussion during the Working Group sessions. On this point, the OP-ICESCR follows the example of Article 6 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, which includes these procedural rules in the Protocol itself, unlike the *Optional Protocol to the International Covenant on Civil and Political Rights*, which deferred the matter to the Committee's Rules of Procedure.

In this case, as in that of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, after the communication has been transmitted to the State, the deadline set for the State's response is six months. The only significant departure from the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* is that the latter, in its equivalent clause (Article 6.1), makes it possible for the individuals concerned to ask for their identity to be withheld from the State party. That possibility was removed from the OP-ICESCR. Although the issue was discussed in the Working Group at the request of the NGO Coalition, which recommended keeping to the wording of the *Optional Protocol to the Convention on the Elimina-*

tion of All Forms of Discrimination against Women, many States claimed that keeping the identity of the individuals concerned confidential would hamper the processing of the communication because it would be difficult to provide a response about a specific de facto situation if the individual who claimed to be the victim of a violation could not be properly identified. After consulting the Petitions Team at the Office of the United Nations High Commissioner for Human Rights, which handles other treaty-based communications mechanisms, the States participating in the Working Group reached the conclusion that, since provisions allowing identity to be kept confidential in communications mechanisms within the universal human rights system were hardly ever used, their exclusion from the OP-ICESCR was justified.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 6.

8. Commentary on Article 7, “Friendly settlement”

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.
2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

Article 7, which specifically regulates the issue of friendly settlement, is an innovation as far as the communications procedures used by treaty bodies within the universal system are concerned.⁶¹ The possibility of reach-

61 This procedure is mentioned only in relation to inter-State communications procedures

ing a friendly settlement is, however, available under communications and complaints procedures used in the Inter-American and European human rights systems⁶² and its inclusion is useful because it takes up a practice that is important to regional mechanisms. When correctly used, the friendly settlement procedure can speed up proceedings and establish a direct channel of dialogue between the victims and the State through which the remedy to be adopted can be discussed.

The text adopted, however, states that any agreement reached “closes consideration of the communication”. This solution is not entirely adequate since what should close the communications procedure is not the fact that the author or authors of the communication and the State have reached a friendly settlement but that the terms of the agreement have been satisfactorily executed. Otherwise the friendly settlement procedure could be a way for States to prevent consideration of the communication by the Committee without having any intention of complying with the agreement.

In any event, although not an ideal solution, it should be pointed out that non-compliance with an agreement on a friendly settlement can give rise to a further communication denouncing that, as a result of such non-compliance, the violation of the right denounced in the original communication is still going on.⁶³ Of course, it would be simpler to keep the

in the *International Covenant on Civil and Political Rights*, Article 41.1 (e), the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 21.1 (c), and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 76 (d).

62 *American Convention on Human Rights*, Articles 48 and 49; *Statute of the Inter-American Commission on Human Rights*, Article 23; *Rules of Procedure of the Inter-American Court of Human Rights*, Article 54; *European Convention on Human Rights*, Articles 38 and 39; *Rules of Procedure of the European Court of Human Rights*, Article 44.

63 See, *mutatis mutandis*, the European Court of Human Rights: judgment of 4 February 2005, *Mamatkulov and Askarov v. Turkey*, para. 128; judgment of 17 January 2006, *Aoulmi v. France*, para. 111; and judgment of 10 August 2006, *Olaechea Cahuas v. Spain*, paras. 81 and 82. In these cases, the European Court of Human Rights decided that the State’s failure to comply with interim measures constituted a violation of the right of the alleged victim to submit a petition to the Court under Article 34 of the *European Convention on Human Rights*. Similarly, failure to comply with an agreement on a friendly settlement, as well as affecting the right to submit a communication, affects

consideration of the original communication open until compliance with the friendly settlement has been verified, in order to avoid pointlessly repeating stages of the procedure that have already been completed. However, given the possible range of scenarios, the Committee should be given a certain degree of flexibility to enable it to regulate the issue in its Rules of Procedure, taking into account how far advanced its consideration of a communication is when a friendly settlement that is later breached is achieved. Another possible way of preventing complications arising from non-compliance is for the parties to include in the actual agreement on a friendly settlement a specific clause establishing that, in the event of non-compliance with the agreement, the parties may inform the Committee so that it can pursue examination of the communication.⁶⁴

Corresponding provisions and references

American Convention on Human Rights, Articles 48 and 49; *Statute of the Inter-American Commission on Human Rights*, Article 23; *Rules of Procedure of the Inter-American Court of Human Rights*, Article 54; *European Convention on Human Rights*, Articles 38 and 39; *Rules of Procedure of the European Court of Human Rights*, Article 44.

the right to obtain reparation for violation of the substantive right allegedly affected and ensures that the violation remains unpunished. In the inter-American human rights system, even when agreement on a friendly settlement has been reached, the Inter-American Commission still has the power to monitor compliance with that agreement. See, for example, the Inter-American Commission on Human Rights, Report N° 21/07, Petition N° 161-02, *Paulina del Carmen Ramírez Jacinto, Mexico, Friendly Settlement*, 9 March 2007, point 2 of the Commission's decision: (The Commission decides) "to continue with the follow-up and monitoring of the points of the friendly settlement that are pending implementation or that require ongoing compliance".

⁶⁴ This is a practice frequently found in agreements on friendly settlements reached within the inter-American human rights system. See, for example, the Inter-American Commission on Human Rights, Report N° 70/07, Petition 788-06, *Victor Hugo Arce Chávez, Bolivia, Friendly Settlement*, 27 July 2007, para. 19, Point 5 of the Compromise Agreement.

9. Commentary on Article 8, “Examination of communications”

1. The Committee shall examine communications received under Article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.
4. When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Article 8 regulates the Committee’s examination of the merits of the communication. It is advisable, however, to undertake a separate analysis of paragraphs 1 and 2, which closely adhere to the wording of other instruments from the universal system, and paragraphs 3 and 4, which introduce some innovations.

a) Paragraphs 1 and 2

Paragraphs 1 and 2 take their inspiration from paragraphs 1 and 2 of Article 7 of the *Optional Protocol to the Convention on the Elimination of All*

Forms of Discrimination against Women. Paragraph 1 obliges the Committee to consider communications “in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned”.

