
Fact Sheet No. 6

Critical components of an effective OP to the ICESCR

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."¹
- **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."²
- **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.

¹ 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.

² Eide, op.cit. note, p. 42.

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 rights, whenever they are unable to realise these rights through the means at their disposal.³

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 individuals⁴ 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 included⁵ or such representative standing has been provided through adjudicative interpretation.⁶ Providing standing to representatives of victims protects victims who face the risk of ill-treatment or other retaliation for directly engaging in the process.⁷

The role of NGOs in the Inquiry Procedure

³ *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.

⁴ 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.

⁵ 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*.

⁶ *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.

⁷ *Supra* note 3 at 43. See also *supra* note 4 at 161.

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.

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.⁸

⁸ 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.