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Standard-setting: Lessons Learned for the Future

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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

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BACKGROUND TO THE INSTRUMENT

1. The development of an individual and collective communications procedure and an inquiries procedure, through the adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP to ICESCR) will address the lack of an international mechanism to adjudicate violations of economic, social and cultural rights (ESCR).<sup>2</sup> As such, it will provide redress to individuals and groups who have been unable to achieve a satisfactory remedy to violation of their rights to food, housing, health, employment and conditions etc, at a domestic level.
2. The adoption of an OP to ICESCR will signal an end to the historic, politically-constructed hierarchy of rights; the fallacious notion that ESCR are not justiciable, increasingly being disproved through domestic adjudication of ESCR; and the false dichotomy which has

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<sup>2</sup> Even reference to a violations approach is contentious. At the SIM Expert meeting to draft an OP to the ICESCR in 1995, Arambulo notes:

Recourse to “hard” language refers to “violations” and therefore entails a judicial-type of procedure. In contrast, “soft” language means using terms such as “failure to give effect to obligations,” which may result in a less contentious and confrontational procedure. Kitty Arambulo, “Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?,” *University of California Davis Journal of International Law and Policy* 2 (1996): 133.

constituted ESCR as positive, cost-intensive obligations and civil and political rights as negative, cost-neutral or no-cost obligations.

3. Through the adoption of an OP to ICESCR a number of gaps which exist within the regional and international system will be overcome. Fundamentally, it will overcome the lacuna of international law that precludes a direct mechanism to address violations of ESCR within the Human Rights Treaty System (HRTS). While other Committees have addressed ESCR issues, primarily through a non-discrimination framework, this has not enabled a fulsome, independent consideration of the normative content of ESCR. Moreover, experts appointed to these Committees, while eminently qualified to address their respective mandates, do not have the opportunity to develop the in-depth understanding of ESCR available to experts of the Committee on Economic, Social and Cultural Rights (CESCR).
4. An OP to the ICESCR will address the limitations of regional mechanisms: for example the San Salvador Protocol only enables communications with respect to violations of the right to education and the right to organise within trade unions; the Council of Europe Social Charter does not provide a comprehensive approach to the ESCR recognised, nor does it enable individual communications. There is no regional system available to victims of ESCR violations in the Asia and Pacific region or the Middle-East. Within the specialist agencies, an OP to ICESCR will address the limitations of provisions in the ILO mechanisms which focus on inquiries into implementation of the right to work and freedom of association and UNESCO which focuses on a confidential communications procedure in relation to the right to education and freedom of expression.
5. The negotiation of an OP is one of the least-fluid standard-setting processes, requiring that it occur within a UN context and successfully move through three stages:
  - Stage One: developing the political will to initiate drafting in an Open-Ended Working Group
  - Stage Two: securing the appropriate level of participation, knowledge to support engagement with substantive issues, and political will to ensure the successful conclusion of negotiations
  - Stage Three: mobilising the political will to obtain the necessary number of ratifications to have the instrument enter into force.
6. Within the context of the OP to ICESCR we are still at Stage One. The process to initiate an OP to ICESCR has a long, halt-ridden and contentious history. Initial consideration of the question occurred during the Commission on Human Rights (CHR) debates in 1954 on the drafting of the ICESCR, but was unsuccessful.<sup>3</sup> More recently, the establishment of the CESCR (in 1986) has been an important component in the campaign. The CESCR provided a non-political, expert forum on to which NGOs could focus their lobbying. FIAN (the Food First Network) and the Habitat International Coalition (HIC) did just that, and in many ways it is the partnership between these two NGOs and the CESCR which has led us to our current position. Of course, along the way, a number of other vital actors have joined in, including supportive governments, the Office of the High Commissioner for Human Rights, and an ever increasing number of NGOs and academics.
7. National and international advocacy campaigns have been vital to secure both political will and also increase substantive knowledge about the justiciability of ESCR. In many ways, these two factors are inextricably inter-related, because many of those governments who are opposed to or