Two issues generated some debate during the Working Group sessions. The first was the replacement of the term “information”, used in paragraph 1 of Article 7 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, with the term “documentation”. This came about because some of the States participating in the Working Group were concerned that the Committee might also take into account information that it received informally or which was published in the media. They therefore suggested the use of the term “documentation” which, in their view, requires that the information considered by the Committee is contained in documents which, in light of the latter part of the paragraph, must be transmitted to the interested parties. It should be noted, however, that the term “documentation” refers not only to written documentation but can also include other media, such as audiovisual or electronic media.

The second issue that provoked some discussion within the Working Group was directly related to a proposal from the NGO Coalition that the possibility of submitting written documents to the Committee in the form of *amicus* briefs be specifically included.⁶⁵ Although the States were reluctant

65 As pointed out by the representatives of some of the delegations, the term *amicus curiae* would be incorrect in the case of quasi-judicial proceedings since the Latin term *curia* means “court”, and the Committees are not courts. In any event, the function of submitting a written document in the form of an *amicus* brief to a Committee would be similar to that of an *amicus curiae* submitted to a court: it enables third parties who have recognized expertise on the issue under discussion and who are interested in the final outcome of the case to submit legal arguments that have consequences for making a decision on the case. It should be remembered that the possibility of submitting *amicus* briefs is common in regional human rights systems such as the European and Inter-American. See, for example, the Rules of Procedure of the European Court of Human Rights, Article 44; and Rules of Procedure of the Inter-American Court of Human Rights, Article 62.3. Although not specifically mentioned in its Rules of Procedure, the African Commission on Human and Peoples’ Rights has also accepted submissions in the form of *amicus* briefs in some cases. Though not a frequent practice in the universal system, there are also some precedents in submissions made to the Human Rights Committee and the Committee against Torture.

to specifically include the term '*amicus* brief' in the text, the fact is that the phrase "all documentation submitted to it" is not confined to the documentation submitted by the authors of communications and the interested State and accordingly paves the way for the submission of *amicus* briefs to the Committee. This is, in fact, an established trend in other Committees within the universal human rights system, such as the Human Rights Committee, even though that possibility is not specifically mentioned in the respective instruments instituting their communications systems.

Paragraph 2, which establishes that communications should be considered by the Committee in closed sessions, did not provoke much discussion and follows the wording used in Article 7.2 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* and Article 5 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 7; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 5; *Rules of Procedure of the European Court of Human Rights*, Article 44; *Rules of Procedure of the Inter-American Court of Human Rights*, Article 62.3.

b) Paragraph 3

Paragraph 3 introduces an innovation by comparison with other individual communications procedures within the universal human rights system in that it offers a procedural solution to a concern some States had concerning the relationship between communications procedures instituted through the OP-ICESCR and regional communications or complaints procedures.

Some States suggested that, in addition to the requirement that domestic remedies be exhausted, the requirement that regional remedies be exhausted should also be included as a condition of admissibility. The suggestion posed a number of insurmountable difficulties: it would have

excessively delayed victims' access to a final decision by an international body, subordinated the importance of the decisions taken by regional bodies to a kind of appeal to the Committee, thereby establishing an unjustifiable hierarchy among human rights protection systems, and caused serious problems of inequality in cases for which there are no appropriate regional appeal systems for dealing with violations of economic, social and cultural rights or in which the States concerned are not a party to the procedures established by such systems.

The solution found in the OP-ICESCR is to allow the Committee to gather relevant information on the situation in question from other international bodies, such as bodies, specialized agencies, funds, programmes and mechanisms belonging to the United Nations and other international organizations, specifically including bodies from the regional human rights systems. This innovation should be welcomed because, in addition to not excessively changing the consideration of communications, it enables the Committee to take into consideration decisions on the subject in question that have already been adopted by regional bodies, thus broadening their knowledge of the significance of the matter under discussion.

c) Paragraph 4

Overall, the most important innovation contained in Article 8 by comparison with other communications procedures is paragraph 4. No other instrument had previously established a standard of review or judgment criterion that the Committee in question should adopt when assessing communications. It was included at the insistence of several States who believed that a provision was needed to clearly set parameters against which the Committee would assess whether States had complied with their obligations under the ICESCR. Two parameters have thus been specifically included.

i) The reasonableness of the steps taken

The first parameter is the reasonableness of the steps taken by the State in order to effectively implement the rights recognized in the ICESCR. Several points may be made in this regard.

Firstly, there is a matter of principle: the standards of review to be used by the Committee can only be those contained in the substantive treaty for which the OP-ICESCR establishes an additional protection procedure, namely the ICESCR. However, although not expressed exactly in those terms, the standard concerning the reasonableness of the steps taken by the State can be deemed to be implicit in the ICESCR because it is a general principle of law that rules and regulations cannot require States to implement what is unreasonable or impossible. Secondly, the notion is directly related to the expression “appropriate means” used in Article 2.1 of the ICESCR.⁶⁶ Furthermore, the notion of reasonableness is closely bound up with the parameters set for limiting rights in Article 4 of the ICESCR.⁶⁷

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- 66 The Committee on Economic, Social and Cultural Rights has said in this regard that “the phrase ‘by all appropriate means’ must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the ‘appropriateness’ of the means chosen will not always be self evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most ‘appropriate’ under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.” (*General Comment N° 3, “The nature of States parties’ obligations”,* para. 4.) Similarly, it has said that “[a]lthough the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee’s examination of the State party’s compliance with its obligations under the Covenant”. (*General Comment N° 9, “The domestic application of the Covenant”,* para. 5.) Although both statements referred originally to the reporting mechanism, there is no reason why the Committee should not take the same view in the context of communications.
- 67 Article 4 of the ICESCR states that: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. Limiting rights “only in so far as this may be compatible” with their nature and only for one specific reason (“solely for the purpose of promoting the general welfare in a democratic society”) also entails making the same sort of judgment as that made when determining the reasonableness of the steps taken.

As a consequence, Article 8.4 of the OP-ICESCR does not add anything that could not already be inferred from the ICESCR itself. In any case, and given that there is no equivalent to Article 2.1 of the ICESCR in the *International Covenant on Civil and Political Rights*, this innovation could be seen as a safeguard, though possibly a redundant one, that prevents States from being confronted with demands that are impossible to meet.

Secondly, it should be pointed out that reasonableness means analyzing the ends and means that justify a State's action and involves considering:

1. the legitimacy of the ends that justify a State's action;
2. the existence of other relevant obligations and principles that the State in question should take into consideration; and
3. the appropriateness of the means chosen in relation to the ends sought, bearing in mind the resources and information available.

