

**The Coalition for an Optional Protocol to the  
International Covenant on Economic, Social and  
Cultural Rights**

**Take Action NOW!  
Advocacy Kit**

**Activities targeting the  
Open-Ended Working Group  
Geneva, 23 February to 5 March 2004**

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## Introduction

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Right now, there is an opportunity for you and your organization to make a difference to the way in which economic, social and cultural rights are thought about both within your own community and internationally.

We need the voices of many to challenge governments who oppose a legal framework of redress for economic, social and cultural rights. These governments do not think it is necessary to provide legal redress to individuals and communities who experience, for example, forced evictions, or are denied the right to health care, or are forced to work in unsafe conditions for less than a living wage, or are denied the right to water or their customary lands.

From **Monday 23 February to Friday 5 March 2004** governments and civil society representatives will be meeting in Geneva to discuss future work an international enforcement mechanism for the range of rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

**The NGO Coalition for an Optional Protocol to the ICESCR** is a growing network of organisations and individuals committed to the adoption of an Optional Protocol to the ICESCR. There is a core group of active members, including representatives from the Centre on Housing Rights and Evictions (COHRE); FIAN- International; the International Commission of Jurists (ICJ); the International Women's Rights Action Watch-Asia Pacific (IWRAW-Asia Pacific); the Social Rights Advocacy Centre; and the World Organisation Against Torture (OMCT); and the Adjudication Working Group of the ESCR-Net. Supporters of the work of the group are kept informed of activities through an email list. If you would like to join the list please go to <http://www.nwjc.org.au/avcwl/lists/info/op-icescr.html>.

This Advocacy Kit provides you with all the materials you need to take action domestically and internationally, and will enable you to make a difference to the way economic, social and cultural rights are thought about both within your own community, and internationally.

“A Quick Guide to the Kit” will help you work out, in a speedy fashion, which bit is right for you!

This Kit contains contributions from the following individuals: Bruce Porter (SRAC and Adjudication Working Group of ESCR-Net), Caroline Lambert (IWRAW Asia Pacific), Edwin Berry (ICJ), Mal Langford (COHRE), Maria Graterol (IWRAW Asia Pacific), Nathalie Mivalez (OMCT).

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## A Quick Guide to Using the Kit

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## Fact Sheet No. 1 About the Open-Ended Working Group

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From **Monday 23 February to Friday 5 March 2004** governments and civil society representatives will be meeting in Geneva to discuss future work on the development of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The meeting of the “Open-Ended Working Group” will report to the Commission on Human Rights, with a recommendation for future actions on the development of the Optional Protocol to the ICESCR.

The meeting is a vital point in the campaign for the Optional Protocol to the ICESCR. **If the meeting fails to recommend future work on the development of a legal text, the momentum that has been developing over the past few years will be lost.**

The Open-Ended Working Group is open to all members of the UN. It is vital to ensure that governments who support the OP to the ICESCR attend the meeting, and speak up in favour of critical components for an effective OP to the ICESCR. If you know that your government is supportive, please lobby them to attend the meeting. For advocacy ideas, please refer to Fact Sheet No. 10, Lobbying Governments.

The Open-Ended Working Group is being chaired by Portugal. They will set the agenda for the meeting during informal consultations in January.

NGOs can attend the meeting as observers. It is crucial that governments see that there is support for an OP to the ICESCR, and that they feel the pressure to move forward in the negotiations. Moreover, NGOs can play a vital role as experts, supporting the negotiations through informal channels. Recognising that it is very expensive to spend time in Geneva, the Coalition is recommending that priority be given to attending the first week. For information on NGO participation, please refer to Fact Sheet No. 2, Activities during the Open-Ended Working Group.

For further information on the Open-Ended Working Group, please read Appendix No. 4, the UN Briefing Note on the meeting, and the accompanying registration form.

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## Fact Sheet No. 2

### Activities during the Open-Ended Working Group

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#### **For those unable to attend the meeting**

While NGOs can participate in the meeting of the Open-Ended Working Group as observers, this can be an expensive option. Additionally, it is vital to ensure that there are informed advocates in capitals who can exert immediate pressure on governments if it is required.

For the duration of the meeting of the Open-Ended Working Group we will send regular updates on the state of negotiations. If required we may also ask individual partner organizations to undertake specific activities to bring about a change in position, or to encourage governments to remain firm if they are taking a positive position. To join the email update list, please subscribe at <http://www.nwjc.org.au/avcwl/lists/info/op-icescr.html>

#### **For those attending the meeting**

NGOs can participate in the meeting of the Open-Ended Working Group as observers. They may also be accredited to government delegations. This is particularly useful if your government is supportive, though you should be aware that governments seldom make funds available to facilitate your participation.

It is important to have a large number of NGOs present at the meeting of the Open-Ended Working Group for three key reasons:

1. It demonstrates broad-based civil society support for the initiative
2. It creates a climate of accountability for governments as they articulate their views on the development of the Optional Protocol to the ICESCR
3. It enables NGOs around the world to track negotiations and mobilize support as required.

The Coalition will meet regularly during the meeting of the Open-Ended Working Group. In particular, we will organize:

- a pre-meeting strategy session, from 3pm-6pm on the afternoon of Sunday 22 February, venue to be advised
- daily briefings with coalition members
- regular meetings with “friendly” governments
- regular email briefings to coalition members unable to attend the Geneva meeting
- two lunch-time seminars during the course of the Geneva meeting
- a morning workshop on Saturday 6 March, from 9am-1pm, to develop future advocacy strategies, venue to be advised.

In light of the considerable expense of staying in Geneva, the Coalition is recommending that priority be given to participating in the first week of the Open-Ended Working Group.

**Accreditation for the Open-Ended Working Group**

To participate as an observer of the Open-Ended Working Group you need to be accredited. Appendix No. 4 is the briefing note and the application form prepared by the Office of the High Commissioner for Human Rights.

Simon Walker, at the Office of the High Commissioner for Human Rights is responsible for organizing NGO accreditation. You must send the registration form (attached) ASAP to Simon, either by fax on 022 917 90 10 or by mail to UNOG-OHCHR, CH-1211 Geneva 10.

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## Fact Sheet No. 3

# What is the International Covenant on Economic, Social and Cultural Rights (ICESCR)?

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### **Introduction to the International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the principle treaty in the United Nations human rights treaty system to address peoples' economic, social and cultural rights.

Once a State has ratified ("signed up to") the ICESCR they must allocate the maximum resources possible to ensuring economic, social and cultural rights in their territory. However, the ICESCR also recognises different levels of economic development and identifies the important role of international co-operation/development in the realisation of economic, social and cultural rights.

The ICESCR also requires that all of the rights contained in it be available to all people, regardless of who they are, which political system they support, who they love, who they worship, where they come from or who their parents were. This is important because, as we know, very often race or sex discrimination, or discrimination based on economic status, political opinion, or religion is used as an excuse to exclude people, either overtly or covertly, from housing, health care, education, work or other economic, social and cultural rights.

One strength of the ICESCR is that it is a legally binding human rights treaty. States *choose* to ratify the treaty. Once they have ratified it, they have a binding obligation to work towards the realisation of the full range of human rights covered in the ICESCR. For activists this means that we can hold the State accountable for the actions they do, or do not take, to ensure the range of economic, social and cultural rights enshrined in the ICESCR. Human rights treaties provide guarantees, so the ICESCR can become a useful tool for advocates: a roadmap for claiming and mobilizing around our rights.

### **What is in the ICESCR?**

The ICESCR not only identifies a range of economic, social and cultural rights, but as we discussed in the introduction, it also requires that all people have these rights without discrimination. The ICESCR also discusses the ways in which states must work to realise the rights.

The rights outlined in the ICESCR include

- the right to work and to just and favourable conditions of work, and to form trade unions;
- the right to social security;
- protection of the family;
- the right to an adequate standard of living, including food, housing and clothing;
- the right to health;

- the right to education (including compulsory primary education); and
- the rights to culture and science.

These rights are not just based in the law. They are also realised through the policies and programmes of governments. The Committee on Economic, Social and Cultural Rights (“the Committee”) have done a lot of work to determine the scope of these rights, and the types of laws, policies and programmes that are required to realise them.

The ICESCR requires that these rights be available without discrimination and that there be equality between women and men in the realisation of the rights.

To aid the implementation of economic, social and cultural rights (ESCR), the Committee on Economic, Social and Cultural Rights (“the Committee”) adopted what is known as a General Comment (an interpretative statement), which addressed the issues of progressive realisation and the availability of resources, as well as developing the concept of a “minimum core obligation” “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”, asserting that:

... a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.<sup>1</sup>

The General Comment further notes that where the minimum core standards are not realised, resource constraints should be considered within the context of the State Party having allocated “all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”<sup>2</sup> Moreover, the Committee noted that a lack of resources does not remove the obligation to strive for implementation of ESCR or to monitor the actual extent of implementation.<sup>3</sup> This interpretation was codified by a meeting of civil society experts in 1997, when a document entitled the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) was developed. The Maastricht Guidelines also discuss the concept of a margin of discretion, the argument that “as in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations.”<sup>4</sup> Through domestic adjudication of ESCR, and through the adoption of Concluding Observations and General Comments, the Committee and domestic jurisdictions have developed a clearer understanding of the ways in which the minimum core standards are realised in different contexts, while simultaneously asserting the universality of ESCR.

You can find a full version of the ICESCR at [www.unhchr.ch](http://www.unhchr.ch)

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<sup>1</sup> United Nations. Committee on Economic, Social and Cultural Rights. 1990. *General Comment Three*.

<sup>2</sup> *Ibid*, para. 10.

<sup>3</sup> *Ibid*, para. 11.

<sup>4</sup> Maastricht Guidelines, para. 8.

## **Challenges of ESCR**

Despite its importance, it cannot be denied that the implementation of the ICESCR has been an on-going challenge for advocates. Notwithstanding continuous efforts to advance the economic, social and cultural rights contained in the ICESCR, as well as the principles of equality and non-discrimination, violations of economic, social and cultural rights remain widespread in all societies and cultures. Moreover, in many countries these rights are, incorrectly, not considered to be “justiciable” (ie, opponents claim that it is not possible to assess these rights through legal processes) and for this reason, remedies don’t always exist. Often, these rights are violated by policies, laws and social practices.

Activists have found that it is useful to be able to frame their local activities in the language of human rights, both because it provides a language of individual empowerment and because it is a language of demand and accountability of government. Moreover, it is a useful tool of international solidarity, providing a common way of articulating the diversity of localised experiences.

