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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Status of the international covenants on human rights

**Report by Mr. Hatem Kotrane, independent expert on the question of
a draft optional protocol to the International Covenant on Economic,
Social and Cultural Rights**

Summary

In his first report, submitted to the Commission on Human Rights at its fifty-eighth session (E/CN.4/2002/57), the independent expert declared himself in favour of adopting the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, although he believed that many of the questions discussed in his report needed to be studied in greater depth.

The present report focuses mainly on the three questions that the Commission, in its resolution 2002/24, adopted at its fifty-eighth session, requested the independent expert to study in greater depth, namely:

1. The question of the nature and scope of States parties' obligations under the Covenant. The independent expert believes that these obligations include each State's duty to respect, protect and actively realize the rights set forth in the Covenant; each of these commitments entails elements of the obligation of conduct and the obligation of result.

All States have an obligation to take steps immediately, or at least within a reasonably short time after the Covenant's entry into force, by taking legislative, administrative, financial and other measures and by setting up appropriate mechanisms that can contribute, progressively but actively, to the full realization of all the economic, social and cultural rights recognized in the Covenant.

All States have an obligation to endeavour to ensure the widest possible enjoyment of all the rights recognized in the Covenant without any discrimination and on the basis of equal opportunity, paying special attention to the protection of the rights of the most vulnerable segments of the population and to the equitable and effective use of the available resources.

All States have an obligation to eliminate immediately all forms of discrimination arising from legislation and to take steps to combat, through vigorous and appropriate measures, those forms of discrimination arising from practices and traditions that prevent the equal enjoyment by everyone of all the rights recognized in the Covenant.

Every State party has a minimum core obligation to ensure the satisfaction of minimum essential levels of each of the rights contained in the Covenant.

2. The question of the justiciability of economic, social and cultural rights. In the light of the experience gained in recent years from the application of international, regional and national human rights instruments and mechanisms, the independent expert notes that there is no longer any doubt about the essentially justiciable nature of all the rights guaranteed by the Covenant.

3. The question of the benefits and the practicability of a complaint mechanism under the Covenant and the issue of complementarity between different mechanisms. The independent expert believes that the procedure envisaged would be both beneficial and practical:

- It would be beneficial in that it would, among other things, ensure that effect was given to every individual's right to appeal, and contribute to the development of international law by producing a coherent body of principles covering all the rights

set forth in the Covenant; these principles could gradually acquire an authority that would be recognized by all, both at the international level and in the various countries where they could be used in the drafting of national legislation. It would also be beneficial in that it would provide more vigorous support for the principle of the indivisibility and interdependence of all human rights;

- It would be practical if, and to the extent that, the new procedure to be established was cost-effective and ensured the necessary complementarity and coordination with other mechanisms.

In conclusion, the independent expert recommends that the Commission adopt a resolution confirming the decision contained in its resolution 2002/24 to establish, at its fifty-ninth session, an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights.

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 6	5
I. NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS UNDER THE COVENANT	7 - 24	6
A. Precise scope of States' obligations: the obligations to respect, protect and fulfil	9 - 11	7
B. Obligations at the international level	12 - 14	8
C. Summary of the question and position of the independent expert	15 - 24	9
II. JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL, REGIONAL AND NATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS	25 - 52	12
A. Experience gained at the national level	25 - 33	12
B. Experience gained at the regional level	34 - 40	14
C. Experience gained at the international level	41 - 49	15
D. Summary of the question and position of the independent expert	50 - 52	17
III. BENEFITS AND PRACTICABILITY OF A COMPLAINT MECHANISM UNDER THE COVENANT AND THE ISSUE OF COMPLEMENTARITY BETWEEN DIFFERENT MECHANISMS	53 - 74	18
A. Benefits and practicability of a complaint mechanism under the Covenant	53 - 57	18
B. Complementarity and coordination between the various mechanisms	58 - 74	20
IV. CONCLUSION AND RECOMMENDATION	75 - 76	23

Introduction

1. At its fifty-seventh session, the Commission on Human Rights in its resolution 2001/30 took note of the report on the workshop organized on 5 and 6 February 2001 by the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists on the justiciability of economic, social and cultural rights (E/CN.4/2001/62/Add.2) and the report of the High Commissioner on the draft optional protocol to the Covenant (E/CN.4/2001/62 and Add.1) and decided to appoint an independent expert to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights in the light of the report of the Committee on Economic, Social and Cultural Rights to the Commission on a draft optional protocol (E/CN.4/1997/105, annex), comments by States, intergovernmental and non-governmental organizations, and the report on the workshop on the justiciability of economic, social and cultural rights. The independent expert was called upon to submit a report to the Commission at its fifty-eighth session with a view to its consideration of possible follow-up and future actions, including the establishment of an open-ended working group to examine the question of a draft optional protocol to the Covenant.
2. At the fifty-eighth session of the Commission, the independent expert submitted his first report (E/CN.4/2002/57), in which he declared himself in favour of adopting the draft optional protocol, although he believed that many of the questions discussed in his report needed to be studied in greater depth.
3. At its fifty-eighth session, the Commission adopted resolution 2002/24, in which it took note with interest of the report of the independent expert appointed to examine the question of an optional protocol to the International Covenant on Economic, Social and Cultural Rights and the recommendations it contained (para. 1) and decided to renew, for a period of one year, the mandate of the independent expert and requested him to examine the following questions:
 - (a) The nature and scope of States parties' obligations under the Covenant;
 - (b) Conceptual issues on the justiciability of economic, social and cultural rights, with particular reference to the experience gained in recent years from the application of universal, regional and national human rights instruments and mechanisms;
 - (c) The benefits and the practicability of a complaint mechanism under the Covenant and the complementarity between different mechanisms (para. 9 (c)).
4. In its resolution 2002/24, the Commission also decided "to establish, at its fifty-ninth session, an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights" (para. 9 (f)).
5. The independent expert has held wide-ranging consultations. A note verbale was sent to States on 2 June 2002 and letters were sent to interested organizations and experts, seeking their views on the questions set out in the resolution. As at 15 November 2002, replies had been received from the Governments of Argentina, Cuba, the Czech Republic, the Islamic Republic of Iran, Italy, Mexico, the Netherlands, Portugal, Sweden and Thailand, from the World Health

Organization and from a group of 56 non-governmental organizations. The Office of the United Nations High Commissioner for Human Rights (OHCHR) also prepared a note for the independent expert covering all three of the questions mentioned above. The International Commission of Jurists organized a round table on the same questions and submitted its report to the independent expert.