The notion of reasonableness has often been employed in litigation concerning economic, social and cultural rights in various courts at both domestic and international level, and a comparison of the resulting jurisprudence may provide the ESCR Committee with guidance on how it can be applied in specific cases.⁶⁸ The Committee itself, in the context of a statement concerning the meaning of the obligation to take steps to the "maximum of available resources" under the OP-ICESCR, has indicated some criteria that should be borne in mind when evaluating the reasonableness and "appropriateness" of steps taken by States:

- a) Whether the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
- b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;

68 See International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series N° 2, International Commission of Jurists, Geneva, 2008.

- d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
- e) The time frame in which the steps were taken;
- f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups, whether they were non-discriminatory and whether they prioritized grave situations or situations of risk.⁶⁹

The Committee's statement also identifies some procedural criteria that it should also consider when evaluating the reasonableness of steps taken by States parties to achieve progressively the full implementation of Covenant rights. Thus, the Committee states that it "places great importance on transparent and participative decision-making processes at the national level".⁷⁰ However, the parameter relating to the reasonableness of the steps taken, though acceptable, is not necessarily applicable to all cases the Committee may address and does not exhaust the possible criteria that it would need to consider when examining communications. For example, the ESCR Committee has already said that some actions or omissions by States can be considered to be *prima facie* violations of their obligations under the ICESCR.⁷¹ In scenarios such as these, it is clear that whether the steps taken are reasonable or not is irrelevant and that the State has to justify its action or omission. The wording of Article 8.4 seems to reflect this idea when it states that examination of the reasonableness of the steps taken by States should be done "in accordance with Part II of the Covenant". It should also be said that, in addition to the general principles

69 See Committee on Economic, Social and Cultural Rights, *Statement: An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant*, E/C.12/2007/1, 21 September 2007, para. 8.

70 *Ibid.*, para. 11.

71 For example, the following would constitute *prima facie* violations: the adoption of discriminatory measures, the failure to adopt measures to achieve full realization of Covenant rights, the failure to meet minimum core obligations, and the adoption of deliberately retrogressive measures. See Committee on Economic, Social and Cultural Rights, *General Comment N° 3, "The nature of States parties' obligations"*, paras. 3, 9 and 10. See also the Committee on Economic, Social and Cultural Rights, *Statement: An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant*, *ibid.*, paras. 9 and 10.

established in Part II of the Covenant, in some cases Part I may also be relevant.

Similarly, the specific criteria established in each of the rights enshrined in the ICESCR, depending on which particular right or rights have allegedly been violated, will also be applicable. For example, Article 13.2 (a) of the ICESCR states that “[p]rimary education shall be compulsory and available free to all”. In this case, the parameter of reasonableness should refer to the steps taken by the State to achieve this specific objective which the ICESCR has set as a priority. It is therefore not enough for the State to claim that it has taken “reasonable steps” to guarantee the right to education in general. Rather there is a specific requirement limiting the State’s discretion with regard to this matter.

ii) The range of steps the State can take

The second sentence of paragraph 4 which states that the Committee should bear in mind “that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant” should be understood in the same way. This second parameter alludes to the *range of steps that the State can take to realize the rights recognized in the ICESCR*, a notion that is not new since it is established in the Covenant itself. The Committee had already specified in its General Comment N° 3 that

the undertaking “to take steps ... by all appropriate means including particularly the adoption of legislative measures” neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as

affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question.⁷²

In General Comment N° 3, the Committee is quite explicitly recognizing that the steps the State party should take can cover a wide variety of subject-matter and political orientations. The ICESCR does not therefore prescribe a particular type of measure but accepts a wide range of social policies that are designed to give full realization to the rights enshrined in the treaty.⁷³ In any case, General Comment N° 3 itself also recalls that “in many instances legislation is highly desirable and in some cases may even be indispensable”⁷⁴ and adds, as we have already seen, that:

however, ... the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase “by all appropriate means” must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the “appropriateness” of the means chosen will not always be self evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.⁷⁵

In other words, despite the fact that States can choose to take a variety of measures in order to comply with their obligations under the ICESCR, not just any measure would be appropriate or sufficient to achieve full imple-

72 *General Comment N° 3, “The nature of States parties’ obligations”, ibid., para. 8.*

73 In its *Statement: An evaluation of the obligation to take steps to the “maximum of available resources” under an Optional Protocol to the Covenant*, the Committee reiterates this idea, saying that it “bears in mind its own role as an international treaty body and the role of the State in formulating or adopting, funding and implementing laws and policies concerning economic, social and cultural rights. To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances”, *ibid.*, para. 11.

74 *General Comment N° 3, “The nature of States parties’ obligations”, ibid., para. 3.*

75 *Ibid.*, para. 4.

mentation of the rights enshrined in it and it will be up to the Committee to assess this matter.

In short, Article 8.4 of the OP-ICESCR does not add anything that was not already contained in the ICESCR itself: namely, that while States may adopt different policies, plans and legislative norms in order to progressively achieve the full realization of the rights enshrined in the Covenant, the “appropriateness” or suitability of such measures can be assessed by the Committee against the above-mentioned criteria.

Corresponding provisions and references

ICESCR, Articles 2.1 and 4; Committee on Economic, Social and Cultural Rights, General Comments N° 3 and 9; and *Statement: An evaluation of the obligation to take steps to the “maximum of available resources” under an Optional Protocol to the Covenant*

10. Commentary on Article 9, “Follow-up to the views of the Committee”

1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
3. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party’s subsequent reports under Articles 16 and 17 of the Covenant.

Paragraph 1 contains a clause concerning transmission of the Committee's views to the parties that is a routine feature of all communications procedures established under treaties within the universal system.

Paragraphs 2 and 3 raise the question of how compliance with the Committee's views will be followed up. The need for treaty-monitoring bodies to follow up on States' compliance with their decisions has traditionally been extremely important in ensuring the effectiveness of the international protection provided as a result of communications procedures. With the exception of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, treaties within the universal system in which such procedures have been established do not contain measures for following up on compliance with such decisions.⁷⁶ However, such procedures are set out in the rules of procedure of the respective treaty bodies.⁷⁷ In the case of the Human Rights Committee, there is a Special Rapporteur to follow up on views adopted by the Committee. He or she must report periodically to the Committee on follow-up activities and the Committee must include information on follow-up activities in its annual report.⁷⁸ For some years now, the Human Rights Committee has begun to mention instances where States have failed to comply with its views in some of the conclusions and recommendations on specific countries it has adopted in the context of its review of State reports. The *Rules of Procedure of the Committee against Torture*, as well as establishing a similar procedure, enables rapporteurs to "engage in necessary visits to the State party concerned".⁷⁹

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76 See the *Optional Protocol to the International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, the *International Convention for the Protection of All Persons from Enforced Disappearance* and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.