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<sup>3</sup> Philip Alston, "Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9 (1987): 335-37.

ambivalent about the process have misgivings which are, respectfully, grounded in erroneous and ill-informed understandings of the justiciability of ESCR. Of course, then there are those opposition governments who have adopted a strategic position of wilful misunderstanding of the justiciability of ESCR. Nonetheless, the challenge for the Coalition in 2005-2006 is to provide accessible and comprehensive information to decision-makers at the domestic level on key issues (i.e., challenging them to understand the implications of adopting an OP which is not comprehensive in its coverage of rights or levels of obligations; helping them to understand the way in which domestic and regional jurisprudence has addressed the issue of allocation of resources, progressive realisation, through the development of tests or standards of reasonableness).

8. The international advocacy for an OP has been able to build on, and in part has been built by, the increased interest in the human-rights framework by domestic advocates and politicians and the concomitant development of a jurisprudence on ESCR. As such, another trigger to the process is the increasing domestic interest and constituency which uses an ESCR framework, and has identified the limitation of having no adjudicative function within the HRTS.

#### **DESCRIPTION OF THE PROCESS AND ITS FORM AND NATURE**

9. As identified, the OP to ICESCR is still at Stage One. The CHR in 2006 will be the crucible of the process to date. The goal for supporters of the OP to ICESCR is that the CHR give the OEWG a mandate to draft. As we have yet to achieve this, it is useful for this process, to consider the means by which the political will has been, and is being, developed to achieve this outcome.
10. The CESCRC consideration of the issue in the 90s was an important step, both for generating substantive understanding of the issues which would need to be addressed in an OP to ICESCR, and also for mobilising political will. Substantively, the CESCRC consideration of the issue generated tremendous intellectual energy around the issue. For example, to aid the drafting of the text, the CESCRC considered four technical papers prepared by Philip Alston. The Netherlands Institute for Human Rights (SIM) convened an expert meeting in 1995 which considered two draft OP texts, ultimately adopting the Maastricht draft. Politically, encouraged by FIAN and HIC, the CESCRC contributed a paper to the 1993 World Conference on Human Rights, which resulted in the Declaration and Programme of Action (VDPA) noting that “all human rights are universal, indivisible and interdependent and interrelated” and calling for the CHR and CESCRC to “continue the examination of optional protocols to the ICESCR”. The import of the Vienna global consensus on this issue is reflected in the ongoing reference to the VDPA in negotiations to date. For example, the preambular text of the 2002 CHR resolution which established the OEWG, and the 2003 CHR resolution extending its mandate, both recall the VDPA consensus on the OP.
11. The presentation of the CESCRC draft to the CHR in 1997 was also a key step. Again, encouraged by FIAN and HIC, the CESCRC decided to draft an OP as a way to move the issue forward. In this respect, the work of the CESCRC became the foundation upon which supportive governments and NGOs built a movement. When the CHR first considered the draft OP in 1997 it simply called for governments, IGOs and NGOs to submit views on the draft text (and only a few responded). It was at this point that FIAN, HIC, the International Commission of Jurists (ICJ) and Terre des Hommes France established a formal alliance to maintain political pressure in the CHR context.
12. As part of this effort, in 2001 the UN High Commissioner for Human Rights, in cooperation with the International Commission of Jurists (ICJ), and with the support of the government of

Finland, organised a two-day workshop on the justiciability of ESCR with particular reference to an OP. The role of the OHCHR has been instrumental during this period in providing background information, informative papers, and supporting initiatives such as this meeting. The 2001 meeting was an important mechanism by which governments were able to air their views on the OP, in a less political setting, and therefore less binding environment than the CHR. Meetings of this type have continued throughout the process, more recently with regional meetings being held, which again have been key to the process of building momentum and support for the process, both within government and NGO circles. As with the initial meeting, these regional meetings enable delegates to debate key issues in a more informal manner, which in turn contributes to movement in the negotiations during the formal meeting of the OEWG. In addition, the Sub-Commission for the Promotion and Protection of Human Rights has also lent its support to the process, calling in 2003, for the CHR to establish a Working Group.

