The Domestic Implementation of the ICESCR:

The Right to Effective Remedies, the Role of Courts and the Place of the Claimants of ESC Rights

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Remarks for the Workshop for Judges and Lawyers in North East Asia

on the Justiciability of Economic, Social and Cultural Rights

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Thank you Madam Chairperson. I want to begin by thanking the UNHCHR, the ICJ and the Government of Mongolia for hosting this workshop and for inviting me to participate. It is a great privilege for me to have the chance to exchange ideas and to work together on this important issue with judges and lawyers from North-East Asia and with the other experts in attendance.

My perspective on international human rights is that of a human rights advocate working primarily in the domestic legal system in Canada, trying to make the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international law relevant to those who are living with poverty or homelessness. So I quite agree with points made by participants this morning that the critical issue is not so much justiciability of ESC rights in the abstract, but rather how we can integrate the rights in the Covenant into domestic law and legal practice.

I have been asked to consider the domestic implementation of the ICESCR in the context of the issue of justiciability.and access to effective domestic remedies. In this context, I will be primarily referring to the interpretation of article 2(1), which is on the screen at the front of the room. I will also be referring to two of the General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) which are in your materials: General Comment No. 3 and

General Comment No. 9. After reviewing this jurisprudence on the domestic implementation and application of the Covenant, I will consider briefly how human rights advocates, lawyers and courts can better integrate international into domestic law and make more effective use of the periodic review process that currently exists at the CESCR.

The key article with respect to the domestic implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the article of the Covenant which has been the primary focus of debates about the justiciability of Economic, Social and Cultural Rights (ESC rights) over the years, is article 2(1) of the Covenant. It enunciates the duties of State parties to give effect to the rights in the Covenant in the following terms:

2.

(1) Each party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, by all appropriate means, including particularly the adoption of legislative measures.

(2) 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

Article 2(1) differs from the parallel article of the *International Covenant on Civil and Political Rights*, which requires that the rights in the ICCPR be given immediate effect and makes no reference to available resources. In addition, the ICESCR makes no reference, as does 2(1)(2) of the ICCPR, to any obligation to "develop the possibilities of legal remedies", though the specific reference to adoption "legislative measures" would presumably encourage provisions for legal remedies for ESC rights as well.

Article 2(1) recognizes the fact that many components of ESC rights cannot be fully realized in situations of limited resources. Indeed, the very definition of the right to adequate housing or the right to health in a particular country will depend, to some extent, on available resources, as well

as cultural, historical, environmental and other factors. In Canada, the fact that 14% of aboriginal homes lack indoor plumbing is a marker of inequality, poverty and social exclusion, and may constitute a violation of the right to an adequate standard of living and the right to housing. It might not be so in developing countries. Article 2(1) thus properly situates the implementation of ESC rights in a dynamic and historical context, inextricably tied to the level of available resources and, ultimately, to notions of social inclusion and distributive justice.

This has led some commentators in early years, and some governments even today, to assert that ESC rights are more in the nature of policy objectives or goals of governments than universally applicable human rights that can be adjudicated and enforced by courts.

The fact that a right may be subject to limitations related to available resources, however, does not mean that the right itself cannot be applied immediately, or that compliance with ESC rights cannot be subject to effective legal remedies in the present. The obligation to "take steps" and to "apply the maximum of available resources" as noted in General Comment No. 3 of the CESCR, constitutes an ongoing obligation under the Covenant. The Committee notes in its General Comment No. 3 that the steps must be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." Whether governments are meeting these obligations to develop reasonable programs and to initiate targeted measures within available resources is a reviewable issue that can be subject to legal remedy. This was clearly demonstrated in the *Grootboom* case in South Africa, which Mr. Berry described to you this morning. The South African Constitutional Court in that case recognized that there are insufficient resources and legacies of oppression and inequality which make it impossible to fully realize the right to housing in South Africa at present. But this does not mean the right does not entail present obligations, or that the actions of the government cannot be reviewed for their consistency with the right. We do not need to wait until the right is fully realized before state compliance can be assessed or adjudicated. At that point, presumably, there would no longer be any violation of a right and no reason for a court to adjudicate it.