6. The independent expert also organized, with the High Commissioner's support, a programme of consultations in June, September and November 2002 in order to clarify the three questions set out in the resolution. The first series of consultations and meetings was held during the meeting of special rapporteurs that took place from 24 to 29 June 2002, with the Special Rapporteur on adequate housing, two experts from the Committee on Economic, Social and Cultural Rights and an expert from the International Commission of Jurists. During the second series of consultations (30 September to 1 October 2002), the independent expert met with two representatives of the International Labour Office, an expert on international trade, Mr. George Abi-Saab, and representatives of OHCHR and the International Commission of Jurists. Finally, on 22 November 2002, the independent expert took part in the discussion day held by the Committee on Economic, Social and Cultural Rights on the right to drinking water, at the end of which the Committee adopted its general comment on the subject.

I. NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS UNDER THE COVENANT

7. Under article 2, paragraph 1, of the Covenant, "each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". In his first report to the Commission, the independent expert underlined the difficulty of determining the nature and scope of States Parties' obligations under the Covenant. Unlike those whose various analyses and views tend to minimize the scope of the progressive nature of the realization of economic, social and cultural rights and to consider the above-mentioned provisions of the Covenant as purely fortuitous provisions of no real significance to the substantive issue, the independent expert said he believed that these provisions needed to be considered carefully. Besides, they do not in themselves in any way diminish the value of economic, social and cultural rights, especially today, when it is increasingly asserted and recognized that a person living in extreme poverty or destitution is faced with a situation that is in many respects similar to that faced by a person subjected to the worst atrocities and torture. The ensuing discussion is therefore not - or at least should not be - a discussion of the value attributed to these rights or of their place in the classification of international human rights. All human rights are, as recognized in the Vienna Declaration and Programme of Action, "universal, indivisible and interdependent and interrelated", and so cannot be put in any kind of hierarchical order.

8. Today, all this is well known. The independent expert will nevertheless attempt here to resolve the difficulties and doubts that have been expressed by undertaking a methodical and in-depth analysis of the exact scope and nature of States parties' obligations under the Covenant.

To do this, the independent expert draws on a number of sources, including the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, and the general comments of the Committee on Economic, Social and Cultural Rights.

A. Precise scope of States' obligations: the obligations to respect, protect and fulfil

9. Under article 2, paragraph 1, of the Covenant, each State party undertakes:
- “to take steps ...”: all States parties have an obligation to begin immediately to take steps towards the full realization of the rights contained in the Covenant.¹ The Committee on Economic, Social and Cultural Rights has emphasized that steps should be deliberate, concrete and targeted as clearly as possible at the full realization of economic, social and cultural rights and that they should be taken by the State concerned within a reasonably short time after the Covenant's entry into force (E/1991/23, annex III, para. 2);
 - “... through international assistance and cooperation ...”: the Committee has highlighted the crucial role of international assistance and cooperation in facilitating the full exercise of economic, social and cultural rights; it has emphasized that international cooperation for development, and thus for the realization of economic, social and cultural rights, is an obligation of all States and that, without it, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries (ibid., paras. 13 and 14). More particularly, international cooperation and assistance should be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized;²
 - “... to the maximum of its available resources ...”: the Committee has stated that, even where the available resources are demonstrably inadequate, an obligation for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances and, in particular, to protect the rights of the most vulnerable (ibid., paras. 11 and 12). In determining whether adequate measures have been taken to realize economic, social and cultural rights, attention should be paid to equitable and effective use of and access to the available resources;³
 - “... with a view to achieving progressively the full realization of the rights ...”: the Committee has noted that the concept of progressive realization constitutes a recognition of the fact that full realization of economic, social and cultural rights will generally not be achieved immediately (ibid., para. 9). However, under no circumstances should that be interpreted as implying that States are entitled to delay indefinitely efforts to ensure full realization of the rights or that they are entitled to set aside the obligation “to take steps” - in fact, States must make the best possible use of

the resources available to them, however limited these may be. Moreover, notwithstanding the progressive realization requirement, some of the obligations set forth in the Covenant, such as the prohibition of discrimination, require immediate implementation in full by all States parties;⁴

- “... by all appropriate means, including particularly the adoption of legislative measures”: the appropriate means may include not only the legislative measures appropriate to a given situation but also the provision of judicial remedies, administrative measures and economic, social and educational measures. It is for the State party itself to determine the appropriate means, though its decision is subject to review by the Committee.⁵

10. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights set out States parties' obligations in respect of the rights contained in the Covenant in the following manner:⁶

- (a) The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights;
- (b) The obligation to protect requires States to prevent violations of such rights by third parties;
- (c) The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

11. The obligations to respect, protect and fully realize human rights each contain elements of obligation of conduct and obligation of result:⁷ the obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right, while the obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.

