

Claiming Women's Economic, Social and Cultural Rights

A Resource Guide to Advancing Women's Economic, Social and Cultural Rights Using the Optional Protocol and Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol and International Covenant on Economic Social and Cultural Rights

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International Network for
Economic, Social and Cultural Rights



International Women's Rights
Action Watch–Asia Pacific

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Foreword

Women's lives are impacted by a myriad of issues such as the frequent lack of basic services, *de jure* inequality, lack of accountability of States, corporations and other global actors, discriminatory cultural stereotypes, beliefs and the impact of harmful practices, religious fundamentalisms and development agendas which exclude consideration of the rights and experiences of women and differences among women. Within this context, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are the two key human rights instruments which provide a forum for demanding realization of women's human rights.

International Women's Rights Watch (IWRAP) Asia Pacific and International Network for Economic, Social and Cultural Rights (ESCR-Net) have been consistently promoting a holistic approach to realization of women's human rights, through mobilization and capacity building of civil society, women's rights organizations and NGOs advocating on economic, social and cultural rights. We have also sustained engagement with the Committees monitoring State Parties fulfillment of obligations under CEDAW and ICESCR to ensure that national level realities of women's economic, social and cultural rights are effectively raised internationally. With the adoption of the Optional Protocol to CEDAW and Optional Protocol to ICESCR, the role of activists and lawyers in using litigation to advance women's economic, social and cultural rights becomes key to changing the situation on the ground for women claiming their rights nationally, regionally and internationally as they offer important additional opportunities to seek accountability.

The collaborative work of IWRAP Asia Pacific and ESCR-Net since 2008 aims to facilitate the work of women's rights activists and NGOs and NGOs working on economic, social and cultural rights in advocating for the promotion and protection of women's economic, social and cultural rights using the substantive equality framework clearly articulated

in CEDAW and echoed by the CESC. Our work aims to build effective advocacy strategies and support activists and NGOs in their campaigning and engagement with key stakeholders. A key component of IWRAP Asia Pacific and ESCR-Net's collaborative strategy was the creation of resources to facilitate and support engagement of activists and NGOs with the mechanisms monitoring the implementation of CEDAW and ICESCR, namely, the CEDAW Committee and Committee on Economic, Social and Cultural Rights.

In 2009, IWRAP Asia Pacific and ESCR-Net began work towards the development of this *Resource Guide: Claiming Women's Economic, Social and Cultural Rights: A Resource Guide to Advancing Women's Economic, Social and Cul-*

tural Rights Using the Optional Protocol and Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol and International Covenant on Economic Social and Cultural Rights. This Resource Guide aims to improve the existing knowledge and understanding of activists and lawyers on international norms and standards, such as substantive equality, in addressing women's economic, social and cultural rights. It further aims to provide a practical and substantive guideline on using the two Optional Protocols in a comprehensive litigation strategy as part of advocacy

by these activists and lawyers in advancing the realization of women's economic, social and cultural rights.

Many women's rights activists may not be fully familiar with the range of existing international norms and standards on women's economic, social and cultural rights. Further, we have found that even where groups use both litigation and advocacy strategies together to realize women's ESCR, there still tends to be less reliance on economic and social rights standards and obligations and a much greater focus on non-discrimination. Finally, there is a significant gap in awareness amongst activists, NGOs and lawyers, of the potential and advantages of the international compliance mechanisms created under the two Optional Protocols.

Rebecca Brown, human rights lawyer and Deputy Director

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at ESCR-Net and Alison Aggarwal, expert from IWRAP Asia Pacific’s pool of resource persons, as the authors of this guide, have provided explanations on international standards on women’s economic, social and cultural rights, the intersection between the substantive equality framework and rights enshrined in CEDAW and the specific rights recognised in the ICESCR, the nature and meaning of substantive equality in relation to women’s economic, social and cultural rights, and the nature and potential of the two Optional Protocols—OP-CEDAW and OP-ICESCR—in claiming women’s rights nationally and internationally. ESCR-Net’s experience and expertise in promoting the use of strategic litigation as a tool in advocacy for advancing economic, social and cultural rights has helped in developing a practical checklist of do’s and don’ts for lawyers litigating for women’s economic, social and cultural rights, especially using both Optional Protocols.

The Resource Guide is enhanced in terms of quality of its content and delivery of information by the feedback and suggestions provided by the women’s human rights lawyers who attended the Pilot-testing and Capacity Building Workshop on Bringing Women’s ESCR Claims before OP-CEDAW and OP-ICESCR, organised by IWRAP Asia Pacific and ESCR-Net in Penang (Malaysia) on 3-7 December 2010. The Pilot-testing of the Resource Guide also provided an opportunity to both the organizations to connect with activists, lawyers and experts actively working on women’s economic, social and cultural rights under CEDAW and ICESCR. We are grateful for the contributions of case studies to the development of this Guide made by The Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer (CLADEM), Center for Reproductive Rights (CRR) and the Women’s Law Centre (WLC) in South Africa. It was a great privilege to work with experts, namely, Leilani Farha, expert on women’s economic, social and cultural rights and Executive Director, Centre for Equality Rights in Accommodation (Canada) and Caroline Lambert, member of IWRAP AP’s team on Drafting of OP-ICESCR and Executive Director, Y.M.C.A. (Australia). Both helped IWRAP Asia Pacific and ESCR-Net with their critical insights and suggestions and in shaping the Resource Guide in its present form. The contribution by Lisa Pusey, former staff of IWRAP Asia Pacific, and her immense commitment towards completion of the Resource Guide is much appreciated and acknowledged.

List of Abbreviations

ESC Rights	Economic, social and cultural rights
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CP Rights	Civil and political rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	Optional Protocol to the ICCPR, individual complaints
ICCPR-OP2	Second Optional Protocol to the ICCPR, abolition of the death penalty
OP	Optional Protocol
OP-CAT	Optional Protocol to the Convention Against Torture
OP-CEDAW	Optional Protocol to CEDAW
OP-CRC	Optional Protocol to the Convention on the Rights of the Child—currently being drafted
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICESCR	Optional Protocol to ICESCR
OP-ICRMW	Optional Protocol to the International Convention on the Protection on the Rights of All Migrant Workers and Members of Their Families
SPT	Sub-Committee on the Prevention of Torture
UDHR	Universal Declaration of Human Rights

It was a conscious decision to make this Resource Guide an online resource for activists and lawyers in the current cyber-age. The case studies included in the Resource Guide demonstrate the challenging and interesting work undertaken by activists and lawyers in different regions, but this is just the tip of the iceberg. There are many of you located in different regions who are promoting substantive equality for women through the use and implementation of international norms and standards on women's human rights. We would be pleased to hear from you to learn about the diverse issues, realities and violations of women's economic, social and cultural rights and efforts undertaken to challenge the status quo and patriarchal hegemony which limit the rights of women.

Acknowledgments

We express sincere thanks and appreciation for the work and commitment showed by the two authors of this guide—Alison Aggarwal, resource person, IWRAW Asia Pacific's pool of CEDAW experts, and Rebecca Brown, Deputy Director, ESCR-Net.

We appreciate the contribution by Paola Garcia Rey in assisting Rebecca Brown in development of the Guide.

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We are grateful to Caroline Lambert (YMCA, Australia) and Leilani Farha (Center for Equality Rights in Accommodation, Canada) for their insights and critical inputs provided as the two external reviewers, and to Lisa Pusey, who played a pivotal role in the conceptualisation and development of this Advocacy Guide, in her capacity as a Programme Officer at IWRAW Asia Pacific and as IWRAW Asia Pacific's resource person on CEDAW, OP-CEDAW and women's ESC rights. We appreciate consistent follow up and dedication of IWRAW Asia Pacific's Programme Staff, Gauri Bhopatkar and Ann Campbell, towards completion of this Guide.

We express special thanks to the women activists and lawyers from Asia, Africa, CEE-CIS and Latin America who participated in the Pilot-testing and Capacity Building Workshop on Bringing Women's ESCR Claims before OP-CEDAW and

OP-ICESCR, organised by IWRAW Asia Pacific and ESCR-Net in Penang (Malaysia) on 3-7 December 2010. Their comments, feedback and suggestions to the writers and the publishers have helped to deliver a practical Guide for application in advancing of women's economic social and cultural rights using CEDAW/ICESCR & OP-CEDAW/OP-ICESCR.

Thanks to Julieta Rossi, Sandra Ratjen, Ximena Andi6n Iba6nez and to the staff members and ex-colleagues at IWRAW Asia Pacific for their inputs during the development of the Guide.



Part One: Executive Summary

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1. Executive Summary

1.1 Women's Economic, Social And Cultural Rights

Economic, social and cultural rights have a particular significance for women because they go to the heart of issues related to poverty and inequality. From women's lived daily experiences and social and cultural roles, they know the central nature of ensuring adequate and nutritious food is available for the family, the importance of being able to easily access clean water, of having a safe and secure dwelling and access to a health centre and medicine. Women know that due to their work life being more often interrupted because of care-giving and child-rearing obligations, or because their work is not formalized, or because they have always been paid less than their male colleagues, their access to adequate social security benefits when they are older may be limited. Women know that school fees, lack of adequate sanitation and privacy, sexual harassment by male teachers and policies excluding young mothers all create significant barriers for girl's educational opportunities. Women know that gender stereotypes impact their ability to achieve equality and success in work, education, politics and at home. Women know the daily impact that poverty and inequality have in their daily lives. As a group, women have less social, economic and political power and are disproportionately poor. In the context of the global financial crisis and deepening economic inequality, women are affected disproportionately by the presence or absence of social programs and policies that ensure health care, education, child care, housing, food and water because women are the principal unpaid providers for these needs when the State fails to do so.

1.2 Benefits of Using International Conventions and Optional Protocols

The international human rights framework and mechanisms

provide individuals with the ability to claim food, housing, employment, education and healthcare as basic rights. When needs are transformed into rights, it allows individuals to claim that these rights be respected, protected and fulfilled; and to hold governments accountable if they fail to do so. The international human rights framework also allows us to connect to the broader international community which is struggling for these rights around the world and to use a common language which can promote solidarity

and movement-building, thereby increasing the impact of our work.

Within the international human rights system, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are particularly relevant for claims involving women's economic, social and cultural rights given these Committees' expertise on women's equality and substantive ESC rights, respectively. The treaty bodies monitoring State compliance with these two covenants should be central in any advocacy or litigation strategy involving women's ESC rights. Periodic review sessions are critical opportunities for civil society to bring inter-

national awareness to the situation of women's ESC rights in a country.

Further, both of these treaties have Optional Protocols which can be used to enhance the normative and accountability framework for women's ESC rights created by ICESCR and CEDAW. There are several benefits that Optional Protocols provide for the implementation of women's ESC rights and redress for violations of women's ESC rights. These include:

- creating an accountability mechanism at the international level for a State's failure to meet its obligations under the Convention;
- affording individuals and groups of women the possibility

- of an effective remedy where none was available at national level;
- identifying specific law and policy reforms that must be undertaken by a State which has breached its obligations under the Conventions;
 - building jurisprudence that can influence decision-making in national courts and by other human rights bodies;
 - clarifying the scope and content of the provisions of the Convention in the context of a specific factual situation, so that all States Parties have more detailed guidance as to their obligations;
 - creating opportunities for targeted capacity-building on advocacy and litigation of women's ESC rights;
 - providing a focus for campaigning by national groups on particular issues, through ratification campaigns or advocacy to promote implementation of the CEDAW and CESCR Committee's concluding observations and recommendations; and
 - encouraging strategic alliances among groups in civil society to support Optional Protocol related activities, including ratification, submission of communications, and inquiries.

1.3 About this Guide

This Guide is one of several initiatives aimed at bringing greater recognition and accountability to violations of women's economic, social and cultural rights. The Guide seeks to provide a practical tool for activists and lawyers to advance the protection and fulfilment of women's ESC rights through the use of CEDAW and ICESCR's normative framework and procedures in complimentary and mutually reinforcing ways.

The realisation of women's ESC rights implicates the norms enshrined in the nine international human rights treaties and in particular in the CEDAW and the ICESCR. While, it is important to work with all treaties, this Guide focuses on CEDAW and ICESCR as the two most relevant treaties. However, for women experiencing multiple discriminations, such as women with disabilities, racialised women or migrant women, conventions such as CRPD, CRC and CERD, will also be critical. Both CEDAW and the ICESCR through their normative framework and the specific expertise of their expert Committees, contribute to a greater

understanding of the intersection between discrimination against women and barriers to women's enjoyment of their economic, social and cultural rights. Using this analysis and expertise in tandem can provide a powerful tool for holding States accountable to fulfilling women's enjoyment of their economic, social and cultural rights.

Activists and lawyers have a key role to play in advancing human rights discourse and standards on women's economic, social and cultural rights. When engaging with the reporting and complaints procedures under CEDAW and ICESCR and their Optional Protocols, activists and lawyers can advance a gender-sensitive analysis of substantive economic, social and cultural rights and their relationship to the fulfilment of women's right to equality. Further, we hope this Guide will encourage and support women's rights advocates, activist and lawyers to take action to bring accountability to violation of women's economic, social and cultural rights and advance enjoyment of their rights. This Resource Guide aims to bring greater accountability and protection to women's economic, social and cultural rights by encouraging and supporting activists and lawyers to use CEDAW and CESCR in their national and international advocacy to advance women's human rights. This Guide also seeks to celebrate women's significant and often unrecognised contribution to economic, social and cultural life and hopes through the use of the mechanisms presented here, women's rights advocates can advance recognition and visibility of these contributions.

This guide lays out how organizations and individuals can use CEDAW and its OP as well as the ICESCR and its OP to implement women's economic, social and cultural rights. The manual also discusses how an Optional Protocol case might be framed, and what should be considered when determining which venue is most appropriate for the claim. The process of claiming one's rights requires strong collaboration between lawyers, and advocates, and the communities and women whose rights have been violated. This manual is intended to be a practical resource to inform the work of advocates, including lawyers, litigators and activists, to seek redress for human rights violations.

This resource guide is divided into the following parts:

Part One: Executive Summary

Part Two: An overview of women's economic social and

cultural rights and the general and specific obligations of states.

Part Three: An overview of Optional Protocols.

Part Four: An overview of the redress mechanisms available under OP-CEDAW.

Part Four: An overview of the redress mechanisms available under OP-ICESCR.

Part Six: An overview of advocacy and litigation strategies for claiming women's ESC rights.

The appendices contain:

- The texts of CEDAW, ICESCR and their respective Optional Protocols—OP-CEDAW and OP-ICESCR.
- Supplementary charts and case studies; and
- Additional resources on the use of OP-CEDAW and OP-ICESCR.



**Part Two:
An Overview of Women's ESC Rights
Under ICESCR and CEDAW**

2

2. An Overview of Women’s ESC Rights Under ICESCR and CEDAW

2.1 Women’s Economic, Social and Cultural Rights

Human rights are inherent and inalienable rights all people have because they are human and they are therefore universal.¹ These basic principles were first established in the UDHR² and later by the ICESCR³ and the ICCPR.⁴

States have obligations arising from the fundamental and inherent nature of human rights as well as under international human rights law and are legally accountable for violations of these duties.⁵ All human rights are “indivisible, interdependent, inter-related, and of equal importance for human dignity.”⁶ This principle recognizes that all human rights—economic, social, civil, political and cultural—are equally necessary to human dignity and equality. These categories fail to capture the inherent connectedness of all human rights and the necessity of their realization in ensuring women’s equality.

The position that economic, social and cultural rights are not in fact rights, or cannot be adjudicated, is outdated and has been proven incorrect by domestic, regional and international courts around the world.⁷ The adoption of the OP-ICESCR itself signals an important shift in the international recognition of justiciability of ESC rights. Furthermore, the traditional dichotomy between so-called “positive” and “negative” rights is also being scrutinized, given clear evidence that all human rights include both negative and positive obligations on States. That is, for most rights, States will be required to refrain from action and to take positive steps and invest resources to realize human rights.⁸

The full spectrum of obligations related to women’s economic, social and cultural rights are drawn from many sources. At the international level the two most relevant are the ICESCR and CEDAW. However, due to the interdependent and indivisible nature of human rights, as well as the need to address rights-violations in an intersectional way

based on the affected women or group of women (or girls) in a particular case; it will also be important to be familiar with the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, among others.⁹

In addition to international agreements and mechanisms, there are several important regional human rights agreements and mechanisms which are directly relevant to women’s economic, social and cultural rights, including:

- **African System**—Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol);
- **Inter-American System**—Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador);
- **European System**—European Social Charter and Council of Europe Convention on preventing and combating violence against women and domestic violence.¹⁰

The treaties listed above all provide relevant interpretative scope for each of the rights below. Depending on the region in which you are working in, or the affected group of women with whom you are advocating, your communication, shadow report or other advocacy should also reference the relevant understanding of women’s human rights as set out in those documents.¹¹ The list below is not exhaustive and how the issue is ultimately defined in the communication or inquiry should be context specific to the case you are highlighting.

2.2 Overview of Substantive Rights

Below are eight commonly recognized economic, social

All human rights are “indivisible, interdependent, inter-related, and of equal importance for human dignity.”



AP/BULLIT MARQUEZ

and cultural rights, which draw primarily on the ICESCR and CEDAW in their description. In the section below, women’s ESC rights are discussed in a way which highlights the links between CEDAW and ICESCR’s elaboration of these rights and obligations. It is important to note that both CEDAW and ICESCR highlight critical but different aspects of each right and obligation. CEDAW is central to arguing the discriminatory effect of ESC rights violations on women and ICESCR will be critical to elaborating the substantive scope of the rights at issue in the communication or inquiry.

➤ Non-Discrimination and Equality

(ICESCR, art 2(2), 3; CEDAW art 2, 3, 4, 5)

States may not discriminate against women, or groups of women, in law or in practice. Moreover, States have the obligation to ensure women and men the equal right to enjoy economic, social and cultural rights. Non-discrimination in law alone will not be enough for the State to satisfy

this obligation. States are required to **adopt appropriate legislative measures**, and modify or **abolish existing laws, customs and practices** to prohibit discrimination against women, in both the public and private spheres. States should also adopt **special measures** designed at accelerating de facto equality between men and women, including steps to modify social, cultural and familial patterns of conduct.

➤ Right to work

(ICESCR Article 6, 7, 8, 10(3); CEDAW Articles 5(a), 6, 11, 14(1))

The right to work entitles women workers to have the possibility to **earn their living through freely chosen work** and to **working conditions** that are safe and healthy and are not demeaning to human dignity. Workers must be guaranteed a **fair wage** that allows for a decent life for them and their families. There should be **no**

discrimination of any kind in employment or promotion, including those based on gender stereotypes. Equal work should be compensated with **equal pay**, and employers should provide their workers with periodic and paid **holidays**. The right to work also includes the **right to associate** with one another and bargain for better working conditions, the right to join the trade union of their choice and the right to strike as long as it is in conformity with the laws of the country. **Forced labour and trafficking are illegal** under international law and are grave violations of human rights. States must ensure child labour is prohibited under a certain age and when girls do work they must be provided additional protections.

➤ Right to social security including social insurance

(ICESCR Article 9, 10(2), 11(1); CEDAW Article 11(1)e, 11(2), 14(2)c).

States must recognize the right of everyone to **social security**, including **social insurance**, which guarantees that everyone will be provided with the **minimum goods and services** required for a dignified life. It is the duty of the State to make sure that everyone in its territory is afforded **protection without discrimination** from “(a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.” Special attention should be given to increasing access to social security benefits for disadvantaged and marginalized groups, such as **older women and women who work in the informal sector**. States must also ensure equalization of the compulsory retirement age for both men and women; ensure that women receive **equal benefits** in both public and private pension schemes; and guarantee adequate maternity leave for women, paternity leave for men, and parental leave for both men and women. Maternity leave, social security and childcare should be available to both formal and informal workers.

➤ Right to food

(ICESCR Article 11; CEDAW Article 14(g)(h), 16(h))

The right to food is essential for a dignified life and is

vital for the realisation of many other rights, such as the rights to life, health and education. The right to food is **not limited to just having a certain amount of calories** and necessary nutrients in one’s diet; it means that everyone should have **physical and economic access** to food or the means of producing it at all times. States must also **prevent discrimination in access to food or resources for the procurement of food**. The State must ensure that “women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so, and ensure that **women have access to or control over means of food production**, and actively to address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food.”

➤ Right to housing

(ICESCR Article 11(1); CEDAW 14(h), 16(h))

The right to housing should be understood as encompassing all those elements in a residence that are essential to a life with dignity: security from outside or domestic threats, a healthy living environment, **security of tenure, affordability, habitability, accessibility, culturally adequate, proximity to necessary services, and freedom to choose one’s place of settlement**. Government must **develop national policies** that will guarantee this right to all its citizens. Forced evictions are understood as a prima facie violation of the right to adequate housing. “The State itself must **refrain from forced evictions** and ensure that the law is enforced against its agents or third parties who carry out forced evictions.” If an eviction is absolutely necessary, it must be carried out in conformity with international human rights law and must not result in homelessness. No one should be deprived of some form of housing even in times of economic downturn.

➤ Rights to water and sanitation

(ICESCR Articles 11 and 12; CEDAW Article 14(h))

The CESCR has stated that the right to water is indispensable for leading a life in human dignity and is a **pre-requisite for the realization of other human rights**. Among other requirements, States must ensure the right of access to water and water facilities and services on

a **non-discriminatory basis**, especially for disadvantaged or marginalized groups and must ensure women's security is not threatened when physically accessing water. The right to water requires that everyone has access to an adequate amount of drinking water for **personal and domestic uses**. The full enjoyment of this right means access to water that is **affordable, clean and physically accessible**. Because **women have been traditionally excluded** in policy-making and decision-making on water, State Parties should ensure they participate. States should ensure that the allocation of water resources, and investments in water, **facilitate access to water for all members of society**. States should ensure that policies and entitlements related to access to water should account for the **disproportionate burden women bear in the collection of water** and its use within the household. States must ensure that women and girls have adequate access to **safe and clean sanitation facilities** at school, and in public buildings for those under state supervision.

➤ Right to education

(ICESCR Articles 13 and 14;
CEDAW Articles 5, 10, 11(c), 14(2)d)

Education has been regarded both as an end in itself and as a means for the individual and society to grow. It is the key to full economic, social, cultural, civil and political participation in society. It encompasses two broad components: enhancement of **access for all to education** on the basis of **equality and non-discrimination** and **freedom to choose** the kind and content of education, which is **available, accessible, acceptable and adaptable**. Access to primary education is a minimum core obligation; **universal primary education** must be compulsory and free of charge for girls and boys. States should implement **temporary special measures** to ensure **de facto equality** for girls and in all educational settings, including higher education. The State should adopt legislation and policies to ensure the **same admission criteria for boys and girls** at all levels of education. State Parties should ensure, in particular through information and **awareness-raising campaigns**, that families desist from giving preferential treatment to boys when sending their children to school, and that **curricula promote equality and non-discrimination**. State Parties must create

favourable conditions to ensure the **safety of children**, in particular girls, on their way to and from school as well as while there. Educational systems and policies must also account for **intersectional discrimination** which affects girl children, such as disability and migratory or citizenship status. States also must provide **vocational and adult education** and lifelong learning which are crucial for women's enjoyment of human rights, as well as to ensure de facto equality.