Article 2(1) also recognizes that every country cannot ensure the same level of enjoyment of

ESC rights and that international co-operation and assistance is critical. Critics have suggested that this is contrary to the universal applicability which ought to characterize justiciable rights. How can a right be justiciable if the standards vary everywhere? However, it needs to be understood that each state is under the **same** obligation to take reasonable steps within available resources, including international assistance and that this obligation is a universally applied requirement under the Covenant.

Contrary to commonly held misperceptions that affluent countries like Canada and the U.S. would rarely be in violation of ESC rights because of their high average standard of living, article 2(1), properly applied, provides a basis for the rigorous application of the Covenant to affluent countries. Widespread homelessness such as we see now in Canada, and even more in the United Sates, in the midst of unprecedented economic prosperity, constitutes a very clear violation of the right to adequate housing . In Canada, the U.S. and other affluent countries, there is no scarcity of resources that would justify leaving certain vulnerable groups without any housing. The problem of homelessness in Canada, now declared a national disaster by the mayors of our ten largest cities, could be solved immediately, if governments were committed to it.

The problem of homelessness in developing countries, on the other hand, may be more widespread and severe. But where governments are making a concerted effort to address the problem, are addressing the needs of the most vulnerable populations, have adopted a plan of action, have put necessary legislative protections in place, and are applying the maximum of available resources to remedying the problem, they will not be in violation of the Covenant. I think many governments, particularly my own, confuse the notion of ESC rights with measures of economic and social development such as the UNDP's Human Development Index, and fail to understand that it is precisely the referencing of the obligations to available resources, and the focus on the situation of vulnerable and disadvantaged groups, which is the difference between a human rights and an economic or social development framework. ESC rights are universally applicable to affluent and developing countries alike.

The notion of progressive realization also means, according to General Comment No. 3, that a very heavy onus falls on governments to justify any "deliberately retrogressive measures" with respect to a particular right. It is not that judicial remedies ought in any way to be restricted to these situations, but rather, that the government ought be held to a higher test in terms of justifying any deliberately backward-moving measures.

In General Comment No. 3 the Committee also states that it is of the view that there are **minimum core obligations** on states to ensure satisfaction of "minimum essential levels" of Covenant rights, such that, for example, large numbers of people left without any housing at all would constitute a *prima facie* violation of the right to housing. Some have suggested that legal remedies might be restricted to violations emanating from failures to meet these minimum core requirements, but the concept of the "minimum core content" needs to be clearly distinguished from the idea of justiciability. As enunciated in General Comment No. 3, the idea of identifying minimal core entitlements is not a matter of restricting legal remedies to these types of violations, but rather, of establishing the basis for a finding of a *prima facie* violation of a right, and thereby placing a greater onus on the governments in particular circumstances to demonstrate that all available resources have been allocated as a matter of priority to meeting the most critical needs.

I should add that the concept of the minimum core obligation, which is not found in the Covenant itself, remains a matter of some debate among advocates. It may be one of those concepts which seems to make sense at the conceptual level, at a meeting of experts in Maasstricht or Geneva, but may be troublesome when you are putting it into practice or trying to defend it before a skeptical court. As the South African Constitutional Court noted in the *Grootboom* decision, it is not an easy task, and not a necessary one, for courts to try to define the minimum core requirements of a right. Adjudicating ESC rights claims, as the Court made clear in the *TAC* case, certainly ought not to be premised on such a task. We do not want to put an onus on claimants of these rights to define the minimum core requirements in order to claim a violation. In addition, the concept risks reducing ESC rights to minimal material entitlements, rather than allowing these rights to be interpreted dynamically, as are other human rights, in

reference to qualitative values of personal dignity and social inclusion – which relates to some of the concerns raised in the discussions this morning.