## **What is the role of the Committee on Economic, Social and Cultural Rights?**

To ensure that States Parties are complying with the ICESCR, the Committee on Economic, Social and Cultural Rights (“the Committee”) was established to monitor and review the activities of States Parties. The Committee meets twice a year, and has eighteen independent experts, who are elected to the Committee by the States Parties to the ICESCR. Every five years, States Parties must submit a report to the Committee outlining their successes and challenges in implementing the ICESCR. Governments must present their reports to the Committee, and the experts have the opportunity of asking the government representatives a series of questions about their report and the implementation of ESCR in their territory/ies. The Committee then issues a series of observations, known as Concluding Comments. The Concluding Comments acknowledge both positive and negative measures, and suggest actions which could improve implementation of the ICESCR or that would stop violations occurring. Increasingly, NGOs are preparing “Shadow Reports” which provide the Committee with additional information on ESCR in their communities.

The Committee also works to interpret the content and meaning of economic, social and cultural rights through the adoption of “General Comments”, interpretative statements on the parameters of the rights. In recent years comprehensive General Comments on the right to housing and forced evictions, food, health, education and water have been adopted. These are available at the Office of the High Commissioner for Human Rights website – [www.unhchr.ch](http://www.unhchr.ch)

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## Fact Sheet No. 4

### What is the Optional Protocol to the ICESCR?

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#### **What is an Optional Protocol?**

An Optional Protocol enables individuals to seek justice internationally, if they have been denied access to justice domestically. It is attached to a “parent” treaty, in this case the ICESCR. It is a separate legal text which establishes a stronger mechanism for accountability, generally including both an individual complaints process (known formally as a “communications procedure”) and an “inquiries procedure” which enables the Committee to investigate of its own volition.

In the UN Human Rights Treaty System, an Optional Protocol grants the human rights Committees judicial powers. That is, through an Optional Protocol a Committee can begin to review individual complaints in a similar way to that of a traditional human rights court. Also, in cases of grave and systematic violations of human rights, some Committees can initiate an investigation in an attempt to hold States Parties accountable.

If you want to find out whether or not your country is a State party to the ICESCR, you can check this information at the website of the Office of the High Commissioner for Human Rights website – [www.unhchr.ch](http://www.unhchr.ch)

#### **How other communications/inquiries processes work**

Most of the other treaties in the UN Human Rights Treaty System have a capacity to receive individual communications or launch inquiries:

- the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, can receive individual communications, and can initiate an “urgent action” processes in cases of imminent danger;
- the Committee on the Elimination of Racial Discrimination, which monitors the International Convention on the Elimination of all forms of Racial Discrimination, can receive individual communications, and can initiate “early warning” and “urgent action” processes in cases of concern or imminent danger;
- the Committee on the Elimination of Discrimination Against Women, which monitors the Convention on the Elimination of all forms of Discrimination Against Women, can receive individual communications and launch investigations of grave or systematic breaches;
- the Committee Against Torture, which monitors the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, can receive individual communications and launch investigations into the systematic practice of torture; and
- the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which monitors the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, can receive individual communications.

### **How the process works**

The communications processes attached to treaties can only be used in countries which have ratified both the parent treaty and the communications process. To lodge a “case” with one of the Committees, an individual needs to have experienced a breach of the human rights contained in a particular treaty. They also need to have tried to achieve justice for that violation through domestic processes. If that has been unsuccessful, or there were no avenues for redress, then they can lodge a communication with the appropriate Committee. One of the challenges is to pick which treaty is most applicable. Once the Committee has received the communication, they consider whether or not it is admissible, that is whether or not it really fits the rights in “their” treaty. If they decide that the case is admissible, they then consider the “merits” of the case to determine whether a breach occurred. If they find that a breach occurred they can make a series of recommendations to the government; their “views” on appropriate “remedies”. The views focus on providing relief for the individual, but also identify the violations and cause of the violations, and as such, can be used in domestic advocacy campaigns to change those laws, policies or programs. Governments are then required to consider the recommendations, take appropriate actions, and report back to the Committee within a specified time-frame. The Committees also have the power in the early stages to require States Parties to take “interim measures” to avoid possible irreparable damage to the victim or victims of the alleged violation.

#### *Further information on the Optional Protocol to the ICCPR*

An Optional Protocol allowing for individual complaints under the ICCPR came into force in 1976 and since then has demonstrated a number of benefits. As of December 2002, 104 States had ratified the Optional Protocol to the ICCPR. Thanks to the individual complaint procedure, several countries have changed their laws, in a number of cases prisoners have been released and compensation paid to the victims. Moreover, a wider consensus has been achieved on the content of the obligations undertaken by the States parties to the ICCPR. The presence of the Optional Protocol has allowed victims to obtain restitution and redress for violations of their civil and political rights and has contributed to the implementation of the rights enshrined in the ICCPR.

#### *Further information on the Optional Protocol to CEDAW*

What is important to know about this OP is that it took 3 years to make it happen! Serious work on the instrument began in 1996, negotiations started in 1997 and by December 1999, the text had been adopted and was open for signature to States parties to CEDAW. In less than four years, of the 167 States Parties to CEDAW 75 have signed the OP and of those, 49 have ratified it.

The OP to CEDAW is the only OP that establishes an inquiry procedure through which the CEDAW Committee can launch an inquiry into grave and systematic violations of women’s rights in a particular country at its own initiative.

Until now, no communications or inquiries have been fully reviewed by the CEDAW Committee. However, contributions to the development of ESCR jurisprudence are likely to be made.

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## Fact Sheet No. 5

### Why do we want an OP to the ICESCR?

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The Coalition for the Optional Protocol to the ICESCR firmly considers that the Optional Protocol to the ICESCR will benefit individuals, States Parties and the international community through:

**BENEFIT ONE: Providing an international remedial mechanism for the infringement of ICESCR Rights**

The Optional Protocol to the ICESCR will provide individuals and groups with access to international remedies where ICESCR rights have been violated. Ideally comprising of a complaint's mechanism and an inquiry procedure, the Optional Protocol to the ICESCR would possess the potential to significantly contribute towards the realisation of economic, social and cultural rights as enshrined in the ICESCR. The Optional Protocol complaint's mechanism would provide individuals and groups with access to an international adjudicative procedure and remedies concerning specific ICESCR violations. The the inquiry procedure would empower the United Nations Committee on Economic, Social and Cultural Rights, (“the Committee”), to initiate an investigation into particularly grave ICESCR abuses. The inquiry procedure would strengthen and compliment the proposed Optional Protocol complaint's procedure as it would:

- (i) Address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of the provisions of the ICESCR;
- (ii) Allow grave and/or systematic ICESCR violations to be investigated where individuals or groups were unable to utilise the complaint's mechanism for reasons including fear of reprisals;
- (iii) Enable a more-timely response to grave and/or systematic violations of the provisions of the ICESCR, and to continuing violations in particular.<sup>5</sup>

**BENEFIT TWO: Identifying and clarifying State party ICESCR obligations**

As demonstrated through the first Optional Protocol to the International Covenant on Civil and Political Rights, (hereinafter ICCPR), an Optional Protocol to the ICESCR would contribute, through the development of international jurisprudence, to the further understanding of the rights contained in the ICESCR. Particularly, it would contribute to the identification of what constitutes a violation of these rights and to the development of corresponding State party obligations. Further, the Optional Protocol would assist in transforming general ICESCR provisions into concrete, tangible and achievable norms. The communications procedure, with its focus on specific violations of the rights of the individual, enables the Committee to provide States

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<sup>5</sup> Inter-American Institute of Human Rights, *Optional Protocol, Convention on the Elimination of all Forms of Discrimination against Women*, Costa Rica: 2000 at 71-72. An Optional Protocol to the ICESCR inquiry procedure could be modelled after either Article 20 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Article 8 of the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women*, both of which authorise inquiry procedures in prescribed situations.

parties with guidance as to their ICESCR obligations in actual situations. These recommendations in turn could constitute guidelines for the effective domestic implementation and promotion of economic, social and cultural rights as contained in the ICESCR.

**BENEFIT THREE: Assisting States parties in protecting and promoting ICESCR enshrined rights**

The elaboration of an Optional Protocol to the ICESCR will encourage States parties to take steps towards the full implementation of all rights enshrined in the ICESCR. This would mark an important step in strengthening the principle that, through ratification, States parties have committed themselves to progressively realise ICESCR rights. Through the promotion of the Optional Protocol's complaint mechanism and inquiry procedure, States parties would be provided with further opportunities to develop the concept of economic, social and cultural rights at the national level, to increase understanding and awareness of these rights and to remedy any existing inequalities in their laws, policies or procedures. The Optional Protocol will encourage the implementation of all the rights enshrined in the ICESCR through progressive changes in national law and policy. Such changes will, in turn, trigger an increased recognition of economic, social and cultural rights at all levels of society and assist all, including the most marginalized, to seek and access justice.

**BENEFIT FOUR: Encouraging the development of domestic jurisprudence concerning economic, social and cultural rights**

The Optional Protocol would provide States parties with a direct role in the development of international economic, social and cultural rights jurisprudence i.e. a body of case law that could be used by the Committee and others in interpreting the provisions of the ICESCR and clarifying state obligations. In turn, international ICESCR jurisprudence would promote the development of domestic jurisprudence on economic, social and cultural rights issues. In deliberating on issues such as the right to health, food, housing and social security, national level Courts could take judicial notice of international Optional Protocol jurisprudence in their own work to further domestic recognition of economic, social and cultural rights. In essence, the concept of violations of economic, social and cultural rights, how they should be recognized and interpreted and how violations might be remedied will be investigated and documented within national and international tribunals. Such documentation will in turn be vital in influencing the enactment, execution and interpretation of domestic laws or procedures to protect the rights as contained in the ICESCR.

**BENEFIT FIVE: Strengthening International Enforcement of Economic, Social and Cultural Rights**

The Optional Protocol to the ICESCR will serve to strengthen the relationship between States parties and the Committee by creating an impetus, at the national level, for nations to promote the effective national implementation of ICESCR rights. Through cases brought under the Optional Protocol to the ICESCR, the Committee and States parties will be required to provide detailed information on the implementation of economic, social and cultural rights in their community. This will strengthen the institutional knowledge of the ways in which economic, social and cultural rights are realised in different communities. Scholars and non-governmental organisations have long noted that one of the major constraints faced by the Committee has been the lack of information available to the Committee. The Optional

Protocol would lead to a new and more involved relationship between the Committee and States parties. Assisting with the effective implementation of economic, social and cultural rights, the Optional Protocol would also discourage other non-economic, social and cultural rights complaints mechanisms from entering the ICESCR field, which has become current practice in the absence of this instrument.<sup>6</sup> Given that the ICESCR and its Optional Protocol would comprise the sole specific international complaints mechanism dedicated to economic, social and cultural rights, this is of the utmost importance, both for the legal development of the rights at the international level, and for the progressive interpretation and enactment of law at the national level.

**BENEFIT SIX: Reinforcing the universality, indivisibility, interrelatedness and interdependence of all human rights**

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Given the existence of an international complaint's procedure concerning the adjudication of ICCPR rights infractions, the creation of an Optional Protocol to the ICESCR would enable States Parties to reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights.