13. And so while the 90s can be characterised as a largely expert-driven consideration of the issue, by the early “noughties” the process was beginning to be characterised in a more political manner. As such, both opposition and support camps began to organise, including among NGOs. In 1991, the formal alliance of NGOs expanded into the NGO Coalition for an OP to ICESCR. The Coalition has played an important role in providing a NGO focal point for information and support for national and Geneva-based activists working on this issue. The Coalition became a more cohesive structure at the inaugural meeting of the ESCR-Net in 2003 agreeing to work together and establishing five “core elements” of an OP as the basis from which our work would develop (the core elements have recently expanded). At the conclusion of the second session of the OEWG, the Steering Committee of the Coalition agreed to formalise a membership process and articulate membership principles.
14. The governments opposing the process were successful in 2001, when the process hit an hiatus as the CHR appointed an Independent-Expert (for a period of two years) to consider the issue. Ultimately, the Independent Expert made a set of recommendations which affirmed the adoption of an OP to the ICESCR. In 2003, the CHR established an OEWG (with a one-year mandate) which was to consider “options regarding the elaboration of an optional protocol.” This mandate was renewed for a period of two years at the 2004 CHR. At the OEWG this year, the High Commissioner for Human Rights also increased her engagement with the process, delivering a strong statement which a number of supportive delegations have identified as an important political milestone.

### **First Session of the OEWG**

15. The first week of the first session of the OEWG was characterised by a very open and constructive dialogue, where issues of substance were discussed. The level of debate was more substantive than NGO observers and some governments had anticipated. The agenda focused on presentations by experts from the UN (Special Rapporteurs and Committee Experts). This facilitated a more open discussion, because governments were able to ask questions and receive clarification about issues of concern. Debates later in the week focused on specific topics, for example, on the nature and scope of state obligations under the ICESCR, the question of justiciability and the question of complementarity.
16. The second week of the first session of the OEWG was characterised by a difficult political process surrounding the recommendations to be made in the report. The recommendations were to call for the renewal of the mandate for a further period of time (at a minimum) and for the establishment of a mandate to draft (the “maximalist” position). Ultimately, the OEWG adopted a report, but it was not possible for it to adopt recommendations, and the Chair presented these as her own recommendations.

## The 2004 CHR

17. The polarised politics flowed through into the CHR negotiations. In both the OEWG and the CHR significant efforts were made by those opposed to the process to scuttle the OEWG, though they ultimately failed. A variety of strategies were used by the opponents of the OP to the ICESCR, including the introduction of an amendment by the delegation of Saudi Arabia/Pakistan which provoked a North-South split over the issue of international cooperation and development; a question the legal status of the Committee as an impediment to the development of the OP; and outright rejection of the need for an OP on a variety of grounds, including the view that ESCR are not justiciable, that adequate mechanisms exist already, and that the HRTS is over-burdened and under-resourced (an interesting echo of the debates around the establishment of the CESC itself). Despite the opposition, as previously mentioned, the mandate of the OEWG was renewed for a period of two years.