If ESC rights are to adjudicated and enforced in courts, such enforcement must include consideration of the positive measures required and consideration of the "maximum of available resources" available. Some governments continue to argue, both in domestic courts and in international fora, that because these rights are subject to these kinds of limits related to resources, courts are not really competent to adjudicate them. Yet it seems to me that assessing the nature of legal obligations in the context of particular circumstances and fact situations and considering appropriate or reasonable limitations on rights is precisely the kind of inquiry that courts are used to making. The ease with which the South African Constitutional Court was able to apply the test of reasonableness, with which it was familiar in many other legal contexts, to ESC rights in the *Grootboom* and *TAC* cases, as described by Mr. Berry and Dr. Arambulo this morning, is an illustration of this.

A similar 'reasonable limitations' doctrine related to available resources has been a part of equality and non-discrimination jurisprudence in Canada and elsewhere for at least a quarter of a century. While the right to equality and non-discrimination, is generally accepted as a civil right which has immediate application, there are many aspects of the right to equality which require resource allocation. People with disabilities, for example, have a right to reasonable measures to ensure equal access to services or housing or inclusion in the workplace. These are subject, when adjudicated in courts or tribunals, to limitations, based in part on cost and resource availability. The standard applied has been that of "undue hardship", very similar, in Canada, to the standard of "maximum of available resources" in the ICESCR. A government or a private actor is required to take **reasonable** measures to ensure equality, commensurate with available resources. It is up to human rights tribunals and courts to determine if a particular requirement would be unduly onerous on a government, an employer or a landlord. Though I do not always agree with their decisions in my cases, I don't think there has been any concern that courts and tribunals lack the competence to adjudicate these kinds of questions, either in Canada or elsewhere.

In Canada, where we have few explicit references to ESC rights in the *Canadian Charter of Rights and Freedoms* or in provincial and federal human rights legislation, the requirement of reasonable positive measures required by the guarantee of equality is a critical vehicle for the consideration of ESC rights. In a 1998 case called *Eldridge*[1], for example, our Supreme Court considered a claim by two deaf women that their right to equality under the Canadian Charter had been violated when the Province of British Columbia failed to provide ongoing funding for a program to provide interpreter services for the deaf in hospitals and other health facilities. They were unable to communicate effectively with their doctors and healthcare providers, which was deemed to be an essential component of adequate healthcare.

The governmental respondent argued in *Eldridge* that courts ought not to interfere with governments' decisions about how to allocate scarce healthcare dollars, just as the South African government had argued in the *Grootboom* and *TAC* cases referred to by Kitty and Edwin, that resource allocation in tough times ought to be left up to governments. But using reasoning almost identical to that employed by the South African Constitutional Court in those cases, the Supreme Court of Canada found that to entirely ignore the needs of those who are deaf was not a reasonable allocation of health resources, and that the cost involved could be reasonably born. The court rejected the government's argument that resource allocation issues ought not to be adjudicated by courts, stating that:

> To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1) [equality rights].[1]

These domestic experiences in Canada and elsewhere reveal that it is increasingly difficult to draw any kind of distinction between ESC rights and civil and political rights with respect to domestic implementation or access to legal remedies. In adjudicating ESC rights, courts are not really doing anything very different from what they do when they adjudicate civil and political

[1] *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624
1*Ibid*. at 677-78.