B. Obligations at the international level

12. The international aspects of economic, social and cultural rights are covered in articles 2, 11, 15, 22 and 23 of the Covenant. Thus, while States parties are primarily responsible for implementing all human rights and it is ultimately incumbent upon them to respect, protect and realize such rights, other actors or entities also have responsibilities. The latter include foreign occupying forces and non-State entities, such as transnational corporations and international organizations, in which States act collectively.⁸

13. As pointed out above, article 2, paragraph 1, of the Covenant provides that international assistance and cooperation are a means by which States can give effect to economic, social and cultural rights. The Limburg Principles state that “international cooperation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized”. Moreover, such cooperation must take

place irrespective of differences in States' political, economic and social systems and must be based on the sovereign equality of States. States not only have to cooperate in the realization of the rights recognized in the Covenant but also have to bear in mind the role of international organizations and non-governmental organizations.⁹

14. The Committee has examined the international aspects of economic, social and cultural rights in its general comments on certain specific rights. More precisely, it has identified certain important areas of relevance to the international obligations established by the Covenant. A non-exhaustive list of these areas is provided below (see, for example, E/C.12/1999/10, paragraph 56; E/1992/23, paragraph 18; and E/C.12/1999/5, paragraphs 36 and 37):

(a) With regard to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not have an adverse impact on the right to education;

(b) States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of economic, social and cultural rights;

(c) The international financial institutions promoting structural adjustment measures should ensure that these measures do not jeopardize the enjoyment of economic, social and cultural rights;

(d) States parties, both recipients and providers of financial aid, should ensure that a substantial proportion of financing is devoted to creating conditions that will allow more people to be adequately housed;

(e) States parties should respect the economic, social and cultural rights that exist in other countries and provide the necessary aid as required;

(f) States parties should refrain at all times from food embargoes or similar measures that endanger food production and access to food in other countries; food should never be used as an instrument of political and economic pressure.

C. Summary of the question and position of the independent expert

15. The above discussion makes it possible now to address the question of the nature and scope of States parties' obligations under the Covenant.

1. Scope of States parties' obligations: obligations of a progressive nature, but with immediate effect

16. The independent expert is of the view that, although States' fulfilment of their obligations implies the progressive nature of such obligations, as expressly stated in article 2, paragraph 1, of the Covenant, this should in no circumstances be interpreted as implying that States have the right to delay indefinitely measures to ensure the full realization of all the rights recognized in the Covenant. It therefore follows that:

(a) All States have an obligation to take steps immediately, or at least within a reasonably short time after the Covenant's entry into force, by taking legislative, administrative, financial and other measures and by setting up appropriate mechanisms that can contribute progressively but actively to the full realization of all the economic, social and cultural rights recognized in the Covenant;

(b) All States have an obligation to endeavour to ensure the widest possible enjoyment of all the rights recognized in the Covenant without any discrimination and on the basis of equal opportunity, paying special attention to the protection of the rights of the most vulnerable segments of the population and to the equitable and effective use of the available resources;

(c) All States have an obligation to eliminate immediately all forms of discrimination arising from legislation and to take steps to combat, through vigorous and appropriate measures, those forms of discrimination arising from practices and traditions that prevent the equal enjoyment by everyone of all the rights recognized in the Covenant.

2. Nature of States parties' obligations: obligations of conduct and obligations of result

17. In his first report (E/CN.4/2002/57, para. 20), the independent expert stressed that the obligations assumed by States under the Covenant are generally presented, because of their objective, not as obligations of result but as obligations of conduct, which means that States - particularly the poorest States - cannot be held solely responsible for the difficulties they encounter in meeting the vital needs of their populations. Quite often they have only assumed a general obligation of diligence, so to speak, undertaking to do all they can to bring about the progressive realization of the rights set forth in the Covenant. In short, these States would like to accomplish all that is humanly and socially desirable but in fact they can only guarantee in the long run what is economically feasible.

18. Nevertheless, the independent expert will try to define precisely, within the framework of the general obligation of diligence assumed by States, their actual, measurable obligations and to translate the provisions of the Covenant into specific commitments, the violation of which could, in certain cases, justify resorting to the communications procedure that would be put in place by the draft optional protocol to the Covenant.

19. In the first place, the independent expert is of the view that the obligations assumed under the Covenant are sometimes true obligations of result, any violation of which can be easily noticed and assessed. This would be the case whenever the State party commits a "violation through acts of commission". In such cases, the State party would be violating, so to speak, an obligation "not to do something", which is by its very nature a measurable obligation and hence not usually subject to different interpretations. States parties cannot simply undertake to do their best not to violate commitments that fall within this category of international commitments. The obligation is flouted in its entirety, and the right in question is violated the moment a State does something that it is forbidden to do.

20. The Maastricht Guidelines give the following examples of violations through acts of commission: the formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed; and the active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination.¹⁰

21. In any event, any violation by a State party of the principle of non-discrimination constitutes a violation through an act of commission, as it is in contravention of the express provisions of article 2, paragraph 2, of the Covenant, according to which “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. In other words, if the resources are available to enable a given right to be enjoyed to some extent, the right must be exercised in circumstances that involve no discrimination, and the State will clearly have failed in its obligation of result if ever it takes or maintains legislative, administrative or other measures that prevent individuals or groups of individuals from enjoying on an equal footing any of the rights recognized in the Covenant. Clearly, respect for such a fundamental principle is not a question of resources, and the obligations of States parties is measurable by its very nature and hence not usually subject to different interpretations. States parties cannot simply undertake to do their best not to violate the principle of non-discrimination. The obligation is flouted, in its entirety, and the principle in question is violated the moment the State does something that it is forbidden to do.

22. In the second place, the independent expert is of the view that, in the remaining cases, whenever the obligations assumed under the Covenant consist of taking steps, or “doing something” - which no doubt relates back to a longer list of commitments undertaken by States parties under the Covenant - violations of these obligations concern “violations through acts of omission” and, depending on the circumstances and pertain to a violation of true obligations of result or of simple obligations of conduct, depending on the State’s scope for action and the means objectively available to the State to give effect to the rights for which it is responsible.

23. According to the Maastricht Guidelines, there may be violations through acts of omission if a State party fails to take appropriate steps as required by the Covenant or fails to reform or repeal legislation that is manifestly inconsistent with an obligation arising from the Covenant.¹¹

24. In any case, each State party has a minimum core obligation to ensure the satisfaction of the basic content of each of the rights contained in the Covenant. 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. The Committee on Economic, Social and Cultural Rights has pointed out in this respect that any interpretation of the Covenant that does not reflect this minimum core obligation would render the Covenant largely meaningless (E/1991/23, para. 10).

II. JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL, REGIONAL AND NATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS

A. Experience gained at the national level

25. The nature and scope of economic, social and cultural rights and their justiciability are becoming better defined in national case law. Cases touching on a broad spectrum of economic, social and cultural rights have been brought before various national courts.

26. The cases mentioned below have been selected in such a way as to reflect regional diversity and to cover a broad spectrum of the rights recognized in the Covenant.

1. The right to work and the right to the enjoyment of just and favourable conditions of work (articles 6 and 7 of the Covenant)

27. In the case of *Daily Rated Casual Labour Employed under P & T Department through Bharatiya Dak Tar Mazdoor Manch v. Union of India and others* (AIR, 1987, SC 234), the petitioners complained that their wages were very low and were lower than those of permanent staff doing similar work even though the petitioners had been in their jobs for a long time (up to 10 years in some cases). Moreover, the petitioners pointed out that the Government had not set up any scheme to absorb them gradually into the civil service and that they had been denied the social benefits - such as annual increments, pensions, leave and other benefits - enjoyed by employees holding permanent contracts. The court found that, although constitutional guidelines requiring the State to reduce inequalities in status, facilities and career opportunities were not enforceable as such, they could serve as a basis for determining the existence of hostile discrimination. In the case in point, there was hostile discrimination amounting to exploitation of the workers and thus to a denial of their human rights. Moreover, the classification of casual labour according to the number of days worked was also a violation of the right to a fair wage and equal pay for equal work without discrimination of any kind.

28. In another case brought before the Indian Supreme Court, *Apparel Export Promotion Council v. A.K. Chopra* (AIR, 1999, SC 625), the Court defined sexual harassment (in the workplace) as including unwelcome behaviour with sexual overtones (whether explicit or implicit) such as: (a) physical contact and advances; (b) a demand or request for sexual favours; (c) sexually coloured remarks; (d) showing pornography; and (e) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

3. Right to social security, including social insurance (article 9 of the Covenant)

29. In case No. 2000-08-0109, on compliance of item 1 of the transitional provisions of the Social Security Act with articles 1 and 109 of the Latvian Constitution, the Constitutional Court of Latvia considered a dispute over non-payment of social insurance premiums for over 13,000 employees and the irregular payment of social insurance premiums for 67,000 employees in 1999 alone. It transpired that many employers liable to pay social

insurance premiums for their employees in the form of a tax had not done so. The Court ruled that, by recognizing the right to social security, the State was obliged to implement it, which it had not done in this case. It considered that the employer was bound by law to pay the obligatory premiums to each of its employees. When the employer failed in its duty, the organizer of the insurance (that is, the State) had to guarantee the implementation of the law through compulsory measures. The State was thus required to set up an effective implementation mechanism to guarantee the uniform implementation of the right to social security.

4. Right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions (article 11 of the Covenant)

30. In the *Government of the Republic of South Africa and others v. Grootboom and others* case, the Supreme Court of South Africa noted that the Government had set up a programme for the progressive realization of the right to adequate housing. However, as the programme did not take account of the needs of people in extremely precarious situations, the measures taken were not considered reasonable.

31. In *Olga Tellis and others v. Bombay Municipal Corporation and others* (AIR, 1986, SC 180), the Supreme Court of India declared that the right to life was not limited to questions such as capital punishment but also covered the right to a source of income - in other words, the right to have the means to live. Consequently, the expulsion of about 500 people living on the street and in shanty towns would deprive them of their means of subsistence and thus their right to life. A decision that deprived them of this right was nevertheless acceptable insofar as it complied with an "equitable, just and reasonable" legal process. According to those living in the shanty towns, this definition covered the basic rules of natural justice, namely, their right to make use of their resources.

5. Right to the enjoyment of the highest attainable standard of physical and mental health (article 12 of the Covenant)

32. In the *Minister of Health and others v. Treatment Action Campaign and others* case, the Supreme Court of South Africa found that restricting the availability of a particular treatment for HIV/AIDS to certain hospitals and clinics was a violation of the right to health, since this policy led to long waits for decisions authorizing the treatment of patients outside those particular hospitals and clinics; such waits were unreasonable within the meaning of the Constitution.

6. Right to education (articles 13 and 14 of the Covenant)

33. In *Campaign for Fiscal Equity et al. v. the State of New York et al.* (719 NYS 2d 475 2001), the New York State Supreme Court considered the scope of the right to education under the New York State Constitution. The court considered a complaint from students, parents and educational organizations alleging that the State had failed in its obligation to provide sufficient funding to public schools in New York City in order to ensure that their pupils received "a sound basic education", as provided for in the State Constitution. With regard to the

scope of the right to education, the court indicated that the State must take steps to ensure that at least adequate resources were provided for pupils in the city's public schools. With regard to funding, the State should determine, insofar as possible, the actual cost of providing a sound basic education in the various educational districts and hence the State must embark on reforms of the school funding system and rectify its shortcomings.

B. Experience gained at the regional level

34. The nature and scope of economic, social and cultural rights and their justiciability are also becoming better defined in the case law of regional human rights mechanisms. Cases touching on a broad spectrum of economic, social and cultural rights have been brought before the European Court of Human Rights, the new European Committee of Social Rights and the African Commission on Human and Peoples' Rights.