**BENEFIT SEVEN: Increase public awareness of economic, social and cultural rights**

The Optional Protocol to the ICESCR would place a renewed emphasis on economic, social and cultural rights nationally and internationally. It would provide a platform for victims of violations of economic, social and cultural rights to identify and publicise their complaints and to influence the development of international human rights standards. Further, the publication of communications and inquiries, would serve to promote public awareness, nationally and internationally, of the human rights standards enshrined in the ICESCR.<sup>7</sup>

Additionally, the beauty of an Optional Protocol to the ICESCR is its capacity to contribute to an existing economic, social and cultural rights campaign. Because the Optional Protocol to the ICESCR would require that all domestic judicial processes have been exhausted it is likely that the case will already have been linked to domestic campaigns. Moreover, because the Committee recognises that both judicial and programmatic responses are required to implement ICESCR rights, the Committee would make recommendations in both areas.

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<sup>6</sup> In adjudicating over complaints under the first Optional Protocol to the *ICCPR*, the United Nations Human Rights Committee has delved into issues specifically covered by the *ICESCR*.

<sup>7</sup> This has been the case with communications submitted under existing complaints procedures and in particular, communications under the first Optional Protocol to the *ICCPR*.

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## Fact Sheet No. 6

### Critical components of an effective OP to the ICESCR

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The NGO Coalition for the OP to International Covenant on Economic, Social and Cultural Rights (ICESCR) is promoting “Five Critical Components” of an effective OP would be an effective human rights instrument for individuals and groups of individuals seeking justice from the international human rights system.

#### **CRITICAL COMPONENT ONE: The Optional Protocol to the ICESCR should contain two procedures: (1) a Communication Procedure and (2) an Inquiry Procedure**

##### *Why a communications procedure?*

The communications procedure would enable individuals and groups of individuals to file complaints before the Committee on Economic, Social and Cultural Rights (“the Committee”). The communications would refer to specific violations of the rights guaranteed in the ICESCR and would allow individuals and groups to seek redress for violations of economic, social and cultural rights that generally go unnoticed at the national level.

##### *Why an Inquiry Procedure?*

This procedure would enable the Committee to launch, on its own initiative, on the basis of reliable information, inquiries into grave or systematic violations of rights enshrined in the ICESCR.

- **Grave violations** would constitute severe abuse. For example violations of economic, social and cultural rights that would have negative impact on of the right to life, physical and mental integrity, and security of a person. Eg, forced evictions by military forces that have caused injuries and deaths of various members of an Indigenous community
- **Systematic** would refer to the scale or prevalence of violations, or to the existence of schemes or policies leading to violations. Violations not amounting to the level of severity implied by “grave” may still be the focus of inquiry if there is a pattern of violations or abuses committed pursuant to scheme or policy. Eg, forced sterilization of Roma women in public hospitals.

#### **CRITICAL COMPONENT TWO: The Procedures established under the Optional Protocol to the ICESCR should be available to victims of violations of ANY substantive right enshrined in the Covenant. The procedures under the OP-ICESCR should extend to ALL the rights set forth in the Covenant.**

The Optional Protocol does not create new substantive rights. It creates complimentary procedures for addressing and redressing violations of rights established in the Covenant. For this reason, all procedures to be included under the Covenant should be available to the wide range of victims of ESCR violations. From this point of view, it would be inadequate to establish procedures by which victims of violations of the right to health can seek redress while victims of violations the right to food do not have access to justice.

The 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Moreover, all existing mechanisms available through the Optional Protocols to major human rights Conventions are linked to ALL the rights embodied in the main treaties. Failure to adopt a similar approach in drafting the OP-ICESCR would make this mechanism less effective, would weaken its potential and would undermine efforts to ensure full domestic remedies to violations of all ESC rights.

**CRITICAL COMPONENT THREE: It must be possible for all aspects of ESC rights, and all levels of state obligation – to respect, protect and/or fulfil – to be reviewed under the Complaints and Inquiries Procedures. The process leading to the OP-ICESCR should clearly establish the need for State Parties to strengthen mechanisms and remedies for addressing violations that result from their failure to respect, protect and/or fulfil ESC rights.**

One of the main principles informing the CESCR is the principle of State Obligation. It is important to emphasize that the views and recommendations of the Committee, when considering communications and inquiries under the OP-ICESCR, would be aimed at strengthening the domestic implementation of the Covenant. For this reason, the Optional Protocol to the ICESCR must address both positive and negative State obligations associated with the realization of all rights enshrined in the ICESCR

- **The obligation to *respect*** requires States parties to refrain from interfering with the enjoyment of the economic, social and cultural rights enshrined in the ICESCR. That is, States parties must not act in a way which violates an economic, social or cultural right, nor infringes on an individual's freedom to access these rights. Within this context, states must "respect the freedom of the individuals to take the necessary actions and use the necessary resources – alone or in association with others."<sup>8</sup>
- **The obligation to *protect*** requires States parties to prevent the violation of ICESCR rights by third parties. States parties must take "the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the infringement of his [sic] material resources."<sup>9</sup>
- **The obligation to *fulfill*** encompasses the state obligations to *facilitate* the access to and/or to *provide* for the full realisation of the economic, social and cultural rights enshrined in the Covenant. The obligation to *facilitate* requires States parties to pro-actively engage in activities that strengthen access to, and the utilisation of, resources and means to ensure the realisation of Covenant rights. The obligation to *provide* requires that States parties, subject to available resources, take measures necessary to ensure that each person within its jurisdiction may obtain what is necessary to the enjoyment of all ESC

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<sup>8</sup> Asbjørn Eide, "Realisation of Social and Economic Rights. The Minimum Threshold Approach", International Commission of Jurists The Review 1989, Issue 43, 40, 1989, p. 43. See also Maastricht Guidelines on Violations of Economic Social and Cultural Rights, January 1997, Para. 6.

<sup>9</sup> Eide, op.cit. note, p. 42.

rights, whenever they are unable to realise these rights through the means at their disposal.<sup>10</sup>

**CRITICAL COMPONENT FOUR: The role of NGOs must be recognised under both procedures.**

*The role of NGOs in the Communications procedure*

NGOs should be able to lodge communications **on behalf of** individuals and groups of individuals. At a minimum, the following should have standing:

- Individuals and groups of individuals<sup>11</sup> who have been victims of violations of Covenant rights by State parties;
- Representatives of individuals or groups of individuals empowered to initiate complaints *on behalf of* individual and collective victims.

The importance of expressly acknowledging the competence of representatives, particularly non-governmental organisations, to launch complaints on behalf of victims of ICESCR violations cannot be underestimated. Under existing instruments, complaints *on behalf of* an individual and group victims have either been specifically included<sup>12</sup> or such representative standing has been provided through adjudicative interpretation.<sup>13</sup> Providing standing to representatives of victims protects victims who face the risk of ill-treatment or other retaliation for directly engaging in the process.<sup>14</sup>

*The role of NGOs in the Inquiry Procedure*

The Committee should be able to consider information from credible sources, including information provided by NGOs, when initiating an inquiry.

Additionally, the Optional Protocol should enable NGOs to file amicus curiae briefs in both instances.

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<sup>10</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6. See also Committee on Economic, Social and Cultural Rights, General Comment 12, United Nations document reference, E/C.12/1999/5, para. 15.

<sup>11</sup> Nowak, M., "The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" in International Commission of Jurists, *The Review: Economic, Social and Cultural Rights and the Role of Lawyers*, France: 1995 at 160. Limiting standing/ability to initiate complaints under an Optional Protocol to the ICESCR to individuals would be to prevent to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

<sup>12</sup> Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims of State party ICESCR rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* which states "Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent", Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 77 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

<sup>13</sup> *Supra* (Arambulo), note 1 at 223, 233-4. Through the practice of the United Nations Human Rights Committee, communications submitted *on behalf of* victims of State party ICCPR violations have been accepted.

<sup>14</sup> *Supra* note 3 at 43. See also *supra* note 4 at 161.

## **CRITICAL COMPONENT FIVE: No reservations should be allowed under the Optional Protocol to the ICESCR**

Reservations that enable governments to exclude either substantive rights, components of rights, or to exclude a procedure, are inappropriate:

- The purpose of the Optional Protocol is to assist people to realise their economic, social and cultural rights, as enshrined in the ICESCR. It is a tool to complement and strengthen the Covenant. An Optional Protocol, which allows for the selection by State Parties of certain rights or aspects of rights contained in the Covenant, would undermine the holistic nature of the rights contained in the Covenant and send a negative message about the need to provide for effective remedies to violations of any ESC rights ;
- The Optional Protocol would by its very nature be optional. Reservations that curtailed its applicability would be unnecessary:
- An effective Optional Protocol will recognise the interrelationship among economic, social and cultural rights contained in the Covenant. Many of the provisions are dependent on others, as many rights are enabled through access to others. To allow States parties to individually select ICESCR rights subject to the procedure would strike at the core of the effective functioning of the Optional Protocol.<sup>15</sup>

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<sup>15</sup> The United Nations Division for the Advancement of Women Department of Economic and Social Affairs, *The Convention on the Elimination of All Forms of Discrimination Against Women, The Optional Protocol: Text and Materials*, United Nations: 2000, at 49-50. See also *supra*, note 3 at 98-99. See also *supra* note 1 at 236.

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## Fact Sheet No. 7

### The question of justiciability

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Can courts enforce economic, social and cultural (ESC) rights? Should UN treaty committees be able to give an opinion that a State has violated such rights and recommend appropriate action to remedy the violation? These questions are frequently raised during discussions on establishing a complaints mechanism through an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). A number of common myths reflect misunderstandings of both the nature of economic, social and cultural rights and of the role of courts and other bodies in adjudicating them.

**Myth:** Adjudicating economic, social and cultural rights is not an appropriate or legitimate role for courts or other bodies since it involves making policy decisions that are properly the function of democratically elected parliaments.

**Reality:** Adjudicating economic, social and cultural rights claims does not require courts to take over policy making from governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases, courts and other bodies adjudicating economic, social and cultural rights review government decision-making, to ensure consistency with fundamental human rights. Holding governments accountable to human rights enhances democracy. It does not undermine it.

**Myth.** Economic, social and cultural rights require governments to ‘give everyone houses’ to comply with the right to housing or ‘buy everyone expensive medicines’ to comply with the right to health. Making these rights justiciable will bankrupt governments.

**Reality:** Under the ICESCR, governments have accepted obligations to progressively realise these rights within their maximum available resources (Article 2.1). This requires that States only demonstrate in good faith the fulfillment of the rights over time within their capacities. Where courts and other bodies have adjudicated ESCR claims, they have shown considerable deference to governments’ decisions about resource allocation, and intervened only to ensure that governments take reasonable steps, without discrimination, and subject to available resources, to respect, protect and fulfill the rights (See examples below).