rights, and in many cases they may be considered both ESC rights and civil and political rights issues. Since violations of ESC rights invariably affect the most vulnerable and marginalized in society, it will be rare that ESC rights claims could not also be framed as a violation of the right to equality - particularly if poverty, economic status or social condition is recognized as a prohibited grounds of discrimination, as is increasingly the case. The CESCR has in recent years, under the leadership of Ms. Dandan, elaborated on the important equality dimensions of ESC rights, with respect to women, indigenous peoples, those with disabilities, the elderly and many other groups. Similarly, as has been well demonstrated in the jurisprudence emanating from the Indian Supreme Court, the right to life, when it is interpreted as including considerations of quality of life, such as dignity and security, provides the basis for courts to adjudicate a wide range of ESC rights. The Human Rights Committee recognized in its General Comment No. 6 on the right to life, that "the protection of this right requires that States adopt positive measures", including measures to reduce infant mortality, to increase life expectancy, and to eliminate malnutrition and epidemics. The Committee's jurisprudence in considering complaints and reviewing periodic reports as further elaborated on this convergence of ESCR and civil and political rights. The Committee has found, for example, that Canada must take positive measures to address homelessness in order to comply with the right to life in the ICCPR.

As noted by the CESCR in General Comment No. 9, it would be extremely difficult, in light of these overlaps and convergences, to justify different means for giving domestic effect to ESC rights than for civil and political rights. The Committee states that to declare this one category of rights to be beyond the reach of courts would be "arbitrary and incompatible with the principle that the two sets of rights are indivisible and interdependent." The indivisibility of the two categories of rights, in fact, makes it a practical impossibility to institutionalise a bifurcation with respect to the appropriate role of courts. In recent reviews of Mongolia before under the two Covenants, for example, both the Human Rights Committee and the CESCR expressed concern about the acute problem of maternal mortality and the need for positive measures to address this. It would be difficult to argue that as an issue arising from the ICCPR, the issue is subject to legal remedies, but as an issue arising from the ICESCR it is not.

Even where the ESCR rights are not incorporated into domestic law, courts must assume that the domestic law is in conformity with the ICESCR and with the requirement of effective remedies. Otherwise, as the Committee points out in its General Comment No. 9, the treaty would have been ratified in bad faith. Where a treaty requires that it be given legal effect in the domestic order

and the state ratifies the treaty but does not modify any law, courts must presume that the state, interpreting its treaty obligations in good faith, views its law as already conforming to the obligations. Courts must therefore actively strive to achieve interpretations of domestic law and to exercise decision-making in a manner which conforms with the recognition of ESC rights as fundamental rights rather than as policy objectives, ie. as rights which give rise to effective remedies. **Domestic law must be interpreted and applied so as to provide, wherever possible, effective remedies to ESC rights**. And other constitutional and human rights provisions such as the guarantee of equality should be interpreted so as to provide, "to the greatest extent possible" the full protection of ESC rights. As noted in General Comment No.9 "Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations."

Back in 1988, after Justice Bhagwati convened a meeting in Bangalore of prominent judges from common law countries to consider the domestic legal status of international human rights law, an important step forward was made with acceptance of the "Bangalore Principles." These affirmed that even in domestic legal systems in which international law cannot be directly applied by courts unless it has been incorporated through domestic legislation, it was agreed that wherever a domestic statute is ambiguous or uncertain, the ambiguity should be resolved in favour of compliance with international law.

The current understanding of this rule of interpretation, as enunciated in General Comment No. 9 and in a number of domestic judgments, has now advanced considerably. Rather than requiring an explicit finding of ambiguity or uncertainty in order to invoke international law, many courts now view international law as a critical component of the rule of law, providing a set of principles and values which must inform and guide all domestic legal interpretation and decision-making.

While state parties, in implementing the CESCR, do not assume a strict obligation to make all of the rights in the Covenant directly enforceable by courts, they do have the obligation to implement the rights of the Covenant as fundamental human rights, subject to the rule of law and the right to an effective remedy. This establishes a strong "interpretive presumption" through which courts can assume, if legislatures have not stated anything to the contrary, that statutes are to be interpreted as providing effective remedies to violations of ESC rights.