77 See, for example, Article 101 of the *Rules of Procedure of the Human Rights Committee* and Article 114 of the *Rules of Procedure of the Committee against Torture*.

78 Article 101 of the *Rules of Procedure of the Human Rights Committee*.

79 Paragraph 4 of Article 114 of the *Rules of Procedure of the Committee against Torture*.

Paragraphs 2 and 3 of Article 9 of the OP-ICESCR take their inspiration from paragraphs 4 and 5 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. Although they do not include the regulatory developments contained in the *Rules of Procedure of the Committee against Torture*, these provisions of the OP-ICESCR are an important step forward. There is nothing to prevent the ESCR Committee from establishing follow-up mechanisms in their own Rules of Procedure that are similar to those contained in the *Rules of Procedure of the Committee against Torture*.

Corresponding provisions and references

International Covenant on Economic, Social and Cultural Rights, Articles 16 and 17; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 7; *Rules of Procedure of the Human Rights Committee*, Article 101; *Rules of Procedure of the Committee against Torture*, Article 114.

11. Commentary on Article 10, “Inter-State communications”

1. A State Party to the present Protocol may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under this Article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this Article shall be dealt with in accordance with the following procedure:

- a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;
- d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;
- e) The Committee shall hold closed meetings when examining communications under the present Article;
- f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

- g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:
 - i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
 - ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present Article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present Article; no further communication by any State Party shall be received under the present Article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 10 regulates the procedure for inter-State communications. It should be noted that this procedure, which is established in some substantive human rights treaties,⁸⁰ has hardly ever been used. Other treaties or their respective protocols do not provide for such a procedure.⁸¹ Except for a few cases in the European system⁸² and, more recently, the Inter-American system,⁸³ States have been reluctant to resort to the use of this type of communications procedure.

The regulation governing the processing of inter-State communications laid down in Article 10 of the OP-ICESCR takes its inspiration from Article 41 of the *International Covenant on Civil and Political Rights* and Article 21 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, and does not contain any significant differences. As has been rightly pointed out by Professor Manfred Nowak, the inter-State communications procedure established in both the Covenant and the Convention is more concerned with mediation and good offices than providing a procedural dispute mechanism.⁸⁴ In both cases, it is characterized by its complicated procedural mechanism and its confidential nature. In this respect, it is regrettable that the OP-ICESCR

80 *International Covenant on Civil and Political Rights*, Article 41; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 21; *Convention on the Elimination of All Forms of Racial Discrimination*, Article 11; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 76; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 33; *American Convention on Human Rights*, Article 45; *European Convention on Human Rights*, Article 33; *African Charter on Human and Peoples' Rights*, Article 47.

81 The *Convention on the Elimination of All Forms of Discrimination against Women* and its *Optional Protocol* and the *Convention on the Rights of Persons with Disabilities* and its *Optional Protocol*. The *Convention on the Rights of the Child* has no form of communications procedure, be it individual or inter-State.

82 See, for example, the judgments and decisions of the European Court of Human Rights on the following cases: *Denmark v. Turkey* (5 April 2000); *Cyprus v. Turkey* (10 May 2001); and *Ireland v. United Kingdom* (18 January 1978).

83 Report N° 11/07 (inadmissibility), Inter-State Case 01/06, *Nicaragua v. Costa Rica*, 8 March 2007.

84 Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, N.P. Engel Publisher, 2nd revised edition, Germany, 2005, p. 759.

did not adopt the model established under Article 33 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, which provides for a simple, non-confidential mechanism that makes it possible for the procedure to be truly adversarial.

According to Article 10 of the OP-ICESCR, in order to be able to trigger the inter-State communications procedure, States must make a declaration specifically accepting the competence of the Committee; simply ratifying the Optional Protocol is not sufficient. They must accept the Committee's competence on two counts: in order to both submit communications against another State and be the subject of an inter-State communication.

Unlike the procedure for individual communications, which deals with violations of any of the economic, social and cultural rights set out in the ICESCR, the inter-State procedure concerns States parties' failure to comply with "their obligations under the Covenant". This difference in the material scope of the procedure is to be found in other instruments that have such a system of inter-State communications: the rationale for it is that States are not the holders of human rights nor can they therefore be the victims of the violation of those rights, although they have a legitimate interest in those rights being protected and not infringed. The formula used in Article 10 is certainly broader than that used in Article 2 of the OP-ICESCR and would allow communications to be based on breaches of other obligations established in the ICESCR without them necessarily corresponding to the economic, social and cultural rights contained in the Covenant. This could include, for example, breaches of the procedural obligations established in the ICESCR, such as the obligation to submit periodic reports.

As for the procedure itself, it should be noted that it also requires the State sending the communication to demonstrate that it has exhausted available domestic remedies unless application of such remedies has been unreasonably prolonged. In such cases it is also possible for the Committee to make available its good offices with a view to reaching a friendly settlement. By contrast, and unlike communications submitted by victims, although the Committee sessions are also closed, in the case of inter-State communications the States parties concerned have the right to be

represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.

Corresponding provisions and references

International Covenant on Civil and Political Rights, Article 41; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 21; *Convention on the Elimination of All Forms of Racial Discrimination*, Article 11; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 76; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 33; *American Convention on Human Rights*, Article 45; *European Convention on Human Rights*, Article 33; *African Charter on Human and Peoples' Rights*, Article 47.

12. Commentary on Article 11, "Inquiry procedure"

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under this Article.
2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in Article 15.
8. Any State Party having made a declaration in accordance with paragraph 1 of the present Article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 11 regulates the inquiry procedure. This procedure is vital for enabling the Committee to react to information that reveals the existence of grave or systematic violations of the rights set forth in the ICESCR. It does not constitute an innovation by comparison with the provisions of other human rights treaties⁸⁵ and its inclusion in the OP-ICESCR reflects the trend within the universal system towards broadening the scope of the international protection given to the rights enshrined in treaties.

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85 For example, inquiry procedures are established in the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (Article 20), the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Article 8), and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Article 6). The *International Convention for the Protection of All Persons from Enforced Disappearance* also provides the respective Committee with a way of taking action when it receives reliable reports of the existence of grave violations of its provisions, namely *in situ* investigations (Article 33).