➤ Right to the highest attainable standard of physical and mental health

(ICESCR Article 11, 12; CEDAW Article 12, 14(b))

The right to health is related to the fundamental right of each person to **live in dignity**. It entitles people to enjoy the **best available health care**, but it is not limited to this. "The right to health is closely related to and **dependent upon the realization of other human rights**, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement." Safe and secure housing, a clean environment, freedom from harmful traditional practices, proper nutrition and accurate and accessible information on sexual and reproductive health, are also the bases for a healthy life. The right to health also entitles women to have **control over their bodies** and their health. States must **"eliminate discrimination** against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, confinement and during the post-natal period." **"Societal factors are largely determinative of the health status of women, ...and for that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups**, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities." States must ensure the greatest possible **availability, accessibility, acceptability and highest quality healthcare** for all on the basis of non-discrimination.

► Cultural rights

(ICESCR Article 15; CEDAW Articles 10(g), 13(c), 14(2)f)

Women have the right to **freely determine their identity, chose their religion and decide their own political beliefs**. Education plays an important role in promoting cultural diversity and forging tolerance among different groups. Governments should recognise and protect the **cultural diversity** of their citizens. Cultural rights cannot be used, however, as a justification for practices that **discriminate against women** or violate human rights. Institutional barriers and other obstacles must be overcome, such as those based on cultural and religious traditions, which prevent women from **fully participating in cultural life**, science education and scientific research, and directing resources to scientific research relating to the **health and economic needs of women** on an equal basis with those of men. Women must have the same opportunities to **participate in sports and other recreational activities** and reasonable accommodation should be made for women with disabilities. Women also have the right to **benefit equally from scientific progress**, and States should provide funding for research which directly targets diseases and conditions disproportionately affecting women.

► Marriage and Family

(ICESCR Article 10; CEDAW Articles 13(a), 14(1), 16)

Women have the right to **chose their marriage freely** and be equally represented, including in passing their nationality onto their children, dissolution of the marriage, family benefits, court and administrative proceedings, contracts and loans, guardianship of the children, choosing a profession and **ownership and inheritance of property**. States must also ensure that women have the ability to decide on the number and spacing of their children, have the same personal rights as to family name, ability to choose a profession and same rights and obligations within the family. **Special protections** should be afforded to mothers before and after childbirth, including paid leave and social security benefits. States should also account for the particular roles rural women have in ensuring the economic survival of their families. Family laws including child maintenance, child custody, marital powers and property should not reinforce **gender stereotypes**.

2.3 Principles and Obligations

There are also several key principles arising under both CEDAW and ICESCR that are necessary to refer to when making claims under either Optional Protocol and in general advocacy on women's ESC rights.

✓ Substantive Equality

The State obligation to ensure women's substantive equality in the enjoyment of economic, social and cultural rights under the ICESCR is captured in Articles 2(2) and 3 and Articles 1 and 2 of CEDAW. Ensuring a comprehensive application of the obligations in these Articles "requires an understanding that focuses upon the subordination, stereotyping, and structural disadvantage that women experience."¹² Utilizing the substantive equality framework to outline a communication allows a complainant to highlight the full spectrum of rights at issue in the case, both within the specific context of the violation while also accounting for the broader structural, cultural and social factors to be included.

States have the immediate duty to ensure that women are not being directly or indirectly discriminated against in access to, or fulfillment of, a substantive right.¹³ Both CEDAW and the CESCR have interpreted this obligation as not only requiring the State to prevent discrimination but to take positive steps to remedy past and structural discrimination that goes beyond enactment of laws—beyond legal or formal equality to substantive or de facto equality.¹⁴ Specifically, General Recommendations 28 of CEDAW and General Comment 16 and 20 from CESCR detail this obligation. States can violate principles of equality with policies and practices that on their face value are neutral, but that have a discriminatory impact or effect on certain disadvantaged groups.¹⁵

A great many of the claims which will emerge under the OP-CEDAW and OP-ICESCR in relation to women's ESC rights will require a more robust approach to analyzing these issues and in promoting the broader social, economic, political policies needed to realize women's ESC rights. Claimants will need to ensure the substantive equality framework is integrated and utilized as the primary lens for analyzing women's ESC rights violations and in framing the request for a remedy.

For instance, when States develop social security and

assistance programs that deny women access to an income reasonably calculated to ensure an adequate standard of living they not only exacerbate the preexisting vulnerable situation of poor women, they also expose women to particular harms that reinforce their subordination and vulnerable status.¹⁶

A substantive equality analysis of the impact of social assistance on women in this example would show that due to the historic and socialized role of women in most societies, her ability to work throughout her lifecycle has been limited due to less access to quality education, childbirth, traditional family care-giving roles, and concentrations in part-time or informal work. This impacts women's ability to build a work and salary history which is often a key component in calculating social security. In addition, when social assistance funds do not accurately account for real costs, women disproportionately suffer as this may increase their exposure to domestic violence and sexual exploitation.

Therefore, the substantive equality approach requires States to acknowledge the actual impact policies and practices have on women, looking at the particular context and take positive measures to ensure equal access and equal benefits for women.

The substantive equality approach highlights that State must have an active role in providing and facilitating the development of comprehensive economic and social policies and programs which account for the differing needs and circumstances of women.¹⁷ "The fact that, for women, poverty enlarges every dimension of women's inequality, not just the economic dimension.(...) without access to adequate social assistance and social services, including transitional housing, access to training and education, and effective legal rights...women are much less able to resist or escape their subordination."¹⁸

The requirement of **temporary special measures** is another example of positive measures required to combat discrimination and is a State obligation arising out of Article 4 of CEDAW and Article 2(2) of ICESCR (as interpreted in General Comment 20). It is a method that CEDAW developed to accelerate women's substantive equality, even if formal equality already exists.¹⁹ Temporary special measures require governments to evaluate discrimination against women "in a contextual way" and take affirmative steps to transform the current structures which perpetuate women's

Substantive equality in the Inter-American Human Rights System

The Inter-American System has been increasingly integrating the notion of structural discrimination and inequality in the analysis of its recommendations. The Inter-American Commission and Court have moved towards a concept of material or structural inequality that recognizes that certain sectors of the population are disadvantaged in exercising their rights, due to legal and factual obstacles and consequently require the adoption of special measures to guarantee equality. This implies the necessity of differential treatment when, due to circumstances affecting a disadvantaged group, identical treatment will in actual effect result in discrimination or fail to address the discrimination as experienced by that particular group. It also requires an examination of the social trajectory of the alleged victim, the social context in which the norms and policies are considered, and the vulnerability of the social group in question.

In *Niñas Yean y Bosico vs. República Dominicana*, the Inter-American Court held "that the binding legal principle of equal and effective protection of the law and non-discrimination mandates that the States, in regulating the granting of citizenship, should refrain from creating regulations that discriminate on their face or in effect against certain sectors of the population. Moreover, States must combat discriminatory practices at all levels, especially in government, and ultimately must adopt the necessary affirmative measures to ensure actual equality under the law for all persons. (Inter-American Court on Human Rights, *Niñas Yean y Bosico vs. República Dominicana*, September 8, 2005.)

inequality.²⁰ Temporary special measures should be distinguished from more general positive measures or longer term policy changes required to realize equality for women and girls. Rather than permanent changes in social policy, temporary special measures can be invoked to deal with particular issues adversely affecting women's human rights. The duration of the measure is not fixed, and may be necessary for a long period of time, but the concept is that the

Substantive Equality and Disability

For example, women with disabilities encounter a particular historic and systemic situation of discrimination based not only to social constructions of gender but also due to the long-accepted medical model of disability. The medical model posits that women with disabilities are naturally excluded from social functions because medical conditions that impede participation. This has meant that women with disabilities face two deep layers of social and economic exclusion related to gender and disability. Disability advocates have long argued that social conditions of exclusion, rather than inherent biological or medical differences, form the main barrier to active participation of women with disabilities in society.²⁸

measure will be discontinued once equality is reached.²¹

The obligation of non-discrimination and therefore the obligation to ensure both women and men have equal right to the enjoyment of ESC rights is **non-derogable** (the State is not allowed to place limitations on the right).²² In addition, the CESCR has drafted General Comment 16 to Article 3 on the equal right of men and women to the enjoyment of all economic, social and cultural rights. General Comment 16 integrates the framework of substantive equality and temporary special measures into the ICESCR²³ and this has been reflected in some of the subsequent General Comments adopted by the CESCR.²⁴ The Committee affirmed that in some cases this may mean the State will need to take measures specifically favorable to women, which “suppress conditions that perpetuate discrimination” in order to achieve substantive equality.²⁵ Further, General Comment 20 notes that States must “immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.”²⁶

Intersectionality

Within this framework it is critical to also integrate the intersectionality dimension of the principle of non-discrimination. For example, General Comment 6 of the CESCR on older persons extrapolates the multiple forms and intersectionality of discrimination experienced by older women and

provides a comprehensive interpretation of State obligations in this context. In particular it highlights the fact that the “discrimination older women experience is often multidimensional, with age discrimination, compounding other forms of discrimination based on sex, gender, ethnic origin, disability, poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds. Older women who are members of minority, ethnic or indigenous groups, or who are internally displaced or stateless often experience a disproportionate degree of discrimination. This is equally true for indigenous women, women with disabilities, lesbians, minority women, migrant women, girls, etc.”²⁷

If you are submitting a communication under the OP-CEDAW or OP-ICESCR on behalf of a woman experiencing multiple forms of discrimination, it is critical that you detail the ways in which the denial of the ESC rights is particularly experienced by the woman or group of women represented in your complaint, highlighting how this denial of access to a substantive right has been exacerbated or experienced differently due to intersectional discrimination.

We can see examples of the medical model play out in the case of *Gauer and Others v. France*, where five women with intellectual disabilities, each under guardianship, were sterilized without their informed consent and against their wishes.²⁹ The doctors claimed the sterilizations were medically necessary and in the best interests of these women. No due process procedures were conducted to actually examine whether these decisions were correct. In order to effectively redress this violation which resulted from discrimination both because they are women, but also because they have intellectual disabilities, understanding the multiple layers of social and cultural discrimination surrounding gender and disability at play in this case are key.

✓ Respect, Protect and Fulfill

All human rights require States to meet the immediate obligations to respect and protect. The obligation to respect requires States to refrain from actions that directly or indirectly discriminate against women and infringe on their enjoyment of ESC rights. States Parties must not adopt or repeal laws, policies, or programs (including those which appear neutral on their face) which adversely impact women’s equal enjoyment of ESC rights.³⁰

The obligation to protect requires States to take steps directed at eliminating of prejudices and gender-based stereotypes; to adopt constitutional and legislative provisions on equality and non-discrimination between men and women; to ensure administrative programs and institutions to protect against discrimination against women; and ensure effective remedies and redress.³¹ Importantly, States must monitor and regulate the conduct of non-State actors, including corporate actors, to ensure equal rights of women to ESC rights, including where public services have been partially or fully privatized.³²

The third obligation on all States with regard to human rights is the obligation to fulfill. Despite the generally progressive nature of obligations to fulfill ESC rights, the Covenant defines at least two obligations of immediate character under the ICESCR: (1) “to take steps” to allow for continuous progress in the realization of ESC rights, (2) on a basis of non-discrimination.³³ Further in General Comment 16, CESCR notes its “[t]he equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States Parties.”³⁴

Under the immediate obligation to “take steps,” these steps must be deliberate, concrete and targeted and States must detail the steps taken including developing a plan of action for implementation.³⁵ In particular, the CESCR has noted that access to effective remedies for violations of rights; implementation of laws and policies targeted at realizing women’s ESC rights; monitoring mechanisms to ensure implementation; implementation of human rights education and awareness-raising programs; and participation of women in all spheres of policy-making, are all particular obligations of States to fulfill women’s ESC rights.³⁶

Progressive Realization

The obligation to achieve progressively the full realization of the rights requires States Parties to exert its best efforts to implement ESC rights and move as rapidly as possible toward the ultimate goal of full realization of these rights. Under no circumstances should this provision be interpreted as allowing States the right to defer indefinitely efforts to ensure full realization. The State has the obligation to ensure on a continuous basis the progressive fulfillment of ESC rights.

Montreal Principles on Women’s Economic, Social and Cultural Rights, Section 10. Intersectionality

Many women encounter distinct forms of discrimination due to the intersection of sex with such factors as: race, language, ethnicity, culture, religion, disability, or socioeconomic class. Indigenous women, migrant women, displaced women, and non-national or refugee women experience distinct forms of discrimination because of the intersection of their sex and race, or their sex and citizenship status. Women may also confront particular forms of discrimination due to their age or occupation; family status, as single mothers or widows; health status, such as living with HIV/AIDS; sexuality, such as being lesbian; or because they are engaged in prostitution. Intersecting discrimination can determine the form or nature that discrimination takes, the circumstances in which it occurs, the consequences of the discrimination, and the availability of appropriate remedies. To ensure that all women enjoy the benefits of their economic, social, and cultural rights, specific measures are needed to address the ways in which women are differently affected in their enjoyment of a right as a result of the intersection of discrimination based on sex with discrimination based on other characteristics.

Where the text of a substantive right does not prescribe the particular steps the State must take to achieve its fulfillment, the Covenant requires both obligations of **conduct and result** and the State must show that the steps it is taking are in line with its capabilities.³⁷ The obligation of conduct requires the State to take action that is likely to result in realization of ESC rights, e.g. establishing a policy to progressively increase women’s access to acceptable, affordable, accessible and quality health care. The obligation of result requires that the State meet specific targets established to meet the substantive standard, e.g. ensuring that more women, including particular groups of women, are able to access to medical treatment.

The CESCR has stated that although the term “progressive realization” recognizes that full realization of all economic,

social and cultural rights will generally be achieved over a period of time, this should not be misinterpreted as depriving the obligation of all meaningful content. “It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”³⁸

✓ **Maximum Available Resources**

The CESCR has noted that although availability of resources serves as a measure by which to assess the steps taken, it does not alter the immediacy of the obligation and cannot be used to justify inaction. Where resources are demonstrably inadequate, the State must ensure the widest possible enjoyment of ESC rights under the circumstances. Even in times of severe resource constraints, such as now with the current economic crisis, States must adopt targeted

Example of Progressive Realization in Practice

In a case decided by the European Committee on Social Rights, the international body recognized that implementation by France of legislation relating to provision of education for persons with disabilities was extremely poor³⁹. The Committee ruled that the Government’s overall lack of progress in the area constituted a violation of the Charter, namely the right of persons with disabilities to education, the right of children and young persons to education, and the right of all persons to non discrimination. Although the Committee noted that the realization of the right was “exceptionally complex and particularly expensive”⁴⁰, and because of this the Government was permitted some flexibility; it still required that realization of social rights must occur within a “reasonable time, with measurable progress and to an extent consistent with the maximum available resources”⁴¹.

programs to protect the most disadvantaged and marginalized members of society.⁴²

Therefore, even if the State has moved forward in ensuring women’s ESC rights, if it has not done so to the maximum extent of all available resources, then it is in breach of this obligation.⁴³ For instance, a State’s systemic failure to reduce maternal mortality and provide access to quality maternal healthcare breaches its international obligations. The case study of *Alyne da Silva Pimentel v. Brazil*, decided by CEDAW in 2011 (see page 102) is an example of this point. In that case CEDAW recognized that despite Brazil’s significant efforts in areas of public health, its failure to prioritize reduction of maternal mortality and to devote the maximum available resources to guarantee that women can go safely through pregnancy and childbirth⁴⁴ created a violation.⁴⁵

Furthermore, the phrase “to the maximum of its available resources” refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.⁴⁶ Thus, resource availability should take into account budgetary availability but also the possibility for international cooperation, private resources and technical assistance.⁴⁷

✓ **Due Diligence**

An important component of a State’s positive obligations under the CEDAW Convention, is the principle of due diligence, as articulated in General Recommendation 28:

“Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor’s acts or omission may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work.”

Further, this obligation has been more recently elaborated in the context of gender-based violence. States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence. In *Ms VK v.*

Bulgaria the CEDAW Committee observed that States parties can be held responsible for private acts if they fail to act with due diligence to prevent violations of women's rights or to investigate and punish acts of violence against women.

As described in CEDAW's General Recommendation 19, "State parties must take reasonable steps to prevent human rights violations, investigate, impose the appropriate punishment and provide adequate redress to the victims." This is an area of State obligation which needs further development and definition, but in principle, this obligation will be applicable at a minimum in the contexts described above and perhaps more broadly.

✓ **No Retrogressive Measures**

The adoption of measures that reduce women's access to or enjoyment of their economic, social or cultural rights constitutes a violation.⁴⁹ The CESCR has interpreted that "[i]f any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources."⁵⁰

For example, in GC 19 on social security, the CESCR indicated that in evaluating retrogressive measures, it will examine whether: "(a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right...an unreasonable impact...or whether an individual or group is deprived of access to the minimum essential level...; and (f) whether there was an independent review of the measures at the national level."⁵¹

✓ **Minimum Core Obligations**

The "minimum core content" of a right refers to the

minimum essential levels of each substantive right, which must be guaranteed by the State.⁵² In this regard, the CESCR has stated 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*, fail-

ing to discharge its obligations under the Covenant."⁵³ The CESCR has emphasized that "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*."⁵⁴

As the case study *Alyne da Silva Pimentel v. Brazil*⁵⁵ shows (see page 102), States have to ensure access to quality medical treatment in conditions of equality and ensure appropriate services to women in connection with pregnancy and childbirth including pre-natal services and timely emergency obstetric care. The government "cannot, under any circumstances whatsoever, justify its non-compliance with core obligations," particularly the

right to health⁵⁶ and should devote the maximum available resources to guarantee that women can safely experience pregnancy and childbirth.⁵⁷

Though the substance of what the minimum entails for each substantive right remains in development, in the meantime, the minimum core concept acts as a burden-shifting device: if a State asserts that it has been unable to meet the minimum core obligation due to resource constraints, it is up to that State to demonstrate that it had attempted to use all available resources for the purpose of ensuring core rights for all, particularly the most vulnerable.⁵⁸

Most importantly, minimum core obligations should be considered a "floor"—meaning if conditions fall below this level, it will be *prima facie* (presumptive) evidence of a violation and the burden would fall upon the State to prove that they have attempted to meet this minimum using maximum available resources.⁵⁹ Once a State has met these very minimum requirements, it is still obligated to continuously realize ESC rights utilizing maximum available resources.

Some human rights advocates are skeptical of this framework, concerned that rather than establishing a floor it will

While the full realization of economic, social and cultural rights may be achieved progressively; deliberate, concrete and targeted steps must be taken immediately to meet the obligations defined in the Covenant.

establish a ceiling, where once States meet these basic levels they will not attempt to improve conditions further. This is a valid concern and one to which all human rights advocates must remain vigilant. The duty of progressive realization within maximum available resources continues after the minimum core obligations are met. Further minimum core obligations can be used to create pressure for immediate action by a State following ratification of the Covenant. Therefore, the concept of the minimum core may offer a useful short or mid-term strategy in which enjoyment of human rights in many contexts would be improved by simply meeting these essential levels, with an eye to demanding continuous implementation and fulfillment after these core obligations are met.⁶⁰

Maximum Available Resources

In assessing the State's obligation to take steps to the maximum of available resources, and whether they are "adequate" or "reasonable," the Committees may take into account the following considerations:

- (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;
- (b) Whether the State Party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) Whether the State Party's decision (not) to allocate available resources was in accordance with international human rights standards;
- (d) Where several policy options are available, whether the State Party adopted the option that least restricts Covenant rights;
- (e) The time frame in which the steps were taken;
- (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were nondiscriminatory, and whether they prioritized grave situations or situations of risk.

Source: CESCR, An Evaluation Of The Obligation To Take Steps To The "Maximum Of Available Resources" Under An Optional Protocol To The Covenant, U.N. Doc. E/C.12/2007/1 (21 September 2007).

For example, in the countries falling into the "least developed" category, claims brought under OP-ICESCR using the minimum core requirement to pressure their State to ensure basic nutritional requirements of school children, pregnant women and lactating mothers could be an important point of leverage. Further, in conflict or post-conflict countries, where funding has been prioritized for military expenditures often at the expense of basic needs, minimum core obligations could be useful to pressure for re-orientation and prioritization of available funding. However, in some contexts, particularly in more developed countries, the argument of the "reasonableness" of government action and the duty to take positive measures may be more useful and better address women's equality and substantive fulfillment of ESC rights.⁶¹

2.4 A Coherent Approach to Women's ESC Rights

As demonstrated by the overview of rights and obligations above, much of the framework for understanding State obligations as they relate to women's economic, social and cultural rights under both mechanisms is quite similar, particularly when a substantive equality approach is utilized. The framework of substantive equality allows for a nuanced understanding of how violations of economic, social and cultural rights may be experienced by women in various social and historical contexts, with various identities, while also integrating clear State obligations related to both conduct and result and to take positive measures to remedy these violations. Although its application under each treaty may not be identical, a thorough understanding of the substantive equality lens itself can be applied to all women's human rights claims to ensure that the remedy demanded, and the means used to implement the remedy, reflect the claimant's articulation of her situation and her needs.

Coherence is clearly important for claimants and rights holders in developing strong legal arguments on women's economic, social and cultural rights under either instrument. As the scope and obligations related to particular rights are developed through General Comments/Recommendations, Concluding Observations or under the Committees' views under both Optional Protocols, it is important that these developments are integrated in the understanding of that right throughout the treaty body system. This coherence

will also support domestic level courts in applying international legal standards at the national level and parliamentarians in designing policies which reflects the State's international legal obligations. In addition, Committee members will benefit from a more consistent interpretation of obligations during periodic reviews or through individual or inquiry procedures.

Furthermore, although CEDAW is an integrated treaty, meaning it includes both civil and political rights as well as economic, social and cultural rights, having a comprehensive understanding of the rights and obligations in both treaties can provide a more complete overview of State obligations for women's ESC rights. Furthermore, CEDAW adds value to women's ESC rights claims by allowing for interpretations which recognize the interrelated nature of civil and political and ESC rights. This helps to inform interpretations of women's rights by the CESCR and contributes to bridging the artificial divide between these rights in practice. Because the ICESCR provides the definitions of the full scope of the substantive content of each right and States' obligations in relation to ESC rights, using these documents in tandem to provide reference to the scope of each right can strengthen arguments made with regard to specific elements of State duties.