*When these rights are infringed, by action or inaction, the court must take action. But it only protects the fundamental rights. It may appear to be a policy decision but the Court is not taking one.*

Justice Iyer,  
formerly of Supreme Court of India

**Myth:** Courts or similar bodies are incapable of adjudicating ESCR because these rights are too vague or complex and involve many different economic and social policies.

**Reality:** Courts and UN human rights bodies adjudicating civil and political rights are used to considering rights claims in the context of complex policies and problems such as crime or systemic discrimination. They can play just as important a role in helping States make themselves accountable to economic, social and cultural rights. Courts regularly order remedies for the unjustified interference with economic, social and cultural rights (for example, dismissal from employment or forced evictions) and have increasingly demonstrated their capacity to monitor the progressive realization of the rights through the implementation of appropriate programs and policies. They play a critical role in protecting the rights of minorities who may be overlooked or treated unfairly in ways which deny them equal enjoyment of economic, social and cultural rights.

*To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.<sup>16</sup>*

Justice Beverly McLachlin, now Chief Justice of the Supreme Court of Canada.

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<sup>16</sup> *RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 at paragraph 136.

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## Fact Sheet No. 8

### Government obligations and domestic jurisprudence

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#### **The obligation to ensure non-discrimination and equality**

The duty not to discriminate in the enjoyment of rights such as the right to work, health, education, housing etc is a binding obligation under articles 2.2 and 3 of the ICESCR. Laws and practices that directly or indirectly discriminate against minorities, women, children and other groups are daily litigated before many courts. Often, these cases have important implications for government allocation of resources. (See Box 1) Courts and human rights bodies must ensure that positive steps are taken so that marginalized and vulnerable groups have equal access to essential goods and services. (See Box 2)

##### *Box 1*

*Brown v. Board of Education (USA)*

*The Supreme Court held that educational segregation of Afro-Americans violated the equal protection clause in the Constitution.*

##### *Box 2*

*Eldridge v. BC (Canada)*

*The Supreme Court of Canada, after considering cost and budgetary implications, ruled that the right to equality requires that governments provide interpretation services for the deaf and hard of hearing in hospitals and in the provision of health care.*

#### **The obligation to Respect**

Economic, social and cultural rights are often taken away from individuals and communities. (See Box 3) The duty to respect means governments must ensure that such interferences only occur when justified and are carried out in the proper way, with provision of compensation or alternatives where appropriate. Courts or other bodies can monitor this duty by hearing complaints from individuals and communities.

##### *Box 3*

*ASK v Bangladesh*

*Eviction of slum-dwellers without notice and without any attempt to find alternative accommodation violates the right to shelter and livelihood, according to Supreme Court of Bangladesh.*

### **The obligation to Protect**

Private actors, individuals or corporations, often impede or deny access to economic, social and cultural rights. Regional human rights bodies have regularly assessed whether States have complied with their duty to protect individuals from such violations. (See Boxes 4 and 5)

#### *Box 4*

*ICJ v. Portugal*

*The European Committee on Social Rights found that Portugal had failed to take sufficient steps to regulate child labour under the European Social Charter.*

#### *Box 5*

*SERAC v. Nigeria*

*Nigeria's failure to prevent Shell from polluting environment was a breach of their duty to protect the rights to food and health environment of Ogoni people according to the African Commission on Human and Peoples' Rights.*

### **The obligation to Fulfill**

Lastly, courts can play an active role in monitoring States' progress in fully realising the rights, by hearing complaints about the failure to make reasonable plans, allocate the necessary and available resources, and implement and monitor appropriate policies and programs. They may also require States to define and achieve progressive benchmarks for the fulfillment of economic, social and cultural rights. (See Box 6)

#### *Box 6*

*Grootboom v South Africa*

*The Constitutional Court of South Africa faulted governmental housing programme for failing to provide a mechanism for emergency relief for those in desperate need – a critical part of the progressive realization of the right to housing of all South Africans.*

### **Further Reading**

Committee on Economic, Social and Cultural Rights, General Comment No. 9. The Domestic Implementation of the ICESCR.

Matthew Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights", *Netherlands International Law Review*, Vol. XL, 1993, at p.389.

COHRE, *50 Leading Cases on Economic, Social and Cultural Rights: Summaries*, COHRE, Geneva, 2003. <[www.cohre.org/litigation](http://www.cohre.org/litigation)>

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## Fact Sheet No. 9 Challenging misconceptions

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### **MISCONCEPTION ONE: Economic, social and cultural rights are not capable of being applied by judicial bodies. They are not justiciable**

One of the major arguments used against an OP to the ICESCR is that economic, social and cultural rights are not justiciable and, as a result, cannot be the object of an individual complaint procedure.

Developments at the domestic and regional levels show, on the contrary, that economic, social and cultural rights can be subjected to the scrutiny of a court of law or another judicial or quasi-judicial entity.

In recent years, a jurisprudence surrounding economic, social and cultural rights has gradually emerged. Domestic and regional courts have, in many instances, adjudicated issues related to the enjoyment of economic, social and cultural rights, offering an adequate remedy to the victims. As a result, a wide range of case law related, among others, to food, health, shelter and education, etc. has emerged. In dealing with economic, social and cultural rights courts have also developed innovations in procedures to deal with economic, social and cultural rights. As such, the existence of domestic and regional case law related to economic, social and cultural rights bear witness to the direct justiciability of these rights.

Indeed, today, an increasing number of countries, across all continents and legal systems, have incorporated judicial review of economic, social and cultural rights. These include South Africa, Finland, Argentina, Mauritius, Canada, Latvia, France, India, Bangladesh, Nigeria, and most countries in Central and Eastern Europe.

Moreover, governments have increasingly supported the justiciability of economic, social and cultural rights in numerous fora. Complaint procedures for violations of economic, social and cultural rights have been developed at the regional level (i.e. the African Charter of Human and Peoples' Rights and Duties, the Collective Complaints Procedure under the European Social Charter and the Inter-American San Salvador Protocol).

For further developments related to the issue of economic, social and cultural rights justiciability, please refer to Fact Sheets No. 7 and No. 8.

### **MISCONCEPTION TWO: Economic, social and cultural rights are too vague to be applicable to a case-based complaint procedure**

It is often claimed that economic, social and cultural rights are not rights but political aims, alleging that they represent too vague provisions to be enforceable. This perception has been overcome by different developments related, notably, to the nature, content and scope of economic, social and cultural rights, as well as to related State obligations.

General Comments of the Committee on Economic, Social and Cultural Rights (“the Committee”), work of UN Special Rapporteurs, experts, academics and NGOs, as well as national and regional case-law have all significantly contributed to refute this assertion and clarify State obligations ensuing from the ICESCR.

The Committee’s General Comments, along with the doctrine and existing jurisprudence offer precise descriptions of economic, social and cultural rights’ content and scope, as well as of the respective State obligations to respect, protect and fulfil. In addition, that same sources also offer a clear description of how the concepts of “progressive realisation” and “available resources” apply to such obligations. As such, a certain degree of interpretative certainty and predictability can be expected.

In this respect, further clarification can only take place on a case-to-case basis, which is precisely why a complaint procedure is needed.

**MISCONCEPTION THREE: Economic, social and cultural rights involve questions of resources allocation and public policy that should not be dealt with by courts**

It is sometimes suggested that matters involving the allocation of resources and public policy questions should be left to the political authorities rather than the courts. These objections relate to the concern that the judiciary should not intervene in such fields, which are said to be the exclusive domain of governments. At the national level, these objections are related to the question of separation of powers, while at the international one they are raised in the context of intrusion into sovereignty.

First, it is important to remember that, as it is the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. In this respect, when national courts have intervened to order that specific programme or policy be implemented, the orders have, in most cases, given a wide degree of discretion to the government to devise the appropriate response. For instance, the Bangladesh High Court noted in 1999 that in order to fulfil the basic rights of equality, life and livelihood, the government had to complement its project to demolish slum-dwellings in Dhaka with a plan to rehabilitate the dwellers and that the project needed to be carried out in stages with reasonable notice given to evict.<sup>17</sup> With regard to the progressive realisation of economic, social and cultural rights, courts have shown the capacity to set boundaries for their intervention. For instance, the Swiss Federal Court has said it lacked the “competence to set priorities in allocating resources” but would intervene if the legislative framework failed to ensure constitutional entitlements.<sup>18</sup>

Secondly, while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters with important resource implications. The adjudication of civil and political rights, as well as many other legal rules such as trade law, regularly impinges upon the political options of governments, notably with regard to the allocation of resources. Indeed, while judges should respect the division of competences between the various branches of government, it is important to

<sup>17</sup> *Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors*

<sup>18</sup> Judgment of the Second Public-Law Division of 27 October 1995 *in re V. v Resident Municipality X. and Bern Canton Government Council (Constitutional Complaint)*.

recognise that their decisions frequently have budgetary consequences.<sup>19</sup> For instance, the right to a fair trial necessitates significant financial investments in court systems, and frequently legal aid.<sup>20</sup> Similarly, the protection against torture and other forms of cruel, inhuman or degrading treatments also requires financial prioritization in term of police training, construction of prison facilities, protection of the victims, etc. While it is obvious that the realisation of civil and political rights involve allocation of resources, the related costs are often not considered because the institutions are already in place.

Thirdly, in many cases, the realisation of economic, social and cultural rights will only require a government to refrain from certain behaviour or to regulate the actions of third parties. For instance, State Parties to the ICESCR have to ensure that there are not arbitrary restrictions on the right to work or that no forcible evictions are carried out in the absence of adequate compensation and resettlement. In such cases, the realisation of economic, social and cultural rights does not involve questions of resource allocation and does not requires the adoption and implementation of policies, programme or measures.

Fourthly, while issues of social and economic policy involve complex questions that are difficult to resolve on a case-by-case basis, courts frequently deal with many questions concerning the public interest. For instance, judgments on the right to freedom of expression will involve certain contested interests. As a result, the judges will have to balance the notion of public or national interest with the restrictions put to the enjoyment of the right to freedom of expression. Such balancing act between contested interests can be easily applied within the realm of economic, social and cultural rights.

Finally, concerns expressed about the democratic legitimacy of courts are often raised in relation to the suggestion that they should not get involved in matters related to the allocation of resources and public policy issues. In this regard, while judicial officers are not elected by popular vote, governments appoint many courts members. In addition, judicial bodies have shown a capacity to uphold the rights of individuals and groups in the face of hostile or negligent State.

#### **MISONCEPTION FOUR: Judicial remedies are not effective in realising economic, social and cultural rights**

It is sometimes argued that judicial remedies alone cannot bring about the systemic changes necessary for the complete realisation of economic, social and cultural rights.