## The Second Session of the OEWG

18. The second session of the OEWG recently concluded its work in Geneva. Following the directions of the 2004 resolution, the session had experts from the UN (Special Rapporteurs and HRTS Committee members), representatives from the ILO and UNESCO and regional representatives who discussed the African Commission on Human and Peoples' Rights and the Council of Europe Committee on Social Rights. Importantly, the report of the second session did not include recommendations to the CHR, thus removing the need for a CHR negotiation on the mandate. It also attributed statements for the opening and closing session. This strategy contributed to a far more open discussion. Moreover, the renewal of the mandate for a period of two years has forced missions and capitals to consider the issue more seriously.
19. The agenda adopted this year enabled further discussion, though probably the most interesting sessions (from the perspective of getting on with drafting) were those which discussed a comparative paper on existing communications and inquiry practices and the CESC draft. These enabled delegations to get into a more substantive debate on the content of a possible OP (though delegations either opposed or ambivalent/with no clear position were very clear to point out that a discussion of elements in no way presupposed a mandate to draft an OP, the option of no OP is still an option...) Without question, the number of states participating has increased and amongst those states participating in the OEWG, the number of states interested in moving to drafting has increased. Concomitantly, the number of states opposed to the process has decreased. Moreover, even amongst those who oppose the process or are ambivalent, there is recognition that momentum has been built, and that continuing to discuss "options" is wasteful of time and resources. Options mooted included reducing the third session meeting period to five days, amending the mandate to draft in 2006, and the proposal eventually adopted, the development of a discussion paper that will provide the basis for a more concrete discussion of "options" (still including an option of no OP, but also including something more akin to an elements paper (though, as certain delegations reiterated and then reiterated some more, it's not an elements paper because there is no mandate to draft an OP yet – it's the elements paper you have when you're not having an elements paper.)
20. It is anticipated, based on the nature of discussions at the second session, that this discussion paper will provide for a more structured debate, which will come closer to discussing the elements of an OP, though will of course, also have to provide for a discussion on the option of no OP. Inter-sessional expert and governmental meetings will continue to play an important part in increasing substantive knowledge among delegates, both those in missions and those in capitals (particularly addressing the splits between Ministries on this issue) and NGOs. This in turn should help capitals to clarify their own position both in terms of gaps in domestic

implementation of ESCR (which may leave them susceptible to communications/inquiries) and their position in relation to the drafting of an OP. The inter-sessional meetings should also facilitate regional groupings to develop consensus positions which will hopefully increase their capacity to speak as regional groups (which has been limited, see below). Moreover, while inter-sessional meetings are important components, the only way forward for an OP at this point is for the political discussions at the OEWG and the CHR to reach consensus on drafting an OP. Thus, while useful, ambivalent governments have also cautioned that the regional and inter-sessional meetings could undermine the development of political consensus, if players opposed to the OP perceive that the political process is in any way being marginalised or side-stepped by proponents of the OP.

### **An end to Stage One? The 2006 CHR**

21. As identified, the key challenge for the OP to the ICESCR is to see the CHR 2006 provide a mandate to draft. It is unclear whether the mandate of the OEWG will be renewed in 2006. Undeniably, momentum is building, and even opposing governments acknowledge that. But, significant opposition remains from influential actors. And while, from a Coalition point of view, we would indeed like to see a change in objectives so that the OEWG moves from considering options for an OP to *drafting an OP*, we are most concerned about Stage Two of the process. It may be that substance is sacrificed to political imperative. We are concerned that an OP will be adopted that is not comprehensive in approach, and will introduce retrogressive international legal principles (see final section).

### **Other influential initiatives**

22. Within the context of other initiatives on the same substantive issues, as mentioned, the African, European and Inter-American systems all have either comprehensive or limited communications procedures. The impact of these systems has been both positive and negative. For example, the comprehensive approach of the African system has resulted in the African Group position which calls for a comprehensive approach with an individual communications procedure. However, the existence of the African system also means that the African Group have called for the exhaustion of *regional* remedies, a new threshold and potentially a new international procedural requirement. The à la carte approach (ALC approach) of the European Social Charter has resulted in some members of the European Union arguing that it is not possible for an OP to ICESCR to incorporate a comprehensive approach. Moreover, it means that even very supportive EU states have already articulated that a “fall-back” position could be this ALC approach. At the same time, the view of the expert from the Secretariat of the European Social Committee, as expressed at the second session of the OEWG, was that in their experience it was most constructive to have a comprehensive approach. Within the context of the Inter-American system, the same concerns around duplication have been raised. However, limited as the San Salvador Protocol is, it has provided for rich interventions on the justiciability of ESCR.
23. Finally, in terms of other UN processes the HRTS reform agenda has also been influential. The governments are able to “shorthand” concerns with duplication of processes, cost of an OP etc. In addition, both the issue of self-determination and international cooperation are linked to other processes. Specifically, in relation to the right to self-determination provisions of article 1, some delegations have already expressed their opposition to the inclusion of this article as subject to communications or inquiries, putting forward the view that a collective right can not be the subject of such procedures. Indigenous representatives are monitoring the OEWG. Finally, within the context of international cooperation (as per Article 2.1 of the ICESCR), there is some concern that the politics surrounding the Right to Development Working Group could be

