

## **Lisbon Recommendation for the drafting of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**

The following recommendations reflect the outcome of discussions of the Lisbon Civil Society Forum on an Optional Protocol to the International Covenant on Economic Social and Cultural Rights (OP-ICESCR). The Forum, organized by the International Center on Economic, Social and Cultural Rights (CIDESC), in collaboration with the NGO Coalition for an Optional Protocol, took place 12 and 13 October, 2006. It gathered 31 non governmental organizations and academic institutions referred in this document as the Lisbon Forum or the Forum. These recommendations reflect only the results of the discussions in Lisbon, and have not been formally endorsed by CIDESC, the NGO Coalition for an Optional Protocol or any of the participating NGO's.

**The Forum addressed a number of the key elements that will be the subject of discussion and negotiation by the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights during the process of elaborating an Optional Protocol, beginning with its upcoming session in July 2007. While the Forum did not reach definitive positions regarding all areas of concern, it decided to make recommendations on a number of points in relation to the following areas of the OP-ICESCR<sup>1</sup>:**

- I.** Scope and Application of the OP-ICESCR
- II.** Admissibility criteria for a communication procedure
- III.** Standing
- IV.** Proceedings on the merits and interim measures
- V.** Inquiry Procedure
- VI.** Views and recommendations
- VII.** International cooperation and assistance
- VIII.** Follow-up decisions and recommendations

### **I. Scope and Application of the OP-ICESCR**

#### **A) Necessity of a Comprehensive Approach**

1. The Lisbon Forum affirms that a comprehensive approach is an indispensable requirement of an OP-ICESCR.
2. A comprehensive approach requires that all rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant), all components of

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<sup>1</sup> For the purposes of the present document, the Forum refers to the future supervisory body of the OP-ICESCR as "the Committee". This designation is for shorthand purposes and is not intended to prejudge whether that body should be the existing Committee on Economic, Social and Cultural Rights, a sub-committee of the existing Committee, or a new body.

these rights, and all duties of states, including the duties to respect, protect and fulfill, must be subject to communication in an OP-ICESCR..

3. The Lisbon Forum reviewed all communication procedures under existing and draft United Nations human rights treaties, and found every one to be comprehensive in scope, covering alleged violations of any of the “rights” or any of the “provisions” in the relevant covenant or convention. No existing United Nations communication procedure permits states parties to choose the rights or components of rights to which the communication procedure will apply.
  4. The Lisbon Forum emphasizes that adopting a non-comprehensive or “*a la carte*” approach under the OP-ICESCR would be unprecedented in the United Nations and would represent a serious setback for, economic, social and cultural rights (ESCR) in particular, and for the United Nations Human Rights System in general.
  5. The Lisbon Form affirms that the principle that every human right must have an effective remedy, reflected in Article 8 of the Universal Declaration of Human Rights, applies to all of the rights in the ICESCR and that a comprehensive approach to the OP-ICESCR is the only approach that is consistent with this principle
  6. The Lisbon Forum also affirms that a comprehensive OP-ICESCR is consistent with the recognition of the need for “appropriate means of redress or remedy” and for “appropriate means of ensuring governmental accountability” in respect of all provisions of the Covenant, as indicated in General Comment No. 9 of the Committee on Economic, Social and Cultural Rights.
  7. The Lisbon Forum recommends that the principle that all human rights must have effective remedies and its application to all of the rights in the ICESCR be incorporated into the Preamble of the OP-ICESCR.
  8. The Lisbon Forum emphasizes that excluding any particular right(s) in the Covenant from the OP-ICESCR, such as through an “*a la carte*” system, would result in the discriminatory exclusion of particular groups from access to the procedure. Excluding the right to housing, for example, would prevent, homeless people, among others, from utilizing the procedure, so constituting discrimination against this group. Excluding the right to self-determination would exclude many communications from indigenous communities.
- B) Violations of “Provisions” or of “Rights”?
9. The Lisbon Forum reviewed the construction of other United Nations communication procedures and observed that the wording of individual communication procedures in the International Covenant on Civil and Political Rights (ICCPR), the Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Convention on the Protection of the Rights of All

- Migrant Workers and Members of Their Families (ICPMW), refer to violations “of any of the rights” in those conventions. However, the wording in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Draft International Convention on the Rights of Persons with Disabilities and the Convention for the Protection of All Persons from Enforced Disappearances (CPPED), refer to a violation “of any of the provisions” in these conventions.
10. The Forum tended to prefer the reference to “provisions” in order to avoid any uncertainty about the scope and application of the OP-ICESCR. However, some concern was also expressed about abandoning reference to “rights” and it was pointed out that it is common to interpret failures to meet obligations under international human rights covenants as violations of “rights”, even if the particular article makes no reference to a right.
  11. One option put forward for consideration is for the OP-ICESCR to refer to a violation of any right or provision in the ICESCR.

## **II. Admissibility Criteria for a Communication Procedure:**

### **A) Subject-Matter of a communication (*Admissibility Ratione Materiae*)**

12. The Lisbon Forum emphasizes that all rights recognized and provisions established in the ICESCR should fall under the scope of protection of the OP-ICESCR. No right or component of any of the rights in the Covenant should be excluded. Any communication that refers to a violation to any of the rights or provisions in the Covenant and that comply with other admissibility criteria, should be admissible.