For example, although Article 12 of CEDAW creates the State obligation not to discriminate in the provision of health-care services and General Recommendation 24 further elaborates on a State's obligations for this Article,⁶² only Article 12 of the ICESCR and subsequent General Comment 14 lay out the normative content of the right to health: such as, it must be universal, non-discriminatory, available, accessible (both physically and financially), and of good quality.⁶³ While CEDAW is critical in defining States obligations with regards to substantive equality and non-discrimination, the ICESCR is necessary to elaborate the content of economic, social and cultural rights.

The integration of both the concepts of substantive equality and of temporary special measures from CEDAW into the articulation of State obligations under the ICESCR further shows the necessity of taking a holistic approach when addressing women's ESC rights. CEDAW provides a deeper analysis of the roots and multiple manifestations of discrimination against women in the protection, promotion and fulfillment of women's human rights. Therefore, in bringing

Competing Needs

As an advocate for women's ESC rights, you will find yourself confronting the reality of competing needs in relation to the realization of ESCR. Because of the nature of most economic and social rights, substantial funding and support will be required to ensure full realization. Inevitably, as you begin to call on your State, developed or developing, to realize women's ESC rights, they will claim an inability to do so, possibly based on competing needs and limited resources. While these claims of limited resources must be challenged, what are advocates to do in situations of truly limited funds?

An example of this question of approach can be examined in the ESCR Committee's response to the raising of school tuition in Germany which they examined during the May 2011 review session. The Committee was making additional recommendations to Germany on lowering the high rate of school fees, which had been raised by the State in the previous two years in the context of the financial crisis. Within this economic context, the CESCR concluded that schools fees should not be increased and the State should continue toward abolishing fees altogether.

In addition, there is precedence at the national level for the argument that financial crisis cannot be the basis for the retraction of existing social supports. In case no. 2000-08-0109 before the Constitutional Court of Latvia, employers were not paying into a social assistance fund for their employees because of the current economic crisis. The Court found that despite the financial situation, the State must ensure proper oversight and enforcement of legislation which requires businesses to maintain their contributions to the social assistance system.

Your approach to advocating for women's ESC rights—arguing for immediate implementation or progressive implementation over time—will largely depend on the context in which you are working, including: the extent of available resources of your State, friendliness of the government to women's ESC rights issues and whether there is widespread popular support for these issues.

attention to women's ESC rights under the ICESCR, a claim or shadow report will be strengthened by integrating standards of non-discrimination and understandings of intersectionality from CEDAW.

The need for this coherence is also evident in the fact that some claims of violations of women's economic, social and cultural rights can potentially be brought to either Committee. For example, if a woman experiences a violation of her right to healthcare because the State's policy only extends maternity leave benefits to those women in formal employment, she would be able to bring a claim under Articles 7, 10 and 12 of the ICESCR or Articles 11 and 12 of CEDAW. Or, if a woman experiences domestic violence and has no means of escaping the violence because the State has failed to ensure she has the legislative and practical means to access emergency and longer-term housing, she could bring a claim under Articles 2(2), 3, 11(1) and 12 of the ICESCR or Articles 2(a)(b)(e), 3, 5(a), and 16 of CEDAW. Therefore, it is important that the understanding of the scope of the rights and obligations under both of these mechanisms are consistent. Although the articulation of the right itself and duty of the State might not be exactly the same under each instrument, each Committee be made aware of interpretations of that right under other mechanisms in its evaluation of the communication or inquiry. This will contribute to the development of coherent and meaningful standards, which allow States to better meet their obligations and claimants to have better clarity on the scope of their rights.

The ICESCR, CEDAW and their Optional Protocols are powerful tools in demanding that women's economic, social and cultural rights be implemented and in providing access to justice for violations. A holistic understanding of the rights and obligations contained in these two Conventions, used in conjunction with each other, can increase accountability for women's ESC rights as well as provide the normative basis for demanding substantive advancement on women's human rights in a manner which reflects the critical importance of ESC rights in women's lives.

Notes

¹ *Universal Declaration of Human Rights (UDHR)*, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948).

² *Idem*.

³ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976

⁴ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

⁵ Rebecca J. Cook, (ed.), *HUMAN RIGHTS OF WOMEN*, (Philadelphia: Univ. of Penn Press, 1994), p. 21.

⁶ Vienna Declaration and Programme for Action, adopted by the World Conference on Human Rights in Vienna, (25 June 1993); UDHR, *Preamble*, supra n. 2 above.

⁷ See, e.g., *Government of the Republic of South Africa. & Ors v Grootboom & Ors*, 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others*, (2009) CCT 24/07; and *Khosa & Ors v Minister of Social Development & Ors.*, 2004(6) BCLR 569 (CC); *Sentencia T-760 of 2008 and Sentencia T-568 of 2006; Case of The Yean And Bosico Children V. The Dominican Republic*, Inter-American Court Of Human Rights, Judgment of September 8, 2005; *The Mayagna (Sumo) Awas Tingni Community Case*, Preliminary Objections Judgment of February 1, 2000; *Caso Comunidad Indigena Yakye Axa v. Paraguay*, Inter-American Court Of Human Rights, Judgment of 17 of June 2005; *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006; *European Roma Rights Centre v Greece*. Complaint No. 15/2003; *International Association Autism Europe v. France*, Complaint No. 13/2002; *International Commission of Jurists v Portugal*, No. 1/1998; and *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 13/2003; *Ms. A.S. v Hungary*, CEDAW/C/36/D/4/2004, Communication No. 4/2004. See, *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987); and *Länsman et al v Finland*, Communication No. 511/1992, UN GAOR, 52nd Session, UN Doc. CCPR/C/52D/511/1992, opinion approved the 8 November 1994.

⁸ Convention on Rights of Persons with Disabilities, Articles 4-5; See also, Sandra Liebenberg, *SOCIO-ECONOMIC RIGHTS JURISPRUDENCE UNDER A TRANSFORMATIVE CONSTITUTION*, (Claremont: Juta & Co. Ltd, 2010,) at p. 54-59.

⁹ For a complete listing of International and Regional Human Rights treaties, see: <http://www1.umn.edu/humanrts/treaties.htm>.

¹⁰ Article 14 of the Association of South East Asian Nations (ASEAN) Charter, adopted in Singapore on 20 November 2007, established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2010. The AICHR is currently drafting the ASEAN Human Rights Declaration.

¹¹ See also *Report of the United Nations High Commissioner for Human Rights 2008*, UN Doc E/2008/76, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/374/93/PDF/N0837493.pdf?OpenElement>

¹² *Montreal Principles on Women's Economic, Social and Cultural Rights*, *Human Rights Quarterly*, 26 (2004) 760–780, at p. 763.

¹³ See, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 14: The right to the highest attainable standard of health*, Twenty-second session, U.N. Doc. E/C.12/2000/4 (2000), para. 16; and CESCR, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, U.N. Doc. E/C.12/GC/20 (2009), at para. 7 and para. 20 in which the CESCR states that, for instance, "...the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men".

¹⁴ Audrey Chapman and Sage Russell, (eds.), *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, (Oxford: Intersentia, 2002), at p. 6.

- ¹⁵ Victor Abramovich, “From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System,” *Sur International Journal on Human Rights*, Vol. 6, No. 11, (Dec. 2009).
- ¹⁶ See, Gwen Brodsky and Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty,” *Canadian Journal of Women and the Law*, Vol. 14 (2002), pp. 184-219.
- ¹⁷ For example, in Canada, the Supreme Court rejected the British Columbian provincial government’s arguments that the right to equality did not require governments to allocate resources in healthcare in order to address disadvantages of particular groups such as the deaf and hard of hearing (*Eldridge vs. British Columbia* (Attorney General) [1997] 2 S.C.R. 624, par. 87). Brazilian courts have held that the right to health of children requires a higher level of prioritisation and that to “submit a child or adolescent in a waiting list in order to attend others is the same as to legalise the most violent aggression of the principle of equality” (BRAZIL, Resp. 577836, 2003).
- ¹⁸ See Brodsky and Day, supra n. 17, above, “Deprivations associated with lack of access to the means necessary to meet basic needs should be understood to engage rights to security of the person, no matter who the affected individual is. However, the particular and disproportionate effects on women of being in a condition of extreme economic vulnerability require recognition that government denials of adequate social assistance constitute a violation of women’s right to equality.”
- ¹⁹ Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 25* On article 4, paragraph 1, on temporary special measures, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004), para 19; See also, Leilani Farha, “Women Claiming Economic, Social and Cultural Rights—The CEDAW Potential,” in Malcolm Langford (ed), *SOCIAL RIGHTS JURISPRUDENCE EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (Cambridge: Cambridge Univ Press, 2008) p. 553-68.
- ²⁰ CEDAW, General Recommendation No. 25, Idem, para 10.
- ²¹ CEDAW, General Recommendation 25, supra n. 20 above, at para. 20.
- ²² CESCR, *General Comment 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Thirty- fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005), para 17.
- ²³ Idem, para 10-15.
- ²⁴ CESCR, *General Comment 19 : The right to social security* (art. 9) (Thirty- ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008), para 32; CESCR General Comment 20, supra n. 14 above, para 8-9.
- ²⁵ CESCR, General Comment 16, supra n. 23 above, para. 15.
- ²⁶ CESCR, General Comment 20, supra n. 14 above, para 8(b).
- ²⁷ CEDAW, *General Recommendation 28: on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, (16 December 2010); and CESCR, General Comment 20, supra n. 14 above.
- ²⁸ Michael Ashley Stein, “Disability Human Rights,” *California Law Review*, Vol. 95, p. 75-122 (2007).
- ²⁹ *Joelle Gauer and Others v. France*, European Court of Human Rights, App No 61521/08, Amicus Brief submitted by Center for Reproductive Rights, European Disability Forum, INTERIGHTS, International Disability Alliance, and Mental Disability Advocacy Center, (16 August 2011) available at: <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Gauer%20v%20France%20Submission%20ECHR%20FINAL.pdf>
- ³⁰ CESCR, General Comment 16, supra n. 23 above, para 18.
- ³¹ Idem. para 19.
- ³² Idem. para 20.
- ³³ ICESCR, Article 2, supra n. 4 above; and CESCR, *General Comment 3, The nature of States parties’ obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para. 1.
- ³⁴ CESCR, General Comment 16, supra n. 23 above, para 16.
- ³⁵ CESCR, General Comment 3, supra n. 33 above.
- ³⁶ CESCR, General Comment 16, supra n. 23 above, para 21.
- ³⁷ Philip Alston and Gerard Quinn, “The Nature and Scope of State Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights,” *Human Rights Quarterly*, Vol. 9 (1987) at p. 185
- ³⁸ CESCR, General Comment 3, supra n. 33 above.
- ³⁹ European Committee on Social Rights, *International Association Autism Europe v. France*, Complaint No. 13/2002, November 4, 2003. The overwhelming majority (80-90 percent) of young adults and children with autism had no access to adequate educational services. Based on current rates of placements in special education, Autism-Europe estimated that it would take 100 years to erase the deficit in the official waiting list, which then stood at 39 514 persons (even higher under the official WHO definition). It was also argued that insufficient provision had been made for mainstreaming of education, early intervention, and teacher training and that the funding formula for special education took insufficient account of the number of children in need. The Government of France acknowledged the above failings but pointed to new funding allocations and programmes, even though many of these were targeted at all people with disabilities.
- ⁴⁰ Idem. The Committee recalled that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. State Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.”
- ⁴¹ Idem. Noting that there had been twenty years of national debate on the subject, and that the Disabled Persons Act had been passed in 1975, the Committee found that there was an unacceptable and chronic shortage of places. It also chided the Government for its restrictive definition of autism. The Committee was not, however, prepared to censure France’s method of funding special education through the State health insurance system, noting that this was a matter for State discretion.
- ⁴² CESCR, *An Evaluation Of The Obligation To Take Steps To The “Maximum Of Available Resources” Under An Optional Protocol To The Covenant*, U.N. Doc. E/C.12/2007/1 (21 September 2007) at para 4.
- ⁴³ See, for instance, African Commission on Human and People’s Rights, *Union Inter Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation Nationale des Droits de l’Homme au Sénégal and Association Malienne des Droits de l’Homme au Angola*, Communication No. 159/96 (11 November 1997). The communication addresses the illegal and arbitrary mass expulsion of West African nationals from Angola in 1996 mass expulsion, which included children, woman, and elderly, without distinction. The Commission conceded that African States in general and the Republic of Angola in particular are faced

with many challenges, mainly economic which compel States to resort to radical measures aimed at protecting their nationals and their economic from non-nationals. Whatever, the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Therefore, it concluded that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations “constitute a special violation of human rights.” This type of deportations calls into question a whole series of rights recognized and guaranteed in the Charter; such as the right to property, the right to work, the right to education and the principle according to which “the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.” See: http://www.achpr.org/english/_info/decision_Article_18.html

⁵⁹ CESCR, General Comment 3, supra n. 33 above, para. 10.

⁶⁰ Chapman and Russell, supra n. 15 above, at p. 9.

⁶¹ Liebenberg, supra n. 9 above, at p. 174.

⁶² CEDAW, General Recommendation 24, supra n. 56 above.

⁶³ CESCR, General Comment 14, supra n. 14 above, para. 12 (a-d).

⁴⁴ CEDAW, *General Recommendation 24: Women and health*, 20th Session. U.N. Doc. A/54/38 (1999), para 27.

⁴⁵ Accordingly, when analyzing the right to house and eviction measures adopted by State parties, the CESCR stated that where an eviction is implemented, “... the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available”[emphasis added]. See CESCR, *General Comment No. 7: Forced evictions, and the right to adequate housing* (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), para 16. In other words, upon eviction, not only is a State Party to the ICESCR obligated to provide housing (four walls and a roof, for example) to evictees, they must also ensure that the alternative housing that is provided is adequate.

⁴⁶ CESCR, “Maximum Available Resources,” supra n. 36 above.

⁴⁷ See, for example, CESCR, General Comment 19, supra n. 25 above, para. 61. “The Committee also wishes to emphasize that it is particularly incumbent on State Parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical, to enable developing countries to fulfill their core obligations.”

⁴⁸ CEDAW, *Ms. V.K. v. Bulgaria*, Communication No. 20/2008, (25 July 2011).

⁴⁹ Montreal Principles, supra n. 13 above, para 29.

⁵⁰ CESCR, *General Comment 15: The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002).

⁵¹ CESCR, General Comment 19, supra n. 25 above, p. 42

⁵² “The concepts of core content and minimum core content are not unique to ESC rights. An example of minimum core content in the area of civil and political rights can be found in the right to freedom from arbitrary detention. One element of the core content of this right is that a warrant for a person’s arrest must be obtained by the state and presented to the individual. Circle of Rights, Economic, Social and Cultural Rights Activism: a Training Resource, Module 8, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm>

⁵³ CESCR, General Comment 3, supra n. 33 above, para. 10.

⁵⁴ *Idem*.

⁵⁵ CEDAW, *Alyne da Silva Pimentel v. Brazil*, (Communication No. 17/2008).

⁵⁶ CESCR, General Comment 14, supra n. 14 at para 14.

⁵⁷ CEDAW, *General Recommendation 24: Women and health*, (20th Sess., par 27, U.N. Doc. A/54/38 (1999).

⁵⁸ CESCR, General Comment 3, supra n. 33 above, para. 10, although in later general comments, such as on in General Comment 14, supra n. 14 above, para 47, and General Comment 15, supra n. 49 above, para 40, the CESCR has moved more toward the position that there is no justification for failing to meet minimum core obligations.



**Part Three:
Optional Protocols—Human rights
complaints mechanisms**

3

3. Optional Protocols— Human rights complaints mechanisms

3.1 What is an Optional Protocol?

To enable individuals, groups of individuals or other States to directly raise complaints of human rights violations with specific treaty bodies, a number of Optional Protocol's have been created which provide individual complaints mechanisms for relevant treaties. In the UN Human Rights Treaty System, Optional Protocols do not amend the text of the original treaty, but rather specify some obligations (a substantive protocol) or create additional mechanisms to monitor compliance with the original instrument (a procedural protocol). So far, under the international human rights system, five of the supervisory Committees (CCPR, CERD,

CAT, CEDAW and now CESCR) can, under given conditions, receive individual complaints.

An Optional Protocol is a supplementary and separate treaty to the main human rights treaty. It is necessary for a member State to sign and ratify the Optional Protocol, in addition to the main human rights treaty. Optional Protocols provide an avenue of access to justice for individuals at international level.

The procedures they provide for can include an individual communication, an inquiry procedure and an inter-state procedure. The communications procedure enables individuals or groups of individuals to bring a complaint before the relevant treaty Committee alleging a violation of their human rights by the State. The inquiry procedure authorises the treaty Committee to investigate allegations of grave or systematic violations of human rights by the State Party. Under OP-ICESCR, a State Party must have explicitly “opted-in” to this procedure for it to be available. Included in some Optional Protocols, there is an inter-state procedure such as the OP-ICESCR which allows one State Party to the mechanism to bring a complaint against another State Party where that State has not fulfilled its obligations under the Covenant. However, this procedure must be explicitly accepted by both State Parties.

The Table at left lists human rights treaties that have individual complaints mechanisms.

There are also procedures for complaints which fall outside the treaty body system, through the special procedures under the Human Rights Council Complaints Procedure and through the Commission on the Status of Women.¹

3.2 Common and differing features of OP-CEDAW and OP-ICESCR

The OP-CEDAW and the OP-ICESCR both allow for a communications procedure and an inquiry procedure. The procedures for the CEDAW and ICESCR Optional Protocols are similar, but also contain slight differences (in bold).

Human Rights Treaties With Complaint Procedures

Treaty	Individual Complaints Mechanism (individual communications)
ICCPR	First Optional Protocol to the ICCPR
ICESCR	Optional Protocol to the ICESCR (also provides for an inquiry procedure) (opened for signatures in 2009)
CEDAW	Optional Protocol to the CEDAW (also provides for an inquiry procedure)
CERD	Article 14 of CERD
CRC	Optional Protocol to the CRC (opened for signatures in 2012)
CAT	Article 22 of CAT (also provides for an inquiry procedure)
CRPD	Optional Protocol to the CRPD
CMW	Art 77 of the CMW
CED	No individual complaints mechanism

Part Three

Common and Differing Features of OP-CEDAW and OP-ICESCR

Procedures	CEDAW	ICESCR
Communication		
Interim Measures	Request for interim measures made by the Committee to the State Party prior to considering admissibility or the merits, where its necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.	
Admissibility	Complaint is in writing	
	Complainant is not anonymous	
	Complaint is submitted on behalf of an individual or group of individuals	
	The facts occurred after the State Party agreed to the Optional Protocol, or the facts continued after that date	
	The complaint is not manifestly ill-founded	
	The claimant must be a victim of a violation of a right under the Convention	
	All domestic remedies are exhausted (or are unavailable or ineffective)	
	Limitation period: None	Limitation Period: Complaint must be submitted within 1 year of domestic remedies being exhausted
	The complaint has not been considered by the Committee or another international investigation or settlement procedure.	
Merits	Whether the matter is within the jurisdiction of the relevant treaty.	
	Whether the State has met its obligations under the relevant treaty.	
Remedies	Individual remedies aimed at redress and repairing the harm to the victim.	
	Systematic remedies (eg law reform)	
Friendly Settlement	Not available	The Committee makes available its offices to the parties to conduct conciliation with a view to reaching a mutually agreeable settlement
Inquiry	Information must be reliable	
	State Party must not have opted out of the inquiry procedure	Grave or systematic violation
	Grave or systematic violation	State Party must have specifically opted-in to inquiry procedure
Inter-State Procedure	Not available	A State Party can submit a complaint about alleged violation committed by another State Party. Both States must have explicitly opted-in .

Notes

¹In 2007, the Human Rights Council adopted the “UN Human Rights Council: Institution Building” (resolution 5/1), which is the basis for the establishment of a new complaint procedure for addressing consistent patterns of gross and reliably attested violations of human rights in a country. Under the CSW Communications Procedure, any individual, non-governmental organization or network may submit a communication on an alleged violation of human rights affecting the rights of women (www.un.org/womenwatch/daw/csw/communications_procedure.html).



Part Four:
**Optional Protocol to the Convention
On the Elimination of All Forms of
Discrimination against Women**

4

4. Optional Protocol to the Convention On the Elimination of All Forms Of Discrimination against Women

4.1 Overview

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW) was adopted on 6 October 1999 and entered into force on 22 December 2000. It is a separate treaty, open to States Parties to the parent Convention, CEDAW. The OP-CEDAW covers all the rights provided for in the CEDAW Convention, including discrimination in access to economic, social and cultural rights. The OP-CEDAW is procedural in nature and does not establish new rights.

Structure of OP-CEDAW

There are 21 Articles in OP-CEDAW which cover the following areas:

Articles 1-5	Communications Procedure;
Article 5	Interim Measures;
Articles 6-7	Procedural stages of communications procedure, CEDAW Committee's consideration of communication and outcome of its consideration;
Articles 8-10	Inquiry Procedure, including opt-out (Article 10);
Article 11	Obligation to ensure complainants are not subjected to retaliatory measures;
Articles 12-17	Publicity of activities related to OP-CEDAW by the CEDAW Committee and State Party, CEDAW Committee's authority to develop its rules of procedure, entry in force, prohibition of reservations to the OP (Article 17);
Articles 18-21	Procedure for amending OP-CEDAW, denunciations, official languages of the OP-CEDAW and transmission of OP-CEDAW text to State Parties.

The procedures under the OP-CEDAW are implemented by the CEDAW Committee, which consists of 23 international independent experts who monitor implementation of the CEDAW Convention and State Parties' compliance with the CEDAW Convention. States that are a party to the Optional Protocol recognise the competence of the CEDAW Committee to receive and consider complaints from persons within their jurisdiction alleging violations of their rights under the Convention.

The CEDAW Committee's, views, findings and recommendations under either the communication procedure or inquiry procedure are not legally binding. However, States Parties have a general legal obligation to act in good faith with regard to their participation in the procedures established by the OP-CEDAW and their obligations under the CEDAW Convention itself. Therefore, they are expected to comply with the CEDAW Committee's views, findings and recommendations.

The CEDAW Committee has established follow-up procedures designed to encourage the implementation of its recommendations under the OP-CEDAW.

Ratification

The OP-CEDAW is a separate treaty, which can only be ratified by States who are already parties to the CEDAW Convention. States Parties must ratify or accede to the OP-CEDAW, separately to the CEDAW Convention.¹ As of 18 March 2013 105 States Parties are signatories to the OP-CEDAW.

At the time of ratifying or acceding to OP-CEDAW States Parties can make a reservation to "opt-out" of the inquiry procedure by declaring that they do not recognise the authority of the CEDAW Committee to conduct inquiries. If a State Party does opt-out, the inquiry procedure cannot be used in relation to that State. States cannot opt-out of the communications procedure.