imported into the OP to ICESCR process. Given that the African Group position has made clear that the issue of international cooperation must be addressed through an OP (including, for example, through the establishment of a Trust Fund to implement adverse findings against developing countries, the establishment of an inter-state complaints mechanism) the issue of international cooperation and development is clearly on the agenda. Indeed, it is imperative that the issue of international cooperation be addressed through the negotiations. Nonetheless, if the issue were to be linked to the politics of the right to development working group it would be very difficult, as seen in the vote at the CHR in 2004 on the Saudi Arabian/Pakistani proposal on the issue.

## **ACTORS OF THE PROCESS**

24. Five sets of actors have been key to this process: 1. NGOs and academic experts; 2. CESCR; 3. OHCHR ; 4. Governments for; 5. Governments against. The role of the first four sets of actors has been elaborated throughout earlier sections of the paper. As such, this section will primarily focus on the role of governments. As the process moved into the political arena of the CHR, a number of governments have been key, both in the positive sense of those supporting the process and the negative sense of those opposing the process. Portugal, Finland and South Africa, have been key advocates for the process. Croatia and Russia have been important supporters, Croatia having supported an inter-sessional meeting for European countries. This year, the leadership of Ethiopia in the African Group has been key. The majority of LAC countries, particularly Peru, Costa Rica, Mexico, Chile, Panama, Venezuela, Brazil and Argentina, have been very supportive; the Dominican Republic, Uruguay, Ecuador, and Bolivia have been supportive. The GRULAC have been supportive from the start, though in the 2001-2002 CHR negotiations their political energy was focused on driving the establishment of the OEWG on a draft legally binding normative instrument for the protection of all persons from enforced disappearances which held its first session in 2003.
25. Of the countries participating in the OEWG process, opposition forces have included the US which this year articulated its opposition as being based on resource implications, which as the largest contributor to the UN it is their duty to consider. The US position is clearly informed too by their view that ESCR are not justiciable. Australia opposes the OP to ICESCR both because they challenge the view that ESCR are justiciable and also because of their general opposition to any new communications procedure attached to any HRT body. Poland, the UK, China, Japan and Iran are yet to be convinced that an OP is the most effective way to implement ESCR, likewise Canada has expressed the view that an OP is not the best way to achieve implementation of ESCR, citing the existence of other mechanisms, particularly article 26 of the ICCPR. Saudi Arabia is of the view that the question of an OP is moot because the Committee lacks the legal status to receive communications or launch inquiries. Within the context of the CHR, opposition broadens, as Asian states and Islamic states who do not attend the OEWG process are for the most part opposed to the OP to the ICESCR.

## **The role of regional groupings and organisations (and others)**

26. Within both the OEWG and the CHR, regional groupings have had both a positive and negative impact on the development of an OP to ICESCR. Representatives of regional adjudicative bodies were invited to participate, and provided positive input (from a Coalition perspective) when they universally endorsed a) the need for an OP to ICESCR and b) the need for a comprehensive approach to the rights which can be subject to a communication/inquiries procedure. The ILO and UNESCO have provided useful input in both sessions of the OEWG, being given a formal invitation to participate in the second session as experts addressing the

delegates. They were able to clarify the limitations of their systems, again calling for an OP, as well as provide information on collaborative relationships with the CDESCR which would, to their mind, counter concerns of duplication. As identified in the previous section, experts from the HRTS and the CHR, have also contributed positively to the process. However, the participation and views of the experts has not been without controversy. Delegations opposed to the process have criticised the Chair for “selecting” only those experts who support the process. In reality, the experts who have participated in the process of have been selected on the basis of availability and through the direction of the omnibus resolution in certain instances. There has been some concern that the participation of so many experts has delayed discussion of substantive elements of what could become an OP to the ICESCR, and it is hoped that the next OEWG will be able to focus on more substantive debates.