### **B) Temporal Dimension (*Admissibility Ratione Temporis*)**

13. In line with general principles of international law and best practice, communications presented under the scope of the OP-ICESCR must relate to violations which occurred after the entry into force of the procedure for the State against which it is presented or which are continuing violations.
14. The Lisbon Forum considers it essential that, following the practice of other international human rights bodies, communications on violations that occurred prior to the entry into force of the OP-ICESCR, but that continue after that day, or that have effect which themselves constitute a violation after that date, be admissible.

### **C) Duplication of Procedures**

15. The Lisbon Forum analyzed the limitations set by various human rights bodies to admit communications relating to situations that have already been subject to analysis by other international bodies.

16. The Forum took into account: (i) that ESCR violations typically relate to multiple rights (ii) that no other body protects the full catalog of ESCR nor all components of these rights (iii) and that bodies that deal with some ESCR may cover only specific groups, may not provide any kind of remedy to victims, or may in other ways not provide protection equivalent to that of the IESCR. Accordingly; the Lisbon Forum recommends that the Committee be granted flexibility to determine when a procedure constitutes an actual duplication of a case. For this purpose, the Committee should take into account, among other aspects, whether the particular facts and victims are identical to those of situations previously subject to a complaint and if full redress was provided to them in case of a violation.

**D) Identification of the Victim and Exclusion of Anonymous Communications**

17. The Lisbon Forum emphasizes the need to distinguish between anonymous communications and confidential communications. While anonymous communications as a general rule are not admitted under other procedures, the identity of victims should not be revealed without their consent, a measure necessary to protect the security of victims and their families.

**E) Written Nature of the Communication**

18. The Lisbon Forum recommends that admissible communications not be limited to those presented in written form. Assistance should be provided to victims that face literary or other barriers to ensure they are not prevented from accessing the system.

**F) Exhaustion of Domestic Remedies and Articulation with Regional Mechanisms**

1) Exhaustion of Domestic Remedies

19. The Forum considers that the Committee should have flexibility to determine when domestic remedies have been exhausted; However, the OP-ESCR should not consider failure to exhaust domestic remedies a bar to admissibility if the legal remedy is (i) unduly prolonged (ii) ineffective or (iii) somehow unavailable to the victim. These exceptions reflect general principles of law.
20. The Forum considers that the burden of proof should fall on the State to demonstrate that there are effective remedies available to the victim.

2) Articulation with Regional Mechanisms

21. The Lisbon Forum recognizes the importance of the existing Regional Human Rights Systems and the need to ensure that their experience and expertise regarding countries within their regions be taken into account by the Committee when considering communications that relate to these countries. The Lisbon Forum also recognizes the importance of ensuring that Regional Systems and the procedure established under the OP-ICESCR strengthen each other.

22. For these reasons, the Forum recommends that language similar to that of Rule 62 of the Rules of Procedure of CAT which establishes that “The Committee may invite ... regional intergovernmental organizations ...to submit to it information, documentation and written statements, as appropriate, relevant to the Committee’s activities under the Convention” be incorporated to the OP-ICESCR. Other means to relate constructively with Regional Mechanisms should be explored.
23. The Lisbon Forum also stresses that under no circumstances should failure to exhaust regional mechanisms be included as an admissibility requirement under the OP-ICESCR. Such a requirement would constitute an unprecedented burden not found in any other mechanism and would create a hierarchy between the United Nations System and regional systems. It would also deny any potential victim the right to choose the most appropriate international forum to address a violation and create inequality as between victims who do and do not have access to regional systems (In the Asian region, for example, no regional mechanism exists). In addition, certain ESCR come under the jurisdiction of certain regional bodies while others do not

### **III.Standing**

24. The Lisbon Forum recommends that the OP-ICESCR should provide that both individuals and groups of individuals alleging violation or violations of rights under the ICESCR, as well as their representatives, have standing to lodge complaints under this mechanism.
25. The Forum also recommends that third parties, including non-governmental organizations, be granted standing in cases where the victims have consented or where the author of the complaint can provide reasonable justification for acting on behalf of victims in the absence of express consent. Provisions on standing should be consistent with those contained in the Optional Protocol to the CEDAW.

### **IV.Proceedings on the Merits and Interim Measures**

#### **A) Proceedings on the Merits**

26. The Lisbon Forum considers that the Committee should have the competency to receive information from third-party sources, as to questions of both fact and law. A broadly framed provision to express this competency should be included, such as that contained in article 22 (4) of CAT, whereby the CAT is allowed to consider “all information made available to it.”
27. The Committee should have the competency to receive written and oral testimony, including direct testimony from victims of violations. It is important that as much as possible, obstacles facing many victims of violations of ESCR, including literacy, linguistic, financial and travel barriers, be considered and addressed so as to ensure that

all relevant information is available to the Committee and victims have effective access to the communications procedure.