As of 18 March 2013 four of the States Parties that are



signatory to the OP-CEDAW have made reservations to opt-out of the inquiry procedure. These are Bangladesh, Belize, Colombia and Cuba.

4.2 Communications Procedure under OP-CEDAW

Although not legally binding, the communications procedure is characterised as “quasi-judicial” in nature because of the following characteristics:

- The procedure is adversarial in nature: both the complainant and the State against which the communication is being brought have an opportunity to present opposing arguments in written form to the CEDAW Committee.
- The CEDAW Committee assesses the sufficiency and credibility of evidence presented by the parties in order to reach a conclusion on the facts of the case.
- The CEDAW Committee applies legal rules in interpreting

the provisions of the CEDAW Convention at issue.

- In considering a communication, the CEDAW Committee members are expected to be impartial and independent.
- The CEDAW Committee’s views as to whether a violation has occurred represent an authoritative determination of the matter.

The OP-CEDAW sets out the requirements regarding the processing and consideration of communications and inquiries.

In addition, the CEDAW Committee has adopted Rules of Procedure that set out more detailed requirements regarding the processing and consideration of communications and requests for inquiries. The development of these is provided for in Article 14 of OP-CEDAW.

The Rules of Procedure cover requirements for the admissibility of communications, the Committee’s working methods for preparing decisions on communications, and the

rules governing the Committee's decision-making process.² They were based primarily on the UN Human Rights Committee's Rules of Procedure for the First Optional Protocol to the ICCPR. The jurisprudence of other human rights bodies with communication procedures can also be drawn upon to clarify the broad meaning of the procedural requirements found in the OP-CEDAW.

The diagram on pages 36-37 maps the main stages of the communications procedure, as outlined in the OP-CEDAW and its Rules of Procedure.

4.2.1 Submitting a complaint under the communication procedure

Individuals or groups of individuals from States which have ratified the Convention and its Optional Protocol can submit a complaint under the communication procedure.

Communications can also be submitted on behalf of individuals or groups of individuals with their written consent, or without such consent, where the complainant can justify acting on their behalf:

- Representatives can include lawyers, family members, a national or international NGO or any other representative designated by the victim(s).
- Evidence of consent can be offered in the form of an agreement to legal representation, power of attorney, or other documentation indicating that the victim(s) has authorised the representative to act on her or their behalf.
- Examples of situations where it may be justifiable to act on behalf of the complainant without their consent include:
 - o bringing a communication on behalf of a very large group of individuals—a "class" of victims—where it is impractical to get consent from each victim;
 - o The victim(s) faces a risk of ill-treatment or other forms of retaliation, including physical injury or economic loss, if the complainant consents to the communication on their behalf;
 - o The victim(s) may be in detention or other confinement, in serious ill health, or have the lack of legal authority to consent;

The Human Rights Committee has allowed representation

in the absence of authorisation³ where: it can be proven that the alleged victim is unable to submit the communication in person due to compelling circumstances, such as (i) following an arrest the victim's location is unknown;⁴ (ii) detained victims;⁵ (iii) when the death of the victim was caused by an act or omission of the State concerned;⁶ and (iv) proof that the alleged victim would approve of the representation.⁷

The practice implemented by the CEDAW Committee under the OP-CEDAW⁸ has required third parties seeking to act without the consent of the victim/s to submit a written explanation of the justification for such action, taking into account the specific context and circumstances of the case:

- the nature of the alleged violation;
- the circumstances that make obtaining the consent of the alleged victims unworkable or impossible;
- the capacity of the third party to represent the interests of the victims effectively, including attentiveness to the needs of victims; and
- the absence of any conflict between the interests of the victims and possible interests that third parties may themselves have in relation to the claim.

Communication No. 5/2005 Goekce v Austria

The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased)—The deceased victim was represented by two NGOs. The authors maintained that it was justified and appropriate for them to submit the complaint on behalf of the victim since the victim had died and would never be able to give consent. The authors also had the written consent from the City of Vienna office for Youth and Family affairs that was the guardian of the victim's children. The Vienna Intervention Centre stated that it was able to submit the complaint given that a) the family of the victims was its client and, therefore, had a personal relationship with the victim; and b) the Vienna Centre was an organization working in the area of domestic violence. The Committee accepted this argument and admitted the communication.⁹

Although there is no provision for direct submissions of *amicus curiae* information from third parties, such information will be considered if submitted by one of the parties. To this end, the Committee decided recently to revise its model

communication form (although the modifications have not yet been made) to include an instruction that expert information, including in an *amicus curiae* brief, must be:

- channeled through the author; and
- provided within a reasonable time after the original submission or within the deadline given to the author for this purpose.

The process for a communication is intended to be as straightforward as possible. The complainant does not need to be a lawyer or to have a legal representative to submit a complaint before the CEDAW Committee. However, the assistance of a lawyer or other trained advocate is often advisable given the legal and procedural intricacy of complaints. Legal advice may also improve the quality of the submissions in terms of the persuasiveness of the presentation of facts and how they represent a violation of economic, social and cultural rights. The United Nations does not provide legal aid or financial assistance for complainants and does not mandate that States Parties provide legal aid. Complainants should verify whether legal aid in their countries is available for bringing complaints under international mechanisms and whether non-governmental organisations offer assistance free of charge.

Some of the requirements for submitting a complaint contained in the text of the Optional Protocol and the Rules of Procedure, include:

a) The complaint must be in writing in one of the six official UN languages (English, French, Spanish, Chinese, Arabic and Russian).

- Oral, recorded or video-taped communications are not allowed. However, communications may be accompanied by documentation and information in various formats to support and/or to prove the violation of the rights at issue.

b) The communication must not be anonymous (individuals may however request that identifying information is not published in the Committee’s final decision).

- There must be an identifiable “victim”—an individual or group of individuals that have been personally and directly affected by a concrete violation of a human right recognized under CEDAW.

- Status as a victim can be based on actual harm already suffered, or potential harm arising from a risk that an offending law may be applied to the victim.¹⁰
- The requirement for communications to not be anonymous can make it difficult for many vulnerable women, such as women victims of violence, to bring complaints forward. The author can request that identifying information is concealed during the consideration and in the Committee’s final decision.

It is the established practice of the CEDAW Committee, other treaty bodies, including the Human Rights Committee and the Committee against Torture, and of the regional human rights bodies, that, if requested, they will suppress the name of the alleged victim in published documents. Initials or pseudonyms are substituted for the names of victims and/or authors.¹¹ This occurred in two CEDAW Committee communications including *Ms B.- J. v. Germany* and *Ms A.T. v. Hungary*.

c) The complaint must concern a State Party to the CEDAW Convention and to OP-CEDAW.

- A communication must be directed against a State Party and not against a non-State entity, such as a private individual, a private company or corporation or an inter-governmental organization. Where the alleged violation relates to the conduct of non-State actors, the claim must be based on the obligation of the State Party to prevent or respond to the alleged violation.
- The victim must be “under the jurisdiction of the State Party.” That is, they must be:
 - o within the territory of the State Party;
 - o in territory under the effective control or occupation of the State Party; or
 - o otherwise subject to the jurisdiction of the State Party (eg, issue of passports).
- For example, where an individual is not legally admitted to the territory of a State Party but faces violations while under the control of officials from the State Party, then the State Party is still considered to have jurisdiction over that person.

Communication No. 15/2007—

Ms. Zhen Zhen Zheng v. The Netherlands

The victim was a Chinese asylum seeker living in the

Communications Procedure

Violation(s)

1. Acts or failure to act by government official
2. Acts of non-governmental persons, groups, or enterprises (SP has duty to prohibit 'private' discrimination)

Submitted by "author"
(victim, representative or others "on behalf")

Receivability requirements

1. written
2. not anonymous

Standing Requirements

Author must be:

1. Individual victim or group of individual victims
2. Designated representatives of victim(s) - need not be under the jurisdiction of the State Party (SP)
3. Others 'on behalf of' victim(s) of (a) consent by victim(s), (b) 'justified' in acting on behalf of without consent

Victim(s) must have:

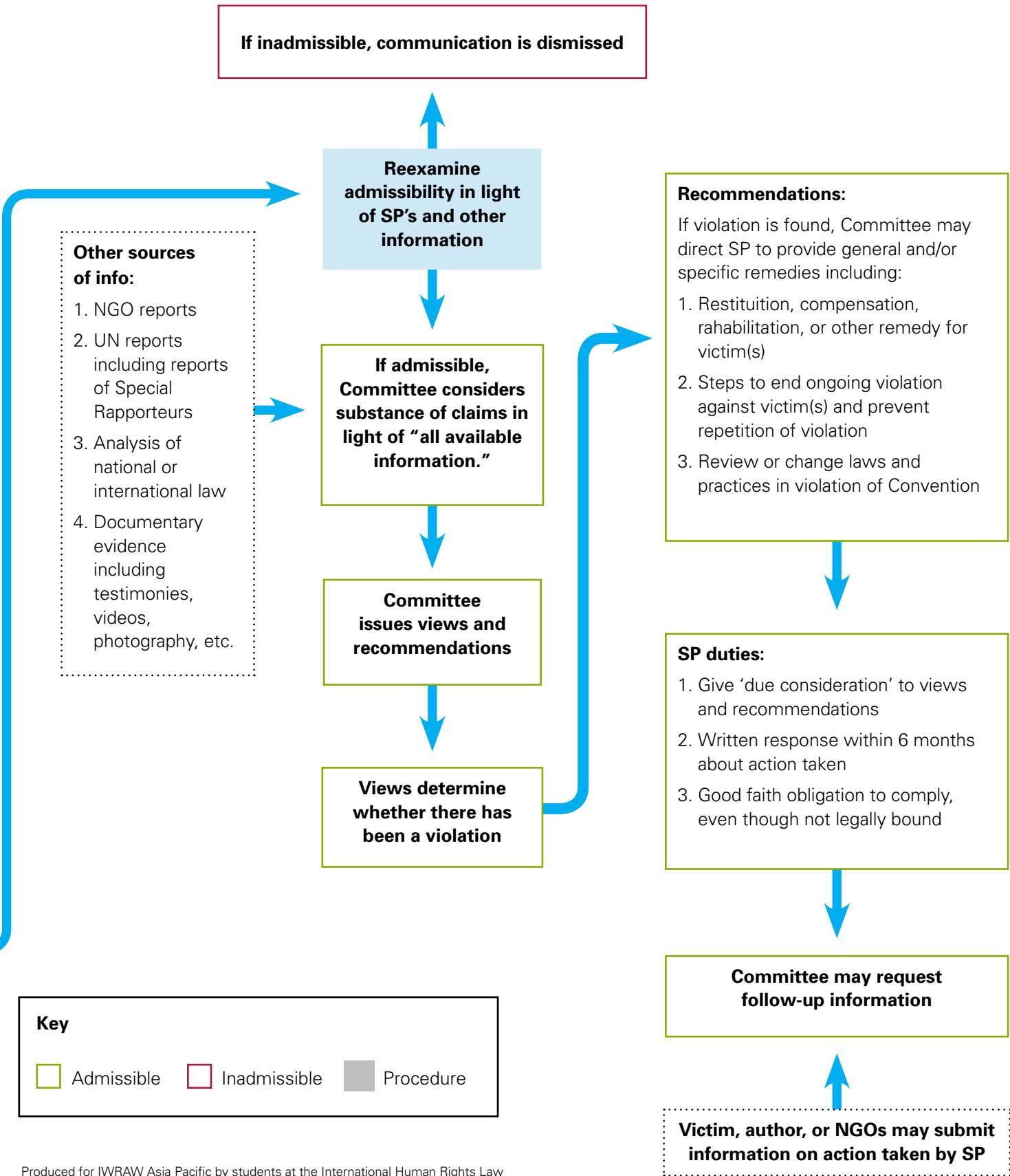
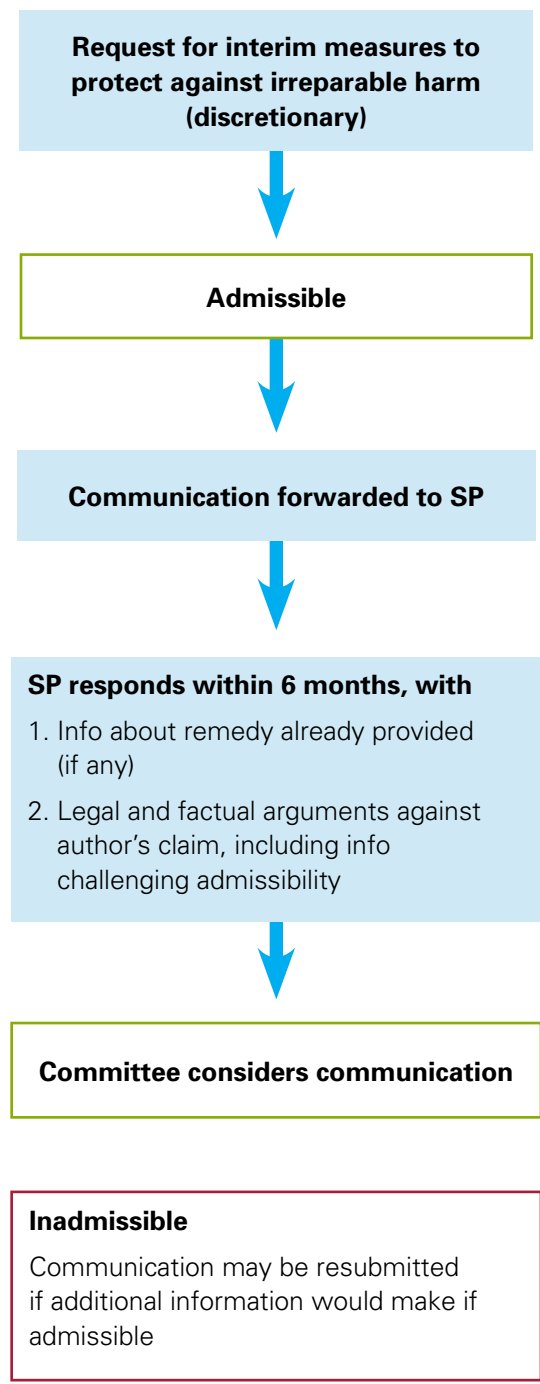
1. suffered harm
2. been under SP's jurisdiction at time of violation

Subject matter jurisdiction:

Violation of right defined in Arts. 2-16 of Convention, or derived from right stated in Convention or interpreted as pre-condition for enjoyment of right explicitly recognised in the Convention

Reasons for inadmissibility

1. Failure to exhaust domestic remedies, unless within recognised exceptions of 'unreasonable delay' or ineffective remedy
2. Same matter examined by Committee or other international procedure
3. 'Incompatible with provisions of Convention'
4. 'Manifestly ill-founded' or not 'sufficiently substantiated'
5. Abuse of the right to submit communication
6. Events occurred before OP entered into force for SP



Produced for IWRAW Asia Pacific by students at the International Human Rights Law Clinic, New York University School of Law (2000/2001)

Netherlands. She complained that she was a victim of a violation by the State Party of Article 6 of CEDAW. Due to the negligence of the State Party, she was traumatized during the asylum procedure and became suicidal as a result of the insecurity of her situation. The victim was under the jurisdiction of the State Party. Although the Committee ultimately found the communication inadmissible on the grounds of failure to exhaust domestic remedies, the Netherlands was recognized as having to legal jurisdiction over the victim.

d) The individual must claim to be a victim of a violation of a right enshrined in CEDAW.¹² The CEDAW Committee’s General Recommendations and Concluding Observations are important sources to refer to for understanding the full scope of specific rights under CEDAW.

In the cases listed in the chart on page 50, the CEDAW Committee discussed and interpreted the meaning of “victim” under the Convention.

**Communication No. 12/2007—
G. D. and S. F. v. France**

The Committee held that the authors failed to show that they suffered any sex-based discrimination by bearing their father’s family name. There was no discrimination as the family name they are given is not dependent on their sex. The Committee therefore concluded that the authors lacked the quality of victims under Article 2 of the Optional Protocol and the communication was inadmissible.

The dissenting opinion found that the test of victim status is whether the authors have been directly and personally affected by the violations alleged. The authors have suffered sex-based discrimination by bearing their fathers’ family names in their civil status documents, and that that discrimination was based on discriminatory and sexist customary rules on transmission of family names which were in force at the time of their births. The legislation governing family names discriminates against women by prohibiting the transmission of or change of family name to the mother’s family name only and that the lack of choice with respect to a mother’s family name, as the family name to be transmitted to her children or changed, constitutes sex-based discrimination against women as defined in Article 1 of the Convention and prohibited under Articles 2, 5 and 16 (1).

**Communication No. 13/2007—
Michèle Dayras, Nelly Campo-Trumel, Sylvie Delange,
Frédérique Remy-Cremieu, Micheline Zeghouani, Hélène**

Muzard-Fekkar and Adèle Daufrene-Levrard (represented by SOS Sexisme) v. France

The Committee found that as Ms. Dayras and Ms. Zeghouani are not married, do not live in husband-and-wife relationships and do not have children, they cannot claim rights pertaining to the use or the transmission of family names and cannot be victims of a right whose beneficiaries are only married women, women living in de facto unions or mothers. They have not personally been adversely affected by French legislation and therefore lack the quality of victim.

e) The complaint should include the following:

- The relevant facts, including any supporting documentation, and an indication of what provisions of the Convention are alleged to have been violated by the State Party.

Although failure to name the Articles of the Covenant alleged to be violated would not affect the Committee’s decision regarding the admissibility of the communication, it can influence the understanding of the matter at issue.¹³ It is important to submit the communication as completely as possible and to include all relevant information on the case. The complainant should set out, ideally in chronological order, all the facts on which her claim is based. For example, a group of women from a rural community that does not have reasonable access to maternal health care, alleges that the State failed to take steps to ensure access for this community. Although the complainants will not be asked to list all the Articles that have been violated, they will be expected to make the necessary efforts to provide as much information as possible, regarding the population that lives in the area, the lack of access to the health system, the chronology of the facts, the context of the situation, whether there is disparate access for men and women because of limited hours or lack of transportation, etc., to give the Committee enough information to recognize the violation and examine the claim.¹⁴

- Information about steps taken to exhaust domestic remedies at the national level. This means that the case must have been brought at the national level, negative decisions appealed as possible, taken to relevant administrative bodies if relevant or otherwise evidence be shown why national remedies are ineffective, unavailable or unreasonably prolonged.
- Importantly, the CEDAW Committee does not place

any time restrictions on when a communication can be made.¹⁵

- An indication of whether this matter is or has been before any other procedure of international investigation or settlement.¹⁶

A model communication form is available from the CEDAW Committee at: <http://www2.ohchr.org/english/law/cedaw-one.htm>. It is also available in IRAW Asia Pacific's "Our Rights Are Not Optional: Advocating for the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) through its Optional Protocol. A Resource Guide, which can be accessed in various languages at <http://www.iwraw-ap.org/publications/opcedaw.htm>.

Communications can be submitted in writing and signed to:

The CEDAW Committee
Office of the High Commissioner for Human Rights
United Nations Office
1211 Geneva 10, Switzerland
Fax: +41 22 917 9022

For further information:
E-mail: tb-petitions@ohchr.org
Or call on Tel: +41 22 917 1234

Confidentiality

All working documents and deliberations related to communications are confidential and the discussions by the Working Group and the full Committee related to communications are held in closed sessions. Members of the CEDAW Committee are prohibited from making public any information related to communications prior to a determination being made. The parties to the communication (ie the State Party and the author of the communication) can make information related to the communication public. The Committee can request the parties not to do so, although it cannot require them to maintain confidentiality.

4.2.2 Interim Measures

After receiving a communication, but before making a determination on admissibility or the merits of the communication, the CEDAW Committee can request the State Party to take interim measures necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

"Interim measures" are usually requested when they are necessary to protect the victim from physical or mental harm or action that could have an irreversible impact on the victim's rights. For example, if a complainant is in custody and under threat of torture or risks losing her life, the Committee could instruct the authorities to provide adequate protection for her. Another example is the provision of maintenance to a woman from her spouse or partner where this issue is under review, and where receiving such resources immediately is a matter of survival for her and her children.

Communication No. 2/2003—Ms. A. T. v. Hungary

The author made a request for interim measures of protection to avoid possible irreparable damage to her person—that is to save her life—which she felt was threatened by her violent former partner. The Committee requested the State Party to provide immediate, appropriate and concrete preventive interim measures of protection to the author, as may be necessary, in order to avoid irreparable damage to her person.

4.2.3 Consideration of a communication

In considering a communication under OP-CEDAW the CEDAW Committee will consider three aspects:

- The admissibility of the communication;
- The merits of the communication; and
- The remedies available and follow-up

The Committee will form a Working Group of up to 5 members to prepare the communication for consideration by the full Committee. The Working Group assigns a Rapporteur, who prepares analyses of the procedural and substantive issues related to the communication and draft texts for consideration by the Working Group. The Working Group meets one week prior to the Committee's regular session. The Working Group has authority to declare a communication admissible if all members agree. If there is no unanimity among its members that the communication is admissible, the Working Group must refer the decision on admissibility for decision by the full Committee. Based on discussion among its members, the Working Group transmits its recommendations and a draft text for review and discussion by the full Committee.

The full Committee considers the communication in light of the Working Group's recommendations and any additional points raised by members in the discussions of the Committee as a whole. It then takes a decision as to its views and

recommendations. The decision is generally reached by consensus but may be reached by simple majority if no consensus is possible. Members of the Committee may register individual concurring or dissenting opinions.

4.2.4 Admissibility

A number of technical legal requirements must be met in order for the communication to be admissible. A communication will be declared inadmissible if:

- All available domestic remedies have not been exhausted.

Communication No. 1/2003—Ms. B.-J. v. Germany

The Committee found that the author had not exhausted domestic remedies concerning the issue of the equalization of pensions, because the author was reasonably expected to include a specific appeal on the issue to the appellate court, as well as in her constitutional complaint. The Committee also held that an improperly filed constitutional complaint cannot constitute an exhaustion of remedies.

Communication No. 8/2005—Rahime Kayhan v. Turkey

The Committee found that the author had not exhausted domestic remedies because she had not put forward arguments that raised the matter of discrimination based on sex in substance and in accordance with procedural requirements in Turkey before the administrative bodies that she addressed before submitting a communication to the Committee.

Communication No. 11/2006—

Ms. Constance Ragan Salgado v. The United Kingdom of Great Britain and Northern Ireland

The Committee stated that in line with a longstanding jurisprudence of other international human rights treaty bodies, in particular the Human Rights Committee, authors of communications are required to raise in substance before domestic courts the alleged violation of the provisions of CEDAW, which enables a State Party to remedy an alleged violation before the same issue may be raised before the Committee.

- It is not necessary to “exhaust” domestic remedies if:
 1. No remedies for the violation are available;
 2. Remedies available are “unreasonably prolonged” (unreasonably time-consuming).
 3. Remedies available are “unlikely to bring effective relief.”