The first object of judicial remedies, at the national or international levels, is to provide adequate redress and compensation to victims of human rights violations, as well as to guarantee the cessation and non-repetition of the violation. Such objectives remain the same across the whole human rights spectrum and apply in cases of civil and political rights, as well as economic, social and cultural rights.

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<sup>19</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant, E/C.12/1998/24, at para. 10.

<sup>20</sup> See for example *Airey v Ireland* [1979] 2 E.H.R.R. 305. The European Court of Human Rights held that the lack of legal assistance for complex divorce proceedings violated the right to a fair trial and right to respect for family life. Ireland subsequently enacted a civil legal aid system.

As judicial or quasi-judicial entities look at specific cases of human rights violations, judicial remedies will always be limited in term of their ability to address or change a whole country situation. In this regard, such limitations apply irrespective of whether the case addresses civil and political rights, or economic, social and cultural rights. For instance, it is unlikely that a decision of the Human Rights Committee on a torture case in a given country will be effective in putting a stop to an institutionalised practice that is taking place throughout the country in question. Indeed, it is more the conjunction of different actions and factors that can trigger change in a given situation and can prove effective in realising economic, social and cultural rights as well as civil and political rights. Judicial remedies play, in this respect, a crucial role.

Indeed, litigation can spur legislative changes, attend to individuals or group complaints and provide a constant and watchful accountability mechanism over legislative and administrative spheres. Litigation can also play a useful educative and transformative role in the dissemination and understanding of human rights principles.

**MISCONCEPTION FIVE: A complaint procedure for economic, social and cultural rights would imply a huge financial burden for States**

An argument that is sometimes put forward against an OP to the ICESCR is that a complaint procedure for economic, social and cultural rights at the international level would have huge financial implications for States. This argument relates to the assumption that economic, social and cultural rights only require action by governments with important financial implications.

However, in many instances, the realisation of economic, social and cultural rights does require restraint by governments, i.e. refraining from certain behaviour or regulating the actions of third parties. As mentioned in General Comment Nr. 12 of the Committee, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect protect and fulfil.<sup>21</sup> Under the obligations to respect and protect States have to refrain from interfering with the enjoyment of economic, social and cultural rights and to prevent violations of these rights by third parties.<sup>22</sup> In both cases, the realisation of economic, social and cultural rights does not impose huge financial burden upon States, as it does not imply the adoption and implementation of expensive programme or measures.

**MISCONCEPTION SIX: A complaint procedure for economic, social and cultural rights would create new obligations for States**

It is sometimes suggested that an OP to the ICESCR would create new obligations for State parties to the ICESCR.

First of all, as indicated by its name, the OP to the ICESCR will remain an option for States. In other words, States will not be obliged to ratify such instrument. Secondly, the OP to the ICESCR will not create new obligations for States but a new supervision procedure for obligations that already exist under the ICESCR. In this regard, the procedure created by an OP to the ICESCR will not be different that the ones existing under the First Optional Protocol to the International Covenant on Civil and Political

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<sup>21</sup> See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 6,

<sup>22</sup> *Ibid.*

Rights (ICCPR), the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Racial Discrimination or the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

**MISCONCEPTION SEVEN: A complaint procedure for economic, social and cultural rights would compete or conflict with other complaint procedures**

Complementarity in the human rights framework is not a new issue. Indeed, complementarity between different human rights mechanisms can be found at the regional and international levels and with respect to conventional and non-conventional mechanisms. It results from the development of human rights law, along with the identified need to bring special protection to vulnerable groups, address particular subjects of concern or respond to regional specificities. Within the human rights framework and with respect to individual complaint mechanisms, complementarity can be understood from two different perspectives: one specific right may be covered by several instruments or mechanisms and one particular individual may have access to several mechanisms.

With respect to the OP to the ICESCR, concerns have been raised that such a mechanism would duplicate, to a certain extent, the work carried out by other bodies such as the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, as well as the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

Complementarity, or overlap between the rights covered by different individual complaint mechanisms is common in the realm of civil and political rights and does not seem to create problems or to raise concerns. For instance, the Committee Against Torture is authorised, under Article 22 of the Convention against Torture (CAT), to receive complaints from individuals who claim to be victims of a violation of the provisions of this Convention by a State party that has made a declaration under this Article. This provision does not prevent the Human Rights Committee from receiving individual complaints regarding alleged violations of Article 7 of the International Covenant on Civil and Political Rights (hereinafter *ICCPR*), under the Optional Protocol to this Covenant. Nor does it prevent the Inter-American Commission, the Inter-American Court or the European Court on Human Rights to look at individual complaints related to torture and other cruel, inhuman or degrading treatment. Moreover, the right to freedom of association, covered by the Optional

Protocol to the ICCPR, has not been excluded from the individual complaint procedure on the grounds of overlap with the ILO Committee on Freedom of Association. Similar examples could be given with respect to other individual complaints mechanisms, including the Convention on the Elimination of Discrimination against Women (*CEDAW*) and the Convention on the Elimination of all Forms of Racial Discrimination (*CERD*).

Potential duplication of work between these different mechanisms has not created problems or raised potential concerns because all these procedures contain clauses preventing the examination of a case that would be, at the same time, under

consideration by another procedure of international or regional settlement or investigation.

The interdependence, indivisibility and interrelatedness of all human rights, reiterated in the Vienna Declaration and Programme of Action adopted by the Second World Conference on Human Rights in 1993, requires that the same standards be applied equally to economic, social and cultural rights and civil and political rights.<sup>23</sup> In this respect, the Draft OP to the ICESCR follows the same approach as its civil and political rights predecessors concerning the ‘examination clause’, stipulating that an individual complaint cannot be examined concurrently by more than one mechanism. The interdependence, indivisibility and interrelatedness of all human rights also highlights the need that a complaint procedure for economic, social and cultural rights be able to look at the full range of economic, social and cultural rights.

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<sup>23</sup> UN. Doc. A/CONF.157/23, para. 5. Paragraph 5 adds: “The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

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## Fact Sheet No. 10 Lobbying governments

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It is essential that governments know that there is support for an OP to the ICESCR, and also that they understand fully the benefits and know how to refute challenges.

To enable the Coalition to be as effective as possible during the meeting of the Open-Ended Working Group we need to:

1. ensure that the coalition knows the position of as many governments as possible
2. ensure that governments have been well-briefed on the key issues
3. encourage supportive governments to participate in the Open-Ended Working Group

On the reverse of this Fact Sheet are four advocacy options:

- The Five-Minute Action
- The Thirty-Minute Action
- The Sixty-Minute Action
- The Half-Day Action

Below is an overview of why we are asking you to undertake these advocacy options.

### **What is your government saying?**

To facilitate the coalition learning more about government attitudes to the Optional Protocol to the ICESCR, including whether or not they intend to participate in the meeting of the Open-Ended Working Group, we are asking national groups, networks to meet with representatives of government. For the most part, participation in negotiations of this nature are the responsibility of Ministries/Departments of Foreign Affairs.

We are interested to know whether they support the Optional Protocol to the ICESCR or whether they oppose it. In either case, we would like to know the factors which informed their decision.

We would also like to know whether they intend to participate in the meeting of the Open-Ended Working Group. If the government is supportive *and* is going to send a delegation, you/your organization might also consider lobbying the government to be included as a NGO representative on the delegation. If your government is not supportive but you have a constructive working relationship with another government, you might also consider approaching them to be accredited as a NGO representative on the delegation. Be aware that governments do not often support the cost of NGO representatives on their delegations.

Please send any feedback to [op\\_icescr\\_group@yahoo.com](mailto:op_icescr_group@yahoo.com)

## A Quick Guide to Advocacy Options

### 1. The “Five Minute” Lobbying Option

Endorse the sign-on statement (in Appendix One) and send it back to Edwin Berry, [berry@icj.org](mailto:berry@icj.org)

The Statement will be used as a collective lobbying tool to government.

### 2. The “Half Hour” Lobbying Option

- a. Use the pro-forma letter to write to your government or relevant bureaucrats. Include a copy of the Sign-on Statement as an attachment or Fact Sheets 3, 4 and 5.
- b. Follow-up with the recipient of the letter to find out what the position of the government is towards the OP to the ICESCR; use the feed-back form as a prompt.
- c. Use the feed-back form to let Rights and Remedies know what the position of your government is towards the OP to the ICESCR.

### 3. The “One-Hour” Lobbying Option

- a. Ring the relevant bureaucrat or MP to discuss the issue; use the feed-back form as a prompt.
- b. Send follow-up information, including
  - i. The pro-forma letter
  - ii. Fact Sheet No. 3 (on the ICESCR) – if you judge that they have no idea what the ICESCR is...
  - iii. Fact Sheet No. 4 (on the OP to the ICESCR) – if you judge that they have no idea what the OP to the ICESCR is...
  - iv. Fact Sheet No. 5 (setting out arguments about why we want an OP to the ICESCR) – if they need encouraging; if they are on-side, encourage them to use these as their own advocacy tools
  - v. Fact Sheet No. 6 (Identifying critical components of an effective OP to the ICESCR) – send to supportive governments only
  - vi. Fact Sheet No. 7 (on justiciability) – if you judge that they don’t understand how ESCR can be adjudicated through domestic legal systems; again, if they are on-side, encourage them to use these as their own advocacy tools
  - vii. Fact Sheet No. 8 (on government obligations and domestic jurisprudence) – if you judge that they don’t understand how ESCR can be adjudicated through domestic legal systems; again, if they are on-side, encourage them to use these as their own advocacy tools
  - viii. Fact Sheet No. 9 (Challenging misconceptions) – if you judge that they don’t understand key issues round ESCR; again, if they are on-side, encourage them to use these as their own advocacy tools
- c. If you have not been able to ascertain their position in the initial phone conversation, contact again to find out what their position is.
- d. Use the feed-back form to let Rights and Remedies know what the position of your government is towards the OP to the ICESCR.

#### 4. **The Half-Day Lobbying Option**

- a. Make an appointment to meet with the relevant MP or bureaucrat.
- b. Prepare a Briefing Kit, including
  - i. Fact Sheet No. 3 (on the ICESCR) – if you judge that they have no idea what the ICESCR is...
  - ii. Fact Sheet No. 4 (on the OP to the ICESCR) – if you judge that they have no idea what the OP to the ICESCR is...
  - iii. Fact Sheet No. 5 (setting out arguments about why we want an OP to the ICESCR) – if they need encouraging; if they are on-side, encourage them to use these as their own advocacy tools
  - iv. Fact Sheet No. 6 (Identifying critical components of an effective OP to the ICESCR) – send to supportive governments only
  - v. Fact Sheet No. 7 (on justiciability) – if you judge that they don't understand how ESCR can be adjudicated through domestic legal systems; again, if they are on-side, encourage them to use these as their own advocacy tools
  - vi. Fact Sheet No. 8 (on government obligations and domestic jurisprudence) – if you judge that they don't understand how ESCR can be adjudicated through domestic legal systems; again, if they are on-side, encourage them to use these as their own advocacy tools
  - vii. Fact Sheet No. 9 (Challenging misconceptions) – if you judge that they don't understand key issues round ESCR; again, if they are on-side, encourage them to use these as their own advocacy tools
- c. Use either Fact Sheet 5 (arguments in favour of the OP to the ICESCR) or the feed-back form to prompt the flow of the meeting.
- d. Use the feed-back form to let Rights and Remedies know what the position of your government is towards the OP to the ICESCR.

