

# ARTICLE: Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?

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## LexisNexis Summary

... At its first meeting, from February 23 to March 5, 2004, the Working Group debated the feasibility of elaborating an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) that would provide for the adjudication of individual and group complaints against states under that Covenant. ... Ever since the adoption of the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) in 1966, proponents of economic, social, and cultural rights have complained that the ICESCR lacks oversight and implementation mechanisms equal to those provided in the ICCPR and its first Optional Protocol. ... As sketched by the Committee, the optional protocol would establish a formal mechanism for the adjudication of individual complaints that states parties had violated their legally binding obligations in respect of any ICESCR rights. ... For example, the ILO representative explained that the Covenant articles that fell within the ILO's scope were framed "in brief general clauses, in conformity with the Governing Body's view that the ILO or other specialized agency concerned should work out in detail those economic and social rights which fell within its competence and apply to them the precise and detailed provisions necessary for their effective implementation." ... During its debate in 1966, states adopted both a revised procedure whereby the Human Rights Committee would review interstate complaints under the ICCPR, and a new proposal for an optional protocol establishing an individual right to petition. ...

## Text

[\*462] Should all internationally recognized human rights--economic, social, and cultural rights, as well as civil and political rights--be subject to the same individual-complaints procedures? This issue is now before a newly convened working group of the UN Commission on Human Rights.<sup>1</sup> At its first meeting, from February 23 to March 5, 2004, the Working Group debated the feasibility of elaborating an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) that would provide for the adjudication of individual and group complaints against states under that Covenant.<sup>2</sup> Participating states were in sharp disagreement over the viabil-

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<sup>1</sup> The decision of the UN Commission on Human Rights (CHR) to establish the Working Group is recorded at para. 9(f) of CHR Res. 2002/24 (Apr. 22). The subsequent ratification by the Economic and Social Council (ECOSOC) can be found in ECOSOC Dec. 2002/254 (July 25). Many of the recent Commission documents relied on or cited in this article are available at the Web site of the Office of the High Commissioner for Human Rights, <<http://www.unhcr.ch>>. Recent ECOSOC documents are available at its Web site, <<http://www.un.org/esa/coordination/ecosoc/>>.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 UNTS 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. The proposal under discussion is based largely on the first Optional Protocol to the International Covenant on Civil and Political Rights [hereinafter ICCPR], Dec. 16, 1966, 999 UNTS 302 & 171, respectively. See *infra* notes 31-48 and accompanying text.

ity of the proposal, however, and the session ended in disarray.<sup>3</sup> Since the Commission has recommended renewal of the Working Group's mandate for two years, the issue remains open.<sup>4</sup>

The demand for an individual-complaints mechanism for economic, social, and cultural rights is hardly new.<sup>5</sup> Ever since the adoption of the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) in 1966, proponents of economic, social, and cultural rights have complained that the ICESCR lacks oversight and implementation mechanisms equal to those provided in the ICCPR and its first Optional Protocol.<sup>6</sup> The Committee on Economic, [\*463] Social and Cultural Rights (Committee)<sup>7</sup> began studying the question of an optional protocol in 1990<sup>8</sup> and submitted a draft proposal for the Commission's consideration in 1996.<sup>9</sup> The Commission itself did not take up the proposal until 2001, when it held a workshop on the justiciability of economic, social, and cultural rights and appointed an Independent Expert to examine the question of a draft optional protocol.<sup>10</sup> Notwithstanding the Independent Expert's admonition to defer the undertaking, the Commission and the Economic and Social Council (ECOSOC) proceeded in 2002 to establish the open-ended Working Group "with a view to considering options regarding the elaboration of an optional protocol."<sup>11</sup>

Proponents of a complaints mechanism have long argued that the absence of strong enforcement mechanisms in the ICESCR has marginalized economic, social, and cultural rights and stymied their full realization. Some point to the putative Cold War origins of the Covenants as an explanation for this disparate treatment.<sup>12</sup> Many assert that if, as current UN doctrine proclaims, all human rights are, in fact, "universal, indivisible, interdependent and interrelated,"<sup>13</sup> they must all now be accorded equivalent enforcement mechanisms. The heart of this argument, however, lies in the contention that state compliance with economic, social, and cultural rights must be "justiciable"--subject to the pos-

<sup>3</sup> Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2004/44 [hereinafter Working Group Report].

<sup>4</sup> CHR Res. 2004/29 (Apr. 19). See UN Doc. E/CN.4/2004/L.11/Add.4, at 3, for the resolution and UN Doc. E/CN.4/2004/L.10/Add.4, paras. 53-72, for the various amendments and votes thereon. Those CHR resolutions and decisions are also published in the Report of the Commission on Human Rights on Its Sixtieth Session, UN ESCOR 2004, Supp. No. 4, UN Doc. E/2004/23. ECOSOC will review the decision in July.

<sup>5</sup> See generally THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Fons Coomans & Fried van Hoof eds., 1995) (SIM Special Study No. 18, Netherlands Institute of Human Rights); Manfred Nowak, *The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, REV. INT'L COMM'N JURISTS, Dec. 1995, at 153; Katarina Tomasevski, *Justiciability of Economic, Social and Cultural Rights*, REV. INT'L COMM'N JURISTS, Dec. 1995, at 203. We recognize that current UN usage is to refer to individual "communications" rather than "complaints," but we find the latter term a more accurate description.

<sup>6</sup> See, e.g., Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332 (1987); Philip Alston, *No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant*, in THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS: ESSAYS IN HONOUR OF TORHEL OPSAHL 79 (Asbjorn Eide & Jan Helgesen eds., 1991) [hereinafter *No Right to Complain*].

<sup>7</sup> The Committee on Economic, Social and Cultural Rights (ESCR Committee), while functioning as a treaty body, was created by ECOSOC in 1985 rather than by the ICESCR itself. ECOSOC Res. 1985/17 (May 28).

<sup>8</sup> ESCR Committee, Report on the Fifth Session, para. 285, UN Doc. E/1991/23. At its sixth (1991) session, the ESCR Committee supported the drafting of an optional protocol "since that would enhance the practical implementation of the Covenant as well as the dialogue with States parties and would make it possible to focus the attention of the public opinion to a greater extent on economic, social and cultural rights." ESCR Committee, Report on the Sixth Session, para. 362, UN Doc. E/1992/23.

<sup>9</sup> The proposal is found in UN Doc. E/CN.4/1997/105, annex (1996) [hereinafter ESCR Committee proposal].

<sup>10</sup> For the report on the workshop, see UN Doc. E/CN.4/2001/62/Add.2 [hereinafter Report on Workshop]. The Commission and ECOSOC decisions establishing the Independent Expert are contained in CHR Res. 2001/30 (Apr. 20) and ECOSOC Dec. 2001/220 (June 4), respectively. The reports of the Independent Expert are contained in UN Docs. E/CN.4/2002/57 [hereinafter Independent Expert 2002 Report] and E/CN.4/2003/53 & Corrs. 1-2 [hereinafter Independent Expert 2003 Report].

<sup>11</sup> CHR Res. 2002/24, *supra* note 1, para. 9(f); ECOSOC Dec. 2002/254, *supra* note 1, para. (b).

<sup>12</sup> See, e.g., Nowak, *supra* note 5; KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS 16-18 (1999).

<sup>13</sup> Vienna Declaration and Programme of Action, pt. I, para. 5, UN Doc. A/CONF.157/23 (1993), 32 ILM 1661 (1993) (adopted at the 1993 World Conference on Human Rights) [hereinafter Vienna Declaration].

sibility of formal third-party adjudication, with remedies for findings of noncompliance.<sup>14</sup>

Much of the debate centers on the textual differences between the two Covenants and, in particular, on the meaning and implications of Article 2(1) of the ICESCR, which provides:

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.<sup>15</sup>

The broader theoretical contours of the discussion are familiar to every student of international human rights. In light of Article 2(1), can it cogently be argued that the ICESCR articulates real rights, or does it merely set forth hortatory goals, programmatic objectives, or utopian ideals? Is it "soft law"? How can rights (or obligations) that depend on the availability of scarce or unpredictable resources in fact be rights (or obligations) in any meaningful sense? How does one calculate the "maximum extent of available resources," and what does "progressive realization" mean? Can economic, social, and cultural rights ever be fully achieved? How can they best be "enforced"?

It is often difficult to discern the real-world relevance of this discussion. The immediate and consequential challenge for all proponents of economic, social, and cultural rights is how to improve the lives of the vast majority of people on this planet, who suffer daily from ruinous privations. According to the UN Development Programme, half the human race--3 billion people--live on less than two dollars a day, and 20 percent of the world's population--more than 1.2 billion people--live on less than one dollar per day.<sup>18</sup> Many go without adequate food, water, clothing, shelter, or health care. For all human rights advocates and activists, the critically important question must be whether (and how) economic, social, and cultural rights can be given meaningful content and application in individual circumstances.<sup>19</sup>

The debate over the need for an individual-complaints mechanism for economic, social, and cultural rights has not yet seemed to contribute to the resolution of this fundamental problem. The current situation results in no small part, we believe, from the fact that such discussions typically focus on the abstract "nature, status, and characteristics" of economic, social, and cultural rights. The issue that needs to be confronted, instead, is that these rights present genuinely different and, in many respects, far more difficult challenges than do civil and political rights. However arduous it may be to determine in practice when certain rights--for example, freedom of expression, or freedom of thought, conscience, and religion--are sufficiently protected, it is a much more complex undertaking to ascertain what constitutes an adequate standard of living, or whether a state fully respects and implements its population's right to education or right to work. Vexing questions of content, criteria, and measurement lie at the heart of the debate over "justiciability," yet are seldom raised or addressed with any degree of precision.

It has never been satisfactorily demonstrated, we submit, that a binding individual-complaints mechanism will be practical, effective, or worth the cost and effort. If it is to carry out its responsibilities fairly, the Working Group (and the states represented thereon) must grapple with a series of underlying substantive issues, including:

<sup>14</sup> The precise meaning of "justiciability" in this context is open to debate, and the term is used ambiguously by those on both sides of the issue. See *infra* notes 81-91 and accompanying text.

<sup>15</sup> See generally Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 156 (1987); E. W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETHERLANDS Y.B. INT'L L. 69 (1978); ESCR Committee, General Comment No. 3, *The Nature of States Parties Obligations*, UN Doc. E/1991/23, Annex III (1990). The General Comments are compiled (with those of other treaty bodies) in UN Doc. HRI/GEN/1/Rev.7 (2004), available at <<http://www.unhchr.ch/tbs/doc.nsf>>.

<sup>18</sup> UN Development Programme, *Human Development Report 2002*, at 17-18, at <<http://hdr.undp.org>>.

<sup>19</sup> The content of economic, social, and cultural rights is generally said to comprise the following: an adequate standard of living, including food, clothing, housing, health, and medical care; education; work; fair conditions of employment; the opportunity to form and join trade unions; social security; and participation in cultural life. See generally MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 7-8 (1995); *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK*, *supra* note 17.

. whether the treaty obligations assumed by states parties under the ICESCR can in fact be measured, quantified, and applied in a meaningful way

. whether such standards can be the same for all countries (regardless of their levels of development) and, if not, how the distinctions will be made

. how states parties would be able to demonstrate their levels of achievement (or failure) in response to individual complaints

[\*465] . whether and how a legally binding adjudicative regime would improve states parties' implementation of economic, social, and cultural rights

. whether and how a complaints mechanism under the ICESCR would add meaningfully to the mechanisms and procedures already available in other international organizations

This article aims to contribute to the task from several perspectives. First, we review the proposal and the views that have been presented by the Independent Expert and in the Working Group. We next examine the relevant negotiating background of the Universal Declaration of Human Rights<sup>20</sup> (UDHR) and the two Covenants in order to assess the validity of some of the arguments put forward in support of a new complaints mechanism. We survey some of the Committee's recent interpretive pronouncements, including on key aspects of the right to an adequate standard of living set forth in ICESCR Article 11 (specifically the rights to housing, food, and water) and the right to health under Article 12, in order to discern the likely leanings of the Committee under a complaints mechanism. We also examine the likely impact of the proposal on the work of various specialized agencies and identify some of the practical difficulties facing the operation of such a mechanism.

Our investigation leads us to question the proposal for an optional protocol on several levels. While shopworn opposition to economic, social, and cultural rights on "ideological" grounds should be abandoned,<sup>21</sup> the argument that a new international adjudicative mechanism is necessary in order to validate those rights proceeds from equally dubious contentions. Formalistic demands that economic, social, and cultural rights must be treated the same as civil and political rights, and must therefore be "justiciable" in the same sense, are equally flawed. That case has not been made.<sup>22</sup>

From the outset, and for good reason, economic, social, and cultural rights, unlike civil and political rights, have been defined primarily as aspirational goals to be achieved progressively. The drafters of the UDHR and the two Covenants well understood the difficulties and obstacles relating to justiciability. The decision to put the two sets of rights in different treaties with different supervisory mechanisms was well considered, and the un-

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<sup>20</sup> Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948) [hereinafter UDHR].

<sup>21</sup> Jack Donnelly notes, for example, that describing the Western conception of human rights as focused exclusively on civil and political rights is a "prominent myth in the human rights literature . . . . Quite the contrary, during the Cold War the West was the only region that in practice took seriously the often-repeated assertion of the indivisibility of all internationally recognized human rights." JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 64-65 (2d ed. 2003). While the present article does not address the question of U.S. ratification (the United States is a signatory, but not a party, to the Covenant), we tend to agree with much of the analysis set out in Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, [84 AJIL 365, 367-68 \(1990\)](#), particularly when he notes that the "nature" of Covenant obligations is "considerably more substantial and demanding than has been assumed in most of the ratification debate in the United States" and that the obstacles to U.S. ratification are "much more formidable" than they were for other human rights treaties. We might add that since the time that Alston wrote that article, the trend in ESCR Committee interpretation, through General Comments and Concluding Observations discussed *infra* section III, has made the task even more difficult. See also the statement by ESCR Committee member Abdessatar Grissa, who, in opposing the protocol, observed that it was "unrealistic since certain countries, even among the most prosperous, could not implement all the provisions of the Covenant in full" and that "the United States had shown greater realism in not [ratifying] the Covenant, knowing that it could not implement it." UN Doc. E/C.12/1996/SR.48, para. 8 (1997).

<sup>22</sup> Regrettably, as discussed *infra* notes 92-94 and accompanying text, much of the argumentation in support of an optional protocol merely contends there is *no reason not to* establish a complaints mechanism, rather than demonstrating good reasons to do so --for example, by establishing what tangible benefits would flow therefrom.

derlying reasons for those distinctions and decisions appear to remain valid today. Their different treatment in no way disqualified economic, social, and cultural rights as rights or relegated them to a lower hierarchical rung. It did reflect an assessment of the practical difficulties that states would face in implementing generalized norms requiring substantial time and resources.

We do not argue against taking a fresh look at these decisions or the reasoning behind them. Indeed, the major motivation for this article was our sense that such an undertaking was necessary. A strong case can be made that further clarification and elucidation of the rights and [\*466] obligations set forth in the ICESCR are vital to promoting greater respect and to achieving more effective implementation of that Covenant. That type of analysis--which has yet to be done--is nevertheless an essential first step before any of those rights can be said to be justiciable in any meaningful sense.

Nothing persuades us that the aspirational goals set forth in the ICESCR can be achieved--or can be achieved more effectively--only by means of an international adjudicative mechanism for individual complaints. In point of fact, the "articulation" function is already being performed by the Committee in its review of, and commentary on, implementation reports by states parties to the Covenant, as well as by the relevant specialized agencies of the United Nations. We see no convincing evidence that a legally binding adjudicative mechanism would lead to greater compliance by states with their ICESCR obligations.<sup>23</sup>

There is also no reason to believe that the Committee is the necessary or logical body to perform such an adjudicative function, even if one could be justified. To the contrary, as we discuss below, there are several apparent reasons why the Committee should *not* be tasked with that responsibility, not least of which is that the additional workload would potentially undermine the Committee's ability to perform its existing functions. Moreover, in the extensive commentaries that the Committee has already rendered on Covenant rights, we find reasons to be cautious about expanding the Committee's purview or giving it authority to issue legally binding judgments.

More fundamentally, adopting the proposed individual-complaints procedure would improvidently "legalize" the content and provision of economic, social, and cultural rights.<sup>24</sup> However satisfying it might be to assert that there can be no "rights" in the absence of a formal adjudicative process and legally sanctioned remedies for identified violations, there are other, more promising pathways to realizing the promises and visions embodied in the UDHR and ICESCR. All rights or rights-related entitlements do not need to be subject to identical or equivalent processes of implementation and enforcement.<sup>25</sup> The call for formal, binding, case-by-case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial or quasi-judicial processes intrinsically produce better, more insightful policy choices than, for example, their legislative counterparts.<sup>26</sup>

<sup>23</sup> Cf. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* [111 YALE L.J. 1935, 2015-19 \(2002\)](#).

<sup>24</sup> Cf. Bangalore Declaration and Plan of Action (1995), which calls throughout for more active involvement of lawyers and judges in the pursuit of economic, social, and cultural rights. REV. INT'L COMM'N JURISTS, Dec. 1995, at 219, 223. On the subject of "overlegalization," see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, [102 COLUM. L. REV. 1832 \(2002\)](#). We acknowledge, of course, that some economic, social, and cultural rights are more readily capable of meaningful adjudication than others. See *infra* note 330 and accompanying text.

<sup>25</sup> To argue, as we do, that rights need not have remedies in order to be obligatory is, admittedly, an anti-Kelsenian approach. That is different, however, from asserting that the Covenant is not binding on states parties; clearly, it is. By comparison, the UDHR was intended to be a broad declaration of inspirational principles, not "a narrow set of legally binding provisions 'confined to a 'document of lawyers.'" PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 234-36 (1998); MARY ANN GLENDON, *A WORLD MADE NEW* 235-41 (2001); cf. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3, 227-30 (1999), where the Nobel laureate argues that development must be viewed in terms of freedom and the removal of major obstacles to it; in his view, "It is best to see human rights as a set of ethical claims, which must not be identified with legislated legal rights . . . . We have to judge the plausibility of human rights as a system of ethical reasoning as the basis of political demands."

<sup>26</sup> Some do fear, of course, that empowering the ESCR Committee to adjudicate the rights of individuals and the concomitant obligations of states is a significant step toward establishing a judicially controlled command economy, and that it is a fundamentally undemocratic approach to issues of social and economic development. A less stark assessment would assert that some issues ought not be adjudicated even if they can be. Cf. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); *The Politics of Human Rights: Does It Help to Think of Pov-*

[\*467] In our view, international adjudication offers a dubious route toward economic and social progress. In any event, it is certainly not the only or even the best means of holding governments "accountable" for their human rights obligations. One need not believe that domestic courts are always or per se "ill equipped to run a railroad"--that is, disqualified from deciding issues of the entitlement to, or adequacy of, economic, social, and cultural rights--in order to take the position that in many, if not most, countries, legitimate political processes offer a more likely pathway than international litigation to achieving the goals of the Covenant.<sup>27</sup> At the international level, efforts to articulate a single approach to the promotion and achievement of economic, social, and cultural rights are bound to fail, given the vastly differing circumstances in which states parties find themselves. Governments must be allowed a substantial measure of discretion in dealing with their disparate domestic situations. We fear that instead of advancing respect for, and implementation of, economic, social, and cultural rights in states parties that to date have given them short shrift, there is a significant risk that trying to "enforce" such rights through binding international adjudication will have the opposite result, causing states to de-emphasize them and further undermining their stature and acceptability.

## I. THE PROPOSAL AND ITS JUSTIFICATIONS

Virtually from its very first meetings in 1987, the Committee on Economic, Social and Cultural Rights has pro- pounded the need for an individual-complaints mechanism as an essential, even irreducible, means of giving effect to the Covenant.<sup>28</sup> In 1992, the Committee presented a paper to the Second World Conference on Human Rights in Vienna, recommending adoption of a noncompulsory complaints procedure open to individuals or groups, and possibly including an optional state-to-state procedure.<sup>29</sup> In its final declaration, the World Conference encouraged further study of the proposal but stopped short of endorsing the complaints procedure itself.<sup>30</sup>

### *The Committee's Proposal*

In 1996, the Committee prepared and sent to the Commission an "analytical report" proposing a draft text for

*erty or Inadequate Health Care as Violations of Basic Rights?* ECONOMIST, Aug. 18, 2001, at 9.

If the intention is to move from stating rights to enforcing laws, they will be constitutionally dangerous. Vague laws would invite, and indeed require, courts rather than governments to settle arguments about social justice. Advocates may not mind this: the courts, they imagine, will give them an extra lever to use in pushing policy in their desired direction. But they must recognize that in practice this amounts to subordinating the popular will to the rule, not of law, but of judges.

*Id.* at 9. Others argue that the judiciary is well suited to enforcing individuals' rights to "a fair share" of community resources, and that "the available resources include not just the wealth produced within a given state but that of the global community as a whole." Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*,

<sup>27</sup> In the field of international law, recent academic commentary suggests that cultivating voluntary obedience, rather than compelling compliance, is more effective at the task of "norm internalization," which is the functional bedrock of a "horizontal" system. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *YALE L.J.* 2599 (1997); Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 *IND. L.J.* 1397 (1999); Hathaway, *supra* note 23.

<sup>28</sup> A majority of ESCR Committee members (supported by many scholars) viewed a complaints mechanism as the sine qua non of an effective system for the protection and promotion of economic, social, and cultural rights. See generally *No Right to Complain*, *supra* note 6. From this perspective, ICESCR rights lack authoritative definition, and absent an internationally agreed adjudicative mechanism, there can be no body of interpretative "jurisprudence" to guide and motivate states. See, e.g., Tomasevksi, *supra* note 5, at 203-04. Virginia Leary made this argument in the context of the right to health as follows: "Procedures which permit legal complaints to be raised by aggrieved groups and individuals have been demonstrated to be the most effective means of protecting civil and political rights. . . . The concept of a 'right' necessarily carries with it the implication of the opportunity to demand that the right be protected." Virginia Leary, *Justiciability and Beyond: Complaint Procedures and the Right to Health*, *REV. INT'L COMM'N JURISTS*, Dec. 1995, at 105, 106.

<sup>29</sup> UN Doc. A/CONF.157/PC/62/Add.5, Annex II (1993); ESCR Committee, Report on the Seventh Session, Annexes III, IV, UN Doc. E/1993/22. The ESCR Committee's report was prepared by Philip Alston, who served first as rapporteur and then as chair of the Committee from 1991 to 1999, and had previously done substantial work in support of an optional protocol. See *id.*, paras. 233-37.

<sup>30</sup> Vienna Declaration, *supra* note 13, pt. II, para. 75.

the optional protocol.<sup>31</sup> As sketched by the Committee, the optional [\*468] protocol would establish a formal mechanism for the adjudication of individual complaints that states parties had violated their legally binding obligations in respect of any ICESCR rights. Decisions would be binding on the states concerned and would be considered authoritative legal interpretations of the ICESCR, as is the case with the ICCPR.<sup>32</sup> The proposed preamble justifies the need for such a mechanism by citing the importance of "social justice and development" and stating that "the possibility for the subjects of economic, social and cultural rights to submit complaints of alleged violations of those rights is a necessary means of recourse to guarantee the full enjoyment of the rights."<sup>33</sup>

The Committee's proposal understandably contemplates that the Committee itself would adjudicate those complaints. Because that is, in fact, an open question, and because we express serious misgivings below about the Committee's capacity to perform that function, we will hereafter refer to the decision makers by using the more neutral term "adjudicators."<sup>34</sup>

Under the Committee's expansive approach to *locus standi*, the "right to petition" would be broadly available to any individuals or groups who themselves claim to be victims of a violation or who act on behalf of alleged victims with their knowledge and agreement.<sup>35</sup> The procedure would encompass alleged violations of any of the rights broadly "recognized" in the ICESCR.<sup>36</sup> A state party to the protocol would be obligated to recognize the competence of the adjudicators to examine complaints from "any individuals or groups subject to its jurisdiction," would be prohibited from interfering with the "effective exercise" of the right to petition, and would be obligated "to prevent any persecution or sanctioning" of persons exercising that right.<sup>37</sup>

General criteria of receivability and admissibility are articulated in the Committee's proposal. The adjudicators would be required to exclude anonymous complaints and empowered to decline any complaint if all available domestic remedies had not been exhausted or if a particular complaint raised substantially the same is-

<sup>31</sup> ESCR Committee proposal, *supra* note 9. The report drew not only on the ICCPR's first Optional Protocol, but also on the communication procedures available under other UN human rights treaties--that is, the Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, Article 8, 660 UNTS 195, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, Articles 17 and 18, 1465 UNTS 85, and the (then draft) optional protocol to the Convention on the Elimination of Discrimination Against Women, March 12, 1999, 38 ILM 763 (1999) [hereinafter CEDAW Optional Protocol]. For an overview of the individual-communications mechanisms of these treaties, see generally ANNE BAYEFISKY, *HOW TO COMPLAIN TO THE UN HUMAN RIGHTS TREATY SYSTEM* (2002), and HURST HANNUM, *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (3d ed. 1999).

<sup>32</sup> See Working Group Report, *supra* note 3, para. 42 (statement of Human Rights Committee member Martin Scheinin). It remains unclear whether, by ratifying the proposed optional protocol, states would assume an independent legal obligation to comply with the decisions of the adjudicators, or whether those decisions would be considered only "authoritative interpretations" of the binding obligations that states had already assumed under the Covenant itself. During the Working Group debate, some delegations were of the view "that the optional protocol would be a quasi-judicial procedure and that the [ESCR] Committee like other treaty monitoring bodies would only make recommendations," while others "questioned the nature of the Committee's decisions on individual cases and suggested that 'quasi-judicial' recommendations by a treaty body" might "be interpreted in practice as 'judicial' decisions." *Id.*, para. 54. If the decisions are merely hortatory, akin to the Committee's recommendations adopted under the state reporting procedure, there would seem to be little point to the exercise. If, on the other hand, the decisions constitute authoritative interpretations of the legally binding obligations of states parties to the Covenant--which states party to the Protocol have agreed to respect, and for violations of which, liability attaches and remedies (including an award of compensation) may be handed down--they clearly assume a binding character of their own.