28. The Forum considers that most specific elements of proceedings on the merits should be developed by the Committee in its rules of procedures and through its practice and not through express provision in the OP-ICESCR.

**B) Interim Measures**

29. The Forum recommends that the Committee be given the competency to request or indicate interim measure to avoid irreparable harm to and preserve the rights of the complainant/victim(s), until such time as the Committee is able to take a decision on the merits of the complaint.
30. The Forum considers that the competency to request or indicate interim measures should be established through a specific provision in the OP-ICESCR, consistent with the trend manifest in recently established complaint mechanisms contained in the Optional Protocol to CEDAW (article 5) and the CPPED (articles 30 and 31).
31. The Forum further considers that the Committee's rules of procedure should identify the procedures and modalities by which the interim measures will be requested or indicated.
32. The Lisbon Forum emphasizes that the OP-ICESCR should contain a provision imposing an obligation upon states parties to take such measures as are necessary to implement any interim measures requested or indicated by the Committee. Such an obligation would be consistent with developments in international jurisprudence, whereby international judicial and quasi-judicial bodies, including the International Court of Justice, the European Court of Human Rights, the UN Human Rights Committee and the UN Committee against Torture have held interim measures to be binding upon the states to which they are directed.
33. The Lisbon Forum considers that the OP-ICESCR should contain a provision specifying that the Committee's indication or request of interim measures does not amount to or imply a determination on the admissibility or merits of the communication itself.
34. The Forum also considers that where a complainant makes a request for interim measures, the communication containing the request need not set forth the entirety of the complaint, but may be abbreviated to contain elements sufficient for the Committee to make a prima facie determination that such measures are warranted.
35. The Lisbon Forum recommends that the Committee have the competency to indicate or request interim measures *proprio motu*, i.e., in the absence of a specific request for such measures on the part of the complainant.

## **V. Inquiry Procedure**

36. The Lisbon Forum considers it exceedingly important that the OP-ICESCR contain a provision allowing for the Committee to institute inquiry proceedings, where it is in receipt of credible information indicating a situation of gross or systematic violations of a Covenant right or rights, irrespective of whether a complaint has been received from specific victims. The provision should expressly contemplate the possibility of in situ visits by the Committee.
37. The Forum affirms that the inquiry procedure must be made an integral component of any complaints mechanism.
38. The Forum recommends that the full modalities of the inquiry procedures should be developed by the Committee in its rules of procedure.

## **VI. Views and Recommendations**

39. The Forum considers that the OP-ICESCR should provide for the Committee to express “views” or “findings of fact” and to make recommendations and propose remedies, consistent with the practice in other individual complaints procedures.
40. The Forum recommends that the Committee should have the competencies to make general and structural recommendations as well as recommendations with respect to reparation to the individual complainant.
41. The Forum also recommends that the OP-ICESCR contain reference in the preamble to relevant international law and standards, including the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.
42. In formulating remedies to violations, the Forum considers that the Committee should be enjoined to consider the views of relevant experts in the state concerned as well as other appropriate sources of expertise.
43. The Forum recommends that the OP-ICESCR in its text should avoid reference to resource allocations or related policy questions. These areas fall within the competency of the Committee, which should apply a test of “reasonableness” in its application of article 2 of the ICESCR.

## **VII. International cooperation and assistance**

44. The obligation, contained in article 2(1) of the ICESCR which establishes that in the realization of the rights of this treaty, states parties “take steps, individually and through international assistance and cooperation, especially economic and technical” is an

integral part of the ICESCR. The Forum considers that it must be reflected in the OP-ICESCR, at a minimum, recalled in its preamble.

45. The Forum recommends that the Committee should be given the competency, following the consideration of a complaint, to communicate its views and recommendations to international agencies, including financial institutions and development agencies. This competency, already given to the Economic and Social Council in article 22 of the ICESCR, should be expressly delegated to the Committee in the OP-ICESCR.

#### **VIII. Follow-up decisions and recommendations**

46. The Forums recommends that the Committee should be given the competency to nominate one or more of its members to serve as a “case” rapporteur (or case rapporteurs) to allow for effective follow-up, particularly with respect to implementation of views and recommendations.
47. The Forum also recommends that the Committee should be given the competency to request that states submit to it further information following the disposition of a complaint, including on steps taken to implement the views and recommendations of the Committee.
48. Furthermore, the Committee should be given the competency to receive follow-up information from the complainants, irrespective of whether the state has provided additional information on steps taken to implement the views and recommendations of the Committee.
49. The Forum further recommends that the Committee should also be given the competency to seek additional information from other United Nations and regional agencies and bodies, national human rights institutions, including ombudsmen, other relevant domestic bodies, and non-governmental organizations. The Committee would exercise this competency when it considers that such sources would have important contributions which would allow the Committee to promote effective implementation of its views and recommendations.
50. The Forum also considers that the Committee should be given the competency to hold additional meetings, including, where appropriate, oral hearings, for the purpose of dealing with follow-up to individual complaints. Such meetings could be made public, pursuant to agreement by the complainant/victim(s).
51. Finally, the Lisbon Forum recommends that the Committee should be given the competency to carry out follow-up through in situ visits where appropriate.