#### **More adventurous, and slightly more time-consuming, options**

Additional activities you might consider include:

- direct meetings with the responsible minister
- visits to influential parliamentarians (for example, if there are sub-committees on treaties, the chair of the committee might be useful to visit; the Attorney-General might also be an appropriate person to visit)
- letter-writing to the “letters page” of influential papers (particularly if you know that relevant parliamentarians “monitor” the media)
- letter-writing to the Minister and influential parliamentarians
- a seminar on the development of the OP to the ICESCR, to which you invite influential parliamentarians, bureaucrats, supportive members of the judiciary and legal profession, academics, and NGOs.

## Pro-forma Letter

Dear

**Re: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**

As you may be aware, an Open-Ended Working Group to consider the development of an Optional Protocol to the ICESCR is meeting in February/March. We are writing to ascertain your position on the development of the Optional Protocol to the ICESCR, and to strongly urge you to support further negotiations on the issue.

Work towards an Optional Protocol to the ICESCR provides an opportunity for the international human rights treaty system to codify the increasing domestic jurisprudence on economic, social and cultural rights. Moreover, work on the Optional Protocol to the ICESCR enables governments to honour the commitments made during the Vienna Conference on Human Rights, which affirmed the indivisibility, interdependence and interrelatedness of all human rights and recommended that the Committee on Economic, Social, and Cultural Rights work with the Commission on Human Rights to examine a draft Optional Protocol to the ICESCR.

It is imperative that economic, social, and cultural rights be accorded full and equal recognition within the United Nations human rights mechanisms. Four of the six international human rights treaties currently have Optional Protocols. An optional protocol to the ICESCR, similar to the one that has been in place for 25 years under the ICCPR, is critical to ensuring that full recognition is accorded to economic, social, and cultural rights.

We hope that the Government will adopt a favorable position on this important issue, and that you will send representatives to the meeting of the Open-Ended Working Group. We have attached a document outlining our arguments in support of an Optional Protocol to the ICESCR and critical components of an Optional Protocol to the ICESCR, for your information. We will follow up shortly to discuss the matter with you.

Sincerely

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## **Fact Sheet No. 11**

### **Media activities**

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In conjunction with letter writing to governments, it may be useful to develop a media strategy as part of your domestic activities.

Activities could include:

- Developing an Opinion piece on the importance of economic, social and cultural rights in your community
- Working with a friendly journalist to highlight a particular economic, social or cultural rights issue in your community, and asking them to also include information on the OP to the ICESCR campaign. This could be a particularly useful strategy if your government is not supportive of the OP to the ICESCR as it could lead to public engagement with the issue
- Send a letter to the editor of a local paper. Again, if the government is not supportive this could be a useful strategy. In general letters to the editor should be no longer than 100 words. It would be important to ground the general call for support of the OP to the ICESCR in a pertinent local ESCR issue.
- Exploring on-line media options in your community, and offering the Opinion piece, with additional information on letter-writing actions individuals can take.
- Contacting social-justice media outlets to see if they will run the Opinion Piece, with additional information on letter-writing actions individuals can take.

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## Fact Sheet No. 12

### How did we get to this point?: Historical milestones

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- 1990 The Committee on Economic, Social, and Cultural Rights started discussing the possibility of drafting an Optional Protocol to the ICESCR.
- 1993 The World Conference on Human Rights adopted the Vienna Declaration and Programme of Action (UN document [A/Conf.157/23](#)). The Declaration reaffirmed that “all human rights are universal, indivisible and interdependent and interrelated” and went on to declare that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.
- Moreover, the document encouraged “the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights”.
- 1996 The Committee on ESCR finalized a draft Optional Protocol that was presented for consideration to the Commission on Human Rights in 1997 (UN document [E/CN.4/1997/105](#)). In its decision 1997/104 of 3 April 1997 the Commission on Human Rights requested the Secretary-General to transmit the text of the draft optional to Governments and intergovernmental and non-governmental organizations for their comments for submission to the Commission on Human Rights. Only a handful of Governments submitted their comments.
- 2001 The UN High Commissioner for Human Rights organizes, in cooperation with the International Commission of Jurists, a two-day workshop on the justiciability of ESCR with particular reference to an Optional Protocol to the ICESCR (the report on the workshop is contained in UN document [E/CN.4/2001/62/Add.2](#)). The same year the Commission on Human Rights decided to nominate an Independent Expert on the question of a draft Optional Protocol to the ICESCR (Commission on Human Rights [resolution 2001/30](#)).
- 2002 Mr. Kotrane, the Independent Expert, submitted his first report declaring himself in favor of the adoption of an Optional Protocol to the ICESCR (UN document [E/CN.4/2002/57](#)). The Commission on Human Rights renewed his mandate to allow him to study in greater depth the nature and the scope of States parties obligations under the ICESCR, the question of the justiciability of ESCR, and finally the question of the benefits and practicability of a complaint mechanism under the ICESCR and the issue of complementarity between different mechanisms (Commission on Human Rights [resolution 2002/24](#)). The Commission also decided that a working group “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights” would be established in 1993.

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**Appendix No. 1**  
**What did your government say?**

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Name	
Organisation	
Contact Details	
Government position	
Government position on participating in Open-Ended Working Group	
Delegation information (who, how long are they staying, any particular background information on individuals we should be aware of)	
Who you contacted – Name, Position and Department	
Any other relevant information?	

Please send this sheet to [op\\_icescr\\_group@yahoo.com](mailto:op_icescr_group@yahoo.com)

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**Appendix No. 2**  
**Joint Sign-On Statement**  
Send endorsements to [berry@icj.org](mailto:berry@icj.org)

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**JOINT SUBMISSION BY NON-GOVERNMENTAL ORGANISATIONS,  
HUMAN RIGHTS INSTITUTIONS AND CIVIL SOCIETY GROUPS  
PERTAINING TO THE DELIBERATIONS OF THE COMMISSION ON  
HUMAN RIGHTS, INTER-SESSIONAL WORKING GROUP ESTABLISHED  
TO CONSIDER OPTIONS REGARDING THE ELABORATION OF AN  
OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON  
ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

February 2004

**I. INTRODUCTION**

The fifty-ninth session of the Commission on Human Rights established an inter-sessional open-ended working group mandated to *consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or the *Covenant*). Motivated by a widespread concern for the protection and promotion of economic, social and cultural rights, the undersigned, in representation of non-governmental organisations, human rights institutions and civil society, submit the following views concerning the deliberations of the working group that will meet for its inaugural session in February 2004.

**II. CONTEXT**

Guided by principles enshrined in the *United Nations Universal Declaration of Human Rights*, it is clear that undivided State party adherence to the *Covenant* is of considerable importance in protecting and promoting economic, social and cultural rights. It is recognised that, through their ratification of the *Covenant*, States parties bear responsibility to ensure that economic, social and cultural rights are protected and promoted. The ensuing need to assist in the realisation of these rights, through the provision of a comprehensive international remedial mechanism to intervene during and/or adjudicate over *ICESCR* rights violations, is thus of paramount importance.

### III. CRITICAL COMPONENTS OF AN OPTIONAL PROTOCOL TO THE *ICESCR*

The undersigned non-governmental organisations, human rights institutions and civil society representatives assert that the following critical components are essential for an Optional Protocol to the *ICESCR* to fulfil its potential as an effective mechanism through which economic, social and cultural rights may be protected and promoted:

#### (a) Comprehensive Scope

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Given that the first Optional Protocol to the International Covenant on Civil and Political Rights, (hereinafter *ICCPR*), relates in a comprehensive manner to all of the rights embodied in that Covenant, not to adopt a similar approach in drafting an Optional Protocol to the *ICESCR* would be to directly challenge the universality, interdependence, indivisibility and interrelatedness of all human rights.<sup>24</sup> For this reason, an Optional Protocol to the *ICESCR* should clearly address *all* of the rights and State obligations enshrined in the *Covenant*.

#### (b) State Obligations to Respect, Protect and Fulfil *Covenant* Rights

As with the first Optional Protocol to the *ICCPR*, an Optional Protocol to the *ICESCR* should address both negative and positive State obligations associated with the realisation of *Covenant* rights. In particular, an Optional Protocol to the *ICESCR* should entertain complaints and empower an inquiry procedure where States parties violate their obligations to respect, protect and fulfil-facilitate/fulfil-provide *Covenant* rights.

The obligation to *respect* requires States parties to refrain from interfering with the enjoyment of *Covenant* enshrined economic, social and cultural rights. This is a negative obligation that mandates States parties to act in a way that does not violate economic, social and cultural rights and/or infringe on an individual's freedom to access these rights. Within this context, States parties must "respect the freedom of

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<sup>24</sup> Arambulo, K., *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural Aspects*, Intersentia, Antwerpen: 1999 at 235. See also van Hoof, F., "Discussion on the Draft Optional Protocols" in van Hoof, F. and Coomans, F., eds., *The Right to Complain About Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, Utrecht: 1995 at 212. See also See United Nations reference document E/C.12/1992/WP.9, paragraph 37. Following a comprehensive approach in drafting an Optional Protocol to the *ICESCR* would not preclude the institution of procedural safeguards that would ensure that the instrument is not abused. By way of example, while a comprehensive approach was utilised in drafting the first Optional Protocol to the *ICCPR*, in interpreting Article 1 of this Covenant, the United Nations Human Rights Committee instituted procedural safeguards so as to prevent the right to self-determination from being the subject of communications. See *Ominayak v. Canada*, Communication No. 167/1984, Official Records of the General Assembly, forty-fifth session, Supplement No. 40 (A/45/40), vol. II, annex IX, section A at 1-30.

the individuals to take the necessary actions and use the necessary resources – alone or in association with others.”<sup>25</sup>

The obligation to *protect* requires States parties to prevent *ICESCR* rights abuses by third parties. In this, States parties must take “measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the infringement of his material resources.”<sup>26</sup>

The obligation to *fulfil* encompasses State party obligations to *facilitate* access to and/or *provide* for the full realisation of economic, social and cultural rights. This is a positive obligation. The obligation to *facilitate* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and means to ensure the realisation of *Covenant* rights. The obligation to *provide* requires States to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal.<sup>27</sup>

State obligations under the Optional Protocol to the *ICESCR* must encompass both negative and positive obligations, thereby reinforcing the universality interrelatedness and indivisibility of all human rights. Such an approach would also serve as a reminder to the international community, through the *ICESCR*/Optional Protocol working group, of the importance it attaches to economic, social and cultural rights issues and seriousness with which it now responds to violations.