<sup>33</sup> ESCR Committee proposal, *supra* note 9, para. 16.

<sup>34</sup> Use of the term "adjudicators" also serves to emphasize that the proposal contemplates a formal, judicial process of adjudication with obligatory results. To contend, as the ESCR Committee itself has done, that the process would be "noncompulsory" and "strictly optional," see *id.*, para. 12(a), (d), UN Doc. A/CONF.157/PC/62/Add.5, Annex I, para. 18 (1993), risks serious miscomprehension.

<sup>35</sup> ESCR Committee proposal, *supra* note 9, paras. 23, 31 (Art. 2).

<sup>36</sup> *Id.*, para. 31 (setting forth Art. 2(1)). The ESCR Committee noted that "the right of 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." *Id.*, para. 25.

<sup>37</sup> *Id.*, paras. 21 (Art. 1), 31 (Art. 2).

sues of fact or law being examined under another procedure of international investigation or settlement.<sup>38</sup> A communication could be declared inadmissible "if the author, after being given a reasonable opportunity to do so, fails [\*469] to provide information which would sufficiently substantiate the allegations contained in the communication."<sup>39</sup> Adjudicators could issue interim measures in order to avoid irreparable harm before the merits of a complaint had been decided,<sup>40</sup> and they could initiate a process of "friendly settlement" of a complaint.<sup>41</sup>

Although no specific rules of procedure have been elaborated (these being left for subsequent adoption by the adjudicators),<sup>42</sup> states parties would be given six months to respond to complaints by providing their "explanations or statements and the remedy, if any, that may have been afforded" to the complainant(s).<sup>43</sup> In considering complaints, the adjudicators would not be limited to information made available to them by either the complainant(s) or the state party concerned, but could take into account supplemental "information obtained from other sources."<sup>44</sup> They would be authorized to conduct on-site visits, subject to the agreement of the relevant state party.<sup>45</sup>

In the event that the adjudicators determine a violation has occurred, they could "recommend that the State Party take specific measures to remedy that violation and to prevent its recurrence."<sup>46</sup> They would also be authorized to "invite" a state party to discuss steps that it has taken to give effect to their decision and to include such information in its periodic implementation reports to the Committee.<sup>47</sup>

No provision would be made for state-to-state complaints.<sup>48</sup>

#### *The Views of the Independent Expert*

Prior to the Working Group's recent debate, only a few states had responded to this proposal, and most voiced generalized support.<sup>49</sup> In February 2001, a review was conducted at an informal workshop of states and nongovernmental participants convened by the Office of the UN High Commissioner for Human Rights (OHCHR) and the International Commission of Jurists (ICJ).<sup>50</sup> In order to facilitate further deliberations, the Commission and ECOSOC decided in 2001 to appoint an Independent Expert, Hatem Kotrane of the University of Tunis, to examine the question of an optional protocol.<sup>51</sup>

<sup>38</sup> *Id.*, para. 33 (Art. 3(1), (3)).

<sup>39</sup> *Id.*, para. 35 (Art. 4(1)).

<sup>40</sup> *Id.*, para. 37 (Art. 5). Interim measures would seem to be unrealistic since most of the rights require institutional development and budget commitments, which take time to develop.

<sup>41</sup> *Id.*, paras. 38-41 (Art. 6(3)).

<sup>42</sup> *Id.*, para. 53 (Art. 10).

<sup>43</sup> *Id.*, para. 41 (Art. 6(2)).

<sup>44</sup> *Id.*, para. 45 (Art. 7(1)).

<sup>45</sup> *Id.*, para. 45 (Art. 7(3)). On-site visits would require substantial resources. Other treaty bodies currently have almost no funds for such mechanisms. *See infra* note 316-17.

<sup>46</sup> ESCR Committee proposal, *supra* note 9, para. 49 (Art. 8(1)).

<sup>47</sup> *Id.*, para. 51 (Art. 9(1), (2)).

<sup>48</sup> *Id.*, para. 14.

<sup>49</sup> For the initial comments of states on the proposal, see generally UN Docs. E/CN.4/1998/84 & Add.1, E/CN.4/1999/112 & Add.1, E/CN.4/2000/49, and E/CN.4/2001/62 (2000) & Add.1 (2001).

<sup>50</sup> *See* UN Doc. E/CN.4/2001/62/Add.2. The Sub-Commission also endorsed the concept of a legally binding optional protocol. UN Doc. E/CN.4/Sub.2/RES/2003/19. A subsequent roundtable was convened by the International Commission of Jurists on Nov. 30, 2001. *See* UN Doc. E/CN.4/2002/161 [hereinafter Roundtable].

<sup>51</sup> Kotrane serves as director of the Department of Private Law at the Faculty of Juridical, Political and Social Sciences at the University of Tunis. His mandate was to "examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights in the light, inter alia, of the [Committee's proposal]." CHR Res. 2001/30, *supra* note 10, para. 8(c); ECOSOC Dec. 2001/220, *supra* note 10.

Over the succeeding months, the Independent Expert reviewed the Committee's 1996 draft, as well as the results of the 2001 OHCHR-ICJ workshop, and held various consultations with member states. In February 2002, he submitted his initial report to the Commission, concluding that "it is necessary to press ahead towards the possible adoption of the draft optional protocol" but recommending *against* the immediate establishment of an open-ended working group because "the matters at issue still provoke too much doubt, uncertainty, and even outright opposition among member States."<sup>52</sup>

At the outset, the Independent Expert's initial report recognized the "misgivings" of states about the practical problems associated with establishing an adjudicative mechanism for individual economic, social, and cultural rights. He acknowledged the important differences in the undertakings of states parties to the two Covenants, noting that civil and political rights are said to be "obligations of result, obligations which are measurable by their very nature, and hence not subject to shades of meaning."<sup>53</sup> By comparison, he noted that obligations under the ICESCR generally represent "obligations of means" rather than "obligations of result."

*How, in other words, are the provisions of the Covenant to be translated into clearly defined commitments so that individual breaches of them can give rise to remedies under the communications procedure established by the draft optional protocol?*<sup>54</sup>

Setting this basic conundrum aside, the Independent Expert proceeded to focus on four practical, but fundamental, questions concerning the proposed optional protocol: (1) Which specific rights articulated in the Covenant should be encompassed by the complaints procedure? (2) What body should have the competence to receive and resolve complaints? (3) Who should be entitled to bring a complaint, and what admissibility criteria should apply to those complaints? (4) What range of remedies should be available for justified complaints?<sup>55</sup>

On the scope of application, the Independent Expert expressed serious reservations over the comprehensive or "omnibus" approach taken in the Committee's draft, fearing inter alia that it could lead to conflicts with other international bodies--in particular, the specialized agencies. He recommended that the complaints mechanism be limited to "situations revealing a species of gross, unmistakable violations of or failures to uphold any of the rights set forth in the Covenant."<sup>56</sup> He voiced particular concern that assigning this new role to the Committee itself could interfere with its primary task of considering the periodic implementation reports by states parties. Instead, he proposed establishing "a new body altogether, a sort of parallel committee whose responsibility it would be to handle the new communications and complaints procedure."<sup>57</sup> He endorsed the Committee's proposal to permit individuals, but not states, to submit complaints, and he also saw merit in "allowing groups duly empowered by alleged victims" to do so as well.<sup>58</sup> Finally, he accepted the Committee's proposal to permit a broad range of potential remedies, including the power to initiate inquiries, to facilitate amicable settlements, to issue interim measures, and to determine what actions states should take to remedy a violation.<sup>59</sup>

Notwithstanding his conclusion that the Working Group "should not be set up immediately,"<sup>60</sup> that is precisely what the Commission and ECOSOC did, with strong support from the European Union, the Group of

<sup>52</sup> Independent Expert 2002 Report, *supra* note 10, summary & para. 55.

<sup>53</sup> *Id.*, para. 16.

<sup>54</sup> *Id.*, para. 20 (emphasis added).

<sup>55</sup> *Id.*, para. 23.

<sup>56</sup> *Id.*, para. 34.

<sup>57</sup> *Id.*, para. 42.

<sup>58</sup> *Id.*, para. 47.

<sup>59</sup> *Id.*, paras. 48-49.

<sup>60</sup> *Id.*, para. 55.

Latin American and Caribbean Countries, and others, but with little evident consideration of the concerns that had been expressed in the Independent Expert's report. The Commission and ECOSOC did extend the Independent Expert's mandate [\*471] for another year, however, and requested a further report from him at its fifty-ninth session, with particular emphasis on three questions: (1) the nature and scope of states parties' obligations under the Covenant, (2) "conceptual issues on the justiciability of economic, social and cultural rights" in the light of the experience of other human rights mechanisms, and (3) "the question of the benefits and practicability of a complaint mechanism under the Covenant and the issue of complementarity between different mechanisms."<sup>61</sup>

In preparing his second report, which was submitted in January 2003, the Independent Expert again held "wide-ranging consultations" with states, interested experts, and organizations.<sup>62</sup> This time, however, his conclusions were constrained by the previous decision of ECOSOC. For example, he modified one of his key earlier recommendations, now endorsing the proposal that the Commission move ahead to establish an open-ended working group "mandated to elaborate an optional protocol."<sup>63</sup> He strongly reiterated his previous recommendation that the complaints procedure, while covering all rights set forth in the Covenant, should be limited to "situations revealing a species of gross, unmistakable violations of or failures to uphold" those rights, in order to reduce the burden on adjudicators as well as the risks of overlapping other investigative or settlement bodies.<sup>64</sup> He also referred again to the practical difficulties that could arise from asking the Committee to consider both complaints and periodic reports from states parties.<sup>65</sup>

In addressing the specific questions posed by the Commission, the Independent Expert noted that each of the obligations under the Covenant entails some measure of immediate action--for example, to eliminate all forms of discrimination in the enjoyment of those rights.<sup>66</sup> Each state party, he said, has a "minimum core obligation to ensure the satisfaction of the basic content of each of the rights contained in the Covenant."<sup>67</sup> Most importantly, he endorsed "the essentially justiciable nature of all the rights guaranteed under the Covenant," so that the remaining question is "at most, one of determining the liability of States and the conditions in which a State may be considered to have failed to fulfil one of its obligations."<sup>68</sup>

### *The Working Group Debate*

At the Working Group session earlier this year, representatives of eighty-five states debated the same three conceptual issues considered by the Independent Expert as part of his extended mandate, rather than revising the Committee's draft text or attempting to elaborate a new one.<sup>69</sup> At the close of the session, given the divergence of views, the Working Group was not able to "make specific recommendations on its course of action concerning the question of an optional protocol," as requested by the Commission.<sup>70</sup> Instead, the chairperson was forced to present her own personal recommendations to the Commission.<sup>71</sup> As noted above, [\*472] the Commission subsequently decided, in a series of contentious votes, to recommend that ECOSOC renew the term of the Working Group for two years.

<sup>61</sup> CHR Res. 2002/24, *supra* note 1, para. 9(c); ECOSOC Dec. 2002/254, *supra* note 1. The Commission and ECOSOC also requested that states, intergovernmental organizations, and nongovernmental organizations (NGOs) submit their views concerning these three questions. A similar request was made at the 2003 session. CHR Res. 2003/18, para. 14 (Apr. 22).

<sup>62</sup> Independent Expert 2003 Report, *supra* note 10, para. 5.

<sup>63</sup> *Id.*, para. 76.

<sup>64</sup> *Id.*, paras. 66-67; *see infra* text accompanying notes 334-37.

<sup>65</sup> *Id.*, para. 72.

<sup>66</sup> *Id.*, para. 16.

<sup>67</sup> *Id.*, para. 24. "A State in which many people lacked the basics--food, primary health care, housing or education--would ostensibly be failing in its obligations under the Covenant and would thus be violating an obligation of result." *Id.*

<sup>68</sup> *Id.*, para. 51.

<sup>69</sup> Working Group Report, *supra* note 3, paras. 7-13. There were thirty-seven member states and forty-eight observers.

<sup>70</sup> CHR Res. 2003/18, *supra* note 61, para. 16.

<sup>71</sup> Working Group Report, *supra* note 3, para. 4. Ambassador Catarina de Albuquerque (Portugal) served as chair.

During the debate, a number of participating delegations reiterated the main justifications for a complaints mechanism, including the need to correct the historical asymmetry between civil and political rights, on the one hand, and economic and social rights, on the other, and to reaffirm the universality, interdependence, and indivisibility of all human rights as proclaimed by the 1993 Vienna Declaration and Programme of Action.<sup>72</sup> It was argued that the separate codification of these rights in different covenants, with different structures of implementation and supervision, was either a mistake or a by-product of ideological, Cold War confrontation--or both.<sup>73</sup> Lack of a complaints mechanism, some delegations asserted, constitutes a major reason why economic, social, and cultural rights are not recognized and respected in practice; in fact, some said, "civil and political rights become solitary and meaningless without the realization of economic, social and cultural rights."<sup>74</sup> Contending that no fundamental differences exist between the two sets of rights--at least none of special relevance to the elaboration of a complaints mechanism<sup>75</sup>--they made the essentially equitable (or "me, too") argument that with the exception of the Convention on the Rights of the Child,<sup>76</sup> all the other main international human rights treaties have optional complaints procedures.<sup>77</sup>

Other delegations rejected the notion that all human rights were alike, especially when one takes into account the nature of the legal obligations stemming from the Covenants.<sup>78</sup> The different formulations set forth in Article 2(1) of the Covenants, they contended, reflect fundamental differences between the two sets of rights.<sup>79</sup> As stated by the Polish delegation,

They were made different deliberately, not just by accident. Consequently the rights protected by the Covenant on Economic, Social and Cultural Rights were also deliberately formulated in an imprecise manner. It was done so specifically to accommodate difference in levels of economic development and in cultural and legal traditions of various countries to allow them to become parties to the Covenant nevertheless.<sup>80</sup>

Perhaps most significantly, representatives disagreed sharply about the "justiciability" of economic, social, and cultural rights. Those from states whose domestic legal systems provide for some degree of adjudication of

<sup>72</sup> *Id.*, para. 70. For the similar views of commentators, see Nowak, *supra* note 5, at 164; Craig Scott, *Toward the Institutional Integration of the Core Human Rights Treaties*, in GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *supra* note 17, at 1. Many of the arguments in favor of justiciability are presented as responses to the "myths" or misconceptions of the naysayers who are said to bear responsibility for obstructing the realization of economic, social, and cultural rights over the decades, *See, e.g.*, David Matas, *Economic, Social and Cultural Rights and the Role of Lawyers: North American Perspectives*, REV. INT'L COMM'N JURISTS, Dec. 1995, at 123. For the Vienna Declaration and Programme of Action, see *supra* note 13.

<sup>73</sup> Finland, for example, asserted that proposals for a complaints mechanism for the Covenant were rejected in the 1950s because of "the international climate" but that, "with the end of the Cold War, the question of adopting an Optional Protocol to [the ICESCR] came under increased consideration by the international community." Finland, Statement (Feb. 23, 2004), at 1-2 (on file with authors). For similar views of commentators, see Roundtable, *supra* note 50, at 5-6 (summarizing comments by ESCR Committee member Eibe Riedel); ARAMBULO, *supra* note 12, at 16-20 ("the alleged difference between the nature of the two groups of human rights was not built on sound arguments"); Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights*, in GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *supra* note 17, at 39 ("the decision to create the [ICESCR] was the product of conflicting ideologies and misconceptions about the nature of human rights, rather than the necessary consequence of fundamental differences between groups of rights").

<sup>74</sup> Working Group Report, *supra* note 3, para. 18.

<sup>75</sup> *Id.*, paras. 41 (statement of ESCR Committee member Eibe Riedel), 53.

<sup>76</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3.

<sup>77</sup> Working Group Report, *supra* note 3, para. 18.

<sup>78</sup> *Id.*, para. 19.

<sup>79</sup> *Id.*, paras. 56-57.

<sup>80</sup> Poland, Statement (Feb. 23, 2004), at 1 (on file with authors). India and the United States were of the same view. India, Statement (Feb. 23, 2004), at 2; United States, Statement (Apr. 8, 2004).

such rights (or that are party to regional mechanisms that so provide) generally accepted the idea of justiciability, arguing that the binding decisions [\*473] of courts can usefully clarify the imprecise provisions of the Covenant.<sup>81</sup> Finland, for example, explained its view as follows:

In 1995, a fundamental [constitutional] reform took place in Finland . . . [whereby] economic, social, and cultural rights were made justiciable. . . . Our regional treaty. . . has an optional protocol allowing for collective complaints. . . . The standards of the European Social Charter . . . are in many ways more far reaching than those of the [ICESCR] . . . . So because we have accepted these standards at the regional level why should we not accept them at the global level?<sup>82</sup>

Other delegations, typically representing the majority of states that do not provide for domestic adjudication of economic, social, and cultural rights, argued that Covenant rights remain imprecise, unenforceable in domestic law, and unsuitable for supranational adjudication.<sup>83</sup> Some raised questions about "whether allocation of resources was a legitimate issue for review by a treaty body under an individual complaints mechanism and, if so, what criteria would be used in deciding on the appropriate allocation of resources."<sup>84</sup> Disparities in economic development were also viewed as problematic. India, for example, asserted that some European countries (and others) "may be in a position to assume legally binding and/or regional obligations" but that "only when we reach a measure of development homogeneity globally would it be meaningful to seriously embark on an international protocol cutting across all regions."<sup>85</sup>

One expert, Katarina Tomasevski (the Commission's special rapporteur on the right to education), took issue with an all-or-nothing approach to the question of justiciability. She noted that "the ICESCR would have been drafted differently had an optional protocol providing for individual complaints been envisaged." She therefore rejected "widespread suggestions that the entire ICESCR (that is all the rights listed therein, and the whole scope of the rights as listed) be deemed suitable for any type of legal enforcement that could be envisaged in an optional protocol."<sup>86</sup>

These comments highlight an underlying difficulty with the debate about a complaints mechanism: both proponents and opponents use the concept of justiciability in ambiguous ways. As indicated above, governments appear to understand the meaning of justiciability primarily by reference to what is permissible in their own domestic law. The Committee itself has expressed a closely related view, arguing that "there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justici-

<sup>81</sup> Working Group Report, *supra* note 3, paras. 58, 60.

<sup>82</sup> Finland, Statement, *supra* note 73, at 3-4 (paragraph structure omitted). See also the written submission of Cuba (not a party to the ICESCR) (noting that its "laws not only recognize economic, social and cultural rights, but also permit complaints about violations of these rights and the award of an appropriate remedy"). UN Doc. E/CN.4/2004/WG.23/2, para. 25 (2003) [hereinafter Secretary-General's Report to CHR]. This document contains summaries of written submissions made by various states prior to the Working Group session.

<sup>83</sup> Working Group Report, *supra* note 3, paras. 59, 63. Italy made a different distinction: "Obligations in relation to civil and political rights are binding in nature, while obligations in relation to economic, social and cultural rights are only declarations of intent that carry moral and political weight but do not constitute direct legal obligations for the State party." Secretary-General's Report to CHR, *supra* note 82, para. 10.

<sup>84</sup> Working Group Report, *supra* note 3, para. 57. Sweden noted that because the ICESCR contains several unclear concepts, such as the principle of "progressive realization" and the phrase "to the maximum of its available resources," clarity would be "an important prerequisite for the consideration of an individual complaint mechanism." Secretary-General's Report to CHR, *supra* note 82, para. 17.

<sup>85</sup> India, Statement, *supra* note 80, at 4.

<sup>86</sup> UN Doc. E/CN.4/2004/WG.23/CRP.4, para. 2 (written submission of Katarina Tomasevski to the Working Group). Tomasevski also advised that the "text of the ICESCR and, in particular, its previous interpretations should be . . . carefully reviewed so as to identify those features of the past decades that no longer influence the practice of the overwhelming majority of states." *Id.*, para. 7. Similarly, the general counsel for the World Bank, Francois Gianviti, concluded in a working paper for the Committee that, "while the provisions of the Covenant may represent a common ground around which members of the United Nations found agreement at a certain point in time, they now appear somewhat removed from the realities of today's internally and externally open economy." UN Doc. E/C.12/2001/WP.5, para. 39.

cialable [\*474] dimensions” and that, as a result, states parties should provide for judicial enforcement of Covenant rights in their domestic law:

It is sometimes suggested that matters involving the elaboration of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. . . .

. . . .

Among scholars and nongovernmental advocates, the term “justiciability” seems to be used most often to refer merely to the existence of a mechanism or procedure to resolve alleged violations of the rights in question. In this view, rights (or disputes about rights) are justiciable when there is a mechanism capable of adjudicating them, and nonjusticiable when one is lacking.<sup>88</sup> Matthew Craven puts the tautology succinctly:

*Prima facie*<sup>89</sup>

A necessary corollary to this formulation is that there is a right to invoke the competence of the Committee; victims of alleged violations have a “right of petition” to bring complaints before the authorized decision maker. In this rather limited sense, the debate over justiciability of economic, social, and cultural rights is simply about creating a mechanism for adjudicating alleged violations. It is not an especially illuminating discussion but does permit the proponents to avoid having to delve into the underlying issues.

A more substantive approach to justiciability looks to the nature of the rights and obligations in question and whether complaints about their violation are susceptible to a rational and meaningful resolution by a duly empowered decision maker.<sup>91</sup> On this view, unlike Craven’s, [\*475] justiciability is not simply a matter of whether the authorized adjudicator is institutionally able to make a reasoned, objective decision. Competent courts can, at least in theory, decide virtually any question put to them and, in the right circumstances, do so

<sup>88</sup> Cf. ARAMBULO, *supra* note 12, at 57 (“Justiciability of a human right means that a court of law or another type of supervisory body deems the right concerned to be amenable to judicial scrutiny.”).

<sup>89</sup> CRAVEN, *supra* note 19, at 102. This statement captures the sense in which we understand the Independent Expert’s observation about “the essentially justiciable nature of all the rights guaranteed under the Covenant,” *see supra* text accompanying note 68—namely, that in the abstract, it is possible to establish a mechanism to address complaints about violations of those rights.

<sup>91</sup> This approach is somewhat closer to the traditional definition of “justiciability” in U.S. courts, which is said to require an actual controversy between two or more parties with adverse interests and with standing to bring the case to court, and where the court’s determination is likely to result in practical relief for the complainant. *See, e.g., Flast v. Cohen*, 392 U.S. 83 (1968); *New York County Lawyers’ Ass’n v. State*, 742 N.Y.S.2d 16 (1st Dept. 2002). Even in the United States, courts are capable of deciding *some* issues related to recognition and enforcement of *some* economic, social, and cultural rights, including the obligation of the state *vel non* to provide minimal levels of subsistence or other basic benefits. *See, e.g., Harris v. McRae*, 448 U.S. 297, *reh’g denied*, 448 U.S. 917 (1980); *Boehm v. Superior Court*, 223 Cal. Rptr. 716 (Ct. App. 1986); *Moore v. Ganim*, 660 A.2d 742 (Sup. Ct. Conn. 1995). Because courts can, of course, does not mean that they should. Some commentators maintain that judicial decision making is simply inappropriate for economic, social, and cultural rights:

No convincing example has . . . been produced of a case in which judges can effectively make decisions allocating positive economic rights. All such decisions are decisions which allocate resources and which therefore have opportunity costs. They also invariably require transfers from individual to individual. Such decisions should be made either by voluntary transactions or by an accountable political process.

BERNARD ROBERTSON, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: TIME FOR A REAPPRAISAL 17 (1997), available at <<http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm>>. Even when domestic law explicitly provides for adjudication of such rights, courts may still have a limited role in enforcing them. *See Minister of Health v. Treatment Action Campaign*, 2002 (5) SALR 721 (CC), para. 25 (S. Afr.). The decisions of South Africa’s Constitutional Court are available at <<http://www.concourt.gov.za>>.

fairly, objectively, and, at least superficially, on a reasoned basis. Instead, it has to do with results. The issue of justiciability must turn on an assessment about the overall impact of the adjudicator's decision: will adjudication contribute to a practical, useful resolution of the issue at hand, which the relevant parties will, in turn, respect and implement?

The Working Group's discussion was also distressingly shallow with respect to the benefits of the proposal. Proponents argued generally that a new complaints mechanism would provide "clarity" to economic, social, and cultural rights, undercut "arguments against . . . justiciability," guarantee a "remedy for victims of violations," and "make up for the lack of information before the Committee."<sup>92</sup> One delegation argued that "a higher burden of proof should be placed on States to prove that there are *no* benefits to adopting an optional protocol under the ICESCR."<sup>93</sup> Responding to express concerns about the potential cost of a new mechanism, the proliferation of mechanisms under human rights treaties, and the prospects for reform of the current Committee procedures, a number of participants merely pointed out that the proposed protocol would be optional."<sup>94</sup>

In short, the Working Group debate reflected a continuing divergence of views and an evident lack of consensus about the need for, and purpose and legal effect of, a binding adjudicative mechanism. For many proponents, there appears to be a "build it and they will come" attitude.<sup>95</sup> However, given the widespread differences in domestic approaches to the treatment of economic, social, and cultural rights, and the evident misgivings on the part of a significant number of delegations about a new international mechanism, it would certainly appear that consensus will be difficult to achieve.<sup>96</sup> Further undercutting the likelihood of agreement is that the proponents' arguments have largely been conclusory, dismissive of [\*476] other viewpoints, and self-serving. That does not mean, of course, that the arguments necessarily lack validity or could not be substantiated, but only that without more they should not be permitted to carry the debate. In the next section, we look specifically at the validity of the argument from original intent.