### **Factors impeding participation**

27. The issue of relevant actors being unable to participate fulsomely in the process has been an issue of significant concern in the proceedings to date. It has two different dimensions. At one level, participation and development of positions on the OP to ICESCR is hampered by, to put it crudely, a lack of knowledge amongst both delegates and relevant Ministries in the capital and missions, as well as amongst NGOs. In particular, there is a lack of understanding in relation to justiciability of ESCR, and also the extent to which ESCR are implemented within their own jurisdictions, and thus the process by which domestic remedies would be exhausted.
28. The second dimension relates to a lack of fiscal and human resources, which have constrained the participation of some actors. For example, it was not until this year that the African Group was able to participate comprehensively in the discussions. And both the African Group and the GRULAC continue to be hampered by smaller delegation sizes and mission sizes which means that they are not able to attend the OEWG or omnibus resolution negotiations on a consistent basis. This has also affected the articulation of regional positions, as groupings have lacked the human resources to meet prior to, and even in some cases, during the OEWG. Delegations from the Western Group tend to be larger, though are also often mission based staff. There are some delegations, on both ends of the spectrum, who are sending two or three member delegations, and this has proven productive for their respective positions.
29. NGO participation is, as always, constrained also by human and financial resources. Every actor will always claim a lion’s share of their part in the process. But, NGOs have contributed very strongly from the get go. More recently, from the perspective of the Coalition, our work has been hampered by the lack of resources, particularly between the sessions, and the Coalition has yet to be able to secure funds that would enable inter-sessional coordination (even if it were limited to one day per week). Another challenge round NGO participation in the development of an OP is a perception by many grassroots activists that the development of an OP is a highly technical, slow process for which there is no immediately obvious benefit, compounded by the high costs associated with travelling to and staying in Geneva. Nonetheless, most NGOs “get” the issue very quickly, particularly if they have an active domestic adjudication process, and the number of national-level organisations participating in the process is increasing. Another issue is that where regional processes exist and are effective or applicable to the issue at hand, activists will prioritise participation in the regional system. This is not to undermine the role that NGOs have played, or the level of engagement they have had with the system. Indeed, government delegates, at the conclusion of the first OEWG noted that they had never seen so many NGOs follow a process. And we know that government positions have been changed as the result of sustained domestic advocacy.

## OTHER INFLUENCES

30. As discussed already, there have been many obstacles to this process. Politically, within the CHR and OEWG, the process has been hampered by a lack of cohesion among the EU (which has been split, and thus unable to lobby effectively for an OP); the previously described limitations affecting the African Group and GRULAC, and the lack of participation in the OEWG but opposition to the OP by the OIC and Asian countries. Substantively, while there have been pockets of exemplary knowledge among governments, secretariat and NGOs, a general lack of knowledge in relation to ESCR (discussed above) has hampered the process.
31. In terms of decisive elements, key substantive issues which have been raised in the context of the first and second OEWG are:
- *Complementarity/Duplication/Effective use of resources*
  - *Comprehensive or ALC* A number of different approaches have been articulated. One, that States Parties would be able to choose which rights to subject to individual communications (i.e., accept housing, but not health); Two, that States Parties would be able to choose which level of obligation (respect, protect, fulfil); Three, that a minimum core content of rights would be agreed to and these would be subject to individual communications; Four, that the OP would recognise that all rights in the Covenant are justiciable but that States Parties would identify those rights which they are willing immediately to subject to communications, and work towards the inclusion of all rights in the future; Five, that only the discrimination aspect of the rights would be justiciable; Six, that State Parties would be able to choose which elements of the rights they want to include in a complaint procedure (the UK position); Seven, that only gross or serious violations could be subject to a complaint procedure.
  - *Standing: who would be able to file communications.*
  - *A mechanism to address the issue of international cooperation in article 2.1, and debate on the legal versus moral nature of the obligations.*
  - *Whether the OP would include the right to self-determination in article 1.*
  - *Whether a non-discrimination OP would be appropriate given the lack of a comprehensive anti-discrimination framework in many countries.*
  - *Exhaustion of domestic remedies and provision of remedies.*
  - *Undue interference in sovereign political matters, particularly in the context of resource allocation.*
  - *How the CESCR would assess violations.*
  - *Whether the OP would include an Inquiries procedure.*
  - *Whether the OP would permit reservations.*
  - *Issues around Confidentiality of the procedure and friendly settlement of disputes.*