Communication No. 1/2003—Ms. B.-J. v. Germany

The dissenting opinion found that given the author’s age and that since her divorce she had lived without a reliable income for five years and had few prospects for being able to earn an independent income—that the application of remedies was “unreasonably prolonged,” which is an exception to the rule of exhaustion of domestic remedies.

Communication No. 12/2007—G. D. and S. F. v. France

The Committee found that although the domestic remedies had not been exhausted because the appeals before the Paris Administrative Tribunal and the Paris Administrative Court of Appeal were pending, the application of the remedy provided by Article 61-1 of the Civil Code was both unreasonably prolonged and unlikely to bring effective relief.

To be effective the relief must be comprehensive enough to cover restitution, compensation or rehabilitation for the victim(s) and/or action to prevent the violation from happening again. To be effective, a remedy must be capable of producing the result for which it was designed and it must offer a reasonable prospect of success or a reasonable possibility that it will prove effective. Core elements of an effective remedy include:

- enforceability;
- the independence of the decision-making body and its reliance on legal standards;
- the adequacy of due process protections afforded the victim; and
- promptness.

Legal and practical barriers that would make a remedy futile or inaccessible include:

- widespread discrimination in the courts;
- refusal of officials to investigate violations;
- lack of financial resources to bring a claim through all stages of the legal procedure;
- intimidation or threats by officials, family members or members of the community;
- lack of legal capacity, lack of due process or if there is no law on which to base the claim directly or indirectly hence the right concerned is not legally recognised at the national level but is provided for in the CEDAW Convention.

Communication No. 5/2005—

The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased) v. Austria

The Committee found that Sahide Goekce’s heirs not availing themselves of the procedure under Article 140, paragraph 1, of the Federal Constitution, did not prevent them from meeting the requirement of exhaustion of domestic remedies because the abstract nature of this remedy meant that it would not be likely to bring effective relief.

The Committee also found that the entitlement of Sahide Goekce to bring a complaint under section 37 of the Public Prosecutor’s Act—which is designed to determine the lawfulness of official actions of the responsible Public Prosecutor — cannot be regarded as a remedy which is likely to bring effective relief to a woman whose life is under a dangerous threat, and should thus not bar the admissibility of the communication.

Communication No. 15/2007—

Ms. Zhen Zhen Zheng v. The Netherlands

The Committee referred to the Human Rights Committee jurisprudence, according to which mere doubts about the effectiveness of the remedies do not absolve an individual from exhausting domestic remedies.

Communication No. 18/2008—

Karen Tayag Vertido v. Philippines

The Committee found that for a remedy to be effective, “adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner”. The Committee found that the case remaining at the trial court level from 1997 to 2005 was not an effective remedy.

Communication No. 22/2009—

T. P. F. (represented by the Centre for Reproductive Rights and the Promotion and Protection of Sexual and Reproductive Rights) v. Peru

In light of the urgency of the situation of the victim, the Committee found that it was not reasonable to require that, in addition to the lengthy procedure before medical authorities, the author should have to initiate a court proceeding of an unpredictable duration and hence the Committee found that domestic remedies had been exhausted.

- Such exceptions allow the Committee to interpret the “exhaustion” requirement in light of the obstacles that women face when seeking redress.

What constitutes an (available, adequate and) effective domestic remedy?

- The case has been considered by all appropriate legal or administrative fora within the domestic legal system without a proper review or assessment of the alleged violations;
- The case has been considered by all appropriate mechanisms but appropriate remedies do not exist;
- The domestic remedy available provides inadequate restitution, compensation, rehabilitation or other relief to the victim;
- Legal barriers, e.g. lack of legal capacity, prevent the victim from seeking redress;
- The victim has been deterred or prevented from seeking redress through intimidation or threats;
- Widespread gender discrimination in the administration of justice or weakness in the rule of law that generally render the domestic procedures ineffective;
- Practical constraints render the remedy inaccessible (e.g. financial costs that are so burdensome as to prevent the victim from pursuing the remedy available; a geographic location that makes the relevant forum inaccessible to the victim; or a failure by the State Party to provide translation where the victim is unable to speak or comprehend the working language of the relevant forum); and
- The domestic remedy itself incorporates discriminatory elements, such as restrictions on the evidentiary weight of women’s testimony.

In all cases, whether it is alleged that domestic remedies have proven inadequate or unavailable, the communication submitted to the CESCR must be fully substantiated with evidence and a detailed account of the steps taken at the domestic level.

Source: A Resource Guide Our Rights are not Optional, Advocating through the implementation of the Convention on the Elimination of All Forms of Discrimination against Women through its Optional Protocol, IWRAW Asia Pacific, 2008 (2nd Edition)

In analyzing the exhaustion of domestic remedies, intersectional discrimination (e.g. race, gender, ethnic, nationality, economic condition, etc.) and the social, economic, political and legal environment that contributes to discrimination and experiences of oppression and privilege should be taken into account. Evidence of a pattern of defects in the administration of justice, such as discriminatory rules of evidence or a widespread refusal by the judiciary and/or the police to apply existing legal protections to migrant women, women with disabilities, lesbians, bisexual or transgender, indigenous women or women from racial and ethnic minority groups, can demonstrate the ineffectiveness of the remedies in question.

- The same matter has already been examined by the CEDAW Committee or has been or is being examined under another procedure of international investigation or settlement.

The Committee will consider both the facts and the content of the rights in question. If the facts have changed significantly, or the claims were raised through other international procedures by a different individual, the Committee may decide that the communication is admissible.

Communication No. 8/2005—Rahime Kayhan v. Turkey

The Committee referred to *Fanali v. Italy* (communication No. 075/1980) in which the Human Rights Committee held: “the concept of “the same matter” within the meaning of Article 5 (2) (a) of the Optional Protocol to ICCPR had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body.” Applying this interpretation the CEDAW Committee held the communication was admissible because the author is a different individual to the one who brought another case regarding the veil before the European Court of Human Rights.

- The matter is incompatible with the provisions of CEDAW.
 - A communication may be considered “incompatible” if it raises claims beyond the scope of the CEDAW Convention (e.g. a claim that a State Party has violated a group’s right to self-determination) or if it seeks a result that conflicts with the objectives of the Convention (e.g. a claim that woman’s parental responsibilities will be undermined by affirmative

action measures to increase the number of women candidates for political office).

Communication No. 7/2005—

Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain

In a dissenting opinion, 8 members of the Committee found that the title of nobility in question was of a purely symbolic and honorific nature, devoid of any legal or material effect. Consequently, they considered that claims of succession to such titles of nobility are not compatible with the provisions of the Convention, as there is no impairing or nullifying of a right.

- Claims related to rights subject to reservations are also inadmissible, if the reservation is one that is permissible and the scope of the reservation covers the specific rights allegedly violated.
 - The matter is manifestly ill-founded or not sufficiently substantiated.
- A communication will be considered “manifestly ill-founded” if it:
 - Alleges violations of rights that are not guaranteed by CEDAW;
 - Relies on an incorrect interpretation of the Convention; or
 - Alleges facts that unquestionably indicate that the State Party’s act or omission is consistent with its obligations under CEDAW.
- To meet the requirement of “sufficient substantiation,” details should be provided concerning the specific situation of the victim(s).
- It is not sufficient to make broad claims about the general situation, such as “the police do not enforce the domestic violence law” or “the health care system fails to address the needs of older women” or to merely present statistics (e.g. the rate of illiteracy among women, differences in pay, etc.). The Committee will declare such communications inadmissible. The facts about the general situation must be related to the specific harm (or threat of harm) to the victim(s). If a communication meets this test, additional information can be submitted later, either to further substantiate the claim or if new relevant information becomes attainable.
- The matter is an abuse of the right to submit a communication.

- It will be considered an abuse of the right to submit a communication if:
 - o The author's purpose is to harass or defame an individual;
 - o There is some other malicious intent;
 - o The claim has been previously found by the Committee to be unfounded; or
 - o The facts of the communication occurred prior to the entry into force of the Optional Protocol for the State Party concerned, unless those facts continued after that date.

Communication No. 1/2003—Ms. B.-J. v. Germany

The Committee did not consider elements of the communication relating to the equalisation of pensions because the author's divorce was finalised together with the matter of the equalization of pensions prior to the OP-CEDAW entering into force in Germany and the Committee found there were no facts that continued after that date.

Communication No. 3/2004 —

Ms. Dung Thi Thuy Nguyen v. The Netherlands

The Committee found that while the first period of pregnancy leave occurred before the OP-CEDAW had entered into force in the Netherlands, the second period of pregnancy leave extended beyond the date OP-CEDAW had entered into force in the Netherlands and therefore the communication was not declared inadmissible on this requirement.

Communication No. 4/2004—

Ms. A. S. (represented by the European Roma Rights Center and the Legal Defence Bureau for National and Ethnic Minorities) v. Hungary

Although the sterilisation took place before the OP-CEDAW came into force in Hungary, the Committee found that sterilization is intended to be irreversible and should be viewed as permanent. Therefore the facts that are the subject of the communication to be of a continuous nature and therefore extend beyond the date that the OP-CEDAW came into force in Hungary.

Communication No. 7/2005—

Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain

The Committee found that the succession to the title was the event that was the basis of the author's complaint, and was completed before the OP-CEDAW came into force in Spain, and that the event was not of a continuous nature.

Communication No. 8/2005—

Rahime Kayhan v. Turkey

The Committee found that while the author's dismissal occurred before the OP-CEDAW came into force in Turkey, the dismissal continued to affect the author's loss of status, namely her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant and her health insurance. The Committee held this constituted a continuation of the facts.

- The Committee can also admit a communication if the State Party has failed to remedy ongoing consequences of a past violation. In this case, the State's inaction can be viewed as an affirmation of its previous violation.¹⁷

The determination of admissibility focuses on an assessment of the specific facts of the case. It is therefore especially important to present a detailed description of the facts of the case, including: the alleged violation; the victim's personal circumstances; and where systemic conditions or violations are relevant, the broader factual context of the case. It is also useful to refer to established interpretations of admissibility requirements developed by other human rights bodies to which the CEDAW Committee is also likely to refer such as the need to apply the rule of exhaustion of domestic remedies with a degree of flexibility, rather than undue formalism, given the context of protecting human rights.¹⁸

To date, of the 20 communications considered, 10 of them have been held inadmissible. The most common reason for inadmissibility has been failure to exhaust domestic remedies.

If the communication is found to be inadmissible, it is dismissed. Where the CEDAW Committee decides that a communication is inadmissible, the decision and the reasons for it are communicated through the CEDAW Secretariat at the Office of the High Commissioner for Human Rights to the author of the communication and to the State Party concerned.

A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request submitted by or on behalf of the author or authors of the communication, containing information indicating that the reasons for inadmissibility no longer apply.

4.2.5 Merits

If the communication meets the admissibility requirements, only then will the CEDAW Committee consider the merits of the claims raised.

In considering the merits, the Committee bases its findings regarding the facts on the written information presented by the complainant and by the respondent State. The Committee will consider a communication even if the respondent State does not submit a response to the communication as the OP requires it to do.

Both parties have an opportunity to review and respond to the other party's submissions. The Committee can request additional information from the parties subsequent to the parties' initial submissions. The parties can provide information from other sources on the record but third parties can not submit information directly to the Committee.

In considering the merits, the Committee may request the Secretariat to obtain information from organizations in the UN system or other bodies that may assist it in the resolution of the communication. The communications procedure does not allow for oral hearings, on-site visits or interviews. All information must be provided in written submissions.

The scope of the factual information considered by the Committee in a communication focuses closely on the set of facts related to the claim, because a communication is intended to resolve claims brought by individual victims. The communication may address systemic factors in considering the broader context at the national level within which the facts related to the individual claim took place, but commonly is more narrowly focused than in an inquiry.

In considering the merits, the CEDAW Committee will consider whether:

a) The violation is within the "subject matter jurisdiction" of the OP-CEDAW. This means the violation must be of a right recognised in Articles 2-16 of the CEDAW Convention. If a right is not explicitly spelled out in the Convention, it can still be within the "subject matter jurisdiction" of the OP-CEDAW if it can be:

- Derived from one or more rights that are explicitly recognised (e.g. in the case of violence against women, which the Committee has found violates multiple rights in the CEDAW Convention);

Communication No. 2/2003—Ms. A. T. v. Hungary

In a communication relating to domestic violence, the Committee recalled its General Recommendation No. 19 on Violence against Women. The Committee also recalled its recommendations made in its Concluding Comments on Hungary's combined fourth and fifth periodic report in 2002.

Communication No. 18/2008—

Karen Tayag Vertido v. The Philippines

The Committee acknowledged that the text of the Convention does not expressly provide for a right to a remedy, however, such a right is implied in the Convention, in particular in Article 2 (c), by which States Parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination." The Committee further found that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.

Communication No. 20/2008—

Ms. V. K. (represented by counsel, Ms. Milena Kadieva) v. Bulgaria

The Committee recalled General Recommendation 19 which notes that gender based violence is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty.

Communication No. 22/2009—

T. P. F. (represented by the Centre for Reproductive Rights and the Promotion and Protection of Sexual and Reproductive Rights) v. Peru

The Committee found that, owing to her condition as a pregnant woman, L. C. did not have access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. Those services included both spinal surgery and therapeutic abortion.

- Interpreted as a precondition for the enjoyment of an explicitly recognised right (e.g. in the case of freedom of movement which is necessary to exercise the right to participation in political life); or
- Defined as a specific aspect of a right that is recognised in more general terms (e.g. the right to be informed of health hazards in the workplace as an aspect of the right safe and healthy working conditions).

Communication No. 18/2008—

Karen Tayag Vertido v. Philippines

The Committee noted that there was an implied right to remedy in Article 2 (c) of CEDAW which requires States to provide legal protection of the rights of women.

Communication No. 18/2008—

Karen Tayag Vertido v. Philippines

The Committee notes that “by Articles 2 (f) and 5 (a), the State Party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.” The Committee found that the court had relied on stereotypes and gender-based myths in the judgment and the State failed to fulfil its obligations under Article 2 (c) and (f), and Article 5 (a) read in conjunction with Article 1 of the Convention and General Recommendation No. 19 of the Committee.

b) The act or failure to act (an “omission”) by a State Party has adversely affected the victim’s enjoyment of a right under the CEDAW Convention; or that there is a real threat of such. The adverse affect must be shown to be causally linked to an act by the State Party or failure by the State Party to take action required under the CEDAW Convention.

To find that the State Party has committed a “violation through omission,” the Committee would analyse whether it has an obligation under the CEDAW Convention to take a general and/or specific action, then consider the facts of the case to see if the State Party has failed to take that action. The State Party has two types of obligations:

- **Duties to take a specific measure (e.g. granting women equal rights to administer property); and**
- **Duties to achieve a result by using measures that the State Party chooses (e.g. eliminating discrimination against women in the field of health care).**

Under the due diligence standard, State Parties must take “reasonable steps” to prevent human rights violations, investigate, impose the appropriate punishment and provide adequate redress to the victims.

Communication No. 3/2004—

Ms. Dung Thi Thuy Nguyen v. The Netherlands

The Committee found that the State had a margin of discretion to determine the appropriate maternity benefits within the meaning of Article 11, paragraph 2 (b) of the Convention for all employed women, and therefore there had been no violation.

The dissenting opinion found that while there was no direct discrimination, the anti-accumulation clause could constitute a form of indirect discrimination based on sex against self-employed women.

Communication No. 5/2005—

The Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased) v. Austria

The Committee referred to the due diligence obligations of the State as outlined in the CEDAW Committee General Recommendation 19: “[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

Communication No. 17/2008—

Maria de Lourdes da Silva Pimentel, represented by the Center for Reproductive Rights and Advocacia Cidadã pelos Direitos Humanos v. Brazil

In this case the Committee found that “Ms. da Silva Pimentel Teixeira’s vulnerable condition required individualized medical treatment which was not forthcoming due to a potential failure in the medical assistance provided by a private health institution, caused by professional negligence, inadequate infrastructure and lack of professional preparedness. The Committee concluded that Ms. da Silva Pimentel Teixeira has not been ensured appropriate services in connection with her pregnancy.”

Even though it was a private hospital that did not provide the appropriate treatment, the Committee concluded that in accordance with Article 2(e) of CEDAW the State has a due diligence obligation to take measures to ensure that the activities of private actors in regard to health policies and practices are appropriate. The State is directly responsible for the action of private institutions when it outsources its medical services, and has the duty to regulate and monitor private health-care institutions.

The Committee will analyse the language of specific Articles and then consider any interpretations of that language

or similar language in other human rights instruments. The Committee could refer to its own General Recommendations and Concluding Observations, established interpretations of other human rights instruments that have provisions similar to those in CEDAW, and other sources of international law, such as the opinions of scholars and consensus regarding best practice as reflected in commitments made in plans of action adopted at various UN world conferences.

Communication No. 15/2007—

Ms. Zhen Zhen Zheng v. The Netherlands

The Committee recalled that in the Concluding Observations issued to the State Party in 2007, the Committee urged the State Party to provide all necessary benefits to victims of trafficking regardless of whether they are able to cooperate.

Communication No. 23/2009—

Inga Abramova v. Belarus

The Committee referred to Standard Rule 53 of the Minimum Rules for the Treatment of Prisoners, General Assembly Resolution 65/299 on the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) and the Human Rights Committee's General Comment No 28.

As increasing cases of violations of women's human rights are brought before the CEDAW Committee, more precise definitions of what constitute a violation of rights as enshrined in the CEDAW Convention will emerge.

Communication No. 17/2008—

Maria de Lourdes da Silva Pimentel, represented by the Center for Reproductive Rights and Advocacia Cidadã pelos Direitos Humanos v. Brazil

The Committee referred to its General Recommendation No. 24, which notes that measures to eliminate discrimination against women are considered to be inappropriate in a health-care system which lacks services to prevent, detect and treat illnesses specific to women.

The Committee also referred to its recent General Recommendation 28 on the Core Obligations of State Parties under Article 2, noting that the lack of appropriate maternal health services means the State is not meeting the specific distinctive health needs of women, which constitutes a violation of Article 12 on the right to health, Article 2 on non-discrimination, and has "a differential impact on the right to life of women."

The Committee also found that the author experienced multiple discrimination as a woman of African descent and her

socio-economic background, and referred to the Committee's Concluding Observations of Brazil in 2007 in which it had noted the de facto discrimination experienced by women from vulnerable sectors of society.

Communication No. 23/2009—Inga Abramova v. Brazil

"Violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms" including "the right not to be subjected torture, cruel, inhuman or degrading treatment punishment," constitutes discrimination within the meaning of Article 1 of the Convention (para. 7 (b)).

The Committee found that the inappropriate touching, unjustified interference with the author's privacy constitutes sexual harassment and discrimination within the meaning of Articles 1 and 5 (a) of CEDAW.

Given that violations may be based on one or more of the CEDAW Convention rights, it may be assumed that as cases are brought recommendations will touch on many, if not all areas, of the Convention. Therefore, although most States will have constitutional or legislative provisions that prohibit discrimination on the basis of sex, the concept of discrimination—how it should be recognised and interpreted, and how it might be remedied—will be investigated and documented through this process. In turn, this documentation will be vital in influencing the enactment, execution and interpretation of laws within State Parties.

Once the Committee's views and recommendations have been adopted they are made publicly available on the Committee's website at: <http://www2.ohchr.org/english/law/jurisprudence.htm>). The texts of the decisions are also published in the CEDAW Committee's annual report to the UN General Assembly.

4.2.6 Remedies

The remedies identified by the Committee if a violation is found typically focus on redress for the individual victim(s) and aim at repairing the harm to the individual(s). They can also include a range of systemic recommendations aimed at preventing future violations, many of which have a public interest component.

The kinds of recommendations that the CEDAW Committee may make include:

- a) Restitution, compensation, rehabilitation, or any other remedies for the victim(s):**

- o Restitution or actions necessary to restore the victim(s) to the conditions she/they would have been in had the violation not occurred (e.g. release from prison);
- o Settlement, compensation and/or rehabilitation for the victim(s);
- o Retrial;
- o Enforcement of domestic court judgments establishing conditions to enable the victim(s) to exercise a right (e.g. women's inheritance rights, visitation rights).

b) Steps to end ongoing violations against the victim(s):

- o Interim guidelines, instructions and steps to end continuing violations or prevent repetition of these in the future.

c) Law reform and changes in programmes and policies that are in violation of the Convention:

- o Including review of laws, administrative decisions and/or policies which are disputed in the case.

d) Steps to prevent the repetition of the violation(s):

- o Development of directives, guidelines or policies to prevent similar violations in the future;
- o Adoption of measures and remedies to effectively address similar violations;
- o Action and measures to ensure the full recognition, enjoyment and exercise of rights contained in the CEDAW Convention;
- o General review or amendment of laws inconsistent with provisions of the CEDAW Convention (e.g. repeal of legislation and/or a review of relevant legislation to ensure that neither the law itself, nor its application, is discriminatory);
- o Adoption of temporary special measures in a particular field (e.g. quota system in parliament);
- o Recognition of the "justiciability" of specific rights enshrined in the CEDAW Convention as a whole;
- o Enactment of new legislation—if this was not available previously—to recognise the right(s) alleged to have been violated;
- o Take steps to condemn, sanction or regulate discrimination by private and public actors;

- o The creation of appropriate support services for victims of abuse such as shelters, counselling services, legal aid etc.

The OP-CEDAW mandates the Committee to transmit its views and recommendations to the concerned parties to the communication.

Communication No. 2/2003—Ms. A. T. v. Hungary

The Committee made the following recommendations for remedies to the State:

Concerning the author of the communication

- (a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;
- (b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

General

- (a) Respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;
- (b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;
- (c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;
- (d) Take all necessary measures to provide regular training on the CEDAW and the Optional Protocol thereto to judges, lawyers and law enforcement officials;
- (e) Implement expeditiously and without delay the Committee's Concluding Comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;
- (f) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(g) Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation; and

(h) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

The State Party was required to submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State Party was also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

Communication No. 18/2008—Karen Tayag Vertido v. The Philippines

The Committee made the following recommendations for remedies to the State:

Concerning the author of the communication

Provide appropriate compensation commensurate with the gravity of the violations of her rights.

General

- Take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay;
- Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:

(i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;

(ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

o requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

o requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances.¹⁹

(iii) Appropriate and regular training on the CEDAW, its Optional Protocol and its General Recommendations, in particular General Recommendation No. 19, for judges, lawyers and law enforcement personnel;

(iv) Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.

The State Party was required to provide within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State Party is also requested to publish the Committee's views and recommendations and to have them translated into the Filipino language and other recognized regional languages, as appropriate, and widely distributed in order to reach all relevant sectors of society.