## II. TEXT AND HISTORY OF THE COVENANTS

A careful review of the negotiating history of the two Covenants confirms the view put forward by the Polish and Indian delegations during the Working Group meeting that their dissimilar provisions on undertakings and implementation resulted from deliberate choices adopted after careful consideration and specific rejection of arguments remarkably similar to those made today in favor of the draft optional protocol. The decision to treat economic, social, and cultural rights differently was *not* attributable simply--or even mainly--to ideological divisions. Nor was it taken *despite* a common desire to make those rights binding and enforceable. To the contrary, there was no unanimity that economic, social, and cultural rights and civil and political rights constitute integral parts of a whole or should be subjected to identical or even similar adjudicative mechanisms. The

<sup>92</sup> Working Group Report, *supra* note 3, para. 70. See also the statement of Finland, *supra* note 73, at 2-3, and the summaries of the written submissions of Mexico and Portugal, Secretary-General's Report to CHR, *supra* note 82, paras. 11, 39 (respectively). Within the Committee, then Chair Philip Alston explained that the "main aim of the optional protocol was to allow the Committee to build up a body of jurisprudence; thus, even though a particular case considered might involve only one State party or a handful of individuals, the Committee's decisions could eventually have a multiplier effect." UN Doc. E/C/1996/SR.45, para. 11.

<sup>93</sup> Working Group Report, *supra* note 3, para. 70 (emphasis added).

<sup>94</sup> *Id.*, para. 51.

<sup>95</sup> To quote Tomasevski:

Justiciability will develop, much as everything else in the field of human rights, bottom-up, through fragmentary incursions into the areas cloaked behind the proverbial unwillingness of governments to concede ways and means for holding them accountable. It is thus fortunate that examples of holding governments accountable for violations of economic, social and cultural rights exist and can be used as a basis for further development of justiciability.

Tomasevski, *supra* note 5, at 206. During the Committee debate, Kenneth Rattray reminded members that the "drafting of an optional protocol was a further step towards establishing an international court to which individuals could apply." UN Doc. E/C.12/1996/SR.48, para. 15 (1997).

<sup>96</sup> The ESCR Committee has long criticized states parties for their failure to incorporate the provisions of the ICESCR into their domestic legislation. See Concluding Observations of the ESCR Committee: New Zealand, para. 11, UN Doc. E/C.12/1/Add.88 (2003); Concluding Observations of the ESCR Committee: Iceland, para. 10, UN Doc. E/C.12/1/Add.89 (2003); Concluding Observations of the ESCR Committee: United Kingdom, para. 11, UN Doc. E/C.12/1/Add.79 (2002).

differences in the two Covenants reflected not only deep-seated legal and practical reservations on the part of the negotiators about the putative justiciability of economic, cultural, and social rights, but also a recognition that the specialized agencies were already fully engaged in the implementation of such rights.

### *The Textual Differences*

It is well known that the two Covenants, along with the first Optional Protocol to the ICCPR, were adopted on the same day in 1966 in a single General Assembly resolution<sup>97</sup> and that they share many features, including a common preamble, several common general principles, and concluding articles.<sup>98</sup> But it is also well known that the General Assembly's original conception had been for a single covenant, setting forth all human rights in the same document.<sup>99</sup> That objective did not prove achievable, and the result was the adoption of two separate instruments.

The essential terms of the Covenants differ markedly. The ICCPR requires states parties to guarantee the enumerated civil and political rights directly through appropriate legal provisions. Article 2(1) stipulates that each state party undertakes to "respect *and ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" (emphasis added). Article 2(2) further mandates that states parties "adopt such other legislative measures as may be necessary to give effect to the rights" recognized in the ICCPR whenever such measures do not already exist in their laws. Under Article 2(3) each state party undertakes to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."

The rights set forth in the ICESCR, however, are not described as obligations to be performed by states parties in full and at once. Rather, they represent goals to be achieved progressively. More precisely, as set forth in ICESCR Article 2(1), each state party undertakes to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . by all appropriate means." In other words, the ICESCR describes a regime of contextual, contingent, and continuing obligations on states aimed at the eventual "realization" of economic, social, and cultural rights.<sup>100</sup>

[\*477] The specific wording of the substantive obligations set forth in the ICCPR also differs substantially from the formulations used in the ICESCR. The ICCPR's articles are written in precise terms and typically provide that "everyone shall have the right" to each fundamental freedom or that a state party shall refrain from interfering with the exercise of such rights. By contrast, the ICESCR generally provides only that "States Parties to the present Covenant recognize the right of everyone" to each enumerated economic goal, consistent with the idea of progressive realization.

The specific measures of supervision set forth in the two Covenants similarly reflect different approaches. The ICCPR created the Human Rights Committee, a body of eighteen experts elected by states parties charged with monitoring compliance by states parties with the rights guaranteed under the Covenant. Among other functions, the Human Rights Committee may entertain state-to-state complaints and, pursuant to the first Optional Protocol, consider individual communications (or complaints) filed against states parties that have ratified the Protocol. In sharp contrast, the ICESCR did not establish an oversight "treaty body," an individual-complaints mechanism, or an interstate-complaints mechanism, but left oversight to ECOSOC and the specialized agencies.<sup>101</sup>

<sup>97</sup> GA Res. 2200A (XXI) (Dec. 16, 1966).

<sup>98</sup> The Covenants contain common Articles 1 (self-determination), 3 (equal rights of men and women), and 5 (safeguards), as well as identical final articles (ICESCR Articles 24-32 and ICCPR Articles 46-53).

<sup>99</sup> GA Res. 421 E (V) (Dec. 4, 1950).

<sup>100</sup> One clear example of the relative (indeed, variable) nature of this undertaking is found in ICESCR Article 2(3), which allows "developing countries, with due regard for human rights and their national economy," to "determine to what extent they would guarantee the economic rights . . . to non-nationals."

<sup>101</sup> The ICESCR (Article 16(1)) requires states parties to submit "reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized" in the Covenant. It provides (Article 22) that ECOSOC "may bring to the attention of other organs of the United Nations . . . and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports . . . which may assist such bodies in deciding . . . on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant." The ICESCR also pro-

Over the years, these differences have been the source of much debate--and not a little mischief. But the real problem for present purposes lies in the reasons why the negotiators ended up dividing the rights into two separate instruments and why they explicitly rejected the idea of establishing a complaints mechanism for economic, social, and cultural rights, or even a supervisory committee. Was it because the ICCPR reflects Western liberal democratic notions of limited government and free markets, while the ICESCR rests on more Eastern or Soviet authoritarian principles of a directed socialist economy? Many proponents of the optional protocol would have it so.<sup>102</sup>

A careful review of the negotiating record demonstrates that this view is flawed and misleading. The differences between the Covenants did not result from oversight or from an inability to agree because of political or ideological confrontations--although there is no denying such conflicts did exist and did influence the debates. Because of their appreciation of practical differences between the two sets of rights, the negotiators intended the implementation provisions to be different. It is simply wrong, as a historical matter, to ascribe all of these decisions to ideological cleavage. It is therefore also wrong to argue that identical or parallel treatment is necessary today in order to comply with the original intent and purpose behind the Universal Declaration or the Covenants.

### *The Universal Declaration*

Throughout the drafting of the UDHR, the East and the West unquestionably proceeded from differing concepts of the role of the state in society. But at base the debate concerned what would be effective, not the inherent "nature" of the rights themselves. Soviet-bloc representatives maintained that economic, social, and cultural rights would be meaningless without a strong state apparatus in charge of economic and social welfare. Representatives of liberal democracies, while accepting the need to describe these rights as fundamental human rights, [\*478] nonetheless opposed efforts to mandate state-oriented implementation procedures for economic, social, and cultural rights, in order not to dampen private initiative or give too much power to the government of a state party.<sup>103</sup> They further emphasized that different systems of government have different approaches to resource allocation and management of economies, and that "a Declaration on Human Rights could not call on states to change the systems which were in force in their countries."<sup>104</sup>

In June 1948, during the Commission's final drafting of the relevant UDHR articles, progress was stalled for several days while states debated these issues, which the French negotiator Rene Cassin later recalled as among "the most emotionally charged in [the Commission's] work."<sup>105</sup> In order to resolve the impasse, states ultimately settled on Cassin's proposal to establish a framework "chapeau" or umbrella provision (ultimately adopted as Article 22) to introduce the provisions on economic and social rights. Cassin urged that the Commission "should follow the example to be found in all constitutions adopted in recent years, and should treat those rights separately from the rights of the individual."<sup>106</sup> As adopted, the article provided that "everyone . . . is entitled to realization of the economic, social and cultural rights enumerated below, in accordance with the organization and resources of each state, through national effort and international cooperation."<sup>107</sup> The Gen-

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vides that ECOSOC "may transmit [the reports] to the Commission on Human Rights for study and general recommendation" (Article 19), and that ECOSOC may, in turn, submit "recommendations of a general nature" to the General Assembly on "the progress made in achieving general observance of the rights recognized" in the Covenant (Article 21).

<sup>102</sup> See *supra* note 73 and accompanying text.

<sup>103</sup> Eleanor Roosevelt (U.S. representative and chair of the Commission) noted that methods of implementation "would necessarily vary from one country to another and such variations should be considered not only inevitable but salutary." UN Doc. E/CN.4/SR.64, at 5 (1948).

<sup>104</sup> Geoffrey Wilson, representative of the United Kingdom, Statement, UN Doc. E/CN.4/SR.71, at 11 (1948); see generally JOHN P. HUMPHREY, *HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE* 45 (1984); GLENDON, *supra* note 25, at 115-17; cf. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 230 (1999).

<sup>105</sup> RENE CASSIN, *LA PENSEE ET L'ACTION* 111 (1972) (authors' translation). For his work on human rights, specifically with regard to the Universal Declaration, Cassin was awarded the 1968 Nobel Peace Prize.

<sup>106</sup> Rene Cassin, representative of France, Statement, UN Doc. E/CN.4/SR.72, at 4 (1948).

<sup>107</sup> The proposal, as amended, was adopted by a vote of 12-0, with 5 abstentions. UN Doc. E/CN.4/SR.72, at 10 (1948). Cassin's initial proposal stated, "Everyone as a member of society has the economic, social and cultural rights enumerated below, whose fulfillment should be made possible in every State separately or by international collaboration." UN Doc. E/CN.4/SR.67, at 2

eral Assembly later adopted the provision without major change.<sup>108</sup>

In considering Article 22, both the Commission on Human Rights and the General Assembly rejected proposals by the Soviet Union to emphasize the state's duty to "take all necessary steps, including legislation, to ensure" the implementation of all rights set forth in the UDHR.<sup>109</sup> The Soviet representative maintained that its amendment "contained not only the idea that the State and society must ensure to the individual the realization of social, economic and cultural rights, but also the idea that they must give him a real opportunity to enjoy all of the other rights set forth in the declaration."<sup>110</sup> Eleanor Roosevelt, in opposing the amendment, stressed that the formulation contained in Article 22 was a "compromise between the views of certain Governments, which were anxious that the State should give special recognition to the economic, social and cultural rights of the individual and the views of Governments, such as the United States Government, which considered that the obligation of each State should not be specified."<sup>111</sup> She emphasized that for the United States, "the essential elements of article [22] were the two phrases 'through national effort and international cooperation' and 'in accordance with the organization and resources of each State'."<sup>112</sup>

#### *Initial Draft of the Provisions on Economic, Social, and Cultural Rights*

At its seventh (1951) session, the Commission set about drafting the articles that formed the basis for the general and specific undertakings, as well as the implementation provisions, of ICESCR Articles 2 through 24. Earlier, at the time of the adoption of the Universal Declaration, the General Assembly had requested that the Commission prepare, as a matter of priority, a draft covenant on human rights and draft measures on implementation, and (importantly for our purposes) that it examine further the question of the right to petition.<sup>113</sup> The General Assembly, at its fifth (1950) session, specifically directed the Commission "to include in the draft Covenant a clear expression of economic, social and cultural rights."<sup>114</sup>

At the outset of these negotiations, states resumed their debate about the undertakings to be included in the Covenant. Soviet-bloc states continued to insist that the state was bound to "guarantee" economic, social, and cultural rights to its citizens "unequivocally." They charged that Western proposals "consisted of empty declarations of principle which would have no binding force on signatory governments."<sup>115</sup> Western delegations maintained that judicial or juridical implementation of economic, social, and cultural rights was both inappropriate and impracticable. For example, Max Sorensen, the Danish representative, asserted that "not all governments were partisans of the socialist solution, and it was essential to recognize that each must be free to select the policy appropriate to its own national requirements and conditions." He went on to point out that "it would not be practicable to transform the general principles themselves into legally binding provisions," because those rights "called for positive government action like that, for example, required to achieve full employment."<sup>116</sup> The specialized agencies expressed a similar view.<sup>117</sup>

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(1948). Egypt (Omar Loutfi) suggested adding the phrase "in accordance with the economic and social possibilities" of each state, while Mrs. Roosevelt proposed "in accordance with the social and economic system and political organization." UN Doc. E/CN.4/SR.71, at 3 (1948).

<sup>108</sup> UN Doc. A/C.3/SR.138, at 512-14 (1948).

<sup>109</sup> The USSR amendment is contained in UN Doc. E/800, at 43 (1948). It was rejected by votes of 11-4 and 10-4 (with 1 abstention) in the Commission, UN Doc. E/CN.4/SR.72, at 9-10 (1948), and by 27-8, with 8 abstentions, in the Third Committee, UN Doc. A/C.3/SR.138, at 512 (1948).

<sup>110</sup> Alexei Pavlov, representative of USSR, Statement, UN Doc. A/C.3/SR.137, at 498-99 (1948).

<sup>111</sup> Eleanor Roosevelt, representative of the United States, Statement, UN Doc. A/C.3/SR.138, at 501 (1948).

<sup>112</sup> *Id.*

<sup>113</sup> GA Res. 217 A, B, E (III) (Dec. 10, 1948).

<sup>114</sup> GA Res. 421 E (V), *supra* note 99; *see* 1950 U.N.Y.B. 529-31.

<sup>115</sup> Platon Morozov, representative of USSR, Statement, UN Doc. E/CN.4/SR.206, at 5 (1951).

<sup>116</sup> Max Sorensen, representative of Denmark, Statement, UN Doc. E/CN.4/SR.207, at 10-11 (1951); *see also* Eleanor Roosevelt, Statement, UN Doc. E/CN.4/SR.236, at 5 (1951) ("they were not justiciable"); H. F. E. Whitlam, representative of Australia, Statement, UN Doc. E/CN.4/SR.206, at 22 (1951) ("juridical implementation was quite inappropriate"); Rene Cassin, Statement, UN Doc. E/CN.4/AC.14/SR.2, at 12 (1951) ("the French delegation recognized the independence of the systems in force in the various States, and desired aims alone to be stated").

States ultimately decided to include an umbrella provision like that contained in UDHR Article 22. By a vote of 10-8, the Commission approved a French proposal, substantially similar to ICESCR Article 2(1), whereby states parties would be required to “undertake to take steps, individually and through international cooperation, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized.”<sup>118</sup> Introducing the proposal, Cassin emphasized the conceptual differences between the two sets of rights, as well as the differing methods by which countries implement them, as justification for a “general clause” along the lines of UDHR Article 22.<sup>119</sup>

[\*480] The Soviet-bloc states contended that the French approach “was entirely wrong from all points of view [since it] separated economic, social and cultural rights from the other human rights.”<sup>120</sup> Several developing countries agreed. According to the Chilean representative, the provision would render “illusory” the rights set out in the Covenant.<sup>121</sup> Nonetheless, the Commission rejected a Soviet-bloc proposal requiring states to take “whatever legislative or other measures are necessary to ensure to their nationals the full exercise of economic, social and cultural rights.”<sup>122</sup> The Commission also narrowly rejected a proposal by the Lebanese representative (and then-chairman of the Commission), Charles Malik, to substitute the word “implementing” for the words “achieving progressively the full realization of” in the French proposal.<sup>123</sup>

In drafting the specific undertakings that came to form the basis for ICESCR Articles 6 to 15, the Commission for the most part followed the recommendations of the specialized agencies.<sup>124</sup> For example, the ICESCR’s provisions on labor (Articles 6 to 11(1)) were cast in general terms, at the specific request of the Inter-

<sup>117</sup> Wilfred Jenks, assistant director-general of the International Labour Organization (ILO), Statement, UN Doc. E/CN.4/SR.203, at 15 (1951) (“By their very nature, such provisions were statements of policy and aims to be attained by dint of sustained endeavour both at the national and international level, rather than by juridical recognition of their validity.”); Jamie Torres-Bodet, director-general of UNESCO, Statement, UN Doc. E/CN.4/AC.14/SR.1, at 14 (1951) (“States should accept the obligation to do all within their power to achieve certain clearly defined aims, without, however, undertaking to attain them within a specified period [since] they could be achieved only by slow degrees”).

<sup>118</sup> UN Doc. E/CN.4/SR.237, at 12-13 (1951); Report of the Commission on Human Rights on Its Seventh Session, UN ESCOR 1951, Supp. No. 9, para. 54, UN Doc. E/CN.4/640 [hereinafter CHR Report on 7th Session].

<sup>119</sup> Rene Cassin, Statement, UN Doc. E/CN.4/SR.237, at 7-8 (1951). Cassin also explained:

As to the word “progressively”, the realization of economic, social and cultural rights always took time, and ratifications of the draft Covenant would not be facilitated by ignoring that fact. Furthermore, if the provisions of the general clause were too strict, the Covenant would be a magnificent monument, but, like all monuments, entirely devoid of life.

*Id.*

<sup>120</sup> Branko Jevremovic, representative of Yugoslavia, Statement, *id.* at 15.

<sup>121</sup> Hernan Santa Cruz, representative of Chile, Statement, UN Doc. E/CN.4/SR.236, at 19 (1951). Santa Cruz added:

The expression “to the maximum extent of their available resources” could, in the absence of a closer definition, be interpreted as applying only to the resources of States available for that particular purpose, and not to their over-all resources. Again, the expression “undertake to take steps” did not constitute a formal undertaking to guarantee the exercise of the rights recognized. Finally, the adverb “progressively” also tended unduly to reduce the scope of the undertaking to be assumed by the signatory States.

*Id.* Other developing countries opposing the French proposal included Uruguay, *id.* at 27-28, and Pakistan, UN Doc. E/CN.4/SR.237, at 14 (1951).

<sup>122</sup> The vote was 8-3, with 7 abstentions. CHR Report on 7th Session, *supra* note 118, para. 53; UN Doc. E/CN.4/609/Rev.1 (1951) (proposal).

<sup>123</sup> The vote was 8-8, with 2 abstentions. UN Doc. E/CN.4/SR.237, at 12 (1951).

<sup>124</sup> CHR Report on 7th Session, *supra* note 118, para. 38.

national Labour Organization (ILO).<sup>125</sup> Similarly, the provision on health (ultimately, ICESCR Article 12) was based upon a proposal by the director-general of the World Health Organization (WHO), and the provisions on education and culture (ICESCR Articles 13 to 15) were based upon proposals by UNESCO's director-general.<sup>126</sup>

This aspect of the East-West debate did not carry over to the drafting of the implementation provisions, as Soviet bloc states were generally opposed to the inclusion of implementation provisions in either Covenant.<sup>127</sup> With respect to the civil and political rights provisions, the Commission had already decided (at its 1949-50 sessions) to establish a permanent independent body--the Human Rights Committee--to consider state-to-state complaints and to offer its good offices to the states concerned.<sup>128</sup> At the 1951 negotiating session, Malik proposed that the articles on economic, social, and cultural rights be implemented "through a special organ similar to, but separate from, the Human Rights Committee."<sup>129</sup> The proposal met with substantial opposition, however, from a large majority of states, as well as from the specialized agencies, and it was ultimately rejected.<sup>130</sup> The final draft articles were based, in part, on [\*481] a joint Pakistani/Swedish proposal drawn from a suggestion by the ILO: states parties would submit their reports on the measures that they had taken to implement the provisions on economic, social, and cultural rights in stages that were "in accordance with a program to be established by ECOSOC in consultation with the States Parties to the Covenant and with interested Specialized Agencies, pursuant to the agreements between the United Nations and these agencies."<sup>131</sup>

During the debate, the specialized agencies stressed that they were constitutionally designed and empowered to ensure the protection of economic, social, and cultural rights and that they had negotiated agreements with the United Nations, based upon Article 57 of the UN Charter, giving them responsibility for taking action as provided in their respective constitutions.<sup>132</sup> They also emphasized their respective mandates to formulate international standards and noted that member states were required to submit detailed reports on the measures that they were taking to comply with the obligations that had been assumed.<sup>133</sup> The ILO representative stressed the need for avoiding duplication of effort ("no disturbance in the existing apportionment of responsibilities as between the United Nations and the specialized agencies").<sup>134</sup> To the same effect, WHO's representative cautioned the Commission "to remember that the World Health Assembly, in which the best medical experts of the world took part each year, was better qualified than any other international body to formulate specific recom-

<sup>125</sup> The ILO counseled that the articles on economic and social rights should be brief and general, leaving the details to the ILO or other specialized agencies. UN Doc. E/2057/Add.2 (1951).

<sup>126</sup> For the negotiating history of ICESCR Articles 12 to 15 in the Commission, see UN Docs. E/CN.4/544 & Add.1 (1951) (WHO proposal) and E/CN.4/541 (1951) (UNESCO proposal); CHR Report on 7th Session, *supra* note 118, paras. 45, 47; and Report of the Commission on Human Rights on Its Eighth Session, UN ESCOR 1952, Supp. No. 4, paras. 119-28, 132-34, UN Doc. E/CN.4/669 [hereinafter CHR Report on 8th Session]. See generally Philip Alston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT'L L. 79, 85-89 (1979).

<sup>127</sup> Both the General Assembly and the CHR rejected several USSR proposals that would have excluded all measures of implementation from the draft covenant. See CHR Report on 7th Session, *supra* note 118, para. 72.

<sup>128</sup> Report of the Commission on Human Rights on Its Sixth Session, paras. 34-41, UN Doc. E/CN.4/507 (1950). The CHR continued to consider the specific details of implementation provisions concerning civil and political rights at its 1951 session. See CHR Report on 7th Session, *supra* note 118, paras. 68-90.

<sup>129</sup> Charles Malik, Representative of Lebanon, Statement, UN Doc. E/CN.4/AC.14/SR.2, at 20 (1951). The proposal is contained in UN Doc. E/CN.4/570/Rev.2 (1951).

<sup>130</sup> The CHR ultimately set up a working group to consider measures on implementation. It rejected the Lebanese proposal by a vote of 6-2. UN Doc. E/CN.4/AC.15/SR.3, at 15 (1951).

<sup>131</sup> The proposal is contained in UN Doc. E/CN.4/622 (1951). See also Abdul Waheed, representative of Pakistan, Statement, UN Doc. E/CN.4/SR.241, at 7-11 (1951); see generally CHR Report on 7th Session, *supra* note 118, paras. 56-67.

<sup>132</sup> See, e.g., C. W. Jenks, representative of ILO, Statement, UN Doc. E/CN.4/SR.203, at 16 (1951).

<sup>133</sup> See, e.g., N. Bammate, representative of UNESCO, Statement, UN Doc. E/CN.4/SR.241, at 16 (1951).

<sup>134</sup> Guildhaume Myrddin-Evans, representative of ILO Governing Body, Statement, UN Doc. E/CN.4/AC.14/SR.1, at 9 (1951). Myrddin-Evans added:

mendations in the field of health.”<sup>135</sup>

States were in general agreement with the position of the specialized agencies. Even Malik was quick to acknowledge “that the Commission was dealing with two separate types of rights, for which a uniform mode of implementation was not possible,” and “that no action should be taken by the Commission [that was] susceptible of weakening the authority of the specialized agencies or of leading to overlapping of activities.”<sup>136</sup>

In sum, by the close of the 1951 Commission session, states had drafted articles on general and specific undertakings, as well as on implementation, that were substantially different for the two sets of rights. The result was the reconsideration of the General Assembly’s decision to draft one rather than two covenants.

#### *The Decision to Split the Covenant*

ECOSOC subsequently invited the General Assembly to reconsider its decision in favor of a single covenant, “conscious of the difficulties which may flow from embodying in one covenant two different kinds of rights and obligations” and “considering that these provisions [in the draft Covenant] provide for two different methods of implementation.”<sup>137</sup> After extended debate, the General Assembly did, in fact, reverse its decision and requested that the Commission draft two separate covenants containing “as many similar provisions as possible,” to be approved and opened for signature simultaneously, “in order to emphasize the unity of the aim.”<sup>138</sup>

During the debate, the Soviet bloc asserted that “economic, social and cultural rights formed the basis of other rights, and that the exercise of civil and political rights might become purely nominal under economic conditions which were conducive to economic instability and unemployment.”<sup>139</sup> This assertion brought sharp rebukes from India and Lebanon.<sup>140</sup> Malik declared that “civil and political rights had an absolute character which other rights had not. . . . [A] people could not attain to the enjoyment of economic, social and cultural rights in full freedom, until its civil and political rights were ensured.”<sup>141</sup>

If the existing balance should be upset, delicate problems would arise in respect of the Constitutions of the specialized agencies and the relationship agreements between the latter and the United Nations. Moreover, duplication, frustration and a lowering of the authority of both of the United Nations and of the specialized agencies would almost certainly follow.

*Id.*

<sup>135</sup> P. Dorolle, representative of WHO, Statement, UN Doc. E/CN.4/SR.203, at 20 (1951).

<sup>136</sup> UN Docs. E/CN.4/AC.14/SR.2, at 20 (1951), E.CN.4/SR.237, at 17 (1951); *see also* Ms. Bowie, representative of United Kingdom, Statement, UN Doc. E/CN.4/SR.238, at 11 (1951) (“The primary responsibility for the implementation of human rights rested with the General Assembly and the Economic and Social Council; but the executive responsibility rested with the specialized agencies.”); Eleanor Roosevelt, Statement, *id.* at 17 (“The role of specialized agencies was vital, but they should direct their attention to assisting governments rather than finding fault with them.”); Rene Cassin, Statement, UN Doc. E/CN.4/SR.203, at 10-11 (1951) (“Whereas the civil and political rights protected by the Commission had not been safeguarded by the specialized agencies, economic, social and cultural rights already had their defenders in the shape of such agencies as the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization.”).