1. European Court of Human Rights

35. In the *Gustafsson* case, dated 25 April 1996, the European Court of Human Rights inferred from article 11 of the European Convention on Human Rights that employers and unions have a right to negotiate. By agreeing to recognize the existence of a fundamental social right derived from civil and political law, in the form of the right of association - even though article 11 extends this right to cover trade union freedom - the Court undoubtedly reconfirmed the uniqueness and indivisibility of human rights, whether civil or political rights or economic and social rights.¹²

36. In the *Gaygusuz* case, dated 16 September 1996, the European Court of Human Rights ruled that an application for a minimum living allowance could not be rejected on the grounds that the applicant did not have the nationality of the country of residence when the applicant met all the other requirements for payment. According to the Court, only "very weighty" reasons could lead it to consider a difference of treatment based on nationality as compatible with the Convention, and no such reasons had been given in this case.¹³

37. In *Airey v. Ireland*, dated 9 October 1979, the European Court of Human Rights deemed that there was no "watertight division" separating the sphere of economic and social rights from the field covered by the European Convention on Human Rights and that "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature". Accordingly, human rights were bound to have an influence on social rights as such.¹⁴

38. In the *Delgado* case, dated 14 November 2000, the European Court of Human Rights found that labour disputes, because they concern "matters of crucial importance to a person's professional situation", must be settled quickly and with "particular dispatch".¹⁵

2. European Committee of Social Rights

39. In its first decision, dated 9 September 1999, concerning the prohibition of child labour, the new European Committee of Social Rights ruled against Portugal, recalling that the aim of the revised European Social Charter - which replaced the earlier European Social Charter and

introduced new social rights - is not to protect “theoretical” rights and that “the satisfactory implementation [of its provisions] cannot be achieved solely through legislation”. On the contrary, respect for these provisions presupposes that their implementation is “rigorously controlled” by the States that are signatories to it.¹⁶

3. African Commission on Human and Peoples’ Rights

40. In *Representatives of the Ogoni people v. the Government of Nigeria*, which was submitted to it recently, the African Commission on Human and Peoples’ Rights considered a communication in which the representatives of the Ogoni people claimed that a number of their fundamental rights had been violated as a result of the behaviour of the Government of Nigeria, acting through the national petroleum company, which is a majority shareholder in a consortium with Shell Petroleum. The Court ruled that the Government’s failure to take certain measures to protect the local population and to avoid ill-considered and destructive military acts, as well as acts harmful to the environment, resulted in the violation of a number of human rights, in particular the right to health, the right to a clean environment, the right of all peoples to dispose freely of their wealth and natural resources, the right to property, the right to the protection of the family, the right to housing, the right to food and the right to life and the integrity of the person.

C. Experience gained at the international level

41. The nature and scope of economic, social and cultural rights and the possibility of invoking them in a court of law are being defined more and more clearly in the case law of international human rights mechanisms. Cases concerning a broad spectrum of economic, social and cultural rights have been brought before, inter alia, the Human Rights Committee, the Committee on Freedom of Association of the Governing Body of the International Labour Office, and the Committee on Conventions and Recommendations of the Executive Board of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

1. Human Rights Committee

42. In Communication No. 182/1984 (Netherlands),¹⁷ the Human Rights Committee considered that a violation of article 26 of the International Covenant on Civil and Political Rights (equality before the law) could be invoked even if it related to the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights. The case in question concerned the right to social security, covered in article 9 of the Covenant.

2. Committee on Freedom of Association of the Governing Body of the International Labour Office

43. The experience gained in the consideration of nearly 2,000 cases in the course of its 50 years of existence has enabled the Committee on Freedom of Association of the Governing Body of the International Labour Office to prepare a coherent, comprehensive and balanced body of principles governing freedom of association and collective bargaining based on the provisions of the Constitution of the International Labour Organization (ILO) and the relevant conventions, recommendations and resolutions. Since it was produced by an impartial and prestigious international specialized agency whose activities reflect a tripartite perspective based

on real situations, this body of principles has acquired an authority that has been recognized by all, both at the international level and in the various countries where it is increasingly being used in the drafting of national legislation. This section will be confined to the presentation of a summary of the cases that have been examined by the Committee on Freedom of Association and of principles and decisions that highlight its decisive contribution to the definition of the nature and scope of trade union rights in the world and the possibility of invoking them in a court of law (justiciability).

44. In case No. 1273,¹⁸ the Committee on Freedom of Association affirmed that “it should be the policy of every government to ensure observance of human rights”.

45. In case No. 1480,¹⁹ the Committee on Freedom of Association referred to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Bureau in November 1977, paragraph 45 of which states that “where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers’ freedom of association or the right to organize and bargain collectively”.

46. In case No. 1512,²⁰ the Committee on Freedom of Association found that “facts imputable to individuals incur the responsibility of States because of their obligation to remain vigilant and take action to prevent violations of human rights”.

47. In case No. 1581,²¹ the Committee on Freedom of Association found that “trade union rights, like other basic human rights, should be respected no matter what the level of development of the country concerned”.

48. In case No. 1590,²² the Committee found that “the matters dealt with by the ILO in respect of working conditions and promotion of freedom of association cannot be considered to be undue interference in the internal affairs of a sovereign State since such issues fall within the terms of reference that the ILO has received from its members, who have committed themselves to cooperate with a view to attaining the objectives that they have assigned to it”.

3. Committee on Conventions and Recommendations of the UNESCO Executive Board

49. UNESCO has, pursuant to its mandate, drawn up many standard-setting human rights instruments, especially in the educational field, education being considered an empowering right that provides the means of upholding the principles of non-discrimination and equal opportunity, as recognized, inter alia, in the Convention against Discrimination in Education that it adopted on 14 December 1960. Since then, it has adopted other binding instruments, in the form of decisions of the General Conference, instruments adopted at intergovernmental conferences, and instruments adopted in the form of UNESCO Executive Board decisions. The procedure for examining complaints received at UNESCO concerning alleged violations of the human rights that fall under its jurisdiction, namely, education, science, culture and information, offers an

edifying example: it is defined in Executive Board decision 104 EX/3.3, and applied by a body subsidiary to the Board, the Committee on Conventions and Recommendations, to which States accord jurisdiction simply by being members of the organization. In practice, even States that are not members of UNESCO have been perfectly willing to allow communications concerning them to be considered by the Committee.²³

D. Summary of the question and position of the independent expert

50. The preceding developments make it possible to reply to the question of the justiciability of economic, social and cultural rights. The experience gained in recent years from the application of international, regional and national human rights instruments and mechanisms is, without any doubt, indicative of the development and recognition of economic, social and cultural rights, and of mechanisms for monitoring them, at the national, regional and international levels. However, if all economic, social and cultural rights are justiciable, it must still be recognized - as the European Court of Human Rights affirmed in the above-mentioned *Delgado* case - that cases involving such rights should be settled quickly and with "particular dispatch".