4.2.7 Follow-up

Where the CEDAW Committee finds a violation has occurred, the State Party and the author of the communication are provided written notice of the findings and recommendations. The State Party is required to submit a written response within 6 months, outlining the steps it has taken to give effect to the Committee's views and recommendations. Two Rapporteurs for follow-up are appointed by the Committee. They have the authority to monitor implementation through contacts with representatives of the respondent State. The CEDAW Committee is allowed to make further requests to the State Party for additional information and updates, including in its periodic reports.

Enforcement of remedies and recommendations by State Parties will, in many ways rely on on-going dialogue and persuasion rather than firm instructions regarding compliance.

If the Committee's recommendations are employed for lobbying and awareness-raising by civil society, they can be important tools to achieve maximum results from States trying to fulfil their obligations under the Convention. Further, it is important to note that the impact of recommendations should not be viewed as unique to the individual(s) subject of the communication. Rather, they must be viewed as having

far-reaching impact that extends beyond the complaint of a particular violation(s). If used effectively, the OP CEDAW procedures can influence and encourage change.

Brief Analysis of CEDAW Decisions to Date (See page 50 for full list of decisions)

In comparison with other more established communication procedures, there have been comparatively fewer communications submitted or decided under the OP-CEDAW. Further, a violation was established in only four cases. The lack of a settled body of jurisprudence and practice means that it is difficult to predict the Committee's likely response to a particular issue. It also means there is an insufficient jurisprudential base to make a general evaluation of the CEDAW Committee's approach to the interpretation of the Convention. It is also not yet possible to have a meaningful assessment of the effectiveness of the Committee's follow-up procedures.

A significant proportion of communications submitted have been declared inadmissible. The majority of these have been inadmissible due to the failure to exhaust domestic remedies. Timing (i.e. the facts occurred before the OP-CEDAW came into force for the relevant State Party), lack of victim status and incompatibility with CEDAW are some of the other reasons communications have been declared inadmissible. Some commentators have noted that the Committee has not yet clarified its approach to a number of questions related to admissibility, leaving it unclear as to how admissibility will be determined in future cases.²⁰

However, the CEDAW Committee's findings of inadmissibility do not appear to reflect an overly strict approach or to be obviously unsupported by the facts and the Committee has frequently referred to relevant jurisprudence from other human rights bodies. Thus the OP-CEDAW results appear to be largely consistent with the practice of other human rights bodies.

The majority of communications to date have been in relation to issues of violence against women, and most commonly domestic violence. Some of the other subject matters have included health, family name change, trafficking, nationality, gender stereotyping, employment and marriage and family among others. This shows a gradual expansion of the use of the communications procedure under OP-CEDAW to a range of human rights violations experienced

by women, including both civil and political and economic social and cultural rights.

Also of note is that the majority of communications under OP-CEDAW have been brought by authors based in Europe. Comparatively fewer communications have been brought by women in other geographical regions. This could in part reflect the number of which State Parties in other regions that have signed the OP-CEDAW (i.e. in the Pacific there are 3 State Parties to the OP-CEDAW, and worldwide there are only 104 State Parties); or the extent to which they are using regional mechanisms rather than the UN mechanism; or even the level of capacity and support that exists within countries in other regions for women to firstly, exhaust domestic remedies and, secondly, to bring a communication at the international level.

The evolving character of the CEDAW Committee's work under the OP-CEDAW's communication procedure presents an opportunity for advocates to shape the approach to procedural and substantive questions through the types of cases submitted and the information presented in submissions.

4.3 Inquiry Procedure

The inquiry procedure under the OP-CEDAW (Article 8) provides for the CEDAW Committee to initiate an examination where it has received reliable information indicating grave or systematic violations by a State Party of rights in CEDAW. The procedure was modelled on the OP inquiry procedure available under the Convention Against Torture (Article 20).

Information sent to the CEDAW Committee about a grave or systematic violation and a request for an inquiry related to a given factual situation can be submitted by women's groups and other NGOs, other UN bodies or experts, regional human rights bodies or experts and the media.

The inquiry procedure can be useful for the CEDAW Committee to respond urgently to serious violations that are occurring (e.g. the widespread rape of women during protests or the disappearance and assassination of women human rights defenders). It can also be useful for addressing the systematic nature of widespread violations of women's human rights, or where individuals or groups are unable to submit communications due to practical constraints or fear of reprisals.

The Committee's role in an inquiry is investigative in

Communications to Date under CEDAW

Communication	CEDAW Articles alleged to be violated	Communication	CEDAW Articles alleged to be violated
Ms. B.-J. v. Germany was adopted on 14 July 2004	1, 2 (a-f), 3, 5 (a and b), 15 (2) and 16 (1.c, d, g and h)	Karen Tayag Vertido v. The Philippines was adopted on 16 July 2010	2 (c), (d), (f) and 5 (a)
Ms. A. T. v. Hungary was adopted on 26 January 2005	2 (a), (b) and (e), 5 (a) and 16	Maria de Lourdes da Silva Pimentel, represented by the Center for Reproductive Rights and Advocacia Cidadã pelos Direitos Humanos v. Brazil was adopted on 25 July 2011	2 (c) and 12
Ms. Dung Thi Thuy Nguyen v. The Netherlands was adopted on 14 August 2006	11 (2) (b)	Ms. V. K.(represented by counsel, Ms. Milena Kadieva) v. Bulgaria was adopted on 25 July 2011	1, 2 (a-c) (e-g), 5 (a) and 16 (1, c, g and h in light of general recommendation No 19)
Ms. A. S. (represented by the European Roma Rights Center and the Legal Defence Bureau for National and Ethnic Minorities) v. Hungary was adopted on 14 August 2006	10 (h), 12 and 16 (1) (e)	Inga Abramova (represented by counsel, Roman Kisliak) v. Belarus was adopted on 25 July 2011	2 (a), (b), (d), (e), (f), 3 and 5 (a) (read in conjunction with 1)
The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased) v. Austria was adopted on 6 August 2007	1, 2, 3 and 5	T.P.F.(represented by the Centre for Reproductive Rights and the Centre for the Promotion and Protection of Sexual and Reproductive Rights) v. Peru was adopted on 17 October 2011	1, 2 (c), (f), 3, 5, 12 and 16 (e)
The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased) v. Austria was adopted on 6 August 2007	1, 2, 3 and 5	Guadalupe Herrera Rivera (represented by counsel, Rachel Benaroch) v. Canada was adopted on 18 October 2011	1, 2(a), (b), (c), (d), 5 (a) and 24
Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain was adopted on 9 August 2007	2 (c) and (f)	Zhanna Mukhina v. Italy was adopted on 18 October 2011	16 (f)
Rahime Kayhan v. Turkey was adopted on 27 January 2006	11	Cecilia Kell v. Canada was adopted on 28 February 2012	1; 2 ((d) and (e)); 14 (2 (h)); 15 (1-4); 16 (1(h))
Ms. N. S. F. v. The United Kingdom of Great Britain and Northern Ireland was adopted on 30 May 2007	2 and 3	RKB v. Turkey was adopted on 24 February 2012	1; 2 ((a) and (c)); 5, (a); 11 (1 (a) and (d))
Ms. Constance Ragan Salgado v. The United Kingdom of Great Britain and Northern Ireland was adopted on 22 January 2007	1, 2 (f) and 9 (2)	Isatou Jallow v. Bulgaria 23 July 2012	1, 2((b), (c), (d), (e), and (f)) 3, 4, 5 (a) and 16.1 ((c), (d), and (f))
G. D. and S. F. v. France was adopted on 4 August 2009	16 (1) (g)	MPM v. Canada was adopted on 24 February 2012	2((c), (d)) ; 3; 15; 16
Michèle Dayras, Nelly Campo-Trumel, Sylvie Delange, Frédérique Remy-Cremieu, Micheline Zeghouani, Hélène Muzard-Fekkar and Adèle Daufrene-Levrard (represented by SOS Sexisme) v. France was adopted on 4 August 2009	16	SVP v. Bulgaria was adopted on 12 October 2012	1; 2 (b), (c), (d), (e), and (f); 3; 4; 5 (a); 12; 15
Ms. Zhen Zhen Zheng v. The Netherlands was adopted on 27 October 2008	6	CJS v. UK was adopted on 12 October 2012	1; 2; 3; 9

nature, whereby in addition to receiving information from NGOs and other groups, as well as the State Party, the Committee can conduct its own fact-finding activities in the form of interviews, on-site visits and hearings, with the consent of the State Party.

An inquiry is conducted confidentially and the cooperation of the State Party is sought at all stages of the proceedings.

The diagram on pages 54-55 maps the main stages of the inquiry procedure, as outlined in the OP-CEDAW and Rules of Procedure.

4.3.1 Meeting the requirements for an inquiry

The technical requirements for submitting a request for an inquiry are less extensive than those under the communications procedure and relate mainly to the nature of the information which the Committee will consider.

- a) In the first instance the State Party must not have opted out of the inquiry procedure under the OP-CEDAW.
- b) Secondly, the inquiry procedure applies only to violations that are grave or systematic in nature. This means the main requirement to be satisfied when requesting the CEDAW Committee to initiate an inquiry is to show that violations of this nature have taken place:

A **“grave” violation** refers to severe abuse (e.g. discrimination against women linked to violations of their right to life, physical and mental integrity, and security, torture, forced disappearances or killings; e.g. two hundred single mothers and their children being forcibly evicted from a public housing building). A single violation can be grave in nature and a single act can violate more than one right.

The term **“systematic”** refers to the scale or prevalence of a violation, or to the existence of a scheme or policy directing a violation(s). A violation not rising to the level of severity implied by “grave” may still be the focus of inquiry if there is a pattern, or if abuses are committed pursuant to a scheme or policy. A violation may be systematic in character without resulting from the direct intention of a State Party (e.g. a government policy promoting population control resulting in the sterilisation of a large group of indigenous women without their consent).

Mexico Inquiry

The Committee found that the widespread and systematic

violence against women and crimes of murder and disappearances of women constituted grave and systematic violations of the provisions of the CEDAW, as well as of Recommendation No. 19 of the Committee.

- c) The third important requirement is that the information provided must be considered “reliable” by the Committee.

The reliability of the information can be determined by consideration of the level of specificity, the internal coherence and consistency in reporting from different sources; the credibility of the sources and the extent to which sources such as the media are independent and bi-partisan.²¹

The scope of the factual information on which the Committee bases its finding of fact is broad: it may encompass details of alleged violations against both named individuals and groups of unnamed victims; the content of national law and policy; statements by victims and witnesses; and statements by government officials at local, regional and/or national levels.

There are no other admissibility requirements as there are with the communications procedure. It is not necessary to identify specific victims or to show that domestic remedies have been exhausted before requesting an inquiry. As individual victims do not have to be identified, it may be better suited than the communications procedure to situations in which individual victims could face the threat of reprisals if they seek redress at the international level.

- d) As mentioned above, the only other requirement to be aware of is that the State Party must not have opted out of the inquiry procedure through a declaration or reservation at the time of signature or ratification of the OP-CEDAW.

IWRAW Asia Pacific has developed Guidelines for the drafting of a request for an inquiry to the CEDAW Committee which are available on its website (www.iwraw-ap.org).

4.3.2 The inquiry process

The formal process of an inquiry can only be initiated by the Committee itself. Information submitted by individuals, NGOs and others will be examined by the Committee to determine whether it is reliable and whether it indicates that grave or systematic violations have occurred.

Mexico Inquiry

Non-governmental organizations Equality Now and Casa Amiga, located in New York and Ciudad Juárez, Mexico, respectively, requested the Committee to conduct an inquiry, under Article 8 of the Protocol, into the abduction, rape and murder of women in and around Ciudad Juárez, State of Chihuahua, Mexico.

Commonly, the Committee designates representative(s) from among its members to evaluate the information received, request additional information and present an evaluation of the factual record to the full Committee as the basis for deciding whether to initiate an inquiry.

The Committee invites the State concerned to submit observations on the information received and it seeks the cooperation of the State at all stages of the process. In these exchanges with the State, the Committee may be subject to political pressure from the State not to launch an inquiry. The confidential nature of the process may increase the likelihood of such pressure.

Upon confirming whether the information relates to a grave or systemic violation and whether the information is reliable, the CEDAW Committee can decide to establish an inquiry.

At this point the Committee's representative(s) are designated to conduct inquiry. The Committee's representatives have a broad authority to determine their own methods of work. The Committee can conduct its own fact-finding activities in the form of interviews, on-site visits and hearings, with the consent of the State Party. During an on-site visit members of the CEDAW Committee's Working Group may conduct hearings to review the facts and in which victims, witnesses and others can testify. It can meet with government officials, NGOs representatives, victims, and witnesses, and it can visit specific institutions or locations.

Mexico Inquiry

Ms. María Yolanda Ferrer Gómez and Ms. Maria Regina Tavares da Silva were the Committee members selected to conduct the inquiry and report to the full Committee. The Government of Mexico consented to the members' request to conduct a visit to Mexico. During the visit the members met with government officials and bodies, UN representatives in Mexico and representatives of civil society, including Casa Amiga, Equality Now and victims' relatives.

The Committee invites the State Party to cooperate in

the examination and to submit observations with regard to the information concerned within six months. The Committee can proceed with the inquiry even if the State refuses to cooperate. However, in practice, the State's cooperation will be necessary for an effective inquiry (e.g. an on-site visit requires the consent of the State). As in the communications procedure, Committee members are expected to carry out their work under the inquiry procedure impartially and independently.

All documents and proceedings related to an inquiry are confidential. The meetings in which the Committee discusses information related to an inquiry are closed. The members of the Committee, testifiers and interpreters are required to maintain confidentiality.

However, NGOs or the State Party are free to make information related to an inquiry public. In practice, the fact that an inquiry has been initiated will be public due to the Committee's fact-finding activities, especially in connection with an on-site visit.

4.3.3 Findings and Recommendations

The outcome of an inquiry by the Committee is in the form of "findings." The findings outline the facts related of the situation, the CEDAW Committee's decision on whether grave or systematic violations have been committed, and the Committee's recommendations for measures to correct any violations. The recommendations may set out specific legal and non-legal steps to halt ongoing violations or establish accountability for violations which have occurred, identify changes to bring domestic laws, policies or practices into line with the Convention, and measures to prevent future violations, including policy reform and broad-based educational or other promotional initiatives. Such recommendations can include:

- measures to combat structural causes of discrimination against women; and
- measures to achieve equality between women and men.

Examples of remedies that could be made include:

- Developing directives, guidelines or policies to monitor, provide early warning and address grave and/or systematic violations of women's human rights;

- Steps to stop on-going violations and prevent the repetition of similar violations in the future. These may include legal and administrative measures addressing a wide range of issues, including building the capacity of the authorities concerned and budgetary allocations;
- General review or amendment of laws inconsistent with the provisions of the CEDAW Convention;
- Enactment of new laws if appropriate;
- Improving the effectiveness of investigative methods, including strengthening of gender perspectives within this context;
- Regular inspections of public facilities (e.g. prisons and detention centres where immigrants are housed);
- Creation of a national machinery for women or a human rights commission;
- Adoption of temporary special measures in a particular field;
- Establishment of programmes or centres to assist women (e.g. legal aid);
- Recognition of the “justiciability” of specific rights in the CEDAW Convention as a whole;
- Taking steps to condemn and sanction discrimination by private and public actors;
- Provision of legal and other support for victims to access the justice system;
- Developing a plan of action to implement recommendations of the Committee and strengthen relationships with civil society organisations to carry out the plan; and
- Setting of a timeframe for the government to give feedback to the CEDAW Committee on steps taken to implement its recommendations.

The recommendations which are issued by the Committee if it finds a violation do not include specific measures of redress for the individual victim(s), such as compensation.

After the Committee concludes an inquiry and adopts its findings, comments and recommendations, it may consult with the State Party concerned prior to issuing to a public report on the inquiry. The final report is described as a “summary of its activities” in connection with an inquiry. The public report is included in the Committee’s annual report to the General Assembly and is available on the CEDAW

Committee website at: http://www2.ohchr.org/english/bodies/cedaw/inquiry_procedure.htm.

4.3.4 Follow-up

After a six-month period in which the State Party must submit its observations to the CEDAW Committee’s findings, the Committee may request the State Party to inform it of any measures the State has taken in response to the Committee’s inquiry, or include information on its response in its next periodic review.

The CEDAW Committee’s findings are not legally binding but they are determinative. As with the communication procedure, enforcement of recommendations to State Parties will, in many ways rely on on-going dialogue and persuasion rather than firm instructions regarding compliance.

4.3.5 Review of Inquiries to date

As of April 2013 the CEDAW Committee has only considered one inquiry. The inquiry related to facts in Mexico and the first information for the inquiry was received from NGOs in October 2002. The Committee decided to initiate the inquiry in July 2003 and its report was adopted in January 2004. The subject of the inquiry was the pattern of violence against women in the area of Ciudad Juarez, Mexico.

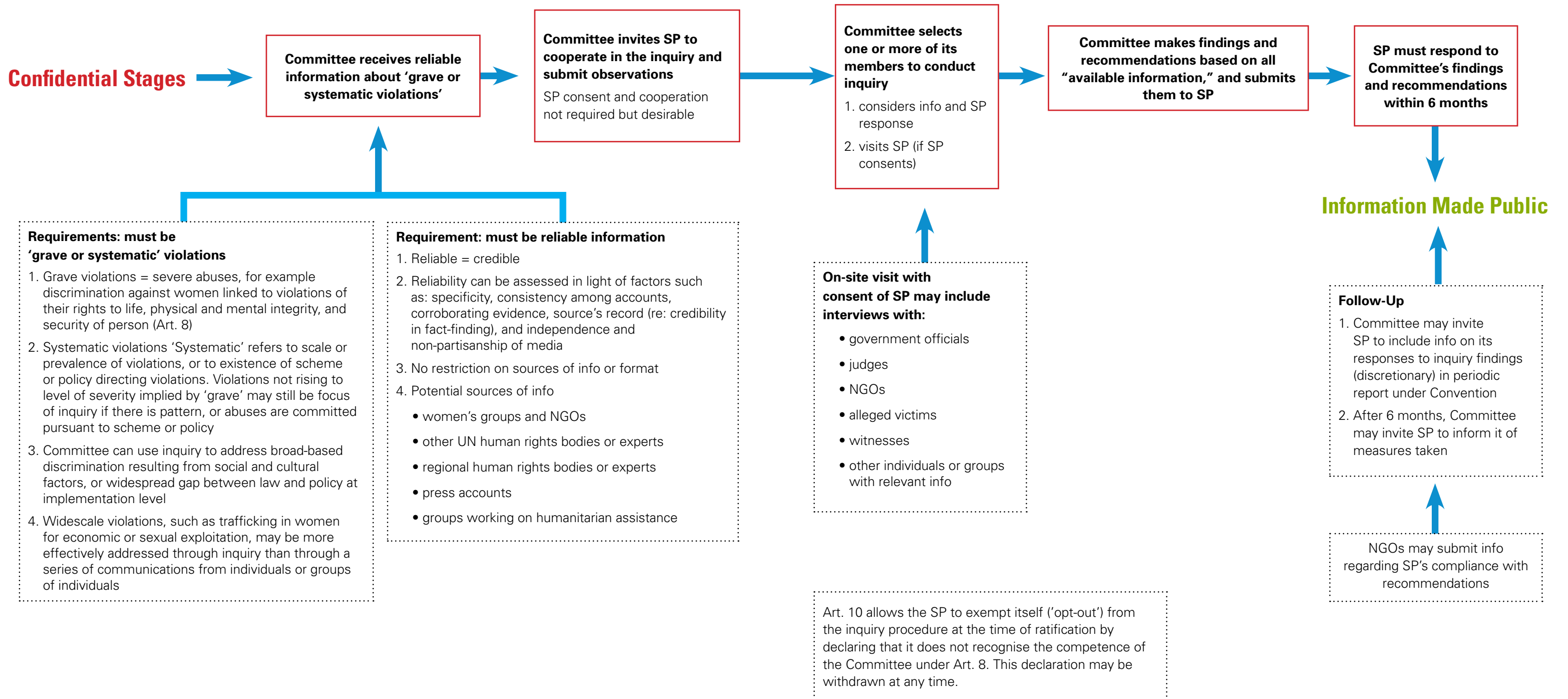
The inquiry took two years from the time information was received from one Mexican NGO (Casa Amiga) and an international NGO (Equality Now), and placed under review until the Committee issued its findings and recommendations.

The violations at issue in the inquiry were abductions, rapes and murders of women over the course of a ten year period. More than 200 young women and girls, primarily maquila workers, students and employees of commercial companies, had been disappeared and murdered in the area of Ciudad Juarez.

The Committee designated two members to assess the information. Based on their assessment and the information itself, the Committee decided that the information before it was reliable and indicated grave or systematic violations were occurring. The nature of violations was both grave and systematic: violations at issue were murders and disappearances, there had been a large number of victims, there was a pattern continuing over a lengthy period of time, and the documented failures of the justice system demonstrated

Inquiry Procedure

Applies to States Parties (SPs) that have not 'opted-out'



that government inaction or complicity had resulted in impunity for the perpetrators. There was also clear evidence of official complicity in the violations at the local level, confirming the systematic nature of the violations.

The Committee invited the Government of Mexico to submit observations and the Government cooperated. In its response the Government acknowledged the gravity of the situation and measures being taken to respond. The Mexican Human Rights Commission and the two NGOs provided additional information indicating that the violations were ongoing. The Committee decided to initiate an inquiry and appointed the same two members to conduct it.

The Mexican Government was fully cooperative and consented to an on-site visit in Mexico for nine days. The visit was conducted by the Committee's representatives and included interviews with senior federal and State officials with the Public Prosecutors Office, Office of the Attorney General, National Women's Institute, Human Rights Unit of Ministry of Interior and the National Human Rights Commission; with Congressional representatives; the UNIFEM representative, and local, national and international NGOs.

The Committee's principal findings were that the facts constituted grave and systematic violations of Articles 2 and 5 of the Convention as well as of Recommendation No. 19 and the UN Declaration on the Elimination of Violence against Women. The Committee found that there had been serious lapses in compliance with the commitments made by Mexico through its ratification of the Convention as evidenced by the continuation of very widespread and systematic violence against women and by the crimes of murder and disappearance of women as one of its most brutal manifestations.

The Committee made a range of recommendations pertaining to the framework for responses to the violations, concerning the investigation of the violations, punishment of perpetrators and support for victims' family and concerning general measures to prevent violence, guarantee security and promote women's human rights. The Mexican Government issued a response and began undertaking measures to address the recommendations.

A second inquiry brought under the OP-CEDAW on the reproductive rights of women in the city of Manila, Philippines, is pending. In October 2011, the CEDAW Committee

agreed to initiate an inquiry procedure in relation to the murders and disappearances of Aboriginal women and girls across Canada. No further information on this inquiry was available at the time of publication.

It is likely that the CEDAW Committee may not establish inquiries frequently, due to the practical need for cooperation from the State concerned, political pressures related to the State's desire to avoid an inquiry, and the financial costs and administrative burdens associated with on-site visits to the State concerned.