<sup>137</sup> ECOSOC Res. 384 (XIII) (Aug. 29, 1951) (adopted by a vote of 11-5, with 2 abstentions); *see generally*, 1951 U.N.Y.B. 479-81.

<sup>138</sup> GA Res. 543 (VI) (Feb. 5, 1952) (adopted by a vote of 27-20, with 3 abstentions); UN Doc. A/PV.375 (1952), paras. 63-67; *see generally* HUMPHREY, *supra* note 103, at 158-62.

<sup>139</sup> 1952 U.N.Y.B. 482.

<sup>140</sup> *Id.* at 483.

<sup>141</sup> Charles Malik, Statement, UN Doc. A/C.3/SR.370, paras. 39-40 (1951). Malik continued:

Neither was it a chance that the two categories of rights had always been regarded as distinct. In the Charter of the United Nations, as in the Universal Declaration of Human Rights, the international problems of an economic, social, cultural or humanitarian character were never confused with those involving respect for human rights and basic freedoms. It would be a pity, therefore, if all rights were included in one and the same covenant.

The critical debate, however, focused upon practical considerations. The Soviet bloc, along with several Latin American delegations (notably, Chile, Guatemala, and Mexico), contended that economic, social, and cultural rights were capable of precise definition and that it was therefore possible to combine them with civil and political rights in a single covenant without robbing the text of necessary clarity.<sup>142</sup> The United States and other Western delegations, along with Brazil, China, India, Lebanon, Liberia, and Venezuela, took the position that while civil and political rights could be protected by appropriate legislation, the realization of economic, social, and cultural rights could be achieved only progressively, because their protection depended upon economic and social conditions.<sup>143</sup>

In this context, Mrs. Roosevelt highlighted four critical differences between the two sets of rights--ones based upon the negotiations that had just occurred at the 1951 session of the Commission:

First Article 19 of the draft covenant [Article 2 of the ICESCR] recognized that, unlike the civil and political rights, which the States bound themselves to protect as soon as possible, the realization of the economic, social and cultural rights should be achieved progressively.

The second difference lay in the way in which States could fulfil the obligations they undertook. Nothing more than the passing of appropriate legislation was required for civil and political rights, whereas for the economic, social and cultural rights the assistance of people in general and that of a large number of governmental and non-governmental bodies was needed.

Thirdly, the proposed measures of implementation were not the same with regard to both categories of rights. The Commission on Human Rights had proposed the establishment of a committee on human rights to hear complaints by one State against another. . . . The majority of the members had appeared to consider that such a procedure would not be appropriate for those rights the realization of which was to be achieved only progressively and with regard to which the obligations of States were less precise. *Those members had believed that it would be better to help States achieve progress in that respect than to enable complaints to be brought against them.* The draft covenant therefore provided for the submission of reports with regard to economic, social and cultural rights as the appropriate procedure.

Finally, the provisions relating to the two categories of rights had been drafted differently: the civil and political rights had been drafted in specific terms, whereas the provisions relating to economic, social and cultural rights had been couched in more general language.<sup>144</sup>

At the close of the debate, the Third Committee had before it a joint proposal submitted by Chile, Egypt, Pakistan, and Yugoslavia under which the General Assembly would have reaffirmed its decision to draft one covenant that would include both sets of rights.<sup>145</sup> Instead, the Committee adopted a counteramendment offered by Belgium, India, Lebanon, and the United States providing for simultaneous submission of two draft covenants to the General Assembly.<sup>146</sup> A French subamendment, stating that the two covenants should "contain . . . as many similar provisions as possible, particularly insofar as the reports to be submitted by States on the implementation of those rights," was also approved.<sup>147</sup>

*Id.*, para. 42. The statement of Mr. D'Souza, representative of India, was similar. UN Doc. A/C.3/SR.361, paras. 27-36 (1951).

<sup>142</sup> 1951 U.N.Y.B. 482.

<sup>143</sup> *Id.*

<sup>144</sup> Eleanor Roosevelt, Statement, UN Doc. A/C.3/SR.360, paras. 10-13 (1951) (emphasis added).

<sup>145</sup> UN Doc. A/C.3/L.182 (1951).

<sup>146</sup> UN Doc. A/C.3/L.185/Rev.1 (1951). The vote was 30-24, with 4 abstentions. UN Doc. A/C.3/SR.395, paras. 59-64.

<sup>147</sup> UN Doc. A/C.3/L.192/Rev.2 (1952) (amendment); UN Doc. A/C.3/SR.395, paras. 56-58 (1952). The vote was 26-24, with 8 abstentions. The General Assembly, in later affirming the Third Committee's decision, rejected a Chilean amendment that would have again provided for the drafting of a single covenant. UN Doc. A/PV.375, paras. 63-66 (1952). The vote was 29-25, with 4 abstentions.

*No Right of Redress for Economic Rights*

Drafting of the substantive provisions of the ICESCR was completed at the Commission's eighth (1952) session. The umbrella provision providing for progressive realization was approved--again through a series of sharply contested votes, similar to those taken at the 1951 session.<sup>148</sup> Most significantly, however, the Commission rejected a Polish amendment that would have added to the umbrella provision two paragraphs drawn directly from what ultimately became the general-undertakings provisions of ICCPR Article 2(2)-(3). The amendment would have mandated each state party to adopt "such legislative or other measures as may be necessary to give effect to the rights recognized" in the ICESCR, and to "ensure . . . that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."<sup>149</sup> These proposals were rejected by separate votes of 10-7, with 1 abstention.<sup>150</sup>

In explaining its amendment, Poland maintained that

the State should be responsible for the realization of economic, social and cultural rights to the same extent as civil and political rights. It [is] surely unreasonable to say that the [\*484] right to vote should be implemented immediately upon entry into force of the covenant, while the right to work should be implemented only in a distant future. . . .

Paragraph 3 of the Polish proposal . . . provide[s] that any person whose rights had been violated should have an effective remedy; [since] many members, including the United States representative, [have] recognized that most economic rights would call for legislation, it [is] only reasonable to grant the right of redress in case that legislation was violated. The paragraph dealing with an effective remedy consequently applie[s] as fully to the present covenant as to the covenant on civil and political rights, as the State was responsible to the same extent for the observance of all its laws.

Western delegations strongly opposed the idea of any comprehensive form of juridical recognition of economic, social, and cultural rights--again, not from an ideological motivation, or because they thought them "lesser rights," but out of practical concerns. The United Kingdom's representative, for example, insisted that "paragraph 3 of the Polish amendment dealing with effective remedies would be altogether inappropriate, as it would clash with the idea of gradual improvement and progress."<sup>152</sup> Cassin took the position that most economic, social, and cultural rights must be expressed in the Covenant as general obligations to take progressive action and not as obligations of result:

*ensure progressively*<sup>153</sup>

Cassin went on to make clear that "absolute guarantees could be required subsequently not on the basis of the Covenant itself but on the basis of precise conventions concluded by States." He explained that "implementation

<sup>148</sup> E/CN.4/L.54/Rev.2 (1952) (proposal); CHR Report on 8th Session, *supra* note 126, para. 109. The proposal, which was put forward by the United States and orally amended by France, added the words "by legislative as well as other means." The Soviet bloc states, along with several developing countries, continued to attack the proposed approach--of permitting states to "take steps," "to the maximum of its available resources," and "with a view to achieving progressively"--as providing too many loopholes for states parties wishing to evade their responsibilities. *See, e.g.*, Platon Morozov, representative of USSR, Statement, UN Doc. E/CN.4/SR.273, at 4-7 (1952); Branko Jevremovic, representative of Yugoslavia, Statement, *id.* at 14-15; Hernan Santa Cruz, representative of Chile, Statement, UN Doc. E/CN.4/SR.272, at 8-9 (1952). The proposal's specific wording was adopted as follows: the words "to the maximum extent of its available resources" by a vote of 12-6; the word "progressively" by a vote of 10-8 on a roll call; and the words "achieving progressively" by 10-7, with 1 abstention. UN Doc. E/CN.4/SR.274, at 15 (1952).

<sup>149</sup> UN Doc. E/CN.4/L.65/Rev.1 (1952).

<sup>150</sup> UN Doc. E/CN.4/SR.274, at 10-11 (1952). The Commission also rejected by a vote of 9-7 with 2 abstentions, *id.* at 11, an amendment by Chile to the effect that the terms of the umbrella provision would not prevent states parties from undertaking any specific obligations relating to particular rights, UN Doc. E/CN.4/L.71 (1952) (amendment).

<sup>152</sup> Sir Samuel Hoare, representative of the United Kingdom, Statement, UN Doc. E.CN4/SR.271, at 10 (1952).

<sup>153</sup> UN Doc. E/CN.4/SR.270, at 11 (1952).

of most economic and social rights . . . presupposed considerable changes and wide-spread reforms” and that such rights “should therefore be embodied in technical conventions” to be negotiated and adopted after completion of the ICESCR.

Developing countries were equally divided over the Polish proposal. Pakistan supported the idea of progressive implementation, as well as the Polish amendment, because it “had constitutional means providing for effective remedy in the broad field of social and economic rights” and it “was essential for the Commission to draft those rights with great precision to make them justiciable.”<sup>156</sup> Egypt, by contrast, observed that it “had been unable to vote for a provision postulating that States undertook to guarantee that the competent political, administrative or judicial authorities would determine a person’s right to redress, in view of the absolute independence of the judiciary in his country.”<sup>157</sup>

Significantly, when the General Assembly considered the ICESCR umbrella provision ten years later at its seventeenth (1962) session, there was much broader acceptance of the concept of progressive realization of economic, social, and cultural rights. The Chilean representative, for example, asserted that the “principle of progressive application was absolutely indispensable” and that developing countries “must be accorded a period of grace” that might be “prolonged beyond what the Commission on Human Rights would consider a reasonable time.”<sup>158</sup> The General Assembly did adopt a technical amendment offered by the United Kingdom, substituting the words “all appropriate means including particularly legislative measures” for “legislative as well as other means.”<sup>159</sup> The UK representative stressed the importance of making it clear that legislative action was not mandatory.<sup>160</sup>

### *Rejection of a Complaints Mechanism*

The Commission completed its consideration of the implementation mechanisms of the two Covenants at its

<sup>156</sup> Abdul Waheed, Representative of Pakistan, Statement, UN Doc. E/CN.4/SR.273, at 10 (1952); *see also* D. Bracco, representative of Uruguay, Statement, UN Doc. E/CN.4/SR.271, at 9 (1952).

<sup>157</sup> Mahmoud Azmi Bey, representative of Egypt, Statement, UN Doc. E/CN.4/SR.274, at 14. To the same effect, *see* Hansa Mehta, representative of India, Statement, UN Doc. E/CN.4/SR.271, at 9 (1952) (“In democratic countries, that decision was taken by representatives of the people, who apportioned expenditure.”).

<sup>158</sup> Diaz Casanueva, representative of Chile, Statement, UN Doc. A/C.3/SR.1181, para. 26 (1962). One commentator has suggested that on “a strict reading of the Covenant,” the terms of Article 2 would not necessarily apply to those ICESCR provisions in which states parties “undertake” specific obligations. CRAVEN, *supra* note 19, at 134; *see also* Alston, *supra* note 21, at 380. There is support for this view in the negotiating record. During the debate in the Third Committee, the Lebanese representative stated:

Article 2 referred to “the full realization of the rights recognized in this Covenant”. The Commission on Human Rights had chosen the word “recognized” intentionally. It was used in all but three of the articles of the Covenant on Economic, Social and Cultural Rights; the three exceptions were article 8 [undertake to ensure right to strike], article [13], paragraph 3 [undertake to have respect for liberty of parents to choose schools], and article [15], paragraph 3 [undertake to respect the freedom indispensable for scientific research] . . . . The reason was that the Commission had considered the three rights referred to in those articles to be in a separate category, since their exercise was in no way connected with economic and social conditions in the country.

Karim Azkoul, Statement, UN Doc. A/C.3/SR.721, para. 21 (1957).

<sup>159</sup> UN Doc. A/C.3/L.1026/Rev.2 (1962).

<sup>160</sup> Mr. Attlee, representative of the United Kingdom, Statement, UN Doc. A/C.3/SR.1202, para. 44 (1962). The UK amendment incorporated a Ghanaian proposal, which similarly sought to clarify “that certain Governments would have to apply other means until public opinion was ripe for legislation.” Mr. Donkor, representative of Ghana, Statement, UN Doc. A/C.3/SR.1203, para. 1 (1962). The amendment was adopted by a vote of 54-0, with 35 abstentions. UN Doc. A/C.3/SR.1206, para. 37 (1962). In short, as one commentator has observed with respect to ICESCR Article 2, “Although it has commonly been asserted that the enactment of legislation is essential to the implementation of economic, social, and cultural rights on the domestic plane, the *travaux préparatoires* make clear this was not intended to be the case.” CRAVEN, *supra* note 19, at 125 (footnote omitted).

tenth (1954) session and decided that a periodic reporting system should be included in both instruments.<sup>161</sup> It was agreed, however, that the Human Rights Committee procedure should apply only to civil and political rights. The Commission also rejected several proposals that would have established a complaints mechanism for economic, social, and cultural rights.<sup>162</sup>

At that time, *no* state suggested that a complaints mechanism could be established for economic and social rights on a comprehensive basis. France proposed adopting an optional procedure, however, for bringing certain *interstate* complaints before the Human Rights Committee. The French proposal would have permitted states parties to select the economic and social rights to be subject to the process. It reasoned that while the "covenant was to receive progressive implementation and the rights stated in it could hardly be subject to court review[,] . . . some of the articles, . . . such as those on trade-union rights and primary education, might well become subject to review by the human rights committee."<sup>163</sup>

The specialized agencies opposed the French proposal. For example, the ILO representative explained that the Covenant articles that fell within the ILO's scope were framed "in brief general clauses, in conformity with the Governing Body's view that the ILO or other specialized agency concerned should work out in detail those economic and social rights which fell within its competence and apply to them the precise and detailed provisions necessary for [\*486] their effective implementation." He also drew attention to the fact that "Articles 24 to 34 of the ILO Constitution embodied a very thorough reporting procedure and an equally thorough procedure for handling complaints by member states or by associations of employers or workers" under the numerous ILO conventions relating to economic and social rights. The ILO had therefore concluded that "reference of complaints to the human rights committee would only lead to duplication and overlapping, which would be likely to endanger the authority and efficiency both of the proposed committee and of the ILO or other specialized agency concerned."<sup>164</sup> UNESCO took a similar view.<sup>165</sup>

A majority of the Commission's members agreed with the specialized agencies. China expressed the view that "it was open to question whether the committee could properly take a decision on a complaint relating to an economic, social or cultural right in respect of which there was no criterion capable of providing the basis for a semi-judicial decision."<sup>166</sup> To the same effect, the Australian representative stated that if the Committee were given any degree of competence to adjudicate economic, social, and cultural rights, it "would also be necessary to evolve some method evaluating those rights and the means used to ensure their observance in quantitative or statistical terms."<sup>167</sup> He also observed that the "real need was to secure the closest possible collaboration between the United Nations and the specialized agencies on the one hand and the States concerned on the other" and that there "was room for doubt as to whether the committee procedure could, for example, facilitate the development of education or the improvement of health conditions in vast areas of the world."<sup>168</sup>

According to the United Kingdom's representative,

If the human rights committee procedure were to be applied to the economic, social and cultural rights, the main issue before the committee could only be the rate at which progress had been made towards ensuring the full realization of those rights. In particular, the question would arise whether the maximum available resources had been used, and that would involve consideration of the distribution of the domestic budget. No democratic State could predict the attitude of its parliament on the subject of the distribu-

<sup>161</sup> Report of the Commission on Human Rights on Its Tenth Session, UN ESCOR 1954, Supp. No. 7, paras. 72-242, UN Doc. E/CN.4/705 [hereinafter CHR Report on 10th Session].

<sup>162</sup> *Id.*, paras. 107-09, 215-25, 227.

<sup>163</sup> P. Juvigny, representative of France, Statement, UN Doc. E/CN.4/SR.431, at 9 (1954); CHR Report on 10th Session, *supra* note 161, para. 216 (proposal).

<sup>164</sup> R. E. Manning, representative of ILO, Statement, UN Doc. E/CN.4/SR.431, at 10.

<sup>165</sup> The representative of UNESCO's Executive Board, Solomon V. Arnaldo, remarked that "examination of the complaints implied a thorough knowledge of the technical conditions of implementation," which the specialized agencies already possessed. UN Doc. E/CN.4/SR.432, at 4 (1954); *see generally* Alston, *supra* note 126, at 90-91.

<sup>166</sup> Cheng Paonan, representative of China, Statement, UN Doc. E/CN.4/SR.432, at 6 (1954).

<sup>167</sup> H. F. E. Whitlam, representative of Australia, Statement, *id.* at 8 (1954).

<sup>168</sup> *Id.*

tion of expenditures or the priority to be given to various government programmes. That was a department which States were certainly not prepared to submit to the consideration of the human rights committee.<sup>169</sup>

The USSR representative stated that his delegation "had never approved of the establishment of a human rights committee" and that the French proposal "could only result in considerable confusion." The Greek representative hoped that France would withdraw its proposal, noting that "while the flexibility of the proposed system made it preferable to any other, it would nevertheless be preferable not to envisage the application of the human rights committee procedure to economic and social rights at all." In light of this strong opposition, France withdrew its proposal before it came to a vote.

For similar reasons, Uruguay also withdrew a proposal that would have recognized the right of individuals and groups to petition ECOSOC concerning the fulfillment of obligations under the Covenant.<sup>173</sup> Delegations supporting the provision had argued that the rights conferred on individuals in the draft covenant not only made them the subject of international law, but entitled them to defend their rights by communicating to the United Nations.<sup>174</sup> The representative of Chile, while sympathetic with the principle of the right to petition, cited "the fact that such a large number of petitions might be submitted that it might be impossible to consider them in a satisfactory manner."<sup>175</sup>

#### *Rejection of a Treaty Body*

Twelve more years elapsed before the General Assembly turned to these questions of implementation. During its debate in 1966, states adopted both a revised procedure whereby the Human Rights Committee would review interstate complaints under the ICCPR, and a new proposal for an optional protocol establishing an individual right to petition.<sup>176</sup> States continued to reject, however, the idea that similar measures should be adopted for the ICESCR.

Interestingly (and as further proof of the nonideological origins of the system), it was the United States that then proposed the establishment of a treaty body of Independent Experts to oversee reporting under the ICESCR. The proposed body was modeled after both the committee established under the Convention on the Elimination of All Forms of Racial Discrimination and the Human Rights Committee ultimately established under IC-CPR Articles 28 to 39.<sup>177</sup> Italy also proposed the establishment of an ad hoc committee that would advise ECOSOC on how to exercise its functions under the Covenant.<sup>178</sup> Western delegations generally supported the U.S. or Italian proposals, arguing that establishment of a committee of experts would bring ICESCR implementation in line as far as possible with the experience of the specialized agencies.<sup>179</sup> Canada stressed that neither proposal "aimed at introducing into the draft Covenant on Economic, Social and Cultural Rights any such advanced techniques as conciliation, petitions, or procedures for the settlements of dispute, which would be quite inappropriate in that particular instrument."<sup>180</sup>

<sup>169</sup> Sir Samuel Hoare, representative of the United Kingdom, Statement, *id.* at 9.

<sup>173</sup> Cesar Montero Bustamante, representative of Uruguay, Statement, UN Doc. E/CN.4/SR.423, at 10, 12 (1954).

<sup>174</sup> *Id.* at 10-14; CHR Report on 10th Session, *supra* note 161, paras. 107-09, 227.

<sup>175</sup> Rudecindo Ortega, representative of Chile, Statement, UN Doc. E/CN.4/SR.423, at 13 (1954).

<sup>176</sup> See MANFRED NOWAK, THE U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS 580-616, 647-723 (1993). The Third Committee considered the draft covenants from 1954 to 1966.

<sup>177</sup> Mrs. Harris, representative of the United States, Statement, UN Doc. A/C.3/SR.1399, paras. 1-10 (1966); UN Doc. A/C.3/L.1360 (1966) (proposal). For the Racial Discrimination Convention, see *supra* note 31.

<sup>178</sup> Mr. Capotorti, representative of Italy, Statement, UN Doc. A/C.3/SR.1398, paras. 2-4 (1966); UN Doc. A/C.3/L.1358 (1966) (proposal).

<sup>179</sup> See Canada, Statement, UN Doc. A/C.3/SR.1399, paras. 27-28 (1966); Finland, Statement, *id.*, para. 30; Ireland, Statement, UN Doc. A/C.3/SR.1400, paras. 2-4 (1966); Netherlands, Statement, *id.*, paras. 13-16; Norway, Statement, *id.*, paras. 24-26; Israel, Statement, *id.*, paras. 50-52. Other delegations supporting the U.S. or Italian proposals included Madagascar, Ceylon, and Panama, UN Doc. A/C.3/SR.1400, paras. 10-11, 19-24, 33 (respectively) (1966).

<sup>180</sup> Donald McDonald, representative of Canada, Statement, UN Doc. A/C.3/SR.1399, para. 27 (1966).

Once again, however, even these moderate proposals met with widespread opposition. The USSR representative was of the opinion that "no body of experts, however able and impartial, could solve the kind of controversial problems that were likely to arise in the implementation of the Covenant."<sup>181</sup> China asserted that "the implementation measures must be feasible and practical," and that "it was true that economic, social and cultural rights differed from civil and political rights in that, whereas the latter could be guaranteed by legislation or administrative measures, the former could not be realized overnight but required an infrastructure of schools, teachers, factories, doctors, hospitals and so forth."<sup>182</sup> Many developing countries agreed with India that "since the Economic and Social Council and various specialized agencies [\*488] in relationship with it dealt with most of the rights enumerated in the draft Covenant, the Council was the appropriate organ to examine and comment on the reports of States parties."<sup>183</sup> Ghana reflected the views of several African delegations when it asserted:

As a developing country, Ghana considered that since the Council was the body through which technical assistance was channelled, it was proper that the Council should carry out the function of examining the reports. . . . A committee would be needed if complaints from individuals or States were contemplated, . . . but the Covenant simply required the States parties to raise the level of living of their citizens and to report on their efforts to the Council, which could offer assistance on requests from States.<sup>184</sup>

These views led to the withdrawal of the U.S. and Italian proposals.<sup>185</sup> So, when adopted, the ICESCR did not itself provide for any oversight or implementation mechanism comparable to the ICCPR's Human Rights Committee. The overwhelming sentiment of states at that time was that ECOSOC should retain supervision of the Covenant.

#### *Establishment of the Committee on Economic, Social and Cultural Rights*

After the Covenant entered into force in January 1976, ECOSOC adopted a resolution in order to institute procedures regarding the submission of reports by states parties and the specialized agencies, as well as for ECOSOC's consideration of such reports.<sup>186</sup> The resolution also called for the establishment of a sessional working group to assist ECOSOC in the consideration of reports. The working group encountered some difficulty in establishing its method of work, however, and in 1981 and 1982, ECOSOC modified its composition, organization, and administrative arrangements.<sup>187</sup> Subsequently, in 1985, ECOSOC changed the working group's composition so that it would consist of experts serving in their personal capacities, and renamed it the Committee on Economic, Social and Cultural Rights.<sup>188</sup>

In practice, the Committee has come to operate similarly to the other treaty bodies in reviewing state party reporting, issuing general comments, and so on. Unlike those other bodies, however, the Committee is not directly accountable to states parties to the Covenant since its members are elected by the 54-state membership of ECOSOC.<sup>189</sup> In this respect, it remains a temporary or "provisional" body, deriving its authority and respon-

<sup>181</sup> Mr. Nasinovsky, representative of USSR, Statement, *id.*, para. 23.

<sup>182</sup> Mr. Tsao, representative of China, Statement, UN Doc. A/C.3/SR.1401, para. 4 (1966).

<sup>183</sup> Mr. Sinha, representative of India, Statement, *id.*, para. 12.

<sup>184</sup> Mr. Dombo, representative of Ghana, Statement, *id.*, para. 15.

<sup>185</sup> *Id.*, paras. 17-21; *see generally* Alston, *supra* note 126, at 91-92.

<sup>186</sup> ECOSOC Res. 1988 (LX) (May 11, 1976); *see also* ECOSOC Dec. 1978/10 (May 3).

<sup>187</sup> ECOSOC Dec. 1981/158 (May 8); ECOSOC Res. 1982/33 (May 6).

<sup>188</sup> ECOSOC Res. 1985/17 (May 28); UN Doc. E/1985/SR.22, paras. 43-48.

<sup>189</sup> *See generally* Centre for Human Rights, United Nations Action in the Field of Human Rights, paras. 248-52, 1306-14, UN Doc. ST/HR/2/Rev.4 (1994) [hereinafter UN Action in the Field of Human Rights]; Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 473 (Philip Alston ed., 1992).

sibility from ECOSOC and thus remaining potentially subject to abolition by that same body.<sup>190</sup>

To summarize, the historical record reveals that the differences in implementation mechanisms were based, to use Cassin's words, upon "two great differences" between the prospective covenants: "Firstly economic, social and cultural rights had been placed under the aegis of the specialized agencies and, secondly, the Commission had repeatedly stressed that application of those rights would be a gradual process."<sup>191</sup> While political confrontations certainly influenced delegates' views, the main concerns unquestionably revolved around the difficulties that states would face in implementing economic, social, and cultural rights. Most states, [\*489] including the USSR and China, opposed oversight mechanisms; there was almost no support to establish adjudicative procedures or to make the rights in question otherwise "justiciable."