The implications of the interpretive use of international human rights law was at issue in a 1998

case at the Supreme Court of Canada. In the *Baker*[2] case, the Court considered whether, despite the fact that the Convention on the Rights of the Child was not incorporated into the law of Canada, an immigration officer was obliged to act consistently with it in exercising discretion under the Immigration Act. He had conducted a review, on humanitarian and compassionate grounds, of a deportation order of an illegal immigrant with four children in Canada, and declined to reverse the deportation order. The Court found in that case that while the provisions of the CRC are not directly enforceable in Canadian law, the values of international human rights law, including the CRC, must inform the the understanding of what is a "reasonable"exercise of discretion in Canada. The Court found that on this basis, the deportation order ought to have been overturned through a reasonable exercise of discretion. This all-encompassing standard of reasonable decision-making, if rigorously applied, ought to allow courts to ensure that a large number of discretionary decisions affecting ESC rights are made consistently with the recogntion of ESC rights in Canada as fundamental values of Canadian society.

Any state party to the ICESCR must now be considered to have accepted ESC rights as rights subject to effective remedies. Any interpretation of domestic law which downgrades ESC rights to mere policy objectives and thereby deprives affected constituencies of an effective remedy is clearly incompatible with the ICESCR. In its most recent reviews of Hong Kong Special Administrative Region, the Committee expressed concern about court decisions describing the rights in the Covenant as "promotional" or "aspirational", rather than justiciable human rights, noting that "such opinions are based on a mistaken understanding of the legal obligations arising from the Covenant." Governments are acting in bad faith when they appear in domestic courts and argue that the Covenant ought to be interpreted as only a list of aspirational goals, and the Committee has urged that the government of HKSAR cease from advancing these kinds of arguments before courts. Similar concerns both about judicial treatment of ESC rights and the nature of governments' arguments in courts have been raised in the last two reviews of Canada, in which the Committee has focussed on the need to interpret the right to "life, liberty and security of the person" and the right to equality, in a broad, purposive manner, so as to provide effective remedies to violations of the Covenant.

The recent reviews of Hong Kong and Canada show that the CESCR is willing and anxious to pay considerable attention in periodic reviews to the question of effective remedies, the status of ESC rights in the domestic legal order and the appropriate interpretation of domestic law so as to ensure effective remedies to ESC rights. These reviews thus provide an important means for

[2] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 69-71

advocates and affected constituencies to create a type of dialogue between treaty review and domestic adjudication. By getting actively involved in the periodic review process at the Committee, groups advancing domestic ESC rights claims have been able to ensure that the Committee has the necessary information about attempts at securing domestic legal remedies, and is thus able to issue concerns or recommendations that are directly relevant to cases advancing through the courts. In turn, domestic courts are able to benefit from specific concerns and recommendations from the Committee as to the interpretation and application of domestic law in specific contexts which is consistent with the ICESCR and with international jurisprudence.

In reviewing ESC rights caselaw, we tend, naturally to focus on high profile cases in which marginalized or disadvantaged groups such as the homeless community in the *Grootboom* case manage to retain lawyers and go to court to claim ESC rights. These cases are rare, however, and it is equally important to recognize that judges and lawyers and many other decision-makers deal, perhaps unreflectively, with issues of ESC rights on a routine basis. Often, poor people have been dragged into the justice system, rather than turning to it to advance a rights claim. They are likely to be unrepresented, and even if they have a lawyer, the lawyer is unlikely to be knowledgeable about ESC rights in international law. However, every time a judge or adjudicator deals with an application to evict households where no alternative accommodation is available, or a sentencing judge ponders whether to send a homeless offender to prison who would be eligible for a community sentence if housing were available, there is a potential ESC rights claim in a courtroom. These and many other everyday occurrences in courts and tribunals around the world offer unique opportunities to apply ESC rights to the application of domestic law that are often missed.