4.4 Conclusion

The CEDAW Convention and the OP are part of a broader, holistic framework for the protection of human rights. Like all human rights, women's human rights are interdependent and the equality aims of the CEDAW Convention can only be achieved in practice if States implement the rights guaranteed in other human rights treaties. OP-CEDAW is a critical tool in demanding the implementation and realization of women's economic, social and cultural rights and should be utilized to make violations specific to women related to food, water, health, housing and work more visible at the national and international levels.

In seeking to use the procedures under the OP-CEDAW, women's human rights advocates should take into account the jurisprudence and practice of other human rights bodies, because the CEDAW Committee and State Parties have referred to those sources for guidance and will undoubtedly continue to do so. A significant number of the procedural and substantive issues that are raised in communications are the subject of broadly agreed jurisprudence in international human rights law, such as the exhaustion of domestic remedies and positive obligations to prevent and respond to violence by non-State actors.

The Convention must be interpreted in light of its specific wording and its object and purpose. However, the language and legal concepts used in other human rights treaties parallel or resemble those found in the CEDAW Convention. The Committee will look to approaches taken by other human rights bodies for authoritative guidance on a range of questions, including methods of interpretation, procedural requirements, general international law principles, and the types of measures necessary to remedy a

violation and prevent future violations.

Jurisprudence under other human rights treaties and general human rights law is relevant not only with respect to procedural or technical questions, but also with respect to certain substantive issues. For example, a communication alleging gender discrimination with regard to the rights to housing or food would require the CEDAW Committee to look to general human rights law for clarification of the scope and content of the underlying rights if it wishes to recommend effective measures to remedy the violation, rather than merely finding that the acts or omission of the State were discriminatory. This is particularly true where claims relate to failure to fulfill the underlying rights. For example, a claim based on the indirectly discriminatory effects of the types of measures taken by the State to fulfill the right to housing requires an evaluation of whether those measures are of the type understood in human rights law to be effective in fulfilling the State's general obligations regarding the right to adequate housing. Similarly, a claim regarding gender discrimination in the context of government responses to the disappearance of a woman human rights defender would require the Committee to consider general human rights law and practice related to the obligations of the State in cases of disappearance. Of course, the Committee would apply the definition of discrimination in the CEDAW Convention and assess the State's obligations under other relevant provisions of the Convention, in order to determine whether a violation had taken place.

The potential for general human rights law to have beneficial effects on developments in women's human rights law is illustrated by the incorporation of the "due diligence" standard into the UN Declaration on Violence Against Women, the CEDAW Committee's General Recommendation No. 19 on Violence against Women and the CEDAW Committee's decisions in communications related to domestic violence: the due diligence standard and the rationale supporting its application to violations by non-State actors were taken directly from the decision of the Inter-American Court of Human rights in the 1988 *Velasquez Rodriguez v. Honduras* case.

If women are to benefit from helpful developments in general human rights law, advocates must take an active role in bringing them to the attention of the Committee and arguing for their application in a particular communication or in a

situation which is the subject of an inquiry. Article 3 of the CEDAW Convention states that:

State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

In thus extending the objectives to be achieved by States beyond enjoyment of the specific rights recognized in the Convention, Article 3 points to the need to situate the Convention within the wider human rights framework.

Notes

¹ For a list of State Parties to CEDAW see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. For a list of State Parties to the OP CEDAW see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en.

² See *Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies. Addendum* (UN Doc HRI/Gen/3/Add.1) 18 April 2002: Part III—Rules of procedure for the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; XVI—Procedures for the Consideration of Communications Received under the Optional Protocol.

³ Rule 96(b) of the Rules of Human Rights Council (HRC) in *Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies HRC/GEN/3/Rev.2* at <http://www.law.wits.ac.za/humanrts//esc/compilationprocedures2001.html>.

⁴ HRC, *Lanza v. Uruguay*, Communication No. 8/1997, UN Doc CCPR/C/9/D/8/1997.

⁵ HRC, *Weinberger v. Uruguay*, Communication No. 28/1978, UN Doc CCPR/C/11/D/28/1978.

⁶ HRC, *Miango v. Democratic Republic of Congo*, Communication No. 194/1985, UN Doc CCPR/C/31/D/194/1995.

⁷ HRC, *Sahid v. New Zealand*, Communication No. 893/1999, UN Doc CCPR/C/77/D/893/1999.

⁸ See CEDAW Committee Rules of Procedure, *supra* n. 65 above, Rule 68(3)

⁹ Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased). CEDAW/C/39/D/6/2005 1 October 2007.

¹⁰ HRC, *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

¹¹ See also Inter-American Commission of Human Rights (IACHR), "PM 43-10—'Amelia', Nicaragua." On February 26, 2010, the IACHR granted precautionary measures for a person who the IACHR will identify as Amelia, in Nicaragua. The request seeking precautionary measures alleges that Amelia, mother of a 10-year-old girl, is not receiving the necessary medical attention to treat the cancer she had, because of her pregnancy. The request alleges that the doctors had recommended to urgently initiate chemotherapy or radiotherapy treatment, but the hospital informed Amelia's mother and representatives that the treatment would not be given, due to the high risk that it could provoke an

abortion. The Inter-American Commission asked the State of Nicaragua to adopt the measures necessary to ensure that the beneficiary has access to the medical treatment she needs to treat her metastatic cancer; to adopt the measures in agreement with the beneficiary and her representatives; and to keep her identity and that of her family under seal. Within the deadline set to receive an answer, the State of Nicaragua informed the IACHR that the requested treatment has been initiated; See also, ECHR, *K.H. and Others v. Slovakia*, (Application no. 32881/04); ACHPR, *B. v. Kenya*, Communication 283/2003, Seventeenth Activity Report.

Commission of Jurists (ICJ), Commentary on the Optional Protocol to ICE-SCR (2010) p. 97.

¹² Office of the High Commissioner for Human Rights, *Fact Sheet: How to submit individual complaints under the Optional Protocol to CEDAW*, available at: http://www.google.com/url?sa=t&rc=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CEkQFjAA&url=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbody%2Fcedaw%2Fdocs%2FFS_ModelCommunicationForm.doc&ei=DukjUJK3GsmT0AGq2IHYDA&usq=AFQjCNF8TyVVxNAfqhyVIY-kfgjunao7zQ.

¹³ See IWRAW-Asia Pacific, *The OP-CEDAW as a mechanism for implementing women's human rights: An analysis of decisions Nos. 6-10 of the CEDAW Committee under the Communications procedure of the OP-CEDAW, Occasional Paper Series, No 13* (2009). Under "Lessons Learned," discussing Communication 9: Case of *N.S.F. vs. the United Kingdom of Great Britain and Northern Ireland*, Communication No.10/2005, CEDAW/C/38/D/10/2005, the author reminds that "proceedings before the Committee are legal in nature and there would be a lot of discussion and analysis of the de jure and de facto position of state obligations and laws. The author did not invoke specific provisions of the Convention nor demonstrated how the Convention may have been violated. The Committee was of the opinion that her claims appeared to raise issues under Articles 2 and 3 of the Convention. And although it was not the reason why the Committee declared the communication inadmissible it was one of the objections of the state party.

¹⁴ See CESCR, General Comment No 15 on the right to water, and No 14 on the right to health, para.11.

¹⁵ In contrast, CERD, for example, will deem a complaint inadmissible if it is submitted after 6 months have lapsed between the exhaustion of domestic or international remedies and the submission of the complaint.

¹⁶ OHCHR Factsheet, supra n. 74 above.

¹⁷ The admissibility requirements can also be identified as follows:

- Admissibility *ratione loci*: requirements concerning the state's jurisdiction with regard to the violation
- Admissibility *ratione materiae*: requirements concerning what rights and obligations of the state are covered by the treaty
- Admissibility *ratione personae*: requirements concerning who may present a claim and who may be the respondent
- Admissibility *ratione temporis*: requirement that the events on which the claim is based occurred after the treaty had entered into force for the State.

¹⁸ See for example, European Court of Human Rights, *Aksoy v. Turkey*, Judgment of 18 December 1996, Reports of Judgments and Decisions 1996 IV, p. 2275, para. 53; African Commission on Human and Peoples' Rights, Communication Nos. 147/95, 149/96, *Jawara v. The Gambia*, Thirteenth Annual Activity Report (1999-2000), para 31; and African Commission on Human and Peoples' Rights, Communication 71/92, *Rencontre Africaine pour la Défense Droits de l'Homme v. Zambia* (Zambian expulsion case), Ninth Annual Activity Report (1995-1996), para. 11.

¹⁹ Handbook for legislation on violence against women, Department of Economic and Social Affairs, Division for the Advancement of Women, United Nations Publication, New York, 2009, p. 27

²⁰ IWRAW Asia-Pacific, Occasional Paper No 13, supra n. 75 above.

⁸⁵ See, Inter-American Institute of Human Rights (IIDH) and International



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

5

5. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

5.1 Overview of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights¹

On December 10th, 2008,—International Human Rights Day and the 60th Anniversary of the Universal Declaration of Human Rights—the United Nations adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). This was the result of a negotiation process which began in the early 1990's. The adoption of the OP-ICESCR brought a close to the significant imbalance of protections available for civil and political rights versus economic, social and cultural rights and provided a concrete means of demonstrating that there is no hierarchy between human rights.

5.1.1 What is the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?

The OP-ICESCR is a new and separate instrument which complements the International Covenant on Economic, Social and Cultural Rights.

Like the OP-CEDAW, the OP-ICESCR is a procedural protocol that gives the supervising bodies the ability to review individual communications in a similar way to that of other human rights courts such as the Inter-American Court or European Court of Human Rights.

In the case of the OP-ICESCR, the CESCR is the body in charge of overseeing the communications submitted. The CESCR will therefore be competent to examine individual complaints, as well as inquiries in cases of grave and/or systematic violations of human rights and inter-State complaints.

When a State ratifies a Covenant or its Optional Protocol, it voluntarily accepts a solemn responsibility to apply each of

the obligations embodied therein and to ensure the compatibility of their national laws with their international duties, in a spirit of good faith.²

5.1.2 The mechanisms introduced by the OP-ICESCR

The OP-ICESCR introduces three new mechanisms under the competence of the CESCR. These mechanisms are:

- Communications procedure
- Inquiry procedure
- Inter-State procedure

Therefore, the OP-ICESCR provides women with international accountability mechanisms to seek remedies for violations of ESC rights. As with the OP-CEDAW, these mechanisms are regulated by the OP-ICESCR itself and by Rules of Procedure that complement it.³

5.2. The Communication procedure

The communication procedure enables an individual or group of individuals to bring a complaint alleging violations of economic, social and cultural rights contained in the Covenant to the attention of the CESCR. By allowing receipt of individual complaints under the communications procedure, the OP-ICESCR has the potential to increase the implementation of ESC rights for individuals who have been unable to access or achieve justice at the domestic level. The CESCR will have the authority to study the case and determine whether any of the rights under the ICESCR had been violated. Cases decided under other Optional Protocols have changed the laws, policies and programs of governments around the world.⁴

As with the OP-CEDAW, the procedure under the supervising body is conducted in a similar way to that of a tribunal—it is quasi-judicial.

5.2.1 Admissibility criteria

There are several requirements that the CESCR will review to determine whether the communication is admissible.⁶

a) Which violations can be claimed in the communication?

The CESCR is able to examine violations related to the rights recognized under Articles 1 to 15 of the Covenant, including equality and non-discrimination (Articles 2.2 and 3).

According to Article 2 of the OP-ICESCR, in order for a communication to be admissible, it has to be related to a violation of an economic, social or cultural right set forth in the ICESCR, including the right to work, the right to social security and social insurance; the right to protection and assistance for the family and the prohibition of child labor; the right to an adequate standard of living (adequate food, water, sanitation and housing), the right to health, and the right to education. Therefore, the communication should identify the right or rights under the ICESCR that have been violated by the State Party.

The CESCR interprets the provisions of the Covenant and the scope of these rights through General Comments. General Comments allow the Committee to clarify the scope of substantive rights in the Covenant, to define the obligations of the State in relation to those rights and to the types of laws, policies and programs that are required to respect, protect and fulfill these rights. Currently there are 21 General Comments that have been developed by the CESCR.⁷ The General Comments provide a resource for your communication by explaining the Committee's analysis of the content of the ESC rights and State obligations.

The CESCR has increasingly emphasized the interconnection and interdependence among economic, social and cultural rights in the understanding that the fulfillment of one right almost universally requires the recognition and realization of the others. For instance, lack of education not only negatively affects the right to work and the right to social security, but it can also be used as a means to justify excluding individuals from fully participating in their communities and government.⁸ Similarly, the Committee has recognized that women's uneven patterns in the workforce and pay discrimination have affected their ability to equally enjoy the right to social security.⁹

What is unique in the OP-ICESCR?

- A new criteria for admissibility, (Article 3.2.a)
- A "clear disadvantage" or "serious issue of general importance" clause (Article 4)⁵;
- Provision for reaching a friendly settlement (Article 7);
- Explicit allowance for the Committee to consult documentation emanating from other international and regional bodies and potentially third parties (Article 8.3);
- A standard of review—"reasonableness of steps taken by the State Party"—for considering communications (Article 8.4);
- A clause allowing the communications procedure to be linked to international assistance and cooperation mechanisms (Article 14); and
- Establishment of a trust fund with a view to providing expert and technical assistance to State Parties for the enhanced implementation of ESC rights (Article 14).

To contribute to the understanding of the content of ESC rights and what constitutes a violation, experts have adopted the **Limburg Principles on the Implementation of the ICESCR**,¹⁰ the **Maastricht Guidelines on Violations of ESC rights**¹¹ and the **Montreal Principles on Women's Economic, Social and Cultural Rights**¹² each of which provide interpretations and clarifications of the provisions of the ICESCR. As an advocate or litigator interested in women's ESC rights, these interpretations will be useful in your arguments and you should consider reviewing them all to get a better sense of what might constitute a violation of women's ESC rights but also as a source of potential arguments for you communication or advocacy document.

➔ Strategies

When submitting a complaint, it is important, though not strictly necessary, to identify the Articles of the treaty that have allegedly been violated. Although failure to name the Articles of the Covenant that have been violated would not affect the Committee's decision regarding the admissibility



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of the communication, it can influence the comprehension of the matter at issue.¹³

It is important to submit the communication as completely as possible and to include all relevant information to the case. The complainant should set out, ideally in chronological order, all the facts on which her claim is based. Although the complainant will not be asked to list all the Articles that have been violated, she will be expected to make the necessary efforts to provide as much information as possible, such as: the population that lives in the area, the lack of access to the health system, the chronology of the facts, the context of the situation, whether there is disparate access for men and women because of limited hours or lack of transportation, whether female doctors are available where same sex examinations are customary; to give the CESC RIGHTS enough information in order to recognize the violation and examine the claim.¹⁴ It is also important to clearly identify the State responsible for the violation.

b) Who can submit a communication?

Article 2 of the OP-ICESCR establishes that “a communication has to be submitted by or on behalf of an individual or a group of individuals under the jurisdiction of a State that has ratified the Optional Protocol.”

- ***Submission by an individual or group of individuals***

According to the OP-ICESCR, any individual or group of individuals, claiming their rights under the Covenant have been violated by a State Party to that treaty, may bring a communication before the Committee.

The inclusion of both individuals and groups of individuals is not new under the international treaty body system. The International Convention on Elimination of Racial Discrimination and OP-CEDAW expressly provide standing for groups of individuals, as do the rules of procedure for the Human Rights Committee.

The system is intended to be as straightforward as

possible. Thus, the complainant does not need to be a lawyer or to have a legal representative to submit a communication under OP-ICESCR. However, the assistance of a lawyer or other trained advocate is advisable given the legal and procedural intricacy of complaints. Legal advice may also improve the quality of the submissions in terms of the persuasiveness of the presentation of facts and how they represent a violation of economic, social and cultural rights.

The United Nations does not provide legal aid or financial assistance for complainants and does not mandate that States Parties provide legal aid. Complainants should verify whether legal aid in their countries is available for bringing complaints under international mechanisms and whether economic and social rights or women's rights organizations offer assistance free of charge.

- ***Standing for third parties***

Complaints may also be brought by third parties on behalf of individuals or a group of individuals. A representative may be designated by the victim/s to submit a communication on her behalf. Representatives may include lawyers, family members,¹⁶ a national or international NGO or any other representative designated by the victim. It is common for NGOs with expertise on human rights and litigation to bring cases and communications before international adjudicatory mechanisms on behalf of individuals and groups. (See Part Six of this manual).

The basis for standing for third parties acting on behalf of victims is also found in the Inter-American and the African System of Human Rights. Both regional mechanisms allow various categories of petitioners to submit petitions on behalf of victims, such as ordinary citizens, groups of individuals, NGOs, including governmental agencies.¹⁷ There are a variety of reasons that might require third parties to submit a claim acting on behalf of a victim such as a women experiencing violence who feels that going public with the claim will increase her risk; homeless persons who are unable to identify and address or often cannot provide identification; and women's human rights defenders or others whose security might be at risk by going public with a case.

According to the general rule set forth under OP-ICESCR, individuals must have given their written consent in order for a third party to have legitimacy in acting on her/his behalf. Evidence of consent can be offered in the form of

an agreement to legal representation, power of attorney, or other documentation indicating that the victim(s) has authorized the representative to act on her or their behalf.

➔ Key Issues on Standing

- ***The (non) consent of the victim***

In certain cases, a third party may bring a case without the consent of the victim if the individual or group submitting it can justify acting on her or their behalf.

The recognition in Article 2 of an exception to the general requirement of consent aims to account for circumstances in which the consent of individual victims may be difficult or impossible to obtain. This may include claims regarding victims who face a danger of reprisal including physical injury or economic loss if they consent to the presentation of a claim on their behalf, women who are deceased, imprisoned, or detained; victims whose whereabouts cannot be determined following displacement; or situations in which it would be unreasonable or impractical to require consent by the victim(s).

Under those circumstances the author must explain why

Who can bring a complaint under the OP-ICESCR?

- a) a single individual whose rights under the ICESCR have been violated;
- b) a group of named individuals whose rights have been violated by the same act (or failure to act);
- c) a group of individuals who have all suffered the same violation(s) but who may not all be identified by name because their safety might be threatened or because the group is so large that it would be impractical to get the consent of all victims;
- d) those that have suffered violations as a group (e.g. women's rights organizations that have been prohibited by the State from organizing activities to promote women's ESC rights under ICESCR)¹⁵;
- e) third parties (NGOs, legal representative) on behalf of an individual; and
- f) third parties (NGOs, legal representative) on behalf of a group of individuals.

s/he has been unable to obtain the victim's consent and why s/he is authorized to bring the complaint on the victim's behalf.

The Human Rights Committee has also allowed representation in the absence of authorization.¹⁸ The Committee indicated several circumstances in which there could be an exception to this rule: where it can be proven that the alleged victim is unable to submit the communication in person due to compelling circumstances, such as (i) following an arrest the victim's location is unknown;¹⁹ (ii) detained victims;²⁰ (iii) when the death of the victim was caused by an act or omission of the State concerned;²¹ and (iv) proof that the alleged victim would approve of the representation.²²

In addition, there are situations that, by their nature, involve collective interests in which it will be impracticable to obtain consent from all those affected. Breaches of rights protected by the Covenant will frequently have collective dimensions and affect groups and communities as such, in contrast to violations of a purely individual nature. In such situations of widespread or collective violations, it will be impractical to obtain consent from large numbers of victims, and a communication submitted on behalf of a small number of individual victims who have given consent may not adequately represent the systemic or collective nature of the violations.²³

The power to accept third party complaints, therefore, is important in order to ensure that violations, which may affect a diffuse group of individuals, do not fall outside the jurisdiction of Committee.

- ***Who is the Victim?***

Another important issue to take into account is the identification of the victim/s. Under the jurisprudence of the UN Human Rights Committee, it has been established that to satisfy the victim test the alleged violation of rights must relate to specific individuals at a specific time. A victim cannot be hypothetical. To be a victim, the individual or group of individuals must be actually and personally affected by a law or practice which allegedly violated their rights.

- ***Collective complaints / Standing for NGOs—the requirement of a victim***

Abstract legal claims (*actio popularis* claims), challenging policy advanced by NGO's without identifying a specific victim are not allowed under the OP-ICESCR.²⁴ However, as

noted above, identified groups of individuals can submit a complaint.

Jurisdiction and Extraterritorial Obligations

Article 2 says that communications may be submitted "by or on behalf" of "individuals or groups of individuals" who are under the jurisdiction of a State Party.

Victims are not required to be in the State Party's territory to submit a complaint before the CESCR, although, they must have been under the "jurisdiction" of the State Party at the time the violation occurred.

- ***Jurisdiction vs. territory***

Jurisdiction and territory are not interchangeable concepts. The jurisdiction of a State is not limited to the boundaries of its territory. That is why it is not the place where the violation occurred but the relationship between the individual and the State in relation to the violation of the rights set forth in the Covenant that has to be considered when analyzing the extent of responsibility of a State Party.²⁵ A failure to recognize the inherent differences between the two concepts -jurisdiction and territory- limits the effectiveness and universality of human rights.²⁶

In this regard, the CESCR has indicated that jurisdiction includes "any territory over which a State Party has geographical, functional or personal jurisdiction."²⁷ This is of particular importance in cases of alleged violations of the rights of migrants and non-nationals residing in States other than their own.²⁸

In addition, States are legally responsible for respecting and implementing international human rights law within their territories and in territories where they exercise effective control with respect to all persons, regardless of a particular individual's citizenship or migration status.²⁹ Thus, jurisdiction is independent from a woman's nationality: an individual who claims to be a victim of a violation does not have to be a national of the State Party concerned. Immigrants or refugees can submit a communication where their rights are violated by the State or private actors in the country where she/they is/are working or living; including an undocumented worker.³⁰ Her migratory status does not restrict her right to claim a violation of the Covenant.

- ***Extraterritorial Obligations***

Under certain circumstances, many human rights

advocates argue that States can be held accountable under international human rights law for acts and omissions committed outside of their territory and these are called extraterritorial obligations. In particular, the **Maastricht Principles on Extraterritorial Obligations** have been launched by key civil society organizations and academics. Extraterritorial obligations are based on an understanding that policies implemented in one country can have negative human rights implications for people living in another country. Whenever a State, its agents or corporations engage in activities in other States, which have an impact on the human rights of people in that foreign State the originator State has an obligation to ensure respect for human rights by its citizens and corporation abroad.³¹

As the first United Nations Special Rapporteur on the Right to Food underlined in his reports on missions to India and Bangladesh, extraterritorial obligations mean that when States exploit trans-boundary watercourses, they must give priority to the satisfaction of basic human needs of the populations that depend on these water courses, in particular safe drinking water, and the water needed for basic subsistence agriculture.³²

Claimants should bear in mind that under the OP-ICESCR, petitioners will have the burden of proof in establishing that a violation occurring outside a State's territory occurs *de jure* (by law) under the State's jurisdiction.³³ The inquiry procedure, for reasons which are more fully explained later in the section 5.3 may have more potential for advancing this type of claim.