By attributing the negotiators' fundamental structural decisions to confrontational "ideological" dynamics that no longer exist, proponents of new oversight mechanisms for the Covenant would return us to the point of departure in 1948, when these issues were first debated in the context of the Universal Declaration, or to 1951-52, when the Commission took up the idea of a covenant on economic, social, and cultural rights. Those proponents simply disregard the fact that a complaints mechanism for economic, social, and cultural rights was specifically debated and rejected, and that there was markedly little support for parallel oversight and supervisory provisions between the two prospective covenants. They would have the international community overlook the reasons for those decisions and, in effect, rewrite the relevant provisions of the ICESCR.

There is no reason why the international community cannot now reconsider the matter. But the current proposal must be evaluated, at least in part, by assessing the continued vitality of the concerns that drove the drafters to reach the conclusion they did--the lack of criteria for evaluating complaints, overlapping and duplication of functions with the specialized agencies, and practical considerations that include the number of potential complaints.

### III. THE NEED FOR WORKABLE CRITERIA

Of the various issues that gave the Covenant negotiators such serious pause, the most fundamental was the difficulty of developing workable criteria by which to measure states' compliance with, or violation of, economic, social, and cultural rights. This difficulty remains the most serious obstacle to adoption of the proposed optional protocol. It is simply backward to pursue a "bottom up" approach by creating the mechanism for adjudication *before* it has been agreed what specific criteria are to be enforced. States should, and likely will, be reluctant to submit to a binding new process without knowing what criteria will be used in determining whether and to what extent they have violated the Covenant.<sup>192</sup> Even more significantly, states are unlikely to comply with the decisions unless they appear to be well reasoned and based upon universally accepted principles.

This is not simply a question of fair procedure. Certainly, if a decision is made to adopt the protocol, the Working Group will be called upon to devote careful attention to such issues as the nature and timing of pleadings and responses, the modalities for submitting and contesting evidence, whether there will be oral hearings and testimony by experts and rebuttal witnesses, whether and to what extent the adjudicators can develop and rely on their own "outside" information, what kinds of sanctions can be imposed and remedies awarded, and so on.<sup>193</sup> These elements are the *sine qua non* of an impartial, effective process of adjudication. But what is more critical in evaluating the propriety of the complaints mechanism is to know how compliance with economic, so-

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<sup>190</sup> In addition to reporting that the "Committee has clearly indicated its preoccupation with its ambiguous status with respect to the Covenant," the secretary-general has noted that the Committee's "role is dependent upon its continuing to be the body to which this function has been delegated by the Council." Report of Secretary-General, Follow-up and Monitoring of the ICESCR, UN Doc. E/1996/101, para. 5 (emphasis omitted).

<sup>191</sup> UN Doc. E/CN.4/SR.427, at 4 (1954).

<sup>192</sup> See, e.g., Working Group Report, *supra* note 3, para. 59; Poland, Statement, *supra* note 80, at 2 ("Treaties ought not to be allowed to evolve informally in disregard of formal amendment procedures.").

<sup>193</sup> A number of serious issues lurk here. Experience under the ICCPR's first Optional Protocol, as well as under the CHR's so-called "1503 procedure," suggests that many, if not most, individual complaints are likely to contain scant supporting documentation. It will obviously not be sufficient for the adjudicators to decide such complaints solely on the basis of superficial allegations. Other petitions, especially those brought by knowledgeable and experienced NGO advocates, will likely be carefully researched, well crafted, and fully detailed. Still, it would not be appropriate for the adjudicators to conclude that such complaints, if not rebutted, necessarily establish treaty violations. A state that is willing to respond will have to commit the resources

cial, and cultural rights will be measured and judged.<sup>194</sup>

[\*490] During the recently concluded Working Group negotiations, a number of states reiterated their concerns about the lack of criteria. India, for example, asserted that the absence of a "clear standard against which to measure a member state's obligation of 'progressive realization' based on the 'maximum of its available resources'" is exactly the reason why no treaty-based monitoring body for economic, social, and cultural rights has ever been established.<sup>195</sup> Some delegations also stated that the "views expressed by the Committee under an optional protocol might lead to a division among States, as some States might not accept the Committee's interpretations," and that "the Committee's views concerning States' social policies and resource allocations might unduly interfere with the policy-making powers of legislatures."<sup>196</sup>

Other states maintained that Covenant rights had been sufficiently elaborated in the Committee's General Comments and recommendations under the state reporting procedure and that "the balanced approach demonstrated by the Committee" should "address concerns over how the Committee would carry out its mandate under the proposed optional protocol."<sup>197</sup> Some states expressed the view (somewhat diplomatically) that "it would be useful to know more about the criteria that would be used in determining whether a violation had occurred."<sup>198</sup>

To be sure, in recent years, the Committee has issued a number of detailed pronouncements on various rights. These statements have come in the form of "General Comments" intended to provide guidance to states parties in preparing their periodic implementation reports.<sup>199</sup> Such pronouncements provide some insight, if not a precise guide, to how individual petitions might be handled if the process was entrusted to the Committee. We here focus on the General Comments on the rights to adequate housing,<sup>200</sup> food,<sup>201</sup> health,<sup>202</sup> water,<sup>203</sup>

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to investigate the charges in the complaint, rebut the allegations or explain the circumstances, defend its policies and programs, and justify the choices that arguably caused (or have not yet ameliorated) the privation in question. This task will be more difficult and time consuming in the case of the well-prepared NGO complaint posited above. If no response--or no adequate response--is forthcoming from the respondent state, the adjudicators would presumably need to determine and analyze the facts themselves, assuming that there is money for such "on-site" fact finding.

<sup>194</sup> Indeed, some of the advocates of the optional protocol point to the lack of conceptual clarity as one of the main reasons for establishing the complaints procedure. This approach seems to put the cart before the horse.

<sup>195</sup> India, Statement, *supra* note 80, at 2.

<sup>196</sup> Working Group Report, *supra* note 3, para. 61.

<sup>197</sup> *Id.*, para. 62.

<sup>198</sup> *Id.*, para. 61.

<sup>199</sup> See ESCR Committee, General Comment No. 1, Reporting by States Parties, UN Doc. E/1989/22, annex. Strictly speaking, the Committee's General Comments cannot properly provide the criteria for adjudicating complaints, since as currently constituted the Committee lacks the authority to issue binding legal interpretations of the Covenant. As a general matter, only states parties to a treaty are empowered to give a binding interpretation of a treaty and its provisions, unless the treaty expressly provides otherwise. Cf. MARJORIE M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 361 (1970) (quoting Research in International Law (Harvard Law School), *Draft Convention on the Law of Treaties*, Art. 19, Comment, 29 AJIL SUPP. 937, 975-76 (1935)). The Covenant does not so provide. This Committee was not constituted as a mechanism to render binding, or even authoritative, interpretations. See *supra* notes 101, 186-90 and accompanying text. Moreover, in explaining the purpose of its General Comments to ECOSOC in 1988, the Committee did not itself even claim such authority. See ESCR Committee, Report on the Second Session, paras. 367-69, UN Doc. E/1988/13. In principle, states parties could, of course, vest such authority in the Committee by amending the Covenant, but in doing so would presumably assert rights of participation and approval in the articulation of the criteria by which their compliance with the Covenant would be judged. Absent such rights, the legitimacy of the criteria would be open to question. In this context, it is worth noting that ICESCR Article 19 provides that state parties may submit comments to ECOSOC on any general recommendations made by the Commission on Human Rights.

<sup>200</sup> ESCR Committee, General Comment No. 4, The Right to Adequate Housing, UN Doc. E/1992/23 (1991), Annex III; see also ESCR Committee, General Comment No. 7, The Right to Adequate Housing: Forced Evictions, UN Doc. E/1998/22, Annex IV (1997).

<sup>201</sup> ESCR Committee, General Comment No. 12, The Right to Adequate Food, UN Doc. E/C.12/1999/5.

<sup>202</sup> ESCR Committee, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4.

<sup>203</sup> ESCR Committee, General Comment No. 15, The Right to Water, UN Doc. E/C.12/2002/11.

and education<sup>204</sup> --those relating to the Millennium Development Goals.<sup>205</sup> There are others, including the rights of older persons<sup>206</sup> and persons with disabilities,<sup>207</sup> but these five will serve to illustrate the Committee's approach for purposes of this discussion.

### *The Committee's Idea of Enforceable Rights*

Not only has the Committee defined ICESCR rights very broadly, but the substance of its commentaries makes its pro-adjudication stance abundantly clear. In its view, the ICESCR unquestionably imposes binding and enforceable obligations on states parties. Despite the clear language of Article 2(1) about progressive implementation, and notwithstanding the relevant negotiating history, many of the elements of the rights articulated in the Covenant are in the Committee's eyes "capable of immediate implementation."<sup>208</sup> The Committee has said, forthrightly, that it expects states parties to "modify the domestic legal order as necessary in order to give effect to their treaty obligations," preferably by "direct incorporation" of Covenant provisions into their domestic laws.<sup>209</sup>

In the Committee's distinctive taxonomy, "obligations to respect" entail responsibilities of direct application and effect, "obligations to protect" generally require states to prevent interference by third parties (particularly nonstate actors) in the enjoyment of the right in question, and "obligations to fulfil" involve the duty of states parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures aimed at "the full realization" of the rights in question. To varying degrees, each of these categories contemplates immediate application by the state, but it is the last that is by far the most onerous and the most questionable in light of the Covenant's negotiating history.

In the Committee's view, the obligation to "fulfil" can involve both a duty to "facilitate" and a duty to "provide." The former contemplates "empowering" action by the state party to create the appropriate circumstances in which individuals can successfully pursue their enjoyment of the rights in question--for example, by developing agrarian systems, adopting national health policies and programs, improving methods of production, establishing effective distribution mechanisms, and so forth--in order to promote efficient development and utilization of natural resources.<sup>210</sup> By contrast, the Committee considers state parties to be obligated to "fulfil (provide)" the rights to food, water, and health whenever an individual or group is unable to realize the right "by the means at their disposal."<sup>211</sup> Thus, states are affirmatively required to supply the content of the right, the commodity in question, when and for whatever reason individuals cannot obtain it themselves. Regarding the right to food, the Committee has stated:

*fulfil (facilitate) whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly.*<sup>212</sup>

<sup>204</sup> ESCR Committee, General Comment No. 13, The Right to Education, UN Doc. E/C.12/1999/10; *see also* ESCR Committee, General Comment No. 11, Plans of Action for Primary Education, UN Doc. E/C.12/1999/4.

<sup>205</sup> The CHR special rapporteur on education, in her paper for the Working Group, suggested that it "explore the option of elaborating an optional protocol which would focus on those economic, social and cultural rights whose substance is also included in the millennium development goals." UN Doc. E.CN.4/2004/WG.23/CRP.4, para. 13.

<sup>206</sup> ESCR Committee, General Comment No. 6, The Economic, Social and Cultural Rights of Older Persons, UN Doc. E/1996/22, Annex IV (1995).

<sup>207</sup> ESCR Committee, General Comment No. 5, Persons with Disabilities, UN Doc. E/1995/22, Annex IV (1994).

<sup>208</sup> General Comment No. 9, *supra* note 87, para. 10.

<sup>209</sup> *Id.*, paras. 3, 8 (respectively).

<sup>210</sup> *See, e.g.*, ICESCR Art. 11(2)(a).

<sup>211</sup> General Comment No. 12, *supra* note 201, para. 15; General Comment No. 14, *supra* note 202, para. 37; General Comment No. 15, *supra* note 203, para. 25.

<sup>212</sup> General Comment No. 12, *supra* note 201, para. 15 (second emphasis added).

Thus conceived, the Covenant's obligations are neither aspirational nor discretionary, but have become unmistakably mandatory and subject to immediate enforcement in whole or in substantial part. As stated in one of the Committee's earliest General Comments:

The undertaking in article 2(1) "to take steps" . . . is not qualified or limited by other considerations. . . . Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, [\*492] concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>213</sup>

Even more transformatory is the Committee's reading of ICESCR Article 2 as containing separate "minimum core obligations." The Committee has taken the position that even though "the enumerated rights are subject to resource availability and may be realized progressively," states parties nonetheless have a "core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of these rights" enunciated in the Covenant.<sup>214</sup> It has begun to articulate these mandatory core obligations to provide "minimum essential levels" of the rights to food, water, housing, and health, and it has confirmed that these core obligations are non-derogable--that is, subject to no exceptions.<sup>215</sup> For example, the Committee stated in its General Comment on the right to health that the right includes "at least" the following core nonderogable obligations: "to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;" "to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;" "to provide essential drugs, as from time to time defined under the relevant WHO Action Programme on Essential Drugs;" and "to ensure equitable distribution of all health facilities, goods and services."<sup>216</sup>

The Committee has increasingly embraced a "violationist" viewpoint. While acknowledging a difference in principle between "acts of commission" and "acts of omission," and between the unwillingness and the inability of a state party to comply, the Committee has left no doubt that a state's failure to take all necessary and feasible steps to meet its obligations constitutes a violation of the rights in question. For example, in its General Comment concerning the right to health, the Committee stated:

*It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.*<sup>217</sup>

A necessary corollary to the violationist approach is that the Covenant requires a remedy for any violation, notwithstanding clear negotiating history to the contrary. Its recent General Comments on food, health, and water declare that "all victims of such violations are entitled to adequate reparation" and that they should "have access to effective judicial or other appropriate remedies at both the national and international levels."<sup>218</sup> This position reflects the Committee's overall belief that economic, social, and cultural rights are legally binding, enforceable, remediable, and justiciable.<sup>219</sup>

<sup>213</sup> General Comment No. 3, *supra* note 15, para 2.

<sup>214</sup> *Id.*, para. 10. See also the ESCR Committee's Statement to the Third UN Conference on Least Developed Countries, para. 15, UN Doc. E/C.12/2001/17, Annex VII (2002) [hereinafter Statement on Least Developed Countries].

<sup>215</sup> In the Committee's opinion, "[A] State party cannot justify its non-compliance with the core obligations set out . . . above, which are non-derogable." General Comment No. 15, *supra* note 203, para. 40.

<sup>216</sup> General Comment No. 14, *supra* note 202, para. 43(b)-(e).

<sup>217</sup> *Id.*, para. 47 (emphasis added).

<sup>218</sup> General Comment No. 12, *supra* note 201, para. 32; General Comment No. 14, *supra* note 202, para. 59; General Comment No. 15, *supra* note 203, para. 55; *cf.* General Comment No. 9, *supra* note 87, para. 4.

<sup>219</sup> As one scholar has put it, "To have a right to *x* is to be *entitled* to *x*. It is owed to you, belongs to you in particular. And if

Such a maximalist approach promises to expand the potential international liability of states parties rather broadly. Under the Committee's approach, states and government officials could, for example--with respect to the right to health--be found liable to individual claimants for unlawful water pollution, inappropriate health care services, failure to insure that individual health practitioners meet professional standards, or failure to provide sufficient food or essential drugs. In some instances, the Committee seems to contemplate imputing responsibility to the state party even for actions or omissions by nonstate actors (such as health care providers, private power companies, and agricultural cooperatives) that cause or result in privations deemed to be violations of protected rights.

### *Parsing Out Rights*

Key to evaluating the Committee's aggressive view of enforceable rights is understanding its effort to "deconstruct" the right to an adequate standard of living, set forth in Article 11, into at least four separate and distinct rights to adequate food, water, clothing, and housing. In so doing, the Committee has overridden the decisions of the negotiators and taken positions inconsistent with the views of states.<sup>220</sup>

Certainly, Article 11(1) does not itself speak in terms of nonderogable obligations, or of separate rights to food, water, clothing, or housing, or even exclusively to an adequate standard of living.<sup>221</sup> It was based, of course, on the general language of Article 25 of the Universal Declaration and was intended to "form the kernel of concepts to be developed in detail either through subsequent international agreements or by the activities of the specialized agencies."<sup>222</sup> During the drafting of the Declaration, both the Commission and the General Assembly specifically rebuffed the USSR's efforts to include provisions recognizing housing as a

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*x* is threatened or denied, right-holders are authorized to make special claims that ordinarily 'trump' utility, social policy, and other moral or political grounds for action." DONNELLY, *supra* note 21, at 8 (citing RONALD DWORIN, *TAKING RIGHTS SERIOUSLY*, at xi, 90 (1977)). This orientation was endorsed, reinforced, and encouraged by the so-called 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, annex (1987), *reprinted in* 9 HUM. RTS. Q. 122 (1987), and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), *in* 20 HUM. RTS. Q. 691 (1998) (both of which have been reprinted in UN Doc. E/C.12/2000/13). The Limburg Principles and Maastricht Guidelines resulted from conferences convened by the International Commission of Jurists, and purported to provide an authoritative "gloss" on the ICESCR for the benefit of the Committee. The Maastricht Guidelines further called for the adoption of the optional protocol for the ICESCR. *Id.*, para. 31. See also the so-called Quito Declaration on the Enforcement and Realization of Economic, Social, and Cultural Rights in Latin America and the Caribbean, para. 10 (1998), at [www.ciel.org/Publications/QuitoDeclaration.pdf](http://www.ciel.org/Publications/QuitoDeclaration.pdf) ("impunity in the face of severe violations of civil, political, economic, social, and cultural rights leads to the breakdown of the ethical values of our society, [making it] imperative that States organize judicial structures to determine the truth about violations, punish those responsible, and ensure reparations to the victims"), and the Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights), UN Doc. E/CN.4/Sub.2/1997/8, paras. 142-43 (prepared by Sub-Commission Special Rapporteur El Hadji Guisse) (calling for the characterization of violations of economic, social, and cultural rights as international crimes subject to the principles of universal jurisdiction and urging adoption of an optional protocol).

<sup>220</sup> We recognize that special recognition has been accorded these rights in other regional treaties. See, for example, Articles 16, 18, 22, 24, and 25 of the African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), and the African Commission on Human and Peoples' Rights *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*, Case No. ACHPR/COMM/A044/1 (May 27, 2002), finding violations of the rights to health, environment, food, and housing, at <http://www.umn.edu/humanrts/africa/comcases/allcases.html>. The case is reported by Dinah Shelton at [96 AJIL 937](http://www.ajil.org/96/937) (2002).

<sup>221</sup> ICESCR Article 11(1) provides:

The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right . . . .

It is unclear exactly what is entailed by the obligation to ensure the continuous improvement of living conditions. A strict reading might suggest that a state could not levy a discriminatory tax on any group even if the aim was redistributive, since the rich are as entitled to the right to continuous improvement of living conditions as much as anyone else. See ROBERTSON, *supra* note 91, at text accompanying note 40.

<sup>222</sup> H. F. E. Whitlam, representative of Australia, Statement, UN Doc. E/CN.4/SR.223, at 4 (1951).

separate right.<sup>223</sup> During the drafting of the Covenant, the Commission initially decided to include [\*494] a provision explicitly recognizing the rights to adequate food, clothing, and housing.<sup>224</sup> When the General Assembly considered the matter, however, it decided to eliminate such a provision and instead included food, clothing, and housing as component parts of the right to an adequate standard of living, an approach that is consistent with that taken in the Universal Declaration.<sup>225</sup> In response to a plea by the director-general of the UN Food and Agricultural Organization, the General Assembly later decided, in 1963, to add a separate "right of everyone to be free from hunger" in ICESCR Article 11(2).<sup>226</sup> The Committee does not discuss this history in its General Comments; instead, it has, in effect, rewritten Article 11 by resurrecting and adopting alternatives that were considered and rejected by the negotiators.

The derivation of a separate right to water is virtually without precedent. The only international human rights instrument that even mentions water is the Convention on the Rights of the Child, which includes "the provision of adequate nutritious foods and clean drinking-water" within the measures that states parties must take in order to secure the right to enjoy the highest attainable standard of health.<sup>227</sup> We are aware of no mention of water in the negotiating histories of the UDHR or the ICESCR.

On what basis has the Committee proceeded to identify and elaborate upon distinct rights to adequate food, water, housing, and clothing under Article 11? The former chair of the Committee offered one explanation in the context of the right to food:

The practical implications of taking, as the primary norm, the right to adequate food rather than the right to be free from hunger are significant. Whereas the former facilitates the adoption of a maximalist approach, the latter, which is more akin to a subnorm, is able at least in theory to be satisfied by the adoption of policies designed to provide a minimum daily nutritional intake.<sup>228</sup>

If the argument is that deconstructed or disaggregated elements of a norm are easier for governments to measure --and therefore to achieve--it is at least a plausible proposition. But that is not what the Committee has done, and even if it had, the argument provides no justification for a unilateral alteration in the substantive content of the Covenant or in the obligations of states thereunder. The negotiators resisted just such an effort in adopting the ICESCR. Nothing gives the Committee authority to rewrite the provisions of the Covenant.

The same analysis can be provided for the other articles that are the subject of the Committee's core, non-derogable "duty to fulfil" obligations. For example, the Committee's position that the right to health contains a core obligation to provide essential drugs as defined by the WHO is at odds with the text of Article 12 (which does not even mention the subject of drugs), as well as with the negotiating history of the Covenant itself, which makes clear that the right was to be closely tied to the idea of progressive realization of rights un-

<sup>223</sup> The Soviet proposal to amend Article 25 of the Universal Declaration and to include, inter alia, a specific "right to housing" was rejected in the Commission by a vote of 6-4, with 3 abstentions, UN Doc. E/CN.4/SR. 71, at 4-12 (1948), and in the Third Committee of the General Assembly by a vote of 20-7, with 10 abstentions, UN Doc. A/C.3/SR.145, at 573-74 (1948).

<sup>224</sup> CHR Report on 8th Session, *supra* note 126, paras. 129-30.

<sup>225</sup> UN Doc. A/C.3/SR.739, para. 38 (1957). The representative of Guatemala (Mrs. Quan) stressed that it "was not intended that States should be directed to do anything specific; they would simply be expected to adopt measures, enabling the individual to obtain more easily what was essential to subsistence: food, clothing and housing." *Id.*, para. 9. Before the vote, the representative of Italy (Mr. Macchia) intervened to support the text, taking special account "of the explanation given by the Guatemalan representative, who had pointed out that rights of the type enunciated in article 11 were not exercised, but enjoyed," and that "in his opinion, the right recognized in Article 11 had the force of a principle binding as such on the States Parties to the Covenant, but not establishing an individual formal right, actionable in courts." UN Doc. A/C.3/SR.743, para. 1 (1957).

<sup>226</sup> UN Docs. A/C.3/SR.1232, para. 10 (1963) (FAO proposal), A/C.3/SR.1269, paras. 1-2 (1963) (General Assembly adoption of revised article). FAO Director-General Sen observed that the international community had not achieved "the same success for economic and social rights" as it had with respect to civil and political rights, and that the "reason might be that the Universal Declaration did not include the right to freedom from hunger among the fundamental human rights." UN Doc. A/C.3/SR.1266, para. 56 (1963).

<sup>227</sup> Convention on the Rights of the Child, *supra* note 76, Art. 24(2)(c).

<sup>228</sup> Philip Alston, *International Law and the Right to Food*, in *FOOD AS A HUMAN RIGHT* 162, 167 (Asbjorn Eide, Wenche Barthe Eide, Susantha Goonatilake, Joan Gussow, & Omawale eds., 1984).

der Article 2.<sup>229</sup>

[\*495] The Committee's revisionist views have not been generally accepted by states, which have instead chosen to hew to the language of the articles as adopted, rather than as interpreted in the Committee's General Comments. By way of example, the 2001 UN Declaration on Cities and Other Human Settlements in the New Millennium, rather than recognizing a separate right to adequate housing as the Committee had recommended, merely urged the special rapporteur on housing, as part of his mandate, to report "on adequate housing as a component of the right to an adequate standard of living."<sup>230</sup> Similarly, during the negotiations at the recent World Summit on Sustainable Development, states rejected the Committee's approach and agreed in the final document only to "realize the right to an adequate standard of living adequate for the health and well-being of themselves and their families, including food."<sup>231</sup> Participating states at the Third World Water Forum in Kyoto in March 2003 also declined to follow the Committee's lead with respect to the right to water.<sup>232</sup>

Most importantly, the Committee's views on justiciability are at odds with the treatment of economic, social, and cultural rights (especially those covered by Articles 11 to 13) as development goals in the UN General Assembly's Millennium Declaration.<sup>233</sup> This instrument specifies a number of goals (the "Millennium Development Goals") to be achieved by 2015, including: (1) halving the proportion of the world's population whose income is less than one dollar a day, who suffer from hunger, or who lack access to safe drinking water; (2) reducing the under-five mortality rate by two-thirds and maternal mortality by three-quarters, and halting the spread of HIV/AIDS, malaria, and other diseases; and (3) ensuring that children everywhere will complete a full course of primary education.<sup>234</sup> States have reaffirmed these goals in recent UN development conferences, including in the Monterrey Consensus and the World Summit on Sustainable Development. Yet, at the same time, states voiced concern over the "current estimates of dramatic shortfalls in resources required to achieve" the Millennium Development Goals.<sup>235</sup>

<sup>229</sup> During the Commission's negotiations of ICESCR Article 12, states adopted a U.S.-proposed amendment that added the words "the steps to be taken by the States Parties to the Covenant to achieve the full realization," thereby making clear that Article 12 was subject to the progressive achievement principle in Article 2. CHR Report on 8th Session, *supra* note 126, para. 133. States rejected a proposal by Uruguay to require that each state party "undertake [] to provide legislative or other measures to promote and protect health." UN Doc. E/CN.4/L.109, para. 2 (1952). The representative of Poland (S. Boratynski) insisted that the amendment would not "carry with it the conception of socialized medicine." UN Doc. E/CN.4/SR.296, at 7 (1952). Mrs. Roosevelt asserted, however, that this type of provision would weaken "the cornerstone of the covenant" (that is, Article 2). *Id.* at 6. Similarly, the ESCR Committee's recent views on social issues, such as its opposition to restrictive abortion laws, find no support in the text of the Covenant or in its negotiating history. See Concluding Observations of the ESCR Committee: Kuwait, paras. 23, 43, UN Doc. E/C.12/1/Add.98 (2004) ("the Committee recommends that the State party's legislation on abortion include other motives [than protecting the life of the mother] for performing legal abortion").