### **(c) An Optional Protocol Complaint's and Inquiry Procedure**

Conceptualised as a complaint's mechanism and an inquiry procedure, an Optional Protocol to the *ICESCR* would possess the potential to significantly contribute towards the realisation of *Covenant* enshrined economic, social and cultural rights.

An Optional Protocol *complaint's mechanism* would provide individuals and groups with access to an international adjudicative procedure. Under this procedure, individuals and/or groups could communicate directly with the United Nations Committee on Economic, Social and Cultural Rights, (“the Committee”), to seek and obtain remedies for specific violations of rights contained in the *Covenant*.

An Optional Protocol’s inquiry procedure would empower the Committee to initiate an investigation into particularly grave or systematic abuses of *Covenant* rights. An inquiry procedure would reinforce an Optional Protocol’s complaints procedure as it would: (i) Open an avenue to address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of *Covenant* provisions; (ii) Allow grave and/or systematic *Covenant*

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<sup>25</sup> Asbjørn Eide, "Realisation of Social and Economic Rights. The Minimum Threshold Approach", International Commission of Jurists The Review 1989, Issue 43, 40, 1989, p. 43. See also Maastricht Guidelines on Violations of Economic Social and Cultural Rights, January 1997, para. 6.

<sup>26</sup> *Ibid.*, (Eide) at 42.

<sup>27</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6. See also Committee on Economic, Social and Cultural Rights, General Comment 12, United Nations document reference, E/C.12/1999/5, para. 15.

violations to be investigated where individuals or groups were unable to utilise the complaint's mechanism for reasons including fear of reprisals; and (iii) Enable a more-timely response to grave and/or systematic violations of the provisions of the *Covenant*, and to continuing violations in particular.<sup>28</sup>

**(d) Standing to Lodge an Optional Protocol Complaint**

At a minimum, parties who possess the ability to initiate a complaint, (standing), under an Optional Protocol to the *ICESCR*, should include:

- (i) Individuals and group of individuals<sup>29</sup> who have been victims of violations of *Covenant* rights by State parties;
- (ii) Representatives of individuals or groups of individuals empowered to initiate complaints *on behalf of* individual and collective victims.

The importance of expressly acknowledging the competence of representatives, particularly non-governmental organizations and national human rights institutions to launch complaints on behalf of individual and groups victims of *ICESCR* violations cannot be underestimated. Under existing instruments, complaints *on behalf of* individual and group victims have either been specifically included<sup>30</sup> or such representative standing has been provided through adjudicative interpretation.<sup>31</sup> The significance of allocating standing to such representatives is rooted in the fact that these types of communications play an essential role in initiating international complaint's procedures, particularly where victims face the risk of ill-treatment or other retaliation for directly engaging in the process.<sup>32</sup>

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<sup>28</sup> Inter-American Institute of Human Rights, *Optional Protocol, Convention on the Elimination of all Forms of Discrimination against Women*, Costa Rica: 2000 at 71-72. An Optional Protocol to the *ICESCR* inquiry procedure could be modelled after either Article 20 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Article 8 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women*, both of which authorise inquiry procedures in prescribed situations.

<sup>29</sup> Nowak, M., "The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" in International Commission of Jurists, *The Review: Economic, Social and Cultural Rights and the Role of Lawyers*, France: 1995 at 160. Limiting standing/ability to initiate complaints under an Optional Protocol to the *ICESCR* to individuals would be to prevent to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

<sup>30</sup> Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims of State party *ICESCR* rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* which states "Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent", Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 77 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

<sup>31</sup> *Supra* (Arambulo), note 1 at 223, 233-4. Through the practice of the United Nations Human Rights Committee, communications submitted *on behalf of* victims of State party *ICCPR* violations have been accepted.

<sup>32</sup> *Supra* note 3 at 43. See also *supra* note 4 at 161.

**(e) State Party Reservations Under an Optional Protocol**

Precluding reservations to the Optional Protocol<sup>33</sup> to the ICESCR would represent a significant commitment by States parties which ratify the Protocol, to uphold the integrity of internationally recognised economic, social and cultural rights. Excluding the use of reservations would be appropriate as:

- (i) The *raison d'être* of an Optional Protocol would be to assist people in realising their economic, social and cultural rights as enshrined in the *ICESCR*. As a tool to both complement and strengthen the *Covenant*, to allow State party reservations to an Optional Protocol would be to undermine its potential as a tool for the full realisation of economic, social and cultural rights;
- (ii) An Optional Protocol would by its very nature be optional and as such, reservations that curtailed its applicability would be unnecessary;
- (iii) An Optional Protocol would be a procedural instrument as it would neither introduce new nor expand present economic, social and cultural rights obligations that States parties accepted through their ratification of the *Covenant*. An Optional Protocol would thus merely serve as a means through which States parties would be encouraged to realise existing *ICESCR* obligations.
- (iv) An effective Optional Protocol must recognise the indivisible and interdependent relationship amongst all *Covenant* rights. To allow States parties to individually select the *ICESCR* rights subject to an Optional Protocol strike at the core this relationship and the instruments ability to protect and promote *Covenant* rights. Such a selective approach would open the door to arguments as to the hierarchy of and inequality between economic, social and cultural rights, thereby encroaching upon the universality, interdependence, indivisibility and interrelatedness of all human rights.<sup>34</sup> Further, permitting the selection of economic, social and cultural rights subject to the Optional Protocol mechanisms would risk that some States parties would enhance their international prestige, through ratification, while restricting the instrument's substantive application;
- (v) State party concerns that might prompt reservations with regard to specific aspects of an Optional Protocol procedure could be accommodated through the provisions of the instrument itself.

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<sup>33</sup> Article 17 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* explicitly states "No reservations to this Protocol may be permitted"

<sup>34</sup> The United Nations Division for the Advancement of Women Department of Economic and Social Affairs, *The Convention on the Elimination of All Forms of Discrimination Against Women, The Optional Protocol: Text and Materials*, United Nations: 2000, at 49-50. See also *supra*, note 3 at 98-99. See also *supra* note 1 at 236.

#### **IV. THE DRAFTING OF AN OPTIONAL PROTOCOL TO THE ICESCR: AVAILABLE RESOURCES**

In considering options regarding the elaboration of an Optional Protocol to the *ICESCR*, the undersigned urge the open-ended working group to recommend the drafting of an Optional Protocol text to the 60th session of the Commission on Human Rights as conceptual issues related to this procedure have received a thorough analysis from a wide variety of sources that include:

- (i) The abundant experience and jurisprudence of national, regional and international bodies/instruments that employ adjudicative/inquiry procedures related to violations of economic, social and cultural rights. Reference may be made to the United Nations Human Rights Committee, the European Court of Human Rights, the European Committee on Social Rights, the *African Charter on Human and Peoples' Rights*, the *San Salvador Protocol*, (Inter-American Commission jurisprudence and country reports), the Optional Protocol to the *Covenant on the Elimination of Discrimination against Women*, the United Nations Educational, Scientific and Cultural Organization Complaint's Procedure, the International Labour Organisation Committee on the Freedom of Association and an abundance of national jurisprudence;
- (ii) A plethora of national and international and civil society conferences and instruments that have clarified the nature and scope of economic, social and cultural rights and States parties obligations under the *ICESCR*. Amongst these, the Declaration of Delhi (1959), the Law of Lagos (1961), the Limburg Principles on the Implementation of the *ICESCR* (1986), the World Conference on Human Rights (1993), the World Summit for Social Development (1995), the Bangalore Plan of Action (1995), the Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights (1996) and United Nations/International Commission of Jurists' conferences on the Optional Protocol and economic, social and cultural rights, (1999, 2000, 2001, 2002 and 2003), amongst numerous others, may be instructive;
- (iii) General Comments from the Committee that have clarified the nature and scope of States parties *Covenant* obligations and *ICESCR* rights including: international technical assistance measures; the nature of States parties obligations under article 2; the right to adequate housing; the economic, social and cultural rights of persons with disabilities and of older persons; the right to adequate housing, (forced evictions); the relationship between economic sanctions and respect for economic, social and cultural rights; the domestic application of the Covenant; the role of national human rights institutions in the protection of economic, social and cultural rights; plans of action for primary education; the right to adequate food; the right to education; the right to the highest attainable standard of health; and the right to water;
- (iv) Committee discussions, summary records, studies and reports that have provided further clarification concerning the nature and scope of economic, social and cultural rights as they relate to an Optional Protocol to the *ICESCR* and in particular its work on a draft Optional Protocol and related issues,

(E/C.12/1996/SR.44-49 and 54), (E/C.12/1996/CRP.2/Add.1), (E/C.12/1994/12), (E/CN.4/1997/105), (E/1993/22), and (E/C.12/1992/WP.9),

- (v) The draft Optional Protocol to the *ICESCR* prepared by the Committee for consideration by the United Nations Commission on Human Rights, (E/CN.4/1997/105); and
- (vi) Other sources that have further clarified conceptual issues related to an Optional Protocol to the *ICESCR* including: the experience of numerous United Nations Special Rapporteurs engaged in various aspects of economic, social and cultural rights;<sup>35</sup> the experience of the United Nations working group under which the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* was created; two reports from the independent expert appointed by the Commission on Human Rights, (resolution 2001/30), to examine the question of a draft Optional Protocol to the *ICESCR*; and the vast amount of doctrine concerning an Optional Protocol and economic, social and cultural rights issues.<sup>36</sup>

Given that conceptual issues related to an Optional Protocol to the *ICESCR* have received a thorough analysis from a wide variety of sources, the open-ended working group should utilise the above listed wealth of resources as a primary basis point from which the text of an Optional Protocol to the *ICESCR* may be drafted.

#### **(V) THE DRAFTING OF AN OPTIONAL PROTOCOL TO THE *ICESCR*: TIMING CONSIDERATIONS**

In conducting its deliberations, the *ICESCR*/Optional Protocol working group should bear in mind the Commission on Human Rights decision of 26 April 2000, (E/CN.4/2000/112), which endorsed that working group,

*(m)andates should always offer a clear prospect of an increased level of human rights protection and promotion, (and that), (i)n creating any standard-setting working group, the Commission should consider a specific time-frame within which the group would be called upon to complete its task. ... (i)n most instances, the established time-frame should not in principle exceed five years.*

Learning from the experiences of other processes that have led to the establishment of other Optional Protocols, the *ICESCR*/Optional Protocol working group should adopt a pragmatic yet determined approach towards the completion of its mandate.