Courts, tribunals and other domestic fora in which decisions are made affecting the rights of those who are poor and marginalized are the most critical site for the development of ESC rights jurisprudence. One of the problems that has dogged academic literature and commentary on economic, social and cultural rights at the international level, is that the rights holders, the constituencies whose dignity and security and life itself are at stake, have tended to be displaced from the analysis and debate. Those who are denied access to adequate food, clothing and housing, healthcare or education are the most marginalized in society. They rarely have access to international institutions. The absence a formal procedure, through an Optional Protocol, through which individual ESC rights complaints can be considered further increases this sense of the ICESCR as a set of rights without a forum for hearing them. As Philip Alston put it in an

article a number of years ago, there is still “No Right to Complain About Being Poor” at the United Nations. So experts and government delegates have met to elaborate the obligations of state parties to implement the ICESCRand to debate the justiciability of ESC rights, discussing the appropriate role of courts, human rights institutions, elected governments and other bodies. But the voices of the rights holders need to be heard, and a consideration of where and how they might get access to effective remedies must surely become the central consideration.

Even in the absence of an optional protocol to the ICESCR, however, we have seen emerge in recent years the emergence of a new form of rights practice which brings into the human rights fold the claimants of ESC rights and allows for a hearing of their unique and important claims to dignity and social inclusion. In 1993, to its significant credit, the CESCR broke new terrain among treaty monitoring bodies by establishing a procedure which gave a voice to domestic NGOs representing affected constituencies, allowing, for the first time, oral submissions to the Committee prior to the Committee’s questioning of the State party’s official delegation. This procedure has been critical in the transformation of the CESCR’s review processes from one which received little attention in countries like Canada, to one which has considerable credibility and receives significant attention from media, government and courts as what Mathew Craven has called an “informal petition procedure.”

In addition, as Kitty and Edwin pointed out this morning, when we consider the rich experience at the domestic and regional levels with claiming and adjudicating ESC rights, as well as the experience with complaints mechanisms under other UN human rights treaty monitoring bodies, such as the Human Rights Committee and CEDAW, we find that ESC rights are claimed and adjudicated in a wide variety of for a. We can now begin to adjust our understanding of the nature of the rights and the obligations by looking at specific rights claims, advanced as practical responses by affected groups and individuals to injustice, social exclusion and the violation of human dignity.

Human rights rely on the concept of a “hearing”, in the broader sense of the word - a hearing of the voice and perspective of an individual’s or group’s central claim to dignity, equality, security and social inclusion. The values of human rights focus on recognition of the central value and worth of the individual human being, so it is the perspective of the claimant that must be the starting point for the analysis and interpretation of law and the principle that these rights must be subject to effective remedies at the domestic level. The claiming of ESC rights by marginalized constituencies is the dynamic through which our understanding of rights, and the complex of

responsibilities and obligations that emanate from them, will grow and flourish. This can only happen if those whose rights are at stake are provided adjudicative space, a room for a hearing, both internationally and domestically.

As noted by the CESCR in its General Comment No.9, decisions about justiciability really amount to decisions about whether courts will provide a hearing to those who are most marginalized and disadvantaged. If ESC rights claims are placed beyond the reach of the courts, the Committee notes, this would "drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged groups in society."

Rather than debating the role of courts in the abstract, and allowing the fundamental rights of the most vulnerable in society to rest on the outcome of our debate, the challenge facing all of us is to reframe the analysis of justiciability and effective remedies around the right of claimants to a hearing and to an effective remedy.

General Comment No. 9 recognizes that it is not necessarily the courts that will provide the hearing and the remedy in all cases. There are a myriad of institutions and procedural mechanisms which are critical to the implementation of ESC rights, and which must supplement the critical role of courts. One positive example is that a number of cities around the world are now drafting and adopting human rights charters, establishing a cosmopolitan framework for new forms of local accountability to ESC rights at the municipal level. Similar reforms are needed at all levels of local and regional decision-making, to ensure transparency and accountability to the norms and values of international human rights and to provide less formal and more community-based methods for hearing complaints and providing remedies. But as the Committee notes, these alternative procedures can be "rendered ineffective if they are not reinforced or complemented by judicial remedies." The courts, therefore, need to send out a clear message that ESC rights are fundamental human rights, and that affected constituencies have an equal right to a hearing.

Thank you very much.