<sup>230</sup> Declaration on Cities and Other Human Settlements in the New Millennium, GA Res. S-25/2, para. 8 (June 8, 2001), at <[http://www.unhabitat.org/declarations/declaration\\_cities.asp](http://www.unhabitat.org/declarations/declaration_cities.asp)> (adopted by the 25th Special Session of the General Assembly). During the negotiations, the Committee had contended (without success) that omitting any reference to the right to adequate housing (or to the Covenant, the Committee, or its General Comments) would "seriously undermine achievements made over the last decade at the national and international level in promoting the right to adequate housing." ESCR Committee, Statement to the Special Session of the General Assembly, para. 6, UN Doc. E/C.12/2001/17, Annex XI. Similarly, the CHR has treated "adequate housing as a component of the right to an adequate standard of living." CHR Res. 2004/21 (Apr. 16).

<sup>231</sup> World Summit on Sustainable Development, Plan of Implementation, para. 40(a), UN Doc. A/CONF.199/20, at 6 (2002), at <<http://www.unctad.org>>. The Committee termed the negotiators' actions "regressive." ESCR Committee, Statement to the Preparatory Committee for the World Summit on Sustainable Development, para. 2, May 17, 2002, UN Doc. E/C.12/2001/17, Annex VI. At the World Food Summit in 1996, states reaffirmed "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger." Rome Declaration on World Food Security 1 (1996) (emphasis added), at <[http://www.fao.org/wfs/index\\_en.htm](http://www.fao.org/wfs/index_en.htm)>; see also Declaration of the World Food Summit: Five Years Later, para. 10, at <<http://www.fao.org/worldfoodsummit/english/index.html>>. For the most recent Cuban-sponsored UN resolutions on "the right to food," see GA Res. 58/186 (Dec. 22, 2003) and CHR Res. 2004/19 (Apr. 16).

<sup>232</sup> Final Report of the 3d World Water Forum (2003), at <<http://www.world.water-forum3.com>>. In 2002, the Commission had authorized a Sub-Commission study on the "right to drinking water supply." CHR Dec. 2002/105 (Apr. 22).

<sup>233</sup> GA Res. 55/2, para. 19 (Sept. 13, 2000). The goals are available at <<http://www.un.org/millenniumgoals/>>.

<sup>234</sup> *Id.* The declaration also included a number of more general development goals such as achieving significant improvement in the lives of at least one hundred million slum dwellers by the year 2020.

<sup>235</sup> International Conference on Financing for Development, Monterrey Consensus, para. 2, UN Doc. A/CONF.198/3, at 2, 2 (2002), available at <<http://www.un.org/esa/ffd/>>.

[\*496] The challenge of realizing these goals is enormous. According to the Food and Agriculture Organization (FAO), the number of undernourished people in the developing world increased by 4.5 million per year from 1995 to 2001. Today some eight hundred million people worldwide suffer from hunger and malnutrition, while perhaps thirty-six million die each year of hunger-related illnesses.<sup>236</sup> The FAO has estimated that in order to reach the Millennium Declaration's goal of halving hunger by 2015, \$ 24 billion per year in incremental public spending would be required, including \$ 8 billion in concessional flows from donors.<sup>237</sup> The WHO has reported that "over one-third of the world's population, and over half the population of poorer countries in Asia and Africa, still lack access to essential medicines" and that "in over 30 countries public spending on medicines is still less than two dollars per head per year on account of unaffordable prices and unreliable supply systems."<sup>238</sup> The WHO estimates that it would take an annual investment of \$ 66 billion (beginning in 2007) "to reach some of the key goals set in the Millennium Declaration. . . . Half [of that amount] must be contributed by the rich countries of the world."<sup>239</sup> According to UNESCO, "almost one-third of the world's population live in countries where achieving the [Education for All] goals remains a dream."<sup>240</sup> UNESCO estimates that the annual external aid for primary education alone would need to be quadrupled (that is, increased to \$ 5.6 billion from the 2000 level of \$ 1.45 billion) if developing states are to have any chance of reaching the Millennium Declaration's education-related goals.<sup>241</sup>

That economic, social, and cultural rights continue to be understood and characterized by the international community as development goals subject to progressive achievement, rather than as enforceable rights subject to third-party adjudication, goes to the heart of the "justiciability" debate. The original negotiators well understood what proponents of the optional protocol now choose to ignore: the task of assessing compliance with the ICESCR is necessarily far more intricate than it is in the case of the ICCPR. Economic, social, and cultural rights present issues of considerably greater complexity and scope--in most cases requiring different kinds of information and greater expertise to resolve than civil and political rights. Whether viewed as absolute or progressive, economic, social, and cultural rights are inherently contextual and interdependent, as the South African Constitutional Court has recently noted in its *Grootboom* decision.<sup>242</sup> A single, simple criterion for judging a state party's overall compliance--for example, by gross national product or per capita income, by the percentage of the population living at or above a specified poverty line, by their average daily caloric intake, or by na-

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<sup>236</sup> FAO, *The State of Food Insecurity in the World 2003*, at 5, 8 (2003), at <<http://www.fao.org/publishing/>>.

<sup>237</sup> Jacques Diouf, director-general of FAO, Political Dimensions of World Hunger, Address Delivered at Kennedy School of Government, Harvard University (Jan. 30, 2003), at <<http://www.fao.org/english/dg/dgspeeches.htm>>.

<sup>238</sup> WHO, Statement to the Commission on Human Rights (Apr. 1, 2003) (on file with authors).

<sup>239</sup> Gro Harlem Brundtland, director-general of WHO, Statement to the 59th Commission on Human Rights (Mar. 20, 2003), at <<http://www.who.int/dg/speeches/2003/commissionhumanrights/en/print.html>>.

<sup>240</sup> UNESCO, EFA Global Monitoring Report 2002: Is the World on Track? 15 (2002), at <<http://www.unesco.org/education/efa/monitoring/>>. Primary education for all was also treated as a development goal in the 1990 World Conference on Education for All (to be reached within a decade) and in the 2000 World Education Forum (to be reached by 2015). Both the 1990 World Declaration on Education for All and the 2000 Dakar Framework for Action are available at the UNESCO Web site, <<http://www.unesco.org>>.

<sup>241</sup> EFA Global Monitoring Report 2002: Is the World on Track? *supra* note 240, at 22-25, 162-63.

<sup>242</sup> *Republic of South Africa v. Grootboom*, 2001 (1) SALR 46 (CC), available at <<http://www.concourt.gov.za>>, a case brought by individuals rendered homeless by eviction and who invoked their right of "access to adequate housing" under Article 26 of the South African Constitution. The Constitutional Court stated:

Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them.

*Id.*, para. 24; *see also* Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 (1) SALR 765 (CC); Minister of Health v. Treatment Action Campaign, 2002 (5) SALR 721 (CC), para. 25. *Grootboom* and *Treatment Action Campaign* are discussed in a case report by Joan Fitzpatrick and Ronald Slye at

tional literacy or infant mortality rates--is certain to be rejected as superficial.<sup>243</sup>

As we demonstrated above, the majority of states participating in the negotiations of the ICESCR felt that imposing absolute obligations applicable to all states parties alike would be entirely unacceptable, that no one size could possibly fit all. Thus, the progress achieved at any given time by any one state party cannot provide the standard by which all other states parties can be judged. In order to be credible and have tangible impact, any criteria must be carefully tailored to set realistic and achievable goals. Such criteria cannot simply be decreed unilaterally by the adjudicators, but must be derived from a participatory process with input from the affected states.

Another fundamental aspect of justiciability concerns the precise purpose of the proposed individual-complaints mechanism. Is it to ameliorate the circumstances in which *each individual* complainant finds him- or herself? Or is it to illuminate a broader societal problem of much greater dimensions--a "consistent pattern of gross and reliably attested violations," to use the standard UN language--through examination of individual cases? The difference is significant.

The Committee seems to have yet a third possibility in mind. By interpreting Covenant rights expansively, it appears to contemplate that the adjudicators would sit in judgment on overall national policies and strategies. Recently, the Committee has characterized the need to "adopt and implement a national . . . strategy and plan of action" for both public health and water as nonderogable minimum core obligations, and has mandated that these strategies and plans of action "shall be devised, and periodically reviewed, on the basis of participatory and transparent process" including "methods, such as . . . indicators and benchmarks, by which progress can be closely monitored."<sup>244</sup> If adoption and implementation of sufficient "strategies" for public health, water, housing, and food are core nonderogable requirements of the Covenant, then a state party's failure either to adopt such strategies or to implement them properly would constitute a violation of its treaty obligations, amenable to an individual complaint and possibly entailing an award of damages.

Would such an approach lead the Committee to adjudicate, for example, a state party's success or failure in achieving the Millennium Development Goals? In many, if not most, circumstances, the lack of an adequate standard of living stems from the absence of sufficient basic resources. Even assuming unquestioned expertise and competence, no rights adjudicator can effectively mandate the creation of resources or the provision of adequate food, water, health, housing, or education where they are scarce or nonexistent. For example, if there is little or no food or water because of a drought, if schools and clinics cannot be built because the government simply lacks the funds and resources, or if education and medical care are deficient because of a shortage of teachers and doctors, the adjudicators' finding of a violation [\*498] can be expected to have little effect.<sup>245</sup> Awarding reparations to individual victims in such cases would typically make even less sense.

A different outcome is possible where adequate commodities or resources do exist but are misspent, where funds are siphoned for less appropriate purposes, or where they are directed discriminatorily for the benefit of favored segments of society. In such circumstances, the purpose of the adjudicators' decision would essentially

<sup>243</sup> Another reason to reject a per se standard is that no government provides all of its citizens a fully adequate standard of living. However conceived, the proper function of a complaints procedure cannot be to hold every state party ipso facto guilty of violating its treaty obligations in respect of every complaint of deprivation. No useful function would thus be served. Nor is it logically or practically possible for any state to devote "the maximum of its available resources" to promoting the enjoyment of any one aspect of the rights in the Covenant to the detriment or exclusion of the others.

<sup>244</sup> General Comment No. 14, *supra* note 202, para. 43(f); General Comment No. 15, *supra* note 203, para. 37(f). Earlier, the Committee had taken a less strident approach. *See, e.g.*, General Comment No. 4, *supra* note 200, para. 12 (1996), where the Committee asserted that the full realization of the right to adequate housing, while varying from one state party to another, "will almost invariably require the adoption of a national housing strategy which . . . defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them." Contrary to the Committee's current position, only Article 14 of the ICESCR requires "a detailed plan of action for the *progressive* implementation, . . . of compulsory primary education free of charge for all" (emphasis added). During the negotiations, the UNESCO representative assured states that it "had considered that the article would not prevent States from amending their plans, as circumstances required and had made a very clear statement to that effect in . . . its commentary on the article." Mr. Maheu, Statement, UN Doc. A/C.3/SR.790, para. 4. (1957); UN Doc. E/CN.4/655/Add.4, annex, sec. I(c) (1952) (UNESCO commentary).

<sup>245</sup> Even while recognizing the justiciability of certain economic rights, the South African Constitutional Court has acknowledged that they are resource dependent. *See Grootboom*, para. 46; *Treatment Action Campaign*, paras. 31-39.

be to require the government to redirect its priorities and programs. While governments intentionally violate civil and political rights with considerable frequency, the deliberate infliction of poverty, famine, or ill health is far less common.<sup>246</sup> When it does occur--when deprivations are deliberately imposed on a population in whole or in part, especially from discriminatory motives--sanctions are, of course, appropriate.

But if a strict violationist approach is applied across the board to the adjudication of alleged violations of economic, social, and cultural rights, it is inevitable that some, perhaps even most, states parties will be accused merely because bad luck, bad policies, or bad judgment (or a combination thereof) has resulted in their failure to achieve the goals of the ICESCR. Should it be the function of the adjudicators to "second-guess" deliberate decisions concerning the use of scarce resources, including those taken by democratically elected governments? Who is to say when a government has spent enough money to ensure a complaining individual's highest attainable standard of physical or mental health? And how likely is the government to adhere to such a decision?

### *International Obligations*

The issue becomes more difficult if one looks for resources beyond national boundaries. There is a likelihood that a strict violationist approach to enforcement of the rights related to the Millennium Development Goals will entangle adjudicators in the ongoing North-South debate over whether the more prosperous nations have an enforceable legal obligation to provide economic and development assistance to under-endowed economies. Developing countries have long maintained that foreign debt, structural adjustment, and even globalization work against human rights, and that by not providing adequate "international assistance and co-operation" as contemplated by ICESCR Article 2(1), the wealthier members of the international community violate the rights of the less fortunate.<sup>247</sup> During the Working Group discussions, the Indian representative expressed concern about the "divisive" potential of these issues.<sup>248</sup> The Commission itself was deeply split on an amendment that would have required the Working Group to focus on the international dimensions of ICESCR obligations; the roll call vote was 25-26, with 2 abstentions.<sup>249</sup>

Inclusion of an interstate-complaints mechanism, as some have proposed, could exacerbate this North-South conflict.<sup>250</sup> A majority of the members of the Committee on Economic, Social and Cultural Rights decided not to include such a mechanism in the 1996 proposal to the [\*499] Commission, noting that "Governments have consistently been wary of what has been referred to as 'a Pandora's Box, which all parties prefer to keep shut'."<sup>251</sup> State-to-state mechanisms exist, of course, under other human rights treaties, though states parties have been markedly reluctant to use them, and the comparable procedures in the specialized agencies have been no more popular.<sup>252</sup> Still, during the recent Working Group debate, some states insisted that it "is unimaginable that a complaints mechanism . . . would lead to fruitful results if [it] disregarded the international dimen-

<sup>246</sup> Sen has observed that "no substantial famine has ever occurred in a democratic country--no matter how poor . . . because famines are extremely easy to prevent . . . and a government in a multiparty democracy with elections and free media has strong political incentives to undertake famine prevention." SEN, *supra* note 25, at 51-52. It is commonly acknowledged, of course, that gross mistreatment of indigenous, minority, and other disfavored groups occurs worldwide. *See also Righting Wrongs*, ECONOMIC, Aug. 18, 2001, at 18, 19-20.

<sup>247</sup> *See, e.g.*, CHR Res. 2004/18 (Apr. 16) ("Effects of Structural Adjustment Policies and Foreign Debt"); CHR Res. 2004/24 (Apr. 16) ("Globalization"); CHR Res. 2004/22 (Apr. 16) ("Unilateral Coercive Measures") (Apr. 16). All three resolutions reflect North-South splits.

<sup>248</sup> India, Statement, *supra* note 80, at 2-3.

<sup>249</sup> E/CN.4/2004/L.10/Add.10, ch. X (vote); UN Doc. E/CN.4/2004/L.67/Rev.1 (Saudi Arabian amendment).

<sup>250</sup> *See, e.g.*, Secretary-General's Report to CHR, *supra* note 82, para. 35 (Cuba); UN Docs. E/CN.4/2000/49, at 4-5 (2000) (Georgia), E/CN.4/2004/WG.23/CRP.6, at 2 (Europe-Third World Centre and American Association of Jurists); Report on Workshop, *supra* note 10, para. 18.

<sup>251</sup> ESCR Committee proposal, *supra* note 9, para. 14. Some members supported such a mechanism. *See* UN Docs. E/C.12/1991/4, para. 363, E/C.12/1992/SR.11, paras. 15, 28, 32, 43, E/C.12/1996/SR.19, para. 52, E/C.12/1996/SR.43, para. 8.

<sup>252</sup> The interstate mechanisms of the 1960 UNESCO Convention Against Discrimination in Education (Article 8) and the Protocol thereto adopted in 1962 (Articles 19 and 20) have never been utilized by states. Only a limited number of state-to-state complaints have been filed under ILO Constitution Article 26. Resort to such mechanisms has been more attractive in the regional human rights systems, particularly under Article 24 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222 (entered into force Sept. 3, 1953). *See* NOWAK, *supra* note 176, at 583-

sion.”<sup>253</sup>

The Committee’s own statements clearly indicate that it views the Covenant as imposing “international obligations” on states parties.<sup>254</sup> In General Comment No. 12, for example, the Committee asserted that states parties have an obligation to “take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”<sup>255</sup> It has also said that “all duty-holders, including States and international organizations, [should be] held to account for their conduct in relation to international human rights law,” and that “steps should be taken by States parties to prevent their own citizens and companies from violating” the ICESCR rights (in this case, water) of “individuals and communities in other countries.”<sup>256</sup>

The Committee has recently emphasized that “it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfil their core and other obligations.”<sup>257</sup> Although the Covenant does not require any specific amount of international cooperation or assistance,<sup>258</sup> the approach taken by the Committee has drawn it into the controversial issue of whether a given state party has provided a sufficient level of financial [\*500] assistance. In its Concluding Observations the Committee now “urges” developed countries “to ensure” that their official development assistance meets the UN target of 0.7 percent of GNP.<sup>259</sup> It has also called upon developed countries--as members of international organizations, such as the International Monetary Fund, the World Bank, and the World Trade Organization--to “ensure that the policies and decisions of those organizations [concerning their lending policies, credit agreements and other international measures] are in conformity with the obligations of States parties under the Covenant, in particular the obligations contained in

87.

<sup>253</sup> Turki Al Madi, representative of Saudi Arabia, Statement, Feb. 23, 2004, at 2 (on file with authors); Working Group Report, *supra* note 3, para. 21.

<sup>254</sup> During the debate the Committee’s experts acknowledged that cases concerning the “international dimension” “might arise.” Working Group Report, *supra* note 3, para. 45.

<sup>255</sup> General Comment No. 12, *supra* note 201, para. 36 (referring to Arts. 2(1), 11, and 23). The Committee has repeatedly emphasized that states “should refrain at all times from imposing embargoes or similar measures” that “prevent the supply of. . . goods and services essential for securing” Covenant rights (in this case, water). General Comment No. 15, *supra* note 203, paras. 31-32; *see also* General Comment No. 8, The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, para. 9, UN Doc. E/C.12/1997/8; General Comment No. 12, *supra* note 201, para. 37; General Comment No. 14, *supra* note 202, para. 41. The Commission’s special rapporteur on food concluded on the basis of similar reasoning that “the Security Council, in subjecting the Iraqi people to a harsh economic embargo since 1991, is in clear violation of its obligation to respect the right to food of the people in Iraq.” UN Doc. E/CN.4/2002/58, para. 123.

<sup>256</sup> Statement on Least Developed Countries, *supra* note 214, para. 14; General Comment No. 15, *supra* note 203, para. 33 (respectively). In the Working Group discussions, India and Cuba also underscored the importance of holding transnational corporations accountable. India, Statement, *supra* note 80, at 2; Secretary-General’s Report to CHR, *supra* note 82, para. 35 (written submission of Cuba). *See also* the judgment of the African Commission on Human and Peoples’ Rights in *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*, Case No. ACHPR/COMM/A044/1 (May 27, 2002), where the Commission concluded that under the African Charter, the Nigerian government had a duty to monitor and control the activities of multinational corporations.

<sup>257</sup> General Comment No. 14, *supra* note 202, para. 45 (endnote omitted); General Comment No. 15, *supra* note 203, para. 38.

<sup>258</sup> Under ICESCR Article 11, for example, states parties recognize the “essential importance of international cooperation based on free consent” (emphasis added). *See* Alston & Quinn, *supra* note 15, at 191 (“on the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance”); CRAVEN, *supra* note 19, at 149.

<sup>259</sup> *See* Concluding Observations of the ESCR Committee: Ireland, para. 38, UN Doc. E/C.12/1/Add.77 (2002); Concluding Observations of the ESCR Committee: Germany, para. 33, UN Doc. E/C.12/1/Add.68 (2001). By comparison, the Monterrey Consensus, *supra* note 235, para. 42, only “urged developed countries that have not done so to make concrete efforts towards the target.”

articles 2.1, 11, 15, 22 and 23 concerning international assistance and cooperation.”<sup>260</sup> Correspondingly, it has concluded with respect to developing countries that “violations of the obligation to fulfil occur through . . . failure by a State to take into account its [ICESCR obligations] when entering into agreements with other States or with international organizations.”<sup>261</sup>

In sum, if the approach of the Committee on Economic, Social and Cultural Rights is followed, a new complaints mechanism is likely to produce confusion, rather than clarity, concerning the international dimension of economic and social rights. It is extremely unlikely that the major donor countries will accept directives from adjudicators to subordinate the activities of international organizations to the ICESCR.<sup>262</sup> It is also unlikely that developing countries will welcome oversight by the Committee of their development framework and strategy agreements with international financial institutions, especially given developing countries’ insistence on strong country “ownership” of these plans. To be sure, economic and social development requires, *inter alia*, high-quality economic growth, macroeconomic stability, structural and market-based economic policies, sound social policies, and good governance. But the appropriate mix of policy and resources to be applied at any given time must be left to each developing country.<sup>263</sup>

#### [\*501] IV. THE PROBLEM OF PERMEABILITY

<sup>260</sup> See Concluding Observations of the ESCR Committee: Ireland, *supra* note 259, para. 37; Concluding Observations of the ESCR Committee: Germany, *supra* note 259, para. 31; *accord* General Comment No. 15, *supra* note 203, paras. 36, 60; General Comment No. 14, *supra* note 202, paras. 39, 64.

<sup>261</sup> General Comment No. 15, *supra* note 203, para. 44(c); *see also* General Comment No. 14, *supra* note 202, para. 50; Concluding Observations of the ESCR Committee: Morocco, para. 15, UN Doc. E/C.12/1/Add.55 (2000); Concluding Observations of the ESCR Committee: Egypt, paras. 10, 14, 28, UN Doc. E/C.12/1/Add.44 (2000); Concluding Observations of the ESCR Committee: Mexico, para. 34, UN Doc. E/C.12/1/Add.41 (1999); Concluding Observations of the ESCR Committee: Argentina, para. 242, UN Doc. E/1995/22 (1994). To the same effect, see the Quito Declaration, *supra* note 219, para. 36:

A serious commitment to the obligations of the States with respect to [economic, social, and cultural rights] requires that commitments to pay external creditors must be subordinated to the duty of promoting full access to, and enjoyment of, economic, social, and cultural rights] by citizens, so that structural adjustment programs agreed upon with international financial organizations must be subordinated to social development and, in particular, to the eradication of poverty, the generation of full, productive employment, and the promotion of social integration mindful of gender and cultural diversity.

<sup>262</sup> ICESCR Article 24 states that “nothing in the present Covenant shall be interpreted as impairing . . . the constitutions of the specialized agencies which define [their] respective responsibilities . . . in regard to matters dealt with in the present Covenant.” Significantly, the constitutions of the international financial institutions have been construed as precluding non-economic influences or political factors in decision making. *See* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, Art. V, sec. 3(a), 60 Stat. 1401, 2 UNTS 39; Articles of Incorporation of the International Bank for Reconstruction and Development, July 22, 1944, Arts. III, sec. 5(b) & IV, sec. 10, 60 Stat. 1440, 2 UNTS 134, *as amended*, Dec. 16, 1965, [16 UST 1942](#), 606 UNTS 294; *see generally* Gianviti, *supra* note 86, para. 56 (“Neither by [the ICESCR’s] terms nor by the terms of the Fund’s relationship agreement with the United Nations is it possible to conclude that the Covenant is applicable to the Fund.”) (author is general counsel, IMF); Roberto Danino, general counsel of World Bank, Statement to Conference on Human Rights and Development (Mar. 1, 2004) (“We must work within the legal framework [and] . . . embrace the centrality of human rights to our work, without adopting a ‘rights-based approach.’”) (on file with authors).

<sup>263</sup> The Monterrey Consensus and the World Summit on Sustainable Development emphasized that “each country has the primary responsibility for its own economic and social development,” and stressed the need to “use development frameworks that are owned and driven by developing countries.” Monterrey Consensus, *supra* note 235, paras. 6, 43; World Summit on Sustainable Development, Plan of Implementation, *supra* note 231, para. 146. In this regard, the World Bank Group and the IMF agreed in 1999 that nationally owned participatory poverty-reduction strategies should provide the basis of all concessional lending and debt relief under the enhanced Heavily Indebted Poor Country Initiative. The Monterrey Consensus, *supra* note 235, para. 4, did stress, in the context of the Millennium Development Goals, the need for a “new partnership between developed and developing countries” whereby international resources are mobilized to complement domestic resources harnessed through “sound policies, good governance . . . and the rule of law.” Similarly, President George W. Bush’s recent pledge of additional development assistance, through the establishment of the Millennium Challenge Account, aims to support projects in countries that exercise good governance (rooting out corruption, upholding human rights, and adherence to the rule of law as essential conditions for successful development), invest in the health and education of their people (schools, health care, and immunization), and pursue sound economic policies that foster enterprise and entrepreneurship, at <http://www.whitehouse.gov/infocus/developingnations/>. This approach captures the sense in which we understand states parties’ obligation under ICESCR Article 2.

A number of the rights that some consider justiciable under the proposed optional protocol are already subject to multiple international complaints procedures in the specialized agencies or elsewhere. Establishing a new complaints mechanism poses a risk of unnecessary duplication of effort and of possible conflicts of interpretation and result.