The most important difference lies in the fact that, while in other instruments States have to opt-out to exclude the application of the inquiry procedure, Article 11.1 of the OP-ICESCR requires States parties to opt-in through a specific declaration to become bound by such procedure. Unfortunately, this regulation lowers the protection threshold for the rights contained in the ICESCR and will undoubtedly weaken the scope of the inquiry procedure. Furthermore, States that have made a declaration accepting the Committee's competence to conduct inquiries are permitted to withdraw that declaration (Article 11.8). The clause thus enables them to quit the procedure after they have expressly declared that they recognize the Committee's competence. Requiring States to make a specific declaration binding them to the inquiry procedure and then making it possible for them to withdraw that same declaration is inconsistent with the object and purpose of the OP-ICESCR, namely to establish international protection procedures.

The draft Protocol originally submitted by the Chairperson-Rapporteur of the Working Group favoured an opt-out approach regarding the inquiry procedure. However, in the interests of achieving consensus on the document, the final negotiations resulted in this ill-advised solution being accepted as part of the compromise for accepting a comprehensive approach.

Other than that important difference, regulation of the inquiry procedure as established in the OP-ICESCR takes its inspiration from the respective clauses of the other instruments that already have one. The language and provisions of Article 11 of the OP-ICESCR combine the respective clauses of Article 20 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Articles 8 and 9 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, and Articles 6 and 7 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.

The following are some of the most important features of the inquiry procedure:

a) Requirements for initiating the inquiry procedure

As in other instruments in which this procedure has been established, the Committee may decide to conduct an inquiry when it receives reliable information concerning grave or systematic violations of any of the economic, social and cultural rights set forth in the ICESCR.

This formula provoked two discussions in the Working Group. The first concerned the “reliable” nature of the information: some States suggested that such information needed to be qualified by restricting the type of information that could be used as grounds for allowing the Committee to initiate the procedure. In the absence of a consensus for making such a change, the Working Group decided to retain the language already used in other instruments. The wording is based on Article 8 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* which requires the receipt of reliable information concerning “grave and systematic violations”.

As for the scope of the term “reliable information”, it has been defined in the following terms: “[T]he reliability of the information can be evaluated in the light of factors such as: its specificity; its internal coherence and the similarities between reports of events from different sources; the existence of corroborating evidence; the credibility of the source in terms of their recognized ability to investigate and report on the facts; and, in the case of sources related to the media, the extent to which they are independent and non-partisan”.⁸⁶

The second discussion focused on whether it was possible to apply the criterion of “grave and systematic violations” to economic, social and cultural rights. Some States maintained that, given the supposed “distinct nature” of economic, social and cultural rights, it would not be possible to do so clearly.

However, in response to these objections, it was rightly pointed out that there were already two instruments in existence (the *Optional Proto-*

86 See Inter-American Institute of Human Rights, *Convención CEDAW y Protocolo Facultativo. Convención sobre la eliminación de todas las formas de discriminación contra la mujer*, IIDH-UNIFEM, 2nd. Ed., San José, 2004, pp. 73-74. [Unofficial translation.]

col to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the Convention on the Rights of Persons with Disabilities) in which a similar formula relating to the requirements for the initiation of inquiry procedures is applicable to the economic, social and cultural rights set forth in them and so it would be inconsistent for their applicability to have been recognized in those cases and not in the case of the ICESCR. If the Committee for the Elimination of Discrimination against Women can, for example, open an investigation when it receives reliable information about grave and systematic violations of women's rights to health or education, it is difficult to argue that the Committee on Economic, Social and Cultural Rights cannot do the same in the case of grave and systematic violations of the rights to health or education in general, regardless of the status of the individuals whose rights have been infringed. The *African Charter on Human and Peoples' Rights*, which does not distinguish between civil and political rights and economic, social and cultural rights, uses a similar formula in the provision relating to the opening of an inquiry.⁸⁷ Thus, within the African human rights system, since 1981 when the African Charter was adopted, it is already possible to conduct inquiries regarding the violation of economic, social and cultural rights.

The objections to the use of this formula do not seem justified from the conceptual point of view either. If one accepts the existence of parameters for evaluating the existence of individual violations of economic, social and cultural rights, it would be odd not to accept the possibility of evaluating the gravity of such violations. There are recognized criteria for doing so, such as, for example, the degree to which the protected right has been impaired and the mass or systematic nature of the violations.

b) The procedure

The inquiry procedure is confidential. If the Committee deems that the conditions for opening an inquiry have been met, it makes the information

87 Article 58.1 of the African Charter refers to the "existence of a series of serious or massive violations of human and peoples' rights".

available to the State concerned and invites it to submit its observations. From those observations and other reliable information it has obtained, the Committee may appoint one or several of its members to conduct an inquiry and request the State to cooperate with it. If necessary, the person or persons in charge of the inquiry may, as long as the State concerned consents, conduct an on-site visit. Once the findings of the inquiry have been considered by the full Committee and comments and recommendations have been formulated, these are sent to the State which then has six months to comment on them. The Committee may, after consultation with the State concerned, decide to include a summary account of the results of the inquiry in its annual report.

Corresponding provisions and references

Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Articles 20 and 28; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Articles 8, 9 and 10; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Articles 6, 7 and 8; International Convention for the Protection of All Persons from Enforced Disappearance, Article 32; African Charter on Human and Peoples' Rights, Article 58.

13. Commentary on Article 12, "Follow-up to the inquiry procedure"

1. The Committee may invite the State Party concerned to include in its report under Articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under Article 11 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in Article 11, paragraph 6, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 12 regulates the follow-up to the recommendations made in the inquiry procedure. The wording is similar to that used in Article 9 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* and Article 8 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*. The Committee has two mechanisms through which it can follow up on its recommendations. It can request the State party concerned to include details of any measures it takes to comply with the recommendations in its next periodic report (Article 12.1) or, six months after the State has been notified of the findings of the inquiry and the Committee's comments and recommendations, the Committee may ask the State to inform it of any measures it has taken in response to the inquiry (Article 12.2).

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 9; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 8.

14. Commentary on Article 13, "Protection measures"

A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 13 refers to the need for States to protect individuals who make use of their right to submit communications or are otherwise involved in the communications procedure. It establishes a new obligation for the States parties to the OP-ICESCR, namely that of taking all appropriate measures to protect those who submit communications to the Committee. The provision is founded, among other things, on the principle of good faith in complying with treaty provisions. Thus States are required not only to

refrain from taking reprisals for submitting communications but to offer active protection to those concerned in the event of ill-treatment or intimidation. Conversely, failing to comply with these same obligations can severely impair the exercise of the right to submit a communication, the very object and purpose of the OP-ICESCR.⁸⁸ The inclusion of this provision is justified both because of the protection it offers and because these obligations on States had already been laid down in other normative instruments⁸⁹ and have been generically recognized by human rights jurisprudence as being an indispensable requirement for the effectiveness of all international communications, petition or complaints procedures.