51. While the often progressive nature attributed to economic, social and cultural rights may give rise to a discussion of the nature and scope of States parties' obligations under the Covenant - obligations of conduct or obligations of result (see above, chapter I, section C) - the independent expert is of the view that there can be no doubt as to the essentially justiciable nature of all the rights guaranteed under the Covenant. The question is then, 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:

(a) In all cases where a State party fails to fulfil an obligation of result, its liability should be incurred and recognized from the moment that, through its action or its manifest inaction, the State causes actual damage to individuals or groups of individuals who claim to be victims. This would be the case when the State party commits violations by action - be it any violation of the principle of non-discrimination (see above, paragraphs 20 and 21) or when it fails to fulfil a minimum core obligation to ensure the enjoyment of the basic content of each of the rights contained in the Covenant (see above, paragraph 24).

(b) In all other cases where a State party fails to fulfil an obligation of conduct, its liability could be incurred on the basis of violations by omission and should be assessed in accordance with the scope for action and the means objectively available to the State to give effect to the rights for which it is responsible (see above, paragraphs 22 and 23).

52. However, in addition to the questions concerning the nature and scope of the obligations assumed by States parties under the Covenant, these obligations may not be reduced to mere moral obligations, or mere "wishes". It is rather, and just as much, a question of legal obligations assumed by virtue of an obligatory and binding international instrument.

III. BENEFITS AND PRACTICABILITY OF A COMPLAINT MECHANISM UNDER THE COVENANT AND THE ISSUE OF COMPLEMENTARITY BETWEEN DIFFERENT MECHANISMS

A. Benefits and practicability of a complaint mechanism under the Covenant

1. Benefits of a complaint mechanism under the Covenant

53. The independent expert hopes that he has helped to promote awareness of the benefits of recognizing the justiciability of all economic, social and cultural rights. The experience gained in recent years from the application of international, regional and national human rights instruments and mechanisms makes it possible, without a doubt, to reduce considerably the impact of the arguments based on State sovereignty, which often point out that a complaints procedure under the Covenant might at times require the international body responsible for examining complaints to conduct a detailed examination of a country's economic, social and cultural policies and thus lead to unacceptable interference in a sphere where the State would normally have exclusive competence within the meaning of international law.

54. Such arguments should not, in the opinion of the independent expert, pose an insuperable obstacle to the justiciability of economic, social and cultural rights. For convincing proof, one need only recall the content of the decision taken by the Committee on Freedom of Association in case No. 1590 (see above, paragraph 48), in which it found that the matters dealt with in respect of working conditions and promotion of freedom of association cannot be considered to be undue interference in the internal affairs of a sovereign State since such issues fall within the terms of reference that the ILO has received from its members, who have committed themselves to cooperate with a view to attaining the objectives that they have assigned to it. This same reasoning would lead to the conclusion that, in essence, an optional protocol to the Covenant would enhance the effectiveness of that instrument, by which State parties pledged to guarantee the full exercise of the rights contained therein and to cooperate with a view to attaining the objectives that they have assigned to it. At the same time, this would make it possible to reaffirm the principles recognized in the Vienna Declaration and Programme of Action, according to which all human rights are "universal, indivisible and independent and interrelated", which means that they cannot be subjected to any attempt to put them in any kind of hierarchical order.

55. Other benefits could result from the establishment of a complaint mechanism under the Covenant, including:

(a) Application of everyone's right of appeal. Without a doubt, one of the main precepts of international human rights law is that everyone has the right of appeal in cases of violations of his or her fundamental rights. A mechanism for examining individual complaints will be an important means of ensuring that this right can be exercised at the international level;

(b) Development of international law. In addition to recognizing everyone's right of appeal, the establishment of a procedure for examining complaints under the Covenant would, without a doubt, contribute, through the specific cases and real situations that will be examined, to the development of a coherent body of principles covering all the rights set forth in the Covenant. Such principles could gradually acquire an authority that would be recognized by all, both at the international level and in countries where they could be used in the drafting of national legislation. The principles could supplement the methodical work that has been carried out in recent years to explain the nature and scope of economic, social and cultural rights, particularly through the Limburg Principles and the Maastricht Guidelines, the Committee's general observations, the consideration of States' reports, and resolutions of the Commission. There is a missing link in this process, namely, a mechanism for examining individual complaints capable of developing case law at the international level on the basis of concrete facts.

(c) Unity of all economic, social and cultural rights. The optional protocol will be, certainly, the only mechanism of its kind that enables persons to obtain reparations for the entire spectrum of rights recognized in the Covenant. While it is true that there are other international complaint mechanisms for economic, social and cultural questions, the Covenant is, at the international level, the only global instrument that deals with these various rights. A complaint mechanism under the Covenant would provide greater support for the principle of the indivisibility and interdependence of all human rights, including indivisibility and interdependence within the category of economic, social and cultural rights. Many of the cases that will be examined could deal with several rights, so that a violation of the right to health would, for example, be linked to a violation of the right to housing or the right to water, and a violation of workers' rights would be linked to a violation of the right to health, or even the right to education - as in the case of violations of the minimum age of employment.

2. Practicability of a complaint mechanism under the Covenant

56. It is important to note that the international treaty system is currently undergoing a process of reform, which is summarized in detail in the report of the Secretary-General entitled "Strengthening the United Nations: an agenda for further change" (A/57/387). The report indicates that the procedures applied by bodies established under international instruments will be reviewed in order to simplify the rules relating to the submission of reports, and that the system of special procedures (rapporteurs, working groups, etc.) will be reviewed in order to strengthen effectiveness by ensuring greater coherence.