**PLEASE SEND ENDORSEMENTS OF THE JOINT  
STATEMENT TO EDWIN BERRY, AT THE ICJ:  
[berry@icj.org](mailto:berry@icj.org)**

<sup>35</sup> For example, housing, education, food and development.

<sup>36</sup> See the work of P. Alston, K. Arambulo, M. Craven, A. Eide, D. Harris, P. Hunt, S. Liebenberg, B. Porter, E. Riedel, M. Scheinin and F. van Hoof, to name but a few.

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**Appendix No. 3**  
**Text of the Draft OP to the ICESCR**

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*The proposed text as of 18 December 1996*  
*PREAMBLE*

The States Parties to the present Protocol

**Emphasizing** that social justice and development, including the realization of economic, social and cultural rights, are essential elements in the construction of a just and equitable national and international order,

**Recalling** that the Vienna Declaration and Programme of Action recognized that all human rights are universal, indivisible and interdependent and interrelated,

**Emphasizing** the role of the Economic and Social Council, and through it the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) in developing a better understanding of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) and in promoting the realization of the rights recognized therein,

**Recalling** the provision of article 2 (1) of the Covenant pursuant to which 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,

**Noting** that the possibility for the subjects of economic, social and cultural rights to submit complaints of alleged violations of those rights is a necessary means of recourse to guarantee the full enjoyment of the rights,

**Considering** that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it is appropriate to enable the Committee to receive and examine, in accordance with the provisions of this Protocol, communications alleging violations of the Covenant,

Have agreed as follows:

**Article 1**

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and examine communications

from any individuals or groups subject to its jurisdiction in accordance with the provisions of this Protocol.

## **Article 2**

1. Any individual or group claiming to be a victim of a violation by the State party concerned of any of the economic, social or cultural rights recognized in the Covenant, or any individual or group acting on behalf of such claimant(s), may submit a written communication to the Committee for examination.
2. States Parties to this Protocol undertake not to hinder in any way the effective exercise of the right to submit a communication and to take all steps necessary to prevent any persecution or sanctioning of any person or group submitting or seeking to submit a communication under this Protocol.

## **Article 3**

1. No communication shall be received by the Committee if it is anonymous or is directed at a State which is not a party to this Protocol.
2. The Committee shall declare a communication inadmissible if
  - (a) does not contain allegations which, if substantiated, would constitute a violation of rights recognized in the Covenant;
  - (b) constitutes an abuse of the right to submit a communication; or
  - (c) relates to acts and omissions which occurred before the entry into force of this Protocol for the State Party concerned, unless those acts or omissions:
    - (i) continue to constitute a violation of the Covenant after the entry into force of the Protocol for that State party; or
    - (ii) have effects which continue beyond the entry into force of this Protocol and those effects themselves appear to constitute a violation of a right recognized in the Covenant.
3. The Committee shall not declare a communication admissible unless it has ascertained:
  - (a) that all available domestic remedies have been exhausted; and
  - (b) that a communication submitted by or on behalf of the alleged victim which raises essentially the same issues of fact and law is not being examined under another procedure of international investigation or settlement. The Committee may, however,

examine such a communication where the procedure of international investigation or settlement is unreasonably prolonged.

#### **Article 4**

1. The Committee may decline to continue to examine a communication if the author, after being given a reasonable opportunity to do so, fails to provide information which would sufficiently substantiate the allegations contained in the communication.
2. The Committee may, upon the request of the author of the complaint, recommence examination of a communication which it has declared inadmissible under article 3 if the circumstances which led to its decision have changed.

#### **Article 5**

If at any time after the receipt of a communication, and before a determination on the merits has been reached, a preliminary study gives rise to a reasonable apprehension that the allegations, if substantiated, could lead to irreparable harm, the Committee may request the State Party concerned to take such interim measures as may be necessary to avoid such irreparable harm.

#### **Article 6**

1. Unless the Committee considers that a communication should be declared inadmissible without reference to the State party concerned, the Committee shall confidentially bring to the attention of the State party any communication referred to it under this Protocol.
2. Within six months, the receiving State shall submit to the Committee explanations or statements and the remedy, if any, that may have been afforded by that State.
3. During its examination of a communication, the Committee shall place itself at the disposal of the parties concerned with a view to facilitating settlement of the matter on the basis of respect for the rights and obligations set forth in the Covenant.
4. If a settlement is reached, the Committee shall prepare a report containing a statement of the facts and of the solution reached.

#### **Article 7**

1. The Committee shall examine communications received under this Protocol in the light of all information made available to it by or on behalf of the author in accordance with paragraph 2, and by the State party concerned. The Committee may also take into account information obtained from other sources, provided that this information is transmitted to the parties concerned for comment.

2. The Committee may adopt such procedures as will enable it to ascertain the facts and to assess the extent to which the State party concerned has fulfilled its obligations under the Covenant.
3. As part of its examination of a communication, the Committee may, with the agreement of the State Party concerned, visit the territory of that State Party.
4. The Committee shall hold closed meetings when examining communications under this Protocol.
5. After examining a communication, the Committee shall adopt its views on the claims made in the communication and shall transmit these to the State party and to the author, together with any recommendations it considers appropriate. The views shall be made public at the same time.

#### **Article 8**

1. Where the Committee is of the view that a State Party has violated its obligations under the Covenant, the Committee may recommend that the State Party take specific measures to remedy the violation and to prevent its recurrence.
2. The State Party concerned shall, within six months of receiving notice of the decision of the Committee under paragraph 1, or such longer period as may be specified by the Committee, provide the Committee with details of the measures which it has taken in accordance with paragraph 1 above.

#### **Article 9**

1. The Committee may invite a State Party to discuss with it, at a mutually convenient time, the measures which the State Party has taken to give effect to the views or recommendations of the Committee.
2. The Committee may invite the State Party concerned to include in its reports under article 17 of the Covenant details of any measures taken in response to the Committee's views and recommendations.
3. The Committee shall include in its annual report an account of the substance of the communication and its examination of the matter, a summary of the explanations and statements of the State Party concerned, of its own views and recommendations, and the response of the State Party concerned to those views and recommendations.

#### **Article 10**

The Committee may make rules of procedure prescribing the procedure to be followed when it is exercising the functions conferred on it by this Protocol.

## **Article 11**

1. The Committee shall meet for such period as is necessary to carry out its functions under this Protocol.
2. The Secretary-General of the United Nations shall provide the Committee with the necessary staff, facilities and finances for the performance of its functions under this Protocol, and in particular shall ensure that expert legal advice is available to the Committee for this purpose.

## **Article 12**

1. This Protocol is open for signature by any State Party to the Covenant.
2. This Protocol is subject to ratification or accession by any State Party to the Covenant. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

## **Article 13**

1. This Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the fifth instrument of ratification or accession.
2. For each State ratifying this Protocol or acceding to it after its entry into force, this Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

## **Article 14**

1. This Protocol will be binding upon each State Party in respect of all territories subject to its jurisdiction.
2. The provisions of this Protocol shall extend to all parts of federal States without any limitations or exceptions.

## **Article 15**

1. Any State Party to this Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to this Protocol with the request that they notify him or her whether they favour a conference of State Parties for the purpose of considering and voting upon the proposal. If within four months from the date of such communication at least one third of the States Parties favour such a conference the Secretary-General shall convene such a conference under the auspices of the United Nations. Any amendment adopted by majority of the State

parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to this Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Protocol and any earlier amendment which they have accepted.

#### **Article 16**

- I. Any State Party may denounce this Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Denunciations shall be without prejudice to the continued application of the provisions of this Protocol to any communication submitted before the effective date of denunciation.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matters regarding that State.

#### **Article 17**

This Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

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**Appendix No. 4**

**UN Briefing Note on Open-Ended Working Group**

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**Open-ended Working Group on a draft optional protocol to the International  
Covenant on Economic, Social and Cultural Rights**

**First session**

**Mandate**

The Commission on Human Rights established the working group by its [resolution 2003/18](#).

In paragraph 13 of that resolution, the Commission requested “the working group to meet for a period of 10 working days, prior to the sixtieth session 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, inter alia, 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 and views submitted by States, intergovernmental organizations, including United Nations specialized agencies, and non-governmental organizations, and the reports of the independent expert (E/CN.4/2002/57 and E/CN.4/2003/53 and Corr.1)”.

**Participants**

The working group is an open-ended working group. This means that all UN Member and Observer States, inter-governmental organizations and non-governmental organizations with ECOSOC consultative status may attend public meetings of the working group.

**Documentation**

The provisional agenda of the session will be available as document [E/CN.4/2004/WG.23/1](#).

All in-session and background documents ready prior to the session will be available on the internet. Documents will also be available in the meeting room of the working group throughout the session.

**Dates**

The working group will meet from 23 February to 5 March 2004.

**Location**

The working group will take place in Room ..... at the Palais des Nations, Geneva.

### **Time**

The working group will have two daily sessions from 10:00 to 13:00 and from 15:00 to 18:00.

### **Registration and accreditation**

Experts and representatives of States, United Nations bodies, specialized agencies and other organizations including non-governmental organizations in possession of an identity badge issued by UNOG Security and Safety Section, valid for the duration of the session, will have unrestricted access to the working group.

Any other person without a UNOG identity badge should apply for accreditation to the session.

States and organizations wishing to accredit representatives to the first session of the working group are invited to complete the registration form (see below) and send it, together with their request for accreditation duly signed to Simon Walker either by fax on 022 917 90 10 or by mail to UNOG-OHCHR, CH-1211 Geneva 10.

Registration prior to the session will ensure that a badge will be available from 9am on 23 February 2004 at the *Villa les Feuillantines*, 8-14 Avenue de la Paix, 1211, Geneva, opposite the Palais des Nations. The accreditation office at the Villa les Feuillantines will remain open from 9:00 to 2:00 during the session.

**First session of the open-ended working group on a draft optional protocol to the  
International Covenant on Economic, Social and Cultural Rights (Geneva, 23  
February to 5 March 2004) Conference Registration Form**

**Date** \_\_\_\_\_

**Male**    **Female**  
   

**Family Name (capital letters)**

**Date of Birth (mm/dd/yyyy)**

**First Name(s)**

**Passport or National Identity Card Nr.**

**Issued (mm/dd/yy)**

**Valid until (mm/dd/yy)**

**E-mail address**

**Affiliation**

**Type of affiliation**

<input type="checkbox"/>	<b>Government</b>	<input type="checkbox"/>	<b>Non-governmental organization with ECOSOC consultative status</b>
<input type="checkbox"/>	<b><i>Intergovernmental organization/ Specialized agency</i></b>	<input type="checkbox"/>	<b>National human rights institution</b>
<input type="checkbox"/>	<b><i>Other (please specify)</i></b>		

**Address of organization**

**Telephone number**            **Fax number**  
                           

**Website**

Note: Working Group Registration Form should be accompanied by a request for accreditation duly signed and returned to Fax Nr. 0041 22 917 90 11.