The wording of Article 13 is taken directly from Article 11 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. Three important aspects can be singled out:

- The State is obliged to adopt positive protection measures, as appropriate, and not only to refrain from exerting pressure.
- The formula used, which refers to “ill-treatment or intimidation”, should be interpreted broadly to include any form of attack, unwarranted interference or pressure, directed at the physical, moral or psychological integrity of those involved in the communication, that seeks to prevent

88 In this regard, the Inter-American Court of Human Rights has argued that attacks on witnesses or possible witnesses “can have a negative and decisive impact on the system for the protection of human rights established by the Charter of the Organization of American States and by the Pact of San José”. See Inter-American Court of Human Rights, “*Velázquez Rodríguez*”, “*Fairén Garbí and Solís Corrales*” and “*Godínez Cruz*” Cases, resolution of 15 January 1988 (Provisional measures), para. 5 and points 1 and 2 of Court Order.

89 In this regard, see the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*; and the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted under United Nations General Assembly resolution A/RES/53/144, Article 9.4 of which states that: “(...) everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms”.

or hinder its submission or consideration, cause it to be withdrawn, or exact reprisals for employing this international procedure;⁹⁰

- Those who merit protection are not confined to those submitting communications but include any individuals under the jurisdiction of the State party who suffer ill-treatment or intimidation because of such a communication. That includes, for example, relatives and close friends of the authors of communications, other members of the group of alleged victims, individuals who may have been involved in drafting the communication, individuals who may have sent the Committee additional information or expert opinions, etc.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 11; *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Article 9.4.

90 For example, the Inter-American Court of Human Rights decreed provisional measures to protect witnesses and others involved in an action before the Court itself after witnesses had been murdered and there had been “a campaign of calumny against Hondurans who have testified in these cases, portraying them as disloyal to their country and exposing them to public hatred and disrespect and even physical or moral attacks”. As well as protecting the lives and physical integrity of those involved in the proceedings, the Court required the State to “adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention”. See Inter-American Court of Human Rights, “*Velázquez Rodríguez*”, “*Fairén Garbí and Solís Corrales*” and “*Godínez Cruz*” cases, resolution of 19 January 1988 (provisional measures), declaratory points, para. 5 (1) & para. 5 (2).

15. Commentary on Article 14, “International assistance and cooperation”

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party’s observations and suggestions, if any, on these views or recommendations.
2. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.
3. A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.
4. The provisions of this Article are without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.

Article 14 answers a concern some African States had regarding the need to give particular consideration to international assistance and coop-

eration as vehicles for realizing economic, social and cultural rights, especially in developing countries. The specific reference made to international assistance and cooperation in both the clause establishing the general obligations under the ICESCR (Article 2.1) and other specific clauses (Articles 11, 15, 22 and 23) clearly constitutes a difference in the wording of the ICESCR compared to that of other treaties, such as the *International Covenant on Civil and Political Rights*, which contains no such references. It is acceptable that the wording of the Protocol reflects that difference.

In fact, the solution provided by the OP-ICESCR is consistent with the jurisprudence developed by the Committee on Economic, Social and Cultural Rights in at least two respects. Firstly, it reflects consideration of the distinction made by the Committee in General Comment N° 12 between a State party's "unwillingness" and "inability" to fully realize the rights enshrined in the ICESCR.⁹¹ If the failure to progressively give full effect to the rights enshrined in the ICESCR is due to a lack of resources, then, strictly speaking, it cannot be said to be a violation attributable to the State. However, according to the Committee's own doctrine, the resources available to States include both their own and those obtained through international cooperation and assistance.⁹² Therefore, in the event that a State argues it lacks resources, it has to demonstrate that it has sought international assistance and cooperation and that, having done so, has still been unable to obtain the resources required.⁹³

91 See the Committee on Economic, Social and Cultural Rights, *General Comment N° 12, "The right to adequate food"*, 12 May 1999, para. 17.

92 See the Committee on Economic, Social and Cultural Rights, *General Comment N° 3, "The nature of States parties' obligations"*, para. 13.

93 In its *General Comment N° 12, "The right to adequate food"*, the Committee on Economic, Social and Cultural Rights specified as follows: "Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment N° 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the

a) Transmission to other international bodies and agencies

As a consequence of the above, paragraph 1 of Article 13 allows the Committee, with the consent of the State concerned, to draw the attention of United Nations specialized agencies, funds and programmes and other competent bodies, to technical advice or assistance needs and other international measures mentioned in the Committee's findings, conclusions and recommendations. This can be done in the context of both communications procedures and inquiry procedures. It is useful to remember that many of the rights included in the ICESCR also fall within the sphere of competence and operation of several different specialized bodies and programmes in the United Nations system, including the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), UN-Habitat, UNAIDS, and the United Nations Development Programme (UNDP), and the work they do can therefore be of benefit in ensuring those rights are realized.

Transmission of the Committee's views or recommendations concerning communications and inquiries can be important for cases or situations in which it is evident that the State concerned was unsuccessful in its efforts to obtain resources from international assistance and cooperation.

The solution proposed provides a good compromise between the right of an individual, who has suffered a situation that appears to be a *prima facie* violation of economic, social and cultural rights, to submit a communication to an international body reporting its existence, and the need to alert the international community to cases in which the State's ability to gradually roll out those rights is limited because of a lack of resources. Both the communications procedure and the inquiry procedure thus become means

case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food" (para. 17, emphasis added). This argument, though in this case referring to the right to food, is applicable to all the rights contained in the ICESCR, provided it is based on an interpretation of the general obligations established in Article 2.1 of the Covenant.

by which the Committee is able to comply with Articles 22 and 23 of the ICESCR. The proposed Article in part takes up the language used in Article 45 of the *Convention on the Rights of the Child*.

Similarly, paragraph 2 allows the Committee, with the consent of the State concerned, to bring the attention of the same bodies to matters arising from communications that it considers to be related to their respective fields of competence. The information referred to them in this way can make them aware or enhance their knowledge of situations that may require international assistance or cooperation and may contribute to the realization of the economic, social and cultural rights contained in the ICESCR.