During the Working Group debate, proponents of the protocol were dismissive of this concern, arguing that "the risk of such conflict already exists in relation to civil and political rights, and that this concern would not outweigh the benefits of an optional protocol."<sup>264</sup> Some years ago, however, Professor (now Judge) Rosalyn Higgins expressed apprehension about the "possibilities of inconsistency of interpretation" arising from the "proliferation of treaty bodies" engaged in authoritative interpretations of treaties.<sup>265</sup> She emphasized that the problem was not limited to treaty bodies but also included subsequent interpretations of standards by political bodies.<sup>266</sup> Philip Alston, writing in his capacity as the Independent Expert on the effective operation of treaty bodies, appears to have reached much the same conclusion. He noted that problems of "permeability" can result when the norms contained in one instrument are used in connection with the interpretation of norms contained in another instrument:

In the longer term, it seems inevitable that instances of normative inconsistency will multiply and that significant problems will result. Among the possible worst-case consequences, mention may be made of the emergence of significant confusion as to the "correct" interpretation of a given right, the undermining of the credibility of one or more of the treaty bodies and eventually a threat to the integrity of the treaty system. While it is to be hoped that none of these scenarios will eventuate, the possibility exists that they might be sufficient to cause the international community to hesitate before creating new treaty bodies beyond those already in the pipeline. It is also an important reason to consider long-term measures towards the rationalization of the present system.<sup>267</sup>

We think that some hesitation is warranted with regard to the optional protocol. Even a brief survey of the activities of the relevant specialized agencies and other UN bodies suggests that its adoption might lead to "permeability" and "norm inconsistency." The result could well be confusion, not clarification, of state parties' obligations regarding the realization of ICESCR rights.

### *Specialized Agencies*

As discussed above, the negotiators drew heavily on the specialized agencies in the preparation of the Covenant and foresaw a central role for the relevant agencies in its implementation--particularly the ILO, UNESCO, FAO, and WHO.<sup>268</sup> In point of fact, the negotiators explicitly rejected a proposal for a selective complaints mechanism under the ICESCR out of a belief that such a mechanism would lead to an overlapping of functions, thereby endangering the authority and efficiency of both the adjudicative body and the specialized agen-

<sup>264</sup> Working Group Report, *supra* note 3, para. 74.

<sup>265</sup> Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 MOD. L. REV. 1, 8-9 (1989).

<sup>266</sup> *Id.* at 9. She identified a number of issues relevant to consideration of the optional protocol:

Does the interpretation under the prior or later treaty prevail? Does an interpretation given under a one topic treaty have greater authority than interpretation given of a specific right under a more general treaty? Is the integrity of each treaty to be protected by each body carefully not looking beyond its own jurisprudence in any given subject area? Is the authority and standing of any one interpreting body to be weighed against the authority and standing of any other interpreting body?

<sup>267</sup> Effective Implementation of UN Human Rights Instruments, para. 128, UN Doc. A/44/668 (1989).

<sup>268</sup> Alston, *supra* note 126, at 100, 117, acknowledges that the drafters contemplated a "greatly enhanced role to be played by the agencies under the Covenant"--indeed, "the primary thrust of the implementation procedures [was] directed at the agencies." For a discussion of the relationship between the United Nations and its specialized agencies, see UN Action in the Field of Human Rights, *supra* note 189, paras. 268-303.

cies.<sup>269</sup> Those concerns remain valid today.

There can be little doubt that adjudication of labor rights under ICESCR Articles 6 to 10 would substantially overlap with the work of the ILO and risk the possibility of conflicting interpretations, just as foreseen by the Independent Expert and the drafters of the ICESCR. The ILO participated in the negotiation of the ICESCR, and its experience served as a model for the implementation procedures contemplated for the Covenant.<sup>270</sup> The ILO continues to maintain an active and authoritative presence, each year reviewing more than 1,500 implementation reports by states under the various ILO conventions pursuant to Article 22 of the ILO Constitution.<sup>271</sup> Additionally, the ILO Constitution boasts several procedures for investigating specific allegations of noncompliance--which have been utilized with increasing frequency.<sup>272</sup> It also offers a special complaints mechanism, set up in agreement with ECOSOC in 1950, to examine complaints from workers' or employers' associations in the field of freedom of association.<sup>273</sup> All ILO mechanisms reflect the unique tripartite structure of the organization, with workers and employers participating as equal partners with governments. The tripartite approach is one of the hallmarks of the ILO system and a principal reason why it has commanded respect and been successful in protecting and promoting labor rights worldwide. Disregarding it would constitute a major, and dubious, change in the international approach to labor rights, a point acknowledged even by supporters of an independent mechanism for the Covenant.<sup>274</sup>

[\*503] In the areas of education, culture, and scientific progress, a new complaints process might intrude on the work of UNESCO.<sup>275</sup> Like the ILO, UNESCO has implemented procedures to examine state compliance with a number of conventions, recommendations, and declarations in areas also covered by the ICESCR.

<sup>269</sup> See *supra* notes 161-75 and accompanying text.

<sup>270</sup> See Alston, *supra* note 126, at 94.

<sup>271</sup> *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Pt. IA)*, International Labour Conference, 91st Sess., at 28 (2003); see generally Klaus Samson, *The Standard-Setting and Supervisory System of the International Labour Organisation*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 149, 158-64 (Raija Hanski & Markku Suksi eds., 1997).

<sup>272</sup> Article 24 of the ILO Constitution grants workers' and employers' organizations the right to submit to the ILO Governing Body a representation or complaint against any member state that, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party." Under ILO Constitution Article 26, any member has the right to file a complaint with the International Labour Office if it is "not satisfied that any other member is securing the effective observance of any Convention which both have ratified." See generally UN Action in the Field of Human Rights, *supra* note 189, paras. 2651-54; Samson, *supra* note 271, at 164-70; Lee Swepston, *Human Rights Complaint Procedures of the International Labor Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 85, 90-95, 100-01 (Hurst Hannum ed., 3d ed. 1999).

<sup>273</sup> The main element of the special complaints mechanism is the Governing Body Committee on Freedom of Association, which has examined more than 2,100 cases since its creation in 1951. The digest of decisions can be found in the International Labour Organization ILOLEX database, at <<http://www.ilo.org/ilolex/index.htm>>. See generally Samson, *supra* note 271, at 170-74. See also Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in THE UNITED NATIONS AND HUMAN RIGHTS 500, 587-88 (Philip Alston ed., 1992), for a discussion of the jurisdictional conflict in 1949 between the ILO and the United Nations regarding human rights. She concludes, "In retrospect it is difficult to regret that the ILO won the jurisdictional battle." *Id.* at 588.

<sup>274</sup> As Leary observed, "To most observers, this full participation of workers' and employers' representatives in the ILO is responsible for much of its success in adopting and implementing conventions. . . . It is unfortunate that an aspect of ILO human rights work which has proved to be particularly helpful is structurally incapable of duplication within the UN." Leary, *supra* note 273, at 584-85; see also *No Right to Complain*, *supra* note 6, at 86-87 ("The International Labor Organization (ILO) has been working since 1919 to develop and clarify the precise normative content of [ICESCR Articles 6 to 9]. It has used a variety of methods for that purpose but many of them have a strong 'petition' or complaints element about them.").

<sup>275</sup> ICESCR Articles 13 to 15 concerning the rights to education, culture, and scientific progress relate directly to the fundamental human rights aims of UNESCO and were adopted on the basis of a drafting proposal first made in 1951 by UNESCO's director-general. See *supra* note 126 and accompanying text; see generally Philip Alston, *UNESCO's Procedures for Dealing with Human Rights Violations*, 20 SANTA CLARA L. REV. 665, 667-69 (1980).

<sup>276</sup> While its dispute settlement mechanisms are little used, UNESCO's success rate in securing compliance with its decisions would appear to be far better than the treaty bodies have achieved. In April 2003, UNESCO's Committee on Conventions and Recommendations reported that it has resolved about 70 percent of its cases since it began using that process in 1978. <sup>277</sup>

Neither the FAO nor the WHO has to date adopted complaints mechanisms, but both were deeply involved in the negotiation of the relevant ICESCR articles and today boast much of the international community's resources and expertise relating to the alleviation of hunger and ensuring adequate health. <sup>278</sup> The FAO's Governing Body and the WHO's World Health Assembly have engaged in substantial standard-setting with respect to food security and health, and both receive and review periodic reports from member states concerning their implementation of those standards and recommendations. In hosting major conferences, technical meetings, and consultations of experts, both organizations serve as vital international forums for debate on food and health issues. <sup>279</sup>

It is highly unlikely the Committee on Economic, Social and Cultural Rights or other adjudicative body could ever match the relevant expertise of these specialized agencies on the substantive issues contained in the ICESCR. Significantly, the regular budgets of the ILO, UNESCO, [\*504] FAO, and WHO are each at least seven hundred times that of the Committee. <sup>280</sup> Indeed, as one of the major proponents of the optional protocol has acknowledged, "The specialized agencies bring to their role under the Covenant on Economic, Social and Cultural Rights a technical competence and expertise in relevant matters which is unmatched." <sup>281</sup>

The possibility that a new complaints mechanism could easily lead to duplication and overlapping of functions and interpretations was of concern to the Commission's Independent Expert. He took pains to examine the mechanisms established by the ILO and UNESCO, and concluded that, should the proposed complaints mecha-

<sup>276</sup> UNESCO's conventions and agreements, as well as a general discussion of its complaints procedures, are available at <<http://www.unesco.org/general/eng/legal/index.shtml>>. In 1953, UNESCO instituted a procedure for its executive director to examine complaints received from private persons or associations alleging human rights violations by states. UNESCO Doc. 30 EX/Decisions 11 (1953). Under that system, as revised in 1978, the Committee on Conventions and Recommendations (CCR) examines cases concerning violations of human rights in UNESCO's field of competence, including the rights to education, to share in scientific advancement and to enjoy its benefits, to participate freely in cultural life, and to information, including freedom of opinion and expression as provided primarily in Articles 26 and 27 of the Universal Declaration and Articles 13 to 15 of the ICESCR. UNESCO Doc. 104 EX/Decisions 3.3 (1978). Cases involving "individual and specific" human rights violations are examined by the CCR in private, whereas "questions of massive, systematic or flagrant violations of human rights and fundamental freedoms" may be considered by UNESCO's Executive Board and General Conference in public meetings. UNESCO Doc. 104 EX/Decisions 3.3, paras. 10, 15-18 (1978); *see generally* UNESCO Doc. 169 EX/CR/2 (2004); Alston, *supra* note 275, at 670-94. UNESCO also adopted dispute settlement mechanisms under its Convention Against Discrimination in Education, as well as through a Protocol (under the same convention) that entered into force in 1968 and instituted a Conciliation and Good Offices Commission responsible for facilitating settlement of any disputes arising between states parties. The instruments are available at <[http://www.unesco.org/human\\_rights/hrad.htm](http://www.unesco.org/human_rights/hrad.htm)>.

<sup>277</sup> Report of the Committee on Conventions and Recommendations, para. 4(b), UNESCO Doc. 166 EX/45 Rev. (2003). In 1998, the UNESCO Executive Board reported that during its first twenty years, its CCR had handled some 460 communications and that 274 of them have been settled. Summary of the Results of the Application of the Procedure Laid Down by 104 EX/Decision 3.3, UNESCO Doc. 154 EX/16, Annex II (1998). By comparison, the Human Rights Committee has resolved about 30 percent of its cases since 1976. *See infra* note 326 and accompanying text.

<sup>278</sup> As discussed above, ICESCR Article 11(2) was based upon a proposal by the FAO director-general, whereas Article 13 was based upon a proposal by the WHO director-general. *See supra* notes 126, 226 and accompanying text. With a regular budget of \$ 749.1 million for the 2004-05 biennium, the FAO employs more than 3,450 professional and general service staff, and maintains 5 regional offices, 5 subregional offices, 5 liaison offices, and 78 country offices in addition to its headquarters in Rome. *See What Is the FAO? at* <<http://www.fao.org>>. The WHO has a regular UN budget of \$ 880 million for the 2004-05 biennium and boasts a secretariat staffed by some 3,500 health and other experts and support personnel, who work at its headquarters in Geneva and in its 6 regional offices and 141 representative offices worldwide. *See Overview of WHO, at* <<http://www.who.int/about/overview>>. Both secretariats assist states throughout the world in carrying out various functions, including setting, validating, monitoring, and pursuing the proper implementation of norms.

<sup>279</sup> *See UN Action in the Field of Human Rights, supra* note 189, paras. 285-89, 299-303, 1202-32, 1240-46, for a general discussion of the human rights work of the FAO and WHO.

<sup>280</sup> The ILO has the lowest regular budget of the four specialized agencies--\$ 529.6 million for the 2004-05 biennium. For a discussion of the ESCR Committee's budget, *see infra* notes 316-19 and accompanying text.

<sup>281</sup> Alston, *supra* note 126, at 82 (footnotes omitted).

nism be adopted, there would exist "a danger that two international investigative or settlement bodies will end up differing in their interpretations of international . . . standards and the rights and obligations they define."<sup>282</sup>

#### *Other International Human Rights Treaty Bodies*

To some extent, claims involving economic, social, and cultural rights are also subject to review, under their respective treaties, by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of Discrimination Against Women. Over time, the treaty bodies have rendered interpretations of the nondiscrimination guarantees concerning economic, social, and cultural rights that seem highly likely to come before the adjudicators under any new complaints mechanism for the ICESCR.<sup>283</sup>

Could the ensuing risks both of forum shopping and of inconsistent interpretations of states' legal obligations be resolved simply through diligence by the adjudicators and more effective coordination among treaty bodies? Possibly, but it would likely prove far more difficult in practice than it sounds in principle. During the recent Working Group debate, some proponents noted that the Committee "has endeavoured throughout its work to ensure consistency with jurisprudence adopted in other forums," citing in particular General Comment No. 13 on the right to education.<sup>284</sup> That General Comment asserts, however, that Article 13(2)(b) imposes "an obligation to take concrete steps towards achieving free secondary and higher education."<sup>285</sup> Yet, as the UN special rapporteur on the right to education (Tomasevski) pointed out (as if to highlight the problem of permeability), the definition of the right to education adopted by the Convention on the Rights of the Child in 1989 "is substantially different from that provided by the ICESCR" concerning secondary and higher education.<sup>286</sup>

The special rapporteur also pointed out that the Committee adopted a General Comment on persons with disabilities and another on older persons, acknowledging in both cases that the ICESCR did not mention these issues.

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<sup>282</sup> Independent Expert 2002 Report, *supra* note 10, para. 32. As noted above, the Committee's aggressive interpretation of the ICESCR has already brought it into conflict with decisions taken by the World Bank and the IMF concerning their lending policies, credit agreements, and structural-adjustment programs. *See supra* notes 260-62 and accompanying text. The Committee has also made clear its position that actions taken by the WTO (particularly "the negative consequences of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)") and World Intellectual Property Organization conflict with the ICESCR and that those organizations should be "held to account." Statement by the ESCR Committee on Human Rights and Intellectual Property, para. 10, UN Doc. E/C.12/2001/17, Annex XIII; Statement by the Committee to the Third Ministerial Conference of the WTO, para. 4, UN Doc. E/C.12/1999/9.

<sup>283</sup> For example, the Human Rights Committee has construed ICCPR Article 26 as a free-standing "nondiscrimination" guarantee, the equivalent of a general equal protection clause not limited to the particular civil and political rights enumerated in the ICCPR. That article provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination, on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." *See Higgins, supra* note 265, at 6-7.

<sup>284</sup> Working Group Report, *supra* note 3, para. 38.

<sup>285</sup> General Comment No. 13, *supra* note 204, para. 14.

<sup>286</sup> UN Doc. E/CN.4/2004/WG.23/CRP.4, para. 1(c). The special rapporteur went on to explain:

The explicit wording of the ICESCR regarding secondary and higher education has been affected by the advent of trade in education services and the corresponding change in practice of states [whereby] post-compulsory education may entail the payment of tuition and other charges. This practice is contrary to the explicit wording of the ICESCR, which anticipated that the right to education would be realized progressively, ensuring all-encompassing free and compulsory education as soon as possible, and broadening post-compulsory education as circumstances permit.

*Id.*, para. 10(b).

She also concluded that it is not possible for any new body to adjudicate comprehensively claims involving economic, social, and cultural rights.<sup>288</sup>

### *Regional Systems*

Each of the three well-established regional human rights systems--the African, European, and Inter-American--provides in one way or another for the consideration of individual and interstate complaints. Each specifically recognizes some economic, social, and cultural rights as justiciable, and each has mechanisms for the issuance of legally binding judgments. The possibility of conflict and inconsistency with these systems is evident. Should they be considered inferior to a new international mechanism? During the Working Group debate, the special rapporteur on housing asserted that "national and regional cases would likely be used by an international body to guide the interpretation of the rights contained in the Covenant."<sup>289</sup> However, as Judge Higgins pointed out from the perspective of the Human Rights Committee, decisions under the European Convention are often not followed, even though "so many of the rights are common to the European Convention and to the Covenant, and . . . the jurisprudence of the European Convention is so well developed."<sup>290</sup> Furthermore, except for the African Charter, regional instruments provide for selective adjudication of economic, social, and cultural rights, and on a collective, rather than individual, basis.<sup>291</sup> Additionally, the regional instruments may define the rights in a manner at odds with the ICESCR.<sup>292</sup>

**[\*506]** We do not agree with the protocol's proponents that because economic, social, and cultural rights have been adjudicated under the regional mechanisms, the justiciability of ICESCR rights has been confirmed. If anything, the decision to provide only for selective adjudication of economic rights under the European and Inter-American systems proves just the opposite. Moreover, even if good results are reached within a regional system, it by no means follows that a global procedure is necessary or advisable. Indeed, one could argue that inconsistent results at the international level might well undermine the regional systems.

It is insufficient for proponents simply to assert that one body ought to have responsibility for the adjudication of claims under the ICESCR and that this need necessarily outweighs any concern about permeability.<sup>293</sup> On the contrary, there is an additional strong presumption today *against* adding new mechanisms; any new mechanism would result in an overlapping of functions, risking conflicts of interpretation and possibly result,

<sup>287</sup> *Id.*, para. 8.

<sup>288</sup> See *supra* note 86 and accompanying text.

<sup>289</sup> Working Group Report, *supra* note 3, para. 36.

<sup>290</sup> Higgins, *supra* note 265, at 7-8. She explained that "it is objectively the case that what may be an appropriate and sensitive interpretation for the Western European democracies is not necessarily so for a global system embracing highly diverse political and economic systems."

<sup>291</sup> Article 20 of the European Social Charter, Oct. 18, 1961, ETS No. 35, established an "a la carte" system under which ratifying states are free to choose by which rights (above a minimum) they consider themselves to be bound. This flexibility has been retained under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, ETS No. 158. Both of the above instruments are available at <<http://www.coe.int>>. Although the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, at <<http://www.oas.org>>, guarantees a number of rights not articulated in the American Convention on Human Rights itself, Nov. 22, 1969, 1144 UNTS 123, the Protocol expressly admits individual petitions (under Article 19(6)) only for violations of trade unionization rights (Article 8(1)(a)) and the right to education (Article 13). See generally TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS (2002). By comparison, the African Charter on Human and Peoples' Rights, *supra* note 220, was the first international human rights treaty to integrate civil, political, economic, social, and cultural rights in a single instrument. See *supra* notes 220, 256.

<sup>292</sup> For example, the *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*, Case No. ACHPR/COMM/A044/1 (May 27, 2002), was in large part based on the African Commission's having found a violation of the right to a "satisfactory environment," which is included among the general guarantees in Article 24 of the African Charter. States have not recognized this right in the ICESCR or in international practice. See Michael J. Dennis, *The Fifty-second Session of the UN Commission on Human Rights*, 91 AJIL 167, 172-73 (1997).

<sup>293</sup> See Working Group Report, *supra* note 3, para. 74.

thereby endangering the authority and efficiency of both the new adjudicative body and existing mechanisms. In short, a plausible case has not been made that the existing efforts of, or remedies provided by, the specialized agencies and other UN and regional bodies warrant duplication or replacement.

## V. PRACTICAL CONSIDERATIONS

It is incumbent on the proponents of the optional protocol to demonstrate that their proposed mechanism is workable, capable of being sustained, and affordable.<sup>294</sup> Surprisingly, questions of practicality do not appear to have been seriously considered; at least they are not discussed or debated in any significant detail.<sup>295</sup> It is as if affordability and functionality have simply been assumed--which strikes us as a grave shortcoming. In the following paragraphs, we identify a number of structural and operational questions that need to be addressed and resolved.

### *Competence and Political Legitimacy*

During the Working Group debate, some states questioned whether the Committee on Economic, Social and Cultural Rights could or should be authorized to consider and resolve individual complaints.<sup>296</sup> As discussed above, the Covenant designates ECOSOC, the Commission on Human Rights, and the specialized agencies as its oversight bodies in different respects.<sup>297</sup> The Committee itself was created some twenty years later by an ECOSOC resolution, and its members are elected by, and accountable to, ECOSOC, not states parties to the Covenant. Since ECOSOC's mandate flows, in turn, from the treaty itself, it seems doubtful that the conclusion of an optional protocol could displace ECOSOC in its oversight role, including its authority to terminate the Committee and establish an entirely new supervisory structure. Changing the [\*507] relationship would seem to require a formal amendment to the ICESCR ratified by all states parties.<sup>298</sup>

The optional protocol could, of course, assign the task of reviewing complaints to ECOSOC, in much the same way as the Covenant gives ECOSOC the responsibility for reviewing state compliance reports, and ECOSOC could, in turn, delegate that task to the Committee.<sup>299</sup> This approach would not resolve, however, the political legitimacy issue.<sup>300</sup> Another option, endorsed by the Independent Expert, would be for the optional protocol to establish an entirely new body to adjudicate complaints.<sup>301</sup> We see substantive reasons

<sup>294</sup> This obligation is even clearer in light of the secretary-general's recent comment concerning the "growing complexity" of the United Nations' human rights machinery, particularly the treaty bodies, and his having noted that "the benefits of the current system are not always clear." Report of the Secretary-General, Strengthening of the United Nations: An Agenda for Further Change, para. 52, UN Doc. A/57/387 (2002).

<sup>295</sup> Several states raised these concerns during the Working Group negotiations. Sweden, for example, in its paper for the working group, cited the secretary-general's report on strengthening the United Nations, *see id.*, and asserted that the problems with the present system of human rights treaty bodies should be "corrected before new mechanisms are put in place." Secretary-General's Report to CHR, *supra* note 82, para. 40. Sweden further stated that it "is seriously concerned about the lack of resources to serve the human rights treaty bodies, including in handling individual complaints which requires enhanced professional secretariat resources." *Id.*

<sup>296</sup> Working Group Report, *supra* note 3, para. 26.

<sup>297</sup> *See supra* notes 101, 186-90 and accompanying text.

<sup>298</sup> The UN Office of Legal Counsel reached this conclusion in a report submitted to ECOSOC in response to ECOSOC Resolution 1996/38 of July 26, 1996. UN Doc. E/1996/101, paras. 6, 18 ("the conclusion of an additional protocol in order to establish a treaty-based human rights monitoring body would also entail amendment of the Covenant in order to, *inter alia*, define the new role of [ECOSOC], if any, once the treaty-based monitoring body was established"). For the Committee's views, see UN Doc. E/C.12/1996/SR.27, paras. 24-25.

<sup>299</sup> The UN Office of Legal Counsel noted the availability of this option in concluding that ECOSOC did not have the independent authority to establish a complaints mechanism by resolution. Opinion of Ralph Zacklin, Assistant Secretary General for Legal Affairs, Legal Status of ESCR Committee 2 (Mar. 2, 2004) (on file with authors).

<sup>300</sup> Initially, the ESCR Committee's draft text included a transitional provision that would have come into force if ECOSOC decided to abolish the Committee. UN Doc. E/C.12/1994/12, para. 18. The subject was dropped after one member asked "whether it was wise for the Committee to envisage its own abolition . . . at a time of financial crisis in the United Nations." Wimer Zambrano, Statement, UN Doc. E/C.12/1996/SR.48, at para. 20 (1997).

<sup>301</sup> Independent Expert 2002 Report, *supra* note 10, paras. 39-44.

for seriously considering this option if a new complaints mechanism is considered necessary.<sup>302</sup>

### *Capacity*

Would the Committee as presently constituted (or a separate, but similar, adjudicative body) actually be able to process all the complaints that would or could be submitted to it? The proposal to permit both individual and group complaints, filed by victims' representatives as well as by victims themselves, invoking any and all of the substantive rights set forth in the ICESCR, obviously opens the possibility of a massive number of complaints. Proponents do not appear to have taken seriously the potential demands on the system. It is simply unrealistic to expect that any single body of experts could, in a timely manner, handle a flood of individual cases from a broad range of states across the globe, covering the full panoply of Covenant rights.

Granted, trying to predict the number of complaints likely to be submitted under the proposed protocol is speculative. The Committee has asserted that "there is no basis for fears that an optional protocol will result in a vast number of complaints."<sup>303</sup> Strikingly, it provided no substantiation for that view. Simple intuition suggests that the number of complaints could actually be quite large. The proponents assure us that economic, social, and cultural rights are widely, even pervasively, disregarded around the world, even in countries where civil and political rights are generally respected. It therefore seems reasonable to be concerned that creation of a new procedure might provoke more of a flood than a trickle of complaints.

It is difficult to draw solid conclusions from the experience of the other international human rights treaty bodies that already operate individual-complaints mechanisms--the Human Rights Committee, the Convention Against Torture, and the Racial Discrimination Convention.<sup>304</sup> In simple numerical terms, those treaty bodies have not received vast numbers of complaints--*in toto*, some 150 complaints per year.<sup>305</sup> By comparison, the volume of complaints submitted annually to the OHCHR has been estimated to exceed 100,000 per year.<sup>306</sup> One scholar concludes that the reason the treaty bodies receive so few complaints is that instead of being directed to them, communications are sent to the Commission on Human Rights (under its so-called 1503 procedure) or to its special rapporteurs, representatives, and working groups, whereas the system should work in the opposite manner: complaints should go first to the relevant treaty body and then--only if that mechanism does not work--to the appropriate thematic or country rapporteur.<sup>307</sup>

Even though the complaints system has been in effect for more than twenty-five years, roughly 30 percent of the states subject to one or more of the various treaty body complaints mechanisms (32 of 110 states) have never been the subject of a single complaint. Only 8 states parties have been subjected to an individual complaint under the Racial Discrimination Convention, and only 3 have been found to have engaged in a violation. Under the Torture Convention, the figures are 22 states parties and 11 violations; and under the first Optional Protocol to the ICCPR, 75 states parties and 54 violations. Moreover, there appears to be no correlation between human rights compliance in a given country and the general level of complaints (or, for that matter, the com-

<sup>302</sup> See *infra* note 320 and accompanying text.