57. The establishment of a new mechanism to deal with complaints of violations of the rights defined in the Covenant should, without a doubt, take account of the reform process; this might lead one to think that new resources for treaty bodies would perhaps be difficult to mobilize. However, the independent expert is of the opinion that what is needed is a mechanism with a good cost/efficiency ratio, bearing in mind the obvious advantages of such a mechanism. This approach would be feasible if, and insofar as, the new procedure to be established ensured the necessary complementarity and coordination with existing mechanisms.

B. Complementarity and coordination between the various mechanisms

58. In his first report, the independent expert mentioned the basic questions making it possible to reply to the main points raised in debates on the draft optional protocol to the Covenant. This report seeks to go further by taking account of the observations and opinions expressed by States, intergovernmental organizations, including the specialized agencies of the United Nations, and non-governmental organizations, as well as the opinions of experts and academics on the question.

59. In addition to theoretical questions, the observations that follow will endeavour to promote considerations of appropriateness together with the need to create a mechanism that ensures the required complementarity and coordination with the monitoring mechanisms established under other international human rights instruments. This would, at the same time, make it possible to provide coherent arbitration between concerns that are sometimes necessarily divergent and to promote States' support for the draft optional protocol to the Covenant.

1. Rights covered

(a) The current situation

60. Under the proposed procedure, the draft put forward by the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights in 1996 would allow recourse against violations of all the substantive rights set forth in the Covenant, apart from the right of peoples to self-determination recognized in article 1 which, as was pointed out - not without reason - could leave the procedure in grave danger of being misused, especially since the right to self-determination was proclaimed in exactly the same words in article 1 of the International Covenant on Civil and Political Rights. Moreover, the Human Rights Committee, which is in a better position to deal with the issue, has in its practice adopted a cautious or restrictive approach to that right. The Committee has pointed out, however, that the other general principles set forth in articles 2 to 5, namely the principle of non-discrimination and the equal right of men and women to the enjoyment of the rights set forth in the Covenant, would always be applicable and would serve as the basis for interpreting and monitoring how States parties give effect to the rights covered by articles 6 to 15 of the Covenant.

61. This rather broad approach that the Committee has proposed is also intended to be an omnibus one, in the sense that any State becoming a party to the optional protocol would have to accept that the procedure set up for the submission of communications and complaints applied to all the rights recognized in articles 2 to 15 of the Covenant.

(b) Position of the independent expert

62. In his previous report, the independent expert pointed out that the Committee's omnibus approach to the rights covered is clearly divergent from the approaches taken in recent years under regional instruments, for example the Additional Protocol to the American Convention on

Human Rights (Protocol of San Salvador) under which individual petitions are admitted only as a means of upholding trade union rights and the right to education, or the Additional Protocol to the European Social Charter, which establishes an “à la carte” system under which ratifying States are free to choose which rights they consider themselves bound by.

63. In order to measure the true scope of the Committee’s approach, it is important to remember how consistent the rights set forth in the Covenant are. In addition to the rights and general principles laid down in articles 2 to 5, which those protected can assert for the purpose of interpreting and monitoring how States are giving effect to the rights set forth in the Covenant, articles 6 to 15 recognize the right to work (art. 6), the right to just and favourable conditions of work (art. 7), the right to form and join trade unions (art. 8), the right to social security, including social insurance (art. 9), the right of families, mothers, children and young persons to the widest possible protection and assistance (art. 10), the right to an adequate standard of living (art. 11), the right to enjoyment of the highest attainable standard of physical and mental health (art. 12), the right to education (arts. 13 and 14), and the right to take part in cultural life (art. 15).

64. In other words, the body authorized to deal with communications and complaints under the draft optional protocol would have to intervene in a very extensive range of rights which, at the moment, it is the responsibility of a number of different institutions and international monitoring bodies, particularly those established by ILO and UNESCO, to follow up.

65. The independent expert emphatically underscores these difficulties which, it should be pointed out, rarely arise in connection with the rights set forth in the International Covenant on Civil and Political Rights because the jurisdiction of the Human Rights Committee appears to be so much more restricted and does not conflict with that of other bodies set up by international organizations. If, besides, one bears in mind that nowadays many of the rights set forth in the International Covenant on Economic, Social and Cultural Rights are justiciable before treaty bodies concerned with the application of other international human rights instruments, the extent of the problems becomes even more apparent.

66. In this regard, the independent experts recalls the proposal that he made in his first report, namely that the procedure envisaged in the draft optional protocol to the Covenant should be restricted as regards to the rights covered. This does not mean that certain rights covered by other international procedures of investigation or settlement should be excluded, since that would be tantamount to introducing a new, intolerable kind of discrimination among the various economic, social and cultural rights. Remedies for all the rights set forth in the Covenant, as the Committee on Economic, Social and Cultural Rights firmly maintains in its draft, should be available under the current draft protocol. The idea is, rather, to restrict the proposed new procedure by introducing a new criterion limiting it to “situations revealing a species of gross, unmistakable violations of or failures to uphold any of the rights set forth in the Covenant”. Such a criterion would at the same time allay the uncertainties and doubts voiced by many member States that fear that the proposed procedure might give rise to arbitrary appeals against simple oversights or shortcomings in the action that States parties take under their policies and programmes for the progressive achievement of the various economic, social and cultural rights recognized in the Covenant.

67. By so doing, the risks of overlapping with or diverging from other investigative or settlement bodies can be substantially reduced. Other considerations contribute to the removal of these difficulties and to the relevance of the new procedure envisaged in the draft optional protocol.

68. The independent expert wishes to point out that the current procedures applied by the bodies reporting to other international organizations, such as the Committee on Freedom of Association, are not open to individuals but restricted to complaints of violations of freedom of association submitted by Governments or employers' or workers' organizations. It would clearly, be useful to enable individuals or groups of individuals to submit to a United Nations body communications concerning violations of which they themselves are the direct victims, and thus to have access, as prime intended beneficiaries of the international human rights instruments, to the procedures designed to give stronger effect to their recognized rights. This would surely demonstrate the interest of the United Nations system in improving the human condition, which is so often presented as the primary objective of international action.