In both cases, the linking of the communications procedure, as a procedure that is capable of detecting obstacles and difficulties that prevent States from fully implementing ICESCR rights, to the work of technical bodies and programmes with an assistance, cooperation and promotion mandate, allows the work of the different United Nations bodies and organizations to be coordinated. It also means that there is a specific body ensuring that the work being done by different actors within the United Nations system to realize economic, social and cultural rights is consistent and mutually reinforcing. Concern that this should be so was already reflected in Article 38 of the *Convention on the Rights of Persons with Disabilities*.

Corresponding provisions and references

ICESCR, Articles 2.1, 11, 15, 22 and 23; *Convention on the Rights of the Child*, Article 45; *Convention on the Rights of Persons with Disabilities*, Articles 32 and 38.

b) The trust fund

Paragraph 3 provides for the establishment of a trust fund, thereby responding to the concern of some African States who were keen that the OP-ICESCR should reflect the importance of international assistance and cooperation as a means of achieving full realization of the rights enshrined in the ICESCR. The trust fund is specifically aimed at cases in which, as a result of the communications or inquiry procedures, the need has arisen

to provide expert and technical assistance to States parties so that the exercise of the rights set forth in the ICESCR can be promoted. The intention, in so doing, is to help build national capacities in the area of economic, social and cultural rights.

This provision of the OP-ICESCR is based on the trust fund established in the *Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (Article 26). The procedure for setting up the fund, contributions to which are voluntary, and its rules of administration, follow the United Nations' practices and rules governing the operation of similar such funds.

The inclusion of a clause referring to a trust fund caused controversy at the Working Group sessions. Some developed countries were opposed to the call from the African group, arguing that such a fund might become a kind of award for States parties who had been found responsible for violating economic, social and cultural rights in the context of a communication brought before the Committee. Defining the purpose of the fund also provoked debate. Some proposals called for the fund to be used to help implement the Committee's recommendations while other States wanted it to be used to promote the OP-ICESCR. Objections to setting up such a fund were also raised on the grounds that it might overlap with other existing funds as well as because of the operating costs that would be required.

In the course of the discussion, it became evident that the practical relevance of the fund would depend on the voluntary contributions it would receive. In the end, a compromise was reached in which the purpose of the fund was broadly defined and paragraph 4 added, the latter stating that the provisions of the other three paragraphs of the Article should not be understood as exempting States parties from fulfilling their obligations under the ICESCR. The intention underlying this addition is to stress that, over and above the existence of any legal obligations of international cooperation and assistance, States parties still retain primary responsibility for meeting the obligations that stem from the economic, social and cultural rights protected in the ICESCR.

Corresponding provisions and references

Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 26.

16. Commentary on Article 15, “Annual report”

The Committee shall include in its annual report a summary of its activities under the present Protocol.

Like most other international instruments that have communications and/or inquiry procedures, the Committee has to report on its activities under the OP-ICESCR in its annual report. It is a standard safeguard for ensuring that the Committee’s activities are transparent and is in no way controversial. Public disclosure of the communications examined and the inquiries conducted makes it possible for the types of cases and situations addressed and their outcome to be known. Nevertheless, it should be noted that, in the case of the inquiry procedure, Article 11.7 of the OP-ICESCR allows the Committee some discretion when publishing the findings of such procedures in its annual report.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 6; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 12; International Convention on the Elimination of All Forms of Racial Discrimination, Article 14; Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 24; Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 16.3; International Convention for the Protection of All Persons from Enforced Disappearance, Article 36.

17. Commentary on Article 16, “Dissemination and information”

Each State Party undertakes to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

Article 16 obliges States to disseminate and provide information about the ICESCR and the OP-ICESCR, especially the views and recommendations of the Committee. The issue caused no controversy in the Working Group. It is an important safeguard for allowing the widespread dissemination of both the ICESCR itself and the protection procedures established under its Protocol. It also seeks to make it easier for civil society organizations to monitor States’ compliance with the Committee’s recommendations. The wording is based on that used in the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 13 of which already provided for such an obligation.

The need for information to be disseminated “in accessible formats” is also added, in line with Article 17 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*,⁹⁴ though the latter only refers to disseminating the protocol itself in such formats and does not mention the views and recommendations of the respective committee. The innovation is appropriate and should be welcomed.

Corresponding provisions and references

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 13; *Optional Protocol to the Conven-*

94 See also Article 49 of the *Convention on the Rights of Persons with Disabilities*.

tion on the Rights of Persons with Disabilities, Article 17; Convention on the Rights of Persons with Disabilities, Article 49.

18. Commentary on Article 17, “Signature, ratification and accession”

1. The present Protocol is open for signature by any State that has signed, ratified or acceded to the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

This is a standard provision usually found in all treaty protocols. Thus, in order to ratify or accede to the OP-ICESCR, the State in question is required to be a party to the ICESCR itself. The mechanisms for ratification and accession follow the standard procedure in such matters, namely the instrument must be deposited with the United Nations Secretary General. Paragraph 2 should be read together with Articles 18 to 21 of the OP-ICESCR since they regulate the duties of the United Nations Secretary General as the depositary of the OP-ICESCR. It should be noted that, as far as the duties of the depositary of a treaty are concerned, the provisions of the OP-ICESCR should be interpreted and supplemented with the relevant provisions of the *Vienna Convention on the Law of Treaties*.⁹⁵

95 Articles 76 to 80 of the *Vienna Convention on the Law of Treaties*.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 8; *International Convention on the Elimination of All Forms of Racial Discrimination*, Articles 17 and 18; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Articles 25 and 26; *Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 27; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 15; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 86; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Articles 9, 10 and 11; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 38; *Vienna Convention on the Law of Treaties*, Articles 76 to 80.

19. Commentary on Article 18, “Entry into force”

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.

Like the previous Article, this is a standard treaty provision. Its purpose is to clearly establish the moment from which a State is legally bound by the treaty it has ratified or to which it has acceded. During the Working Group sessions, there was debate about the number of ratifications or accessions needed for the OP-ICESCR to enter into force, since there is no standard rule in other similar such instruments. The only criterion that has

emerged from United Nations practice is that, in the case of treaties that establish a body of experts, the number of ratifications should be at least equal to the number of experts who make up the treaty body. Nevertheless, this criterion was not applied to the OP-ICESCR since the ESCR Committee had already been established when negotiation of the instrument began. The proposal that the number of ratifications or accessions be ten did not cause controversy and was accepted without much discussion.