<sup>303</sup> ESCR Committee proposal, *supra* note 9, para. 12(c). Not all Committee members endorsed this position. See e.g., Abdesatar Grissa, Statement, UN Doc. E/C.12/1996/SR.43, para. 13.

<sup>304</sup> See *supra* note 31. The CEDAW Optional Protocol, which provides for an individual-complaints mechanism, entered into force only on December 22, 2000. As of January 30, 2004, sixty states were parties to the Protocol. The Committee has recently appointed a five-member working group on communications and, as of January 3, 2004, had registered three communications. Information concerning the Protocol is available at <<http://www.un.org/womenwatch/>>. Additionally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, which entered into force July 1, 2003, includes provisions for both interstate and individual-communications procedures. Pursuant to Articles 76 and 77 of the Convention, however, both procedures require ten declarations by states parties in order to enter into force. To date, no state has made the necessary declaration with respect to either procedure. Information concerning the Convention is available at <<http://www.unhchr.ch>>.

<sup>305</sup> To be sure, submission of complaints to the treaty bodies as a group is increasing. Whereas only 50 cases were registered with the three treaty bodies in 1993, 143 cases were registered in 2002. Methods of Work Relating to the State Reporting Process, para. 11, UN Doc. HRI/ICM/2003/3 (background document prepared by the Secretariat).

<sup>306</sup> ANNE F. BAYESKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 105 (2001).

<sup>307</sup> *Id.* at 105-08.

plete absence of complaints). For example, under the Torture Convention, only two non-Western states--Tunisia (4 violations) and Venezuela (1 violation)--have been found to be in violation of the treaty, while under the Racial Discrimination Convention, no non-Western state has even had a complaint registered against it.

Table 1 (see next page) provides a statistical summary of the treatment of individual complaints submitted under each of the treaties.<sup>308</sup>

Drawing inferences from these data is risky. The treaty-based complaints mechanisms are not identical in their details or application, and there is no reason to think that complaints based on violations of economic, social, and cultural rights would be filed at the same rates as those based on alleged abuses of civil and political rights (which form the vast majority of all complaints filed in all relevant forums to date).

More importantly, simple numbers of complaints filed and resolved do not tell us about the actual workload imposed on the treaty bodies by the communications or complaints procedures. By far the most active body in terms of complaints has been the ICCPR's Human Rights Committee. Over the 27-year period from 1977 to 2004, it has issued views concerning violations in only 452 cases. Still, the Committee spends 30-35 percent of its time on individual complaints. Historically, inadmissibility decisions are taken in two-and-a-half years, and final views take four years. The other committees, despite lighter workloads, still spend a substantial amount of their time on individual complaints--approximately 20 percent for the Torture Convention and 10 percent for the Racial Discrimination Convention.

<b>TABLE 1: INDIVIDUAL COMPLAINTS UNDER ICCPR, CONVENTION AGAINST TORTURE, AND RACIAL DISCRIMINATION CONVENTION</b>			
	<b>ICCPR Protocol</b>	<b>Convention</b>	<b>Racial</b>
		<b>Against Torture</b>	<b>Discrimination</b>
		<b>Article 22</b>	<b>Convention</b>
States Subject to	104	56	45
Complaint Process			
States Complained	75	22	8
Against			
Registered Complaints	1,279	242	33
Pending	287	46	5
Inadmissible	362	40	13
Discontinued	178	63	0
No Violation	103	68	10
Violation	349	25	5

<sup>308</sup> This information about complaints and violations is drawn from the Web site of the UN Office of the High Commissioner for Human Rights, <<http://www.unhcr.ch/html/menu2/complain.htm#conv>>, as of June 6, 2004. The office provides the support functions for these treaty bodies.

Are those treaty bodies able to handle even this "light" caseload and still carry out their primary function--review of the reports of states parties--in a timely fashion? Some have argued that the Human Rights Committee has not succeeded in this regard:

Despite the significant delays experienced in dealing with communications, and the almost two year backlog in the consideration of submitted reports, the Human Rights Committee spends only 45% of its time on state reporting, finding itself unable to deal expeditiously either with communications or state reports.<sup>313</sup>

Extrapolating from the available information, what could one anticipate if the Committee on Economic, Social and Cultural Rights were charged with resolving complaints about violations under the Covenant? By its own calculations the Committee is now able to review implementation reports from only some 10 states per year. With 149 states parties, that means a review cycle of roughly fifteen years.<sup>314</sup> Adding even a relatively light caseload to this burden could more than double that period and possibly also degrade the Committee's work in other respects.<sup>315</sup>

#### *Costs*

How much additional cost would the optional protocol entail? The budgetary aspects of the additional workload cannot be overlooked. In recent years, all of the UN bodies relating to the principal international human rights treaties have suffered substantial financial shortages, and all treaty bodies have had their meeting times limited or curtailed.<sup>316</sup> The current UN budget for the Committee on Economic, Social and Economic Rights is approximately \$ 700,000 for the 2004-05 biennium, which is similar to that of the other treaty bodies. Any increase in funding seems unlikely.<sup>317</sup>

In order to provide the capacity to process individual complaints, the Committee would require an infusion of professional staff, if only because its members (all of whom serve in a voluntary, part-time capacity) do not as a group appear to possess the necessary range or depth of technical expertise or experience in the specific issue areas likely to be presented by individual or group complaints (such as labor economics; nutritional science and agricultural policy; urban development; environmental and occupational health and safety; public health delivery systems; primary and secondary education; and so on).<sup>318</sup> It is unrealistic to suggest that this demand could be met by the OHCHR's existing support staff financed through the regular UN budget--which comprises some thirty professionals, half of whom lack permanent positions, and who pro-

<sup>313</sup> BAYEFESKY, *supra* note 306, at 133.

<sup>314</sup> ESCR Committee, Report on the Twentieth and Twenty-first Sessions, at 9, UN Doc. E/C.12/1999/11 ("Under the current arrangements of two three-week sessions each year, the Committee is able to consider no more than 10 reports annually . . ."). During the last two years, the Committee has held two sessions each year, reviewing five states at each session. ESCR Committee, Report on the Twenty-eighth and Twenty-ninth Sessions, paras. 62-65, UN Doc. E/C.12/2002/13 [hereinafter ESCR Committee 2002 Report]; ESCR Committee, Report on the Thirtieth and Thirty-first Sessions, paras. 60-63, UN Doc. E/C.12/2003/CRP.1.

<sup>315</sup> All of the treaty bodies have experienced substantial difficulties in reviewing implementation reports on a timely basis, but the ESCR Committee's record is especially poor. It has been estimated that in 1999, of all the bodies reviewing reports of states parties, the Committee had the highest average interval between the submission and consideration of reports--2.6 years. BAYEFESKY, *supra* note 306, at 223-29. As of March 15, 2002, approximately 1,300 state party reports (under the various treaties) were overdue, and of those, more than 500 had been overdue for more than five years. To put this backlog in context, the six treaty bodies collectively examine about 100 reports per year. Methods of Work Relating to the State Reporting Process, para. 23, UN Doc. HRI/ICM/2002/2 (background document prepared by the Secretariat). The secretary-general earlier noted that "the most extreme case" concerned the ICESCR, where "over 40 per cent of the States parties . . . have failed to submit even their initial reports." Effective Functioning of Human Rights Mechanisms: Treaty Bodies, para. 60, UN Doc. E/CN.4/2000/98. As of June 6, 2004, 92 of 149 states parties to the ICESCR had one or more overdue reports. See <<http://www.unhchr.ch>> for the most recent data on state reporting practices under the various human rights treaties, including the ICESCR.

<sup>316</sup> The Independent Expert on enhancing the long-term effectiveness of the UN human rights treaty system (Philip Alston) concluded that "the present system is unsustainable," in part because the "resources available to service [the] sizeable expansion in the system have actually contracted rather than expanded." Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System, paras. 7(f), 10, UN Doc. E/CN.4/1997/74 (1996); see generally Markus Schmidt, *Servicing and Financing Human Rights Supervision*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, 481, 482-87 (Philip Alston & James Crawford eds., 2000).

<sup>317</sup> In its written comments concerning the optional protocol, the UN Office of Legal Counsel noted that the "benefits of adding a new and major function . . . should also be assessed in light of the potentially considerable increase in workload and the unlikely prospect of a proportional increase in the financial resources available to it." UN Doc. E/CN.4/1998/84, at 7.

<sup>318</sup> The educational and professional backgrounds of the Committee members are available at <<http://www.unhchr.ch/tbs/doc.nsf/Committeefrset/>>.

vide support for *all* of the reporting functions for five treaty bodies (the Committee on Economic, Social and Economic Rights, Committee on Racial Discrimination, Committee on the Rights of the Child, Committee Against Torture, and Human Rights Committee).<sup>319</sup> We have not seen any quantification of the additional expenses that might be incurred in meeting added responsibilities of the Committee on Economic, Social and Economic Rights or, for that matter, of what it might cost to establish a new body to perform these functions.

Such issues are potentially resolvable, but they deserve to be addressed carefully in advance of any decision to vest responsibility for a complaints mechanism in the Committee on Economic, Social and Economic Rights. They also suggest that strong consideration should be given to an alternative arrangement. It is worth recalling the Independent Expert's admonition that having the Committee consider complaints would likely undermine the accomplishment of its other tasks. He explained:

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#### *Compliance*

A commonly advanced argument of those who advocate a complaints mechanism is that a "violations" approach is necessary because formal determinations of failure to comply with legally binding treaty obligations constitute the best, if not the only, way to compel states parties to give effect to the Covenant.<sup>321</sup> But is that assumption true?

It is certainly the case, although difficult to demonstrate empirically, that governments in general are criticism averse, particularly when it comes to human rights. Anyone familiar with the annual consideration of complaints and accusations under the so-called 1503 or 1235 processes in the Human Rights Commission and its Sub-Commission knows the lengths to which governments will go to avoid condemnatory conclusions--which must be one of the main reasons that individuals and nongovernmental organizations have increasingly opted to invoke those processes.<sup>322</sup> The effort to avoid criticism is surely motivated by political concerns, in whole or very large part. One could surmise that the same political motivations might suffice to make a formal complaints mechanism under the Covenant work effectively. By the same token, there is little reason to expect that those few countries that are impervious to public condemnation of their human rights records would give any greater credence to a formal decision of an adjudicative mechanism.

The "violationists" argue that a formal complaints mechanism resulting in binding determinations of treaty violations will provide stronger motivation and prove more effective than noncompulsory mechanisms (such as General Comments or Concluding Observations on state implementation reports).<sup>323</sup> There certainly would appear to be some substance to the assertion, as one commentator put it, that "many states have ratified [the international human rights treaties] precisely because the international scheme was evidently dysfunctional and the lack of democratic institutions at home made the likelihood of national consequences comfortably remote."<sup>324</sup> It is also true that states parties to the European Convention on Human

<sup>319</sup> BAYEFISKY, *supra* note 306, at 126.

<sup>320</sup> Independent Expert 2002 Report, *supra* note 10, para. 39. One scholar agrees: "It is unrealistic to expect that [a single, part-time treaty body] can both handle individual cases in a timely manner from a broad range of states, with an even wider range of problems, and at the same time consider state reports in a timely manner, as well as states in the absence of reports." BAYEFISKY, *supra* note 306, at 26. A similar conclusion was reached in the deliberations leading to the adoption of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, Dec. 18, 2002, 42 ILM 26 (2003), where states formed an entirely new body to conduct inspections separate from the Committee Against Torture. See Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AJIL 364, 371-74 (2003). Alston criticized the proposal, arguing that it "would contribute very significantly to the further proliferation of instruments and committees" and recommending, instead, that consideration should be given to *consolidation* of the treaty bodies into "one or perhaps two new treaty bodies." Final Report on Enhancing the Long-Term Effectiveness of the UN Human Rights Treaty System, *supra* note 316, paras. 80, 94-97.

<sup>321</sup> See, e.g., Audrey R. Chapman, *A "Violations Approach" to Monitoring Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996); Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81 (1998).

<sup>322</sup> Advocates sometimes refer to this as the "name and shame" approach to promoting respect for human rights. See, e.g., ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME* (2001); Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* 24 (Samantha Power & Graham Allison eds., 2000).

<sup>323</sup> See, e.g., Chapman, *supra* note 321, at 38 (the violations approach would render more effective one of the few "weapons" available to human rights monitors--namely the "stigma of being labeled a human rights violator").

<sup>324</sup> BAYEFISKY, *supra* note 306, at 7. More generally, we know little indeed about the actual effects of human rights treaties. For two recent forays into this important field, see Hathaway, *supra* note 23; Ryan Goodman & Derek Jinks, *Measuring the Ef-*

Rights generally comply with the judgments of the European Court of Human Rights.<sup>325</sup> However, we are [\*512] aware of no evidence indicating that states are highly likely to comply with decisions rendered by the existing treaty-based individual-complaints mechanisms. In fact, the evidence suggests the contrary. In its 2002 report, the Human Rights Committee concluded that states complied with its decisions in only 30 percent of the cases.<sup>326</sup> The Committee further expressed deep concern "about the increasing number of cases where states parties fail to implement" its decisions.<sup>327</sup> There is also no evidence to suggest that states parties take their responsibilities under the ICESCR more seriously than they do with respect to the ICCPR.

## VI. ALTERNATIVES

Are there workable alternatives to the maximalist approach of the Committee on Economic, Social and Cultural Rights? Could the potential burden on the adjudicators be limited without eviscerating the proposed complaints mechanism entirely?

### *Selective Approach*

One option favored by a "strong minority" of the Committee, as well as by a number of states during the Working Group debate, was a selective (or "smorgasbord" or "a la carte") approach to substantive jurisdiction permitting states to specify the rights that they agree would be justiciable.<sup>328</sup> States could, for example, limit their acceptance to those rights that the Working Group deemed to be immediately achievable, or to those already subject to adjudication under their own domestic law.<sup>329</sup>

Most Covenant rights are, at base, claims to scarce resources, and decisions regarding their recognition and enforcement will necessarily involve questions of resource allocation. We do not deny that some Covenant rights are, at least on their face, more amenable to judicial interpretation and enforcement than others. For example, some Covenant rights are capable, at least to some degree, of immediate application by judicial and other organs in many national legal systems.<sup>330</sup> But just because some states provide for domestic adjudication of a given right, it does not necessarily follow that that right should be justiciable for all states in an international forum. Given the existing, widespread differences in domestic approaches and because the enforcement of Covenant rights would, in most cases, pose significant resource allocation questions, the issue of their justiciability ought to receive open and careful consideration on a right-by-right basis.<sup>331</sup>

*fects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003).

<sup>325</sup> Article 46(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 252, gives the Committee of Ministers authority to ensure enforcement of any final judgment. That committee has rarely found it necessary to resort to political or diplomatic pressure to ensure the execution of judgments by states parties to the Convention. Report of the 13th Meeting of the Chairpersons of the Human Rights Treaty Bodies, para. 36, UN Doc. A/57/56 (2002).

<sup>326</sup> Human Rights Committee 2002 Report, *supra* note 309, para. 225.

<sup>327</sup> *Id.*, para. 255.

<sup>328</sup> The Committee's comments accompanying the protocol state that a "strong minority favoured the adoption of a selective approach which would permit States to accept obligations only in relation to a specified range of rights. The minority considered that this could be achieved either through requiring States expressly to 'opt out' of provisions that they would need to identify at the time of becoming a party to the protocol or through enabling them to 'opt in' in relation to provisions which they would specify." ESCR Committee proposal, *supra* note 9, paras. 26-28. For the positions of the Committee members favoring a selective approach, see UN Docs. E/C.12/1996/SR.43, paras. 18-19, 23, E/C.12/1996/SR.47, paras. 40, 45, 50-51, E/C.12/1997/SR.46/Add.1, paras. 50-51, 55. For the views of states supporting the selective approach, see Working Group Report, *supra* note 3, para. 65, and Argentina, Statement, Secretary-General's Report to CHR, *supra* note 82, para. 33.

<sup>329</sup> Working Group Report, *supra* note 3, para. 65.

<sup>330</sup> See General Comment No. 3, *supra* note 15, para. 5, listing ICESCR articles that "would seem to be capable of immediate application in . . . many national legal systems"--including Articles 2 (nondiscrimination), 3 (equal rights of men and women), 7(a)(i) (equal pay for equal work), 8 (rights to form and join trade unions, and to strike), 10(3) (states "should" set age limits for child labor), 13(2)(a) (primary education compulsory and free for all), 13(3) (liberty of parents to choose schools), 13(4) (liberty to establish educational institutions), and 15(3) (freedom for scientific research). See *supra* note 158.

<sup>331</sup> ESCR Committee member Eibe Riedel, citing the "comprehensive approach" adopted by the optional protocols to ICCPR and CEDAW, "strongly advised the working group against embarking on an article-by-article discussion of which rights should be subject to a complaints mechanism." Working Group Report, *supra* note 3, para. 40. Of course, unlike the ICESCR, all other international human rights treaties providing for individual complaints (Torture Convention, Racial Discrimination Convention, and Optional Protocols to CEDAW and ICCPR) contain a common requirement that states parties adopt measures to give "immediate effect" to their obligations--which, in the vast majority of states, are enforceable in domestic courts. During the debate over CEDAW's new Protocol, Human Rights Committee experts noted that "the availability of domestic remedies, including non-judicial remedies, was . . . essential and their sufficiency would be subject to review by a treaty body." Report of the Open

Even if the substantive scope of a new complaints mechanism was confined to specified rights or issues, it is difficult to see how that would significantly promote the main goals sought by those who favor an optional protocol--including uniformity, clarity, and overall "justiciability" of Covenant rights. Some, including the Independent Expert, have objected that it would "introduce a new, intolerable kind of discrimination among the various economic, social and cultural rights."<sup>332</sup> Moreover, such an approach would conflict with the Committee's view that the Covenant imposes nonderogable "minimum core obligations" for each of the rights in the ICESCR.<sup>333</sup> Perhaps most significantly, the rights most frequently considered "justiciable" are already subject to complaints under other mechanisms, including those of the ILO, UNESCO, and human rights treaty bodies at the UN and regional levels.

#### *Gross Violations*

Another option might be to limit the adjudicators' purview to complaints identifying "consistent patterns of gross violations" of Covenant rights. The Independent Expert made this proposal in his 2002 report:

*"situations revealing a species of gross, unmistakable violations of or failures to uphold any of the rights set forth in the Covenant."*<sup>334</sup>

Just how a "gross violations" procedure might operate was not indicated, and the matter was not actively considered by the Working Group. Confining the process to "gross violations" would probably not reduce the adjudicators' workload significantly since arriving at a finding of nonadmissibility would still require a large investment of time and effort. Moreover, such situations can, under existing procedures, already be brought to the attention of the Commission on Human Rights.

#### [\*514] VII. CONCLUSION

The effective realization of economic, social, and cultural rights remains a global challenge of gigantic proportions.<sup>338</sup> People in every part of the world lack an adequate standard of living. In fact, the vast majority of the world's population continues to live in deep poverty. And in many countries, conditions are worsening.<sup>339</sup> For various reasons, many states cannot cope on their own. According to the UN Development Programme, external spending (official development assistance) will have to increase enormously--by \$ 40 to 100 billion over the current level of \$ 50 billion--just in order to meet the United Nations' Millennium Development Goals.<sup>340</sup> In too many countries, regimes and elites simply cannot or will not devote the time, energy, or resources to improving the lot of their populations.

Establishment of a new international adjudicative mechanism will not remediate this situation. In the vast majority of circumstances, the origins of individual privations are not legal, and their ultimate resolution will not be found in legal edicts or directives. We do not dispute that emphasizing economic, social, and cultural rights underscores the essential importance of human needs and values, which are often overlooked or undervalued in political and economic decision making. Highlighting those rights not only is individually empowering, but unquestionably helps (and inevitably pressures) govern-

Ended Working Group on Elaboration of a Draft Optional Protocol to CEDAW, appendix, para. 5, UN Doc. E/CN.6/1996/15, Annex III.

<sup>332</sup> Independent Expert 2002 Report, *supra* note 10, para. 34.

<sup>333</sup> This argument was the main one advanced by ESCR Committee members favoring a comprehensive approach. *See, e.g.*, UN Docs. E/C.12/1996/SR.43, para. 21 ("Although the Committee had in the past attached greater importance to some rights than to others, no hierarchy of rights could be drawn up. . . . The problem was that almost every right had both a justiciable and a non-justiciable aspect.") (statement of Philip Alston), E/C.12/1996/SR.46/Add.1, para. 52 (1996) ("the Committee had a philosophy to defend, to the effect that all the rights recognized in the Covenant were equally important") (statement of Mr. Simma). During the Working Group debate, states and Committee experts supporting a comprehensive approach expressed similar views. Working Group Report, *supra* note 3, paras. 47, 66.

<sup>334</sup> Independent Expert 2002 Report, *supra* note 10, para. 34 (emphasis added).

<sup>338</sup> Extreme poverty and lack of social and economic development unquestionably constitute a threat to mankind. As President Bush has said, "A world where some live in comfort and plenty, while half of the human race lives on less than \$ 2 a day is neither just nor stable." George W. Bush, Remarks to World Bank (July 17, 2001), at <<http://www.whitehouse.gov/news/releases/2001/07/20010717-1.html>>; *see* Frank Bruni, *Bush Urges Shift to Direct Grants for Poor Nations*, N.Y. TIMES, July 18, 2001, at A1.

<sup>339</sup> *See* UN Development Programme, Human Development Report 2003, at 34, at <<http://hdr.undp.org>>, reporting that fifty-four countries are poorer today than they were in 1990; that in twenty-one, a larger proportion of the population is going hungry; and that in fourteen, more children are dying before age five. Some 42 million people live with HIV/AIDS. *Id.* at 97.

<sup>340</sup> *Id.* at 146-47.

ments in protecting and promoting those rights, giving them priority, and internalizing the relevant norms.<sup>341</sup>

But because the underlying causes for states' failure to achieve the goals of the Covenant are most often grounded in the absence or misuse of resources, there is scant reason to believe that the Committee's legally binding "decision" in a specific case would prove any more persuasive or authoritative to a receptive government than a perceptive Concluding Observation on a periodic report or a carefully crafted General Comment. There is little basis for concluding that external dictates (in the form of binding decisions from an independent adjudicative body) would prove more effective than external development assistance in ameliorating internal privation.

This is not to say that economic, social, and cultural rights are not human rights, or that they are devoid of content, or that their continued articulation in international discourse would be meaningless. Clearly they *are* rights, and they *are* binding on states that have ratified the ICESCR. We agree that states parties *do* have legal obligations under the Covenant, and we firmly believe that implementation reports and comments thereon serve an important function in calling attention to the pathetic living conditions of much of the world's population.

However, justiciability is not the only or indispensable defining characteristic of a human right. Economic, social, and cultural rights will remain bona fide, recognized human rights even in the absence of an international mechanism for binding adjudication.<sup>342</sup> In the words of the Universal Declaration, human rights are "a common standard of achievement for all [\*515] peoples and all nations." We strongly support inclusion of human rights considerations in development activities and do not reject out of hand the notion that some economic and social rights may be domestically justiciable. The question is whether a new international complaints mechanism would help to bridge the still growing gap between human rights commitments and concrete action. We think not.

The challenges to a new complaints mechanism along the lines of the proposed optional protocol are substantial. Beyond the issues of criteria, capacity, costs, and conflicts with other existing adjudicative procedures as discussed above, the success of a complaints mechanism would depend in substantial part on the overall competence of the adjudicators. Even assuming unparalleled skill, energy, expertise, and impartiality on the part of the members of an international adjudicative body, there is still no reason to believe that they would, in fact, have better access to, or understanding of, the relevant economic, demographic, and statistical data than the government concerned, much less the time and ability to make more informed or effective choices about the allocation of limited resources in a malfunctioning economic system. Even if the improbable were to occur and the adjudicators managed to achieve truly enlightened insight (whether for a moment or a year), the question must be asked: in dealing with such problems, would it be the most desirable political choice to vest international adjudicators with the authority to proclaim what must be done domestically? Again, we think not.

The proposal for a new individual-complaints mechanism remains an ill-considered effort to mimic the structures of the ICCPR--and largely for mimicry's sake. The principal justifications put forward in its favor are, at base, attacks on decisions made by the negotiators and participating states fifty years ago, and the proponents have failed to make a convincing case for reversing those decisions or for establishing a new mechanism. Even if justified within a narrow perspective, the proposal ignores practical issues, overlooks the important role of specialized agencies and other existing mechanisms, and fails to describe the criteria by which compliance with the ICESCR would be measured in the context of individual complaints. The proposal proceeds from questionable premises--namely, that a punitive approach will be effective, especially as to the worst violators, and that binding adjudication will be more effective than encouragement, assistance, and leadership by persuasive example. It offers formalistic structures and procedures in place of concrete, cooperative, "on the ground" efforts to improve peoples' lives. It promises paper judgments and learned opinions in lieu of practical achievements.

The rights and obligations contained in the ICESCR were never intended to be susceptible to judicial or quasi-judicial determination. The negotiators and drafters of the Universal Declaration and the two Covenants well understood the differences between economic, social, and cultural rights, on the one hand, and civil and political rights, on the other. Those differences have not disappeared.

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<sup>341</sup> As Michael Ignatieff notes, "Human rights is a language of individual empowerment." MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 57 (2001). Ignatieff also acknowledges that human rights is "an account of what is right, not an account of what is good," *id.* at 55, and that "when political demands are turned into rights claims, there is a real risk that the issue at stake will become irreconcilable, since to call a claim a right is to call it nonnegotiable, at least in popular parlance," *id.* at 20.

<sup>342</sup> Cf. Uendra Baxi's discussion of the "haunting ambiguities of human rights" in THE FUTURE OF HUMAN RIGHTS 5-13 (2002).