69. The risk of divergent interpretations of international protection standards and the rights and obligations defined in various places can also be diminished thanks to the cooperation that has grown up in recent years among the bodies responsible for enforcing these standards. For example, in performing its task of considering States' periodic reports and making its related general comments, the Committee on Economic, Social and Cultural Rights has often drawn on the international labour conventions and the comments made by the appropriate ILO committee of experts. Such cooperation in the field of investigation or settlement procedures could be developed further by a variety of means.

70. The same comment could be made about the communications procedure established under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Although the rights covered intersect at many points, advantage can be taken in practice of the coordination that cannot fail to evolve between the two monitoring bodies as regards the interpretation and application of these rights by States parties.

2. Competent body

(a) The current situation

71. The draft submitted by the Committee to the Commission in 1996 would make the Committee the competent body for examining complaints and communications under the proposed investigation and settlement procedure. This option may seem fully justified, given the experience and authority that the Committee has gained since its establishment. One may wonder, however, whether the Committee as currently constituted and with the means that it has at its disposal is really in a position to accomplish the task, which would enlarge its mission substantially and add to the difficulties it is experiencing in coping fully and within reasonable time limits with its primary mission, the consideration of States' periodic reports.

(b) Position of the independent expert

72. In his first report, the independent expert considered that there was “a conflict of authority to be discerned in the prerogatives accorded to treaty bodies: on the one hand, considering periodic reports from States parties; on the other, considering complaints and communications about alleged violations of the human rights covered by the various international instruments”. Quite apart from the practical difficulties arising from the excessive workload on the members of these various bodies, the independent expert considered that the two activities were somewhat incompatible, which could have a negative effect on the quality of the work of such bodies and also on their working conditions.

73. The independent expert acknowledges that that opinion should be further discussed in the working group that will be established by the Commission at its fifty-ninth session with a view to considering the options concerning the drafting of an optional protocol to the Covenant. He hopes, nevertheless, that he has contributed to the debate on the effectiveness of and coordination among the various monitoring and follow-up mechanisms under the human rights instruments.

3. Possibility for individuals and/or groups to submit complaints and possible means of remedying violations by States parties of their obligations

74. With regard to these questions, the independent expert refers to his first report, in which he endorsed the relevant comments contained in the report submitted in 1996 by the Committee on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex).

IV. CONCLUSION AND RECOMMENDATION

75. **The adoption of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights would, no doubt, contribute to the efforts to promote, in accordance with the principles contained in the Charter of the United Nations, “recognition of the inherent human dignity and of the equal and inalienable rights of all members of the human family [which] is the foundation of freedom, justice and peace in the world”, when we know that, as the preamble to the International Covenant on Economic, Social and Cultural Rights and the preamble to the International Covenant on Civil and Political Rights state, the ideal of free human beings enjoying civil and political rights and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his or her civil and political rights as well as his or her economic, social and cultural rights. These are the challenges to be taken up and the solutions to be discovered or rediscovered; one solution is, certainly, to strengthen the international machinery designed to ensure that States parties honour their commitments.**

76. **This leads the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights to recommend that the Commission on Human Rights adopt a resolution in which it confirms the decision**

contained in its resolution 2002/24, adopted at its fifty-eighth session, and to establish, at its fifty-ninth session, an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights in the light of the report of the Committee on Economic, Social and Cultural Rights to the Commission concerning a draft optional protocol, comments by States, intergovernmental and non-governmental organizations, and the report of the independent expert.

Notes

¹ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, reproduced in E/C.12/2000/13, paragraph 16.

² Ibid., para. 30.

³ Ibid., para. 27.

⁴ Ibid., paras. 21 and 22.

⁵ Ibid., paras. 17 and 20.

⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reproduced in E/C.12/2000/13, paragraph 6.

⁷ Ibid., para. 7.

⁸ Ibid., paras. 16-19.

⁹ Limburg Principles, *op. cit.*, paras. 29-34.

¹⁰ Maastricht Guidelines, *op. cit.*, paras. 14 and 15.

¹¹ Ibid., para. 15.

¹² *Recueil Dalloz 1997*, p. 363, note by J.-P. Marguenaud and J. Mouly, cited in J. Mouly, "Les droits sociaux à l'épreuve des droits de l'homme", *Revue de droit social*, 2002, p. 799.

¹³ *Recueil Dalloz 1988*, p. 438, note by J.-P. Marguenaud and J. Mouly, cited in J. Mouly, *loc. cit.* (note 12).

¹⁴ *Airey v. Ireland*, 9 October 1979 (Series A, No. 32), cited in J. Mouly, *loc. cit.* (note 12).

¹⁵ *Recueil Dalloz 2001*, p. 2,787, note by J.-P. Marguenaud and J. Mouly, cited in J. Mouly, *loc. cit.* (note 12).

¹⁶ See J.-F. Akandji-Kombe, “L’application de la Charte sociale européenne: la mise en oeuvre de la procédure de réclamations collectives”, *Revue de droit social*, 2000, p. 888, cited in J. Mouly, loc. cit. (note 12).

¹⁷ Communication No. 182/1984 (Netherlands, CCPR/C/29/D/182/1984).

¹⁸ See *Freedom of Association*, a digest of decisions and principles of the Committee on Freedom of Association of the Governing Body of the International Labour Office, Geneva, International Labour Office, fourth edition, 1996, No. 15, p. 9.

¹⁹ Ibid., No. 12, p. 9.

²⁰ Ibid., No. 19, p. 10.

²¹ Ibid., No. 17, p. 10.

²² Ibid., No. 3, p. 7.

²³ Document 146 EX/7, paragraph 50. See also, on the Committee’s working methods and for figures on the communications examined, document 154 EX/16 of 24 February 1998.