The OP-ICESCR will enter into force three months after the tenth instrument of ratification or accession has been deposited with the United Nations Secretary General. For new State parties thereafter, its entry into force will take effect three months after the respective instrument of ratification or accession has been deposited.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 9; International Convention on the Elimination of All Forms of Racial Discrimination, Article 19; Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 27; Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 28; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 87; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 16; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 13; International Convention for the Protection of All Persons from Enforced Disappearance, Article 39.

20. Commentary on Article 19, “Amendments”

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of this Article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

These are standard provisions of public international law usually found in most human rights treaties. Article 19 reflects the provisions of the *Vienna Convention on the Law of Treaties*.⁹⁶ In the past, such provisions have been used to make amendments to the *International Convention on the Elimination of All Forms of Racial Discrimination*⁹⁷ and the *Convention*

⁹⁶ Articles 39, 40 and 41 of the *Vienna Convention on the Law of Treaties*.

⁹⁷ In 1992, Article 8 of the Convention was amended, though the amendment has still not entered into force.

against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment,⁹⁸ in particular to ensure that their respective Committees were funded from the ordinary United Nations budget. The *Convention on the Elimination of All Forms of Discrimination against Women* has also been amended.⁹⁹ As a result of using the amendments procedure, the number of experts on the Committee on the Rights of the Child was increased from 10 to 18.¹⁰⁰ Thus, although making an amendment may be a long drawn-out process, it allows procedural changes to be introduced to strengthen the financial and operational capacity of treaty bodies.

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 11; International Convention on the Elimination of All Forms of Racial Discrimination, Article 22; Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 29; Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Article 34; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 90; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 18; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 15; International Convention for the Protection of All Persons from Enforced Disappearance, Article 44; Vienna Convention on the Law of Treaties, Articles 30, 40 and 41.

98 In 1992, Articles 17 (7) and 18 (5) of the Convention were amended, though the amendments have still not entered into force.

99 In 1995, paragraph 1 of Article 20 of the Convention was amended, though the amendment has still not entered into force.

100 In 1995, Article 43 (2) of the *Convention on the Rights of the Child* was amended and in 2002 the amendment entered into force.

21. Commentary on Article 20, “Denunciation”

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Articles 2 and 10 or to any procedure initiated under Article 11 before the effective date of denunciation.

These are standard provisions of human rights treaties. It is worth noting that this type of situation has occurred within the universal system. Indeed, Jamaica denounced the *Optional Protocol to the International Covenant on Civil and Political Rights* on 23 October 1997, the denunciation taking effect from 23 January 1998. Communications that had been submitted before the denunciation entered into effect were still examined by the Human Rights Committee. Up until 2004, the Committee continued to adopt views on communications submitted prior to 23 January 1998.¹⁰¹ Lastly, it is worth remembering that, according to the *Vienna Convention on the Law of Treaties*, the “denunciation of a treaty... shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.”¹⁰²

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 12; *International Convention on the Elimination of All Forms*

¹⁰¹ See, for example, Views of 16 March 2004, *Dennis Lobban v. Jamaica*, Communication N° 797/1998.

¹⁰² Article 43 of the *Vienna Convention on the Law of Treaties*.

of *Racial Discrimination*, Article 21; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 31; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 89; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 19; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 16; *Vienna Convention on the Law of Treaties*, Article 43.

22. Commentary on Article 21, “Notification by the Secretary General”

The Secretary-General of the United Nations shall notify all States referred to in Article 26, paragraph 1 of the Covenant of the following particulars:

- a) Signatures, ratifications and accessions under the present Protocol;
- b) The date of entry into force of the present Protocol and of any amendment under Article 19;
- c) Any denunciation under Article 20.

This standard clause from public international law explicitly states some of the duties incumbent on the depositary of the international instrument, as laid down in Article 77 of the *Vienna Convention on the Law of Treaties*. The wording may vary from one instrument to another. The OP-ICESCR follows the wording used in Article 20 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. It should be noted that this duty of notification incumbent on the United Nations Secretary General refers to all States mentioned in paragraph 1 of Article 26 of the ICESCR, namely: “any State Member of the United Nations or member of any of its specialized agencies, [...] any State

Party to the Statute of the International Court of Justice, and [...] any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant”.

Corresponding provisions and references

International Covenant on Economic, Social and Cultural Rights, Article 26.1; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 13; *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 24; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 32; *Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 28; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 20; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 40; *Vienna Convention on the Law of Treaties*, Article 77.

23. Commentary on Article 22, “Official languages”

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in Article 26 of the Covenant.

This is also a standard provision of all human rights treaties within the universal system. Under it the versions of the protocol in all the languages listed in paragraph 1 are deemed authentic and valid. Nevertheless, when international instruments are considered authentic in several different languages, difficulties may arise with regard to the interpretation of particular

clauses. Although Article 21 does not provide a solution in such situations, they can be settled in the light of two standards. Firstly, the guidelines on interpretation set out in the *Vienna Convention on the Law of Treaties*,¹⁰³ in particular Article 33 (4), which specifies that, as a last resort, namely when other interpretative techniques have been exhausted, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”. The second standard or, to be more precise, interpretative source is the “*travaux préparatoires*” relating to the treaty in question. In the case of the OP-ICESCR, these are contained in the reports 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*.¹⁰⁴

Corresponding provisions and references

Optional Protocol to the International Covenant on Civil and Political Rights, Article 14; *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 25; *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 33; *Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, Article 37; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 93; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Article 21; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Article 18; *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 45; *Vienna Convention on the Law of Treaties*, Articles 31, 32 and 33.

103 See Articles 31, 32 and 33.

104 See United Nations documents: E/CN.4/2004/44, E/CN.4/2005/52, E/CN.4/2006/47, A/HRC/6/WG.4/2, A/HRC/8/WG.4/2, A/HRC/8/WG.4/3 and A/HRC/6/8.

On 10 December 2008, the 60th anniversary of the adoption of the *Universal Declaration of Human Rights*, the United Nations General Assembly adopted the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. The Optional Protocol fills a gap that has existed for over 40 years, namely the absence of effective procedures for the international protection of economic, social and cultural rights. By establishing mechanisms for such international protection, the Optional Protocol will contribute to a better enforcement of the rights. Understanding its provisions and the legal and procedural implications of the Optional Protocol is of utmost importance. To meet this need, the Inter-American Institute for Human Rights and the International Commission of Jurists came together to publish this *Commentary*, which explains the content of the Protocol clause by clause and its drafting history.