## ASSESSMENT OF THE OUTCOME

32. While the OP to ICESCR process has not led to a concrete outcome at this time, the consensus driven model favoured by the UN has already had a detrimental impact on the process. For example, the appointment of the Independent Expert, while resulting in a set of recommendations which affirmed the adoption of an OP to the ICESCR delayed the establishment of the OEWG by two years, and was in effect, the compromise position between the LAC/South Africa and some EU member states who wanted to draft immediately and those states who continued to oppose the process. The mandate to “consider options to an OP” is also the result of compromise, again between the same groups, and contains within it the capacity to scuttle the process at the 2006 CHR, by arguing that, after three years of debate, the OEWG has

failed to reach consensus, and thus the “no OP” option is the only feasible option, particularly in the context of the 5-year rule established by the CHR for Open-Ended Working Groups.

33. Identifying which important issues could be left out of a drafting process is an exercise in crystal ball gazing. However, crystal balls deal in qualifications and loose language, and are often defective, offering a cloudy or partial view with no way to seek a remedy for dodgy advice. So, if I ask the crystal ball to tell me about the OP, it could tell me about the OP, but it won't necessarily tell me about an unforeseen event in the Right to Development Working Group which could have an impact on the way in which international cooperation is addressed. It won't have access to the mobile phone conversation in which the OP to ICESCR, or an important substantive component of it, is horse-traded with some other standard-setting process on the agenda of this meeting. And it precludes consideration of another paradigm-shifting event, such as the consequences of the attacks in the US in 2001.
34. However, based on the lowest-common-denominator experience which has characterised the omnibus resolutions and the process around the adoption of the first OEWG report, and based on issues raised so far and the polarisation around some of these issues, it would seem likely that, barring some extraordinary turn-around of political persuasion by key states, an OP is unlikely to be comprehensive in its approach, it may not include an inquiries procedure, it will dodge and weave its way round the issue of international cooperation drafting a quintessential international legal solution which will satisfy all and achieve nothing. In addition, standing is unlikely to be innovative, a new international legal standard on the exhaustion of regional remedies could be established and an appalling precedent to exclude article 1 on the right to self-determination may be realised. As I said at the start, the only thing you can accurately predict with crystal ball gazing is that the paragraph will be filled with qualifications!

#### **IMPLEMENTATION PHASE**

35. It is not possible at this time to offer an opinion on the implementation phase as we're not there yet. But the process to date has increased the level of knowledge around ESCR and justiciability of ESCR. This has been complemented and informed by advances in domestic adjudication of ESCR. The challenge will be to transform the piece of paper on which an OP is printed into a real tool for domestic advocacy. Our concern is that the compromises governments may make during the course of the negotiations (for example, to limit the scope of the OP, to limit standing, to fail to include provision for effective remedies, to set thresholds of domestic exhaustion at an unrealistic level etc) will render the OP inadequate for the purpose of remedying the everyday violation of economic, social and cultural rights.