- **Extraterritorial Obligations:**

- *International assistance and cooperation*³⁴

Article 2.1 of the ICESCR requires States to recognize the essential role of international cooperation and assistance and to take joint and separate action to achieve the full realization of the rights in the Covenant. In addition, as opposed to the ICCPR and the CRC, Article 2.1 does not contain express reference to jurisdictional limitations of the State Party.³⁵

- **c) Exhaustion of Domestic Remedies**

Article 3 of the OP-ICESCR establishes that a communication has to be **submitted within 1 year** after the exhaustion of available domestic remedies **unless** it was not possible to respect the time limit or domestic remedies are unreasonably prolonged.

To avoid delays in the procedure, when submitting a communication, in order to meet the exhaustion requirement, the author must show the following:

- Final decision: The complainant has obtained a final decision from the highest court to which recourse is available.
- Adequate use: The complainant has adequately utilized the remedy provided by the State.
- Substance: Although it is not necessary to raise the claim in exactly the same form domestically and in the communication presented at the international level, the substance of the claims presented in the communication should reflect the substance of the domestic complaint.⁴⁷

The OP-ICESCR establishes a time limit during which a communication is admissible. The CESCR will consider those petitions that are lodged within a period of one year following the date on which the alleged victim has been notified of the decision that met the exhaustion requirement—i.e., a decision by a domestic appeals court. The exception to the rule would apply if it was not possible to respect the time limit or domestic remedies are unreasonably prolonged or where the violation is continuing (as it will be explained below).

Why does the OP-ICESCR require exhaustion of domestic remedies?

The underlying aim of the exhaustion rule is to provide the State with the opportunity to redress a violation using the domestic legal system before a claim is brought to an international body. This is an intrinsic aspect of the subsidiary character of the OP-ICESCR and international mechanisms in general.³⁶ The exhaustion requirement in Article 3(1) is inextricably linked to the duty of the State to provide domestic remedies as a means of giving full effect to the rights recognized in the Covenant.³⁷

Human rights bodies have frequently underlined the need to apply the rule with a degree of flexibility and without excessive formalism, bearing in mind that it is being applied

in the context of protecting human rights and that the application of the rule requires an assessment of the particular circumstances of each individual case.³⁸ Exceptions to the exhaustion requirement have been recognized on the basis of the facts of the individual case and the facts concerning the general legal, political and socioeconomic context within which the remedy operates, particularly when a case has been unduly prolonged in the domestic court system.

In light of this, factors particular to violations of ESC rights under the Covenant that will necessarily influence the application of the exhaustion requirement under the OP-ICESCR should be considered. These include: the systemic or collective nature of many violations that involve economic, social and cultural rights; the absence of recognition or judicial remedies for ESC rights in many domestic systems; and the need to clarify standards regarding the adequacy and effectiveness of quasi-judicial remedies for violations.

Which remedies have to be exhausted?

The term domestic remedy is understood in human rights jurisprudence to refer primarily to judicial remedies, as the most effective means of redressing human rights violations, but if there are other remedies, such as administrative remedies, if these are accessible, affordable, timely and effective in the particular circumstances of the case, it may be necessary to exhaust these as well.³⁹ If available, administrative remedies must be delivered by a decision-making body that is impartial and independent, has the competence to issue enforceable decisions, and applies clearly defined legal standards. The proceedings must also ensure basic due process guarantees, such as the possibility for judicial review, and the prompt implementation of the remedy.

The exhaustion rule under the OP-ICESCR is similar to other international and regional human rights treaties,⁴⁰ and although its interpretation can slightly vary, human rights jurisprudence makes clear that in order for a claimant to be required to exhaust a remedy, it must be:

- **Available in practice:** it is not sufficient that a remedy be available theoretically under the law but it must be capable of being applied in practice; and is applicable to the

case. Thus, the availability of a remedy depends on its de jure and de facto accessibility to the victim in the specific circumstances of the case. In other words, “remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant.”⁴¹

In considering the claims under the OP-ICESCR it should be noted that for vulnerable groups, the actual availability of the remedies, even where they exist in the law, is restricted by social and economic obstacles of a structural or systemic character. Domestic remedies may prove illusory due to economic barriers, such as lack of free legal aid, the location of courts or administrative tribunals, procedural costs, or due to the broad-based effects of structural inequalities, such as illiteracy, on women, migrants, indigenous communities, marginalized racial and ethnic groups, and other sectors of society that face systemic discrimination.⁴²

Therefore, if the actual situation of the complainant does not allow her to meet the substantive requirements for exhausting domestic remedies or she lacks legal standing, the remedy is in practice unavailable. For example, if the State Party does not provide court-appointed interpreters for women who are deaf or provide support for women who are illiterate to be

able to file a petition, or fails to ensure a safe space to stay for a victim of domestic violence during the duration of the trial and afterwards, or does not provide transportation for a women in a rural area to go to the relevant tribunal, she will not be able to access to justice even if the remedy is recognized in the law.

An intersectional approach should also be taken into account in the evaluation of the access to justice. In analyzing the exhaustion of remedies, the Committee will examine the grounds of discrimination (e.g. race, gender, ethnic, nationality, economic condition, etc.) and the social, economic, political and legal environment that contributes to discrimination and structured experiences of oppression and privilege. Therefore, evidence of a pattern of defects in the administration of justice with regard to women’s human rights, such as discriminatory rules of evidence or a widespread refusal by the judiciary and/

Exhaustion of domestic remedies is not a condition or requirement for the exercise of the Committee’s discretion to grant interim measures.

or the police to apply existing legal protections for immigrant, or disabled women, or women from racial and ethnic minorities, demonstrates the ineffectiveness of the remedies in question.

b) Adequate to provide relief for the violation suffered in the particular circumstances of the case. The adequacy of a remedy depends on the nature of the violation, the type of relief that may be obtained in the event of a successful outcome, and the objective sought by the victims in the particular circumstances of the case. Thus, the Committee will have the duty to evaluate the adequacy of domestic remedies as a means of addressing the particular violation which occurred under the facts in the communication.

c) Effective for the object for which it was conceived. This depends both on the nature of the remedy and the relationship between the remedy and the facts of the case.⁴³ To be effective, a remedy must be capable of producing the result for which it was designed and it must offer a reasonable prospect of success or a reasonable possibility that it will prove effective. Core elements of an effective remedy include enforceability, the independence of the decision-making body and its reliance on legal standards, the adequacy of due process protections afforded the victim, and promptness. The express reference in Article 3(1) to the exception for remedies that are unreasonably prolonged points to the particular importance of promptness or timeliness as an aspect of effectiveness.⁴⁴

However, the OP-ICESCR has taken a more restrictive approach than OP-CEDAW and has eliminated an express exception to the exhaustion rule when domestic remedies are ineffective. Advocates will need to remain aware of this difference and consider taking a pro-active approach through argumentation to overcome this restrictive interpretation.

Many domestic systems lack adequate remedies for violations of the rights protected under the ICESCR, including judicial remedies or enforceable administrative remedies that guarantee due process of law. In the absence of available domestic remedies, complainants will need to argue to the CESCR that the exhaustion requirement in Article 3(1) does not apply.

Key Issues for Exhaustion of Domestic Remedies

- **Burden of proof:** Where a State contests admissibility on grounds of non-exhaustion, it bears the burden of demonstrating that a remedy was available in practice, that it was one which was capable of providing redress in respect of the applicant's complaints, offered reasonable prospects of success and would have been effective in the particular circumstances of the case;⁴⁵ thus, the burden of proof shifts to the State. The information provided by the State as to effectiveness must be detailed and relate to the specific circumstances of the case⁴⁶ If the State advances such proof, the burden shifts back to the complainant to show that the remedies identified by the State were exhausted or an exception to the rule applies.

Therefore, when planning to submit a communication, the author must either provide:

- (1) Information indicating that domestic remedies have been exhausted, including the specific remedies utilized, the substance of the claim raised in domestic proceedings, and whether a final decision has been issued in the proceedings; or
- (2) In the alternative, present information supporting arguments that no domestic remedies are available or, if they are available, one or more of the recognized exceptions to the requirement applies (not available in practices, not effective, or not adequate to provide relief).

Taking into account the experiences of other international and regional human rights treaties, particularly OP-CEDAW, exhaustion of domestic remedies is consistently contested by State Parties and complainants must ensure they present all the facts clearly in their communication and relate those facts to the rule and its exceptions, if necessary.

Practice under international bodies has also recognized that if the State fails to raise non-exhaustion in the first available opportunity, it will be unable to do so at a later stage. The European Court of Human Rights, the Inter-American Commission and the Inter-American Court of Human Rights have held that the State may tacitly or expressly waive the exhaustion requirement, since the rule is designed for the benefit of the State and operates for it as a defense. If the State fails to assert

non-exhaustion during the first stages of the proceedings, tacit waiver of the requirement by the State will be presumed. Once in effect, waiver is irrevocable.⁴⁸ This approach is supported by principles of fairness and judicial economy, bearing in mind that exhaustion is an admissibility requirement of procedural character that is for the State's benefit.

d) Violations occurring after entry into force of OP-ICESCR / Continuing violations

The CESCR will only examine violations occurring after the entry into force of the OP-ICESCR for the State Party concerned, unless those facts arose prior to and continued after that date—or “continuing violations.”

As a matter of general principle, only acts or omissions occurring after the date in which the treaty is enforceable against the State Party can be considered by the CESCR. However, if the violation continues after that date; or if the effects of a violation, which originated before the State's ratification of the treaty, continue thereafter, the State can be held responsible for a continuing violation.

The concept of continuing violations “extends jurisdiction to cases that originated before the entry into force of the declaration of acceptance (the “critical date”), but that produced legal effects after that date.”⁴⁹

The UN Human Rights Committee stated that it would consider alleged violations which, although relating to events that took place before the entry into force, “continue, or have effects which themselves constitute violations, after that date.”⁵⁰ And that “a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of previous violations of the State Party.”⁵¹ In its General Comment 33 on the Obligations of State Parties under the First Optional Protocol to the ICCPR, the HRC states that “in responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State Party, the State Party should invoke that circumstance explicitly, including any comment on the possible “continuing effect” of a past violation.”⁵²

The Inter-American Commission,⁵³ in analyzing the case of *Maria Eugenia Morales de Sierra*,⁵⁴ stated that “the legislation in question [the Civil Code of Guatemala in respect of the role of each partner within marriage] gives rise to

restrictions on the rights of women on a daily, direct and continuing basis (...) Given the nature of the claims raised, which concern the ongoing effects of legislation which remains in force, the six-months rule creates no bar to the admissibility of this case under the circumstances analyzed above. Likewise, in the case of *Yean Bosico*, the Inter-American Court found that the denial of the right to nationality was a continuing violation for which the State could be held responsible.⁵⁵

e) Violations have not already been examined by the Committee or another international procedure;

The rationale behind the prohibition of the duplication of procedures is to refrain from faulting member States twice for the same alleged violations of human rights.⁵⁶

• Considerations by the same body

There are some important exceptions to this general rule that advocates should keep in mind:

(1) There is no restriction on the CESCR from examining a case involving the same or similar facts under the inquiry procedure that previously arose in an individual communication. However, the reverse is not true. If a case has been the subject of an inquiry or individual communication under OP-ICESCR or another treaty, CESCR cannot accept review under the individual communication procedure.

(2) “The discussion of specific facts in the Concluding Observations of the CESCR should not constitute previous review by the body.” This was the position adopted by the Inter-American Commission when confronted with the question in which the State of Colombia argued that the subject matter of the petition—the massive and systematic extra judicial killings of many members of the Union Patriótica Party—were already subject of a pronouncement by the Commission in its Second Report on the Situation of Human Rights in Colombia.⁵⁷

In a similar understanding of this rule and the different approach of the individual communication mechanism vis a vis the periodic reporting procedure, CEDAW, when analyzing the case of *Ms. A.T. vs. Hungary* recalled its recommendations under the reporting procedure and noted its concern about the prevalence of violence against women and girls, including domestic violence and the lack of protection or exclusion orders or shelters exist for the immediate

A communication will be considered “manifestly ill-founded” if:

- the communication alleges violations of rights that are not guaranteed by the ICESCR;
- the communication relies on an incorrect interpretation of the ICESCR; or
- the communication alleges facts that unquestionably indicate that the State Party’s act or omission is consistent with its obligations under the ICESCR.

protection of women victims of domestic violence.⁵⁸ This therefore, can be interpreted as also confirming that the concluding observations issued by treaty bodies do not constitute a previous consideration by that body.

• *Cases pending or decided by another international body*

A communication will be declared inadmissible if the same matter has been examined under another international procedure.

To determine whether it is the “same matter,” the Committee will consider both the facts underlying the claim and the content of the rights in question. If it finds that the facts have changed significantly, or that the claims raised under other international procedures concerned different rights or obligations—even though the facts were the same—the Committee may decide that the communication is admissible.

More specifically, the Human Rights Committee held that “the concept of “the same matter” within the meaning of Article 5 (2) (a) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body.”⁵⁹

Another key element to take into consideration is the nature of the other procedure. This element should be analyzed in such a way to exclude procedures that do not: (i) assess complaints about specific individuals or groups; (ii) require both the victim(s) and the State Party to submit their arguments, (iii) issue a pronouncement directed to the State regarding to the decision; and (iv) order remedies for the victim.⁶⁰

For instance, it would be admissible to submit a communication under the OP-ICESCR about a case that has already been sent to the Special Rapporteur on Violence against Women because a reporting procedure of the latter is not another “procedure of international investigation or settlement.” As in the *Mamerita Mestanza* case (see page 108), in which it was possible to submit a petition before the IACHR—and, at the same time, address the situation of forced sterilization in Peru under the HRC reporting mechanism.⁶¹

However, a matter that has been examined by the OP-CEDAW would not be admissible under the OP-ICESCR unless it addresses different rights or obligations or is submitted on behalf of a different complainant.

f) Communication it is not manifestly ill-founded, (i.e., it is sufficiently substantiated)

Another technical requirement for admissibility is the provision of sufficient information to assist the CESCR to make the necessary identification of a rights violation in the course of its examination of the case.

The communication has to be sufficiently substantiated, meaning that it must contain particulars of when, where and how the alleged violation occurred. Specifics should be provided concerning the violation of the rights of the victim. It is not sufficient to make broad claims about the general situation, such as “the health care system fails to address the needs of women” or to merely present global statistics (e.g. the rate of illiteracy among women, the percentage of lack of access to health care etc.). The facts about the general situation will help to contextualize the specific violation of the victims, but the author must detail the actual experiences of the individual or group of individuals who initiate the communication.

If on a preliminary examination of the communication this requirement is not met, the CESCR is no longer required to examine the communication on the merits.⁶² The application of this rule, however, should be restrictive since the ESCR Committee can always request further information from the complainants, such as detailed under Article 2 of the Rules of Procedure.

➔ Key Issues on Substantiating a Claim

- *Evidence*

Because claims involving economic, social and cultural rights often involve policy decisions and sometimes complex decisions around allocation of resources, it can be important to help support the claims made in the communication by integrating the use of indicators, human rights budgeting and disaggregated data as sources of evidence. Also, previous reports by the State to any of the other international human rights bodies during periodic review sessions as well as findings by regional bodies, where related, can be critical sources of information. For a further discussion on the development of evidence relevant to a claim on women's ESC rights, refer to Part Six of this manual, on strategic litigation.

In addition, under Article 8(3) of the OP-ICESCR allows for the CESCRC to receive evidence from third parties, potentially including *amicus curiae*.

g) Communication is in writing and not anonymous;

Article 3 of the OP-ICESCR requires the communication to be in writing and not anonymous.

The communication can be filed in any of the six official UN languages: English, French, Spanish, Chinese, Arabic and Russian. Oral, recorded or video-taped communications are not allowed. This by no means implies that communications cannot be accompanied by documentation and information in various formats to support and/or to prove the violation of the rights at issue.

In addition, anonymous communications are not admissible under existing communications procedures. This requirement has been controversial, as many groups have argued that it makes it more difficult for the most vulnerable groups, such as women victims of violence, to bring complaints forward. Similar considerations were made when OP-CEDAW was adopted, however, the requirement has remained.

Confidentiality vs. Anonymity

Although a communication cannot be anonymous, the author of the communication (the victim or legal representative acting on behalf of the victim/s) may request that identifying information is concealed during the consideration and in the Committee's final decision.

The Committee will normally agree, if requested, to suppress the name of the alleged victim in published documents. This is the established practice of other UN human

rights treaty bodies dealing with individual communications, including the Human Rights Committee, the Committee against Torture and the CEDAW Committee and regional human rights mechanisms. Initials or pseudonyms are substituted for the names of victims and/or authors.⁶³

The Committee could also agree not to reveal the victim's name to the State in certain circumstances in which the individual lodging the complaint might be at risk—when, for example, the victim faces a threat of retaliation—and this measure would guarantee the physical and psychological integrity of the complainant and her family.

Consequently, the exclusion of anonymous communications does not necessarily exclude the protection of the identity of the author from the State Party.⁶⁴

The rationale behind confidentiality is the safety of the victim. However, complainants should be aware that so far there are few examples under international human rights systems' practice that applies the anonymity of the victim in all stages of the procedure. At some point, if a remedy is requested, disclosure of victim's name might be necessary to implement the Committee's recommendations. Given the lack of international exercise regarding this issue, clarification will be needed. However, it remains clear that if the victim and/or his/her legal representatives ask for confidentiality, personal information should never be disclosed.

5.2.2. Communication is Inadmissible

If the CESCRC concludes that the communication is inadmissible, it will communicate its decision and reasons as soon as possible to the author of the communication and the State concerned.

The decision of the Committee is irrevocable, however, it can be reviewed by the Committee if it receives a written request submitted by or on behalf of the author/authors of the communication containing the information indicating that the reasons for inadmissibility no longer apply.

5.2.3 Interim Measures

In special circumstances requiring urgent attention, the CESCRC may request that the State takes protective measures in order to prevent irreparable harm to the victim in relation to all the rights set forth in the Covenant.

A request for interim measures can be issued at any time after the receipt of a communication and before a determination on the merits, on the basis of a request by the victim, the authors of the communication, or any other concerned party, or at the initiative of the CESCR itself when the facts before it indicate the necessity for such measures.

It should be noted that **exhaustion of domestic remedies is not required for the exercise of the Committee's discretion to grant interim measures**, which follows the practice of other international adjudicatory bodies.⁶⁵

The provision of interim measures is essential to the effectiveness of the OP-ICESCR as a means of redressing violations of rights protected by the Covenant, as the objectives of the communications procedure would be defeated if irreparable damage to the victims of an alleged violation were to occur while a communication is pending.

The refusal of a State Party to comply with an order of interim measures constitutes a breach of the international obligations of the State. In this regard, the Human Rights Committee has characterized a refusal to abide by interim measures as a violation of the Covenant: "a State Party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile." Compliance with a request for interim measures under Article 5 should be considered as an aspect of compliance with the objectives of the OP-ICESCR, and the Committee should characterize a refusal to implement interim measures as a breach of the State Party's obligations.⁶⁶

The use of interim measures in the Inter-American system has been significant in protecting the right to health of people living with HIV/AIDS seeking access to essential medicines⁶⁷ or to protect displaced women who have been victims of sexual violence.⁶⁸

In the first case examined by the CEDAW Committee, *Ms. A.T. vs. Hungary*, the Committee granted interim measures. The Committee requested that the author be immediately offered a safe place for her and her children to live and that the State Party ensure that the author receive adequate financial assistance, if needed. Although the communication was later declared inadmissible, in *Ms N.S.F. vs. the United*

Kingdom of Great Britain and Northern Ireland, the Committee requested the State Party not to deport the author and her two children as an interim measure while their case was pending.⁶⁹

It should also be noted, that situations necessitating the request and imposition of interim measures for ESC rights violations do not have to rise to the level of potential right to life violations, or that there be a threat of irreparable harm. For example, the threat of missing one or two years or longer of school (the potential length of time for the communication to be received, reviewed and decided) could be considered an irreparable harm.⁷⁰

5.2.4 Clear Disadvantage

Article 4 of the OP-ICESCR is a controversial addition to the Protocol and is unique within the UN treaty body system. During the development of the OP-ICESCR supporters of the addition of this provision claimed it was not an additional admissibility requirement, but rather allowed the Committee to dismiss certain claims if their caseload became too unwieldy.

As advocates, it is critical that we remind the Committee of this history of the inclusion of the provision. Communications should not be required to show any particular "clear disadvantage" or "issue of general importance" beyond the violation itself in the initial admissibility phase.

Once a communication is declared admissible, at that point, if necessary due to an unwieldy caseload, the Committee may take steps to request additional information from complainants regarding the particular disadvantage suffered or whether the communication involves a serious issue of general importance.

Article 4 is a unique provision throughout the international human rights system, so the CESCR will have little guidance in its application. Until the CESCR begins receiving cases, it is difficult to predict their application of this provision.

As advocates bringing communications under the OP-ICESCR, it will important to note in your complaint that Article 4 was not intended as an additional admissibility criteria, but rather a way to deal with their workload should the need arise. But strategically, if possible, it could be useful to argue in your complaint that should the CESCR choose to invoke this provision, your communication can demonstrate clear

Standard of review “reasonableness of steps”

In assessing whether the measures taken by the State Party are reasonable, the Committee may take into account, *inter alia*, the following considerations:

- (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;
- (b) whether the State Party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) whether the State Party’s decision (not) to allocate available resources is in accordance with international human rights standards;
- (d) where several policy options are available, whether the State Party adopts the option that least restricts Covenant rights;
- (e) the time frame in which the steps were taken;
- (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.

Source: Statement by the Committee: An evaluation of the obligation to take steps to the “Maximum of available resources” under an Optional Protocol to the Covenant UN. Doc. E/C.12/2007/1 (2007) 10, May 2007.

disadvantage and a serious issue of general importance and then explain how.

5.2.5 Merits

If the communication is considered admissible, the CESCR will proceed with an examination of the facts to determine whether the State concerned has complied with its obligations under the ICESCR.

The analysis of the admissibility and the merits of the communication can occur in one or two steps. Where the Committee, for reasons of efficiency and effectiveness, does not feel it necessary to separate the analysis of admissibility from that of merits, the steps may be merged. However,

separation of the consideration of admissibility from merits is the best way to ensure that relevant information from third parties, UN agencies or international organizations, is obtained in appropriate cases. Given that the procedure remains confidential until the publication of the views of the Committee, without a prior decision on admissibility, these organizations may have no way of knowing, prior to the publication of the Committee’s views on the merits, that communications raising important public policy or systemic issues in which they have relevant expertise or views, were to be considered by the Committee.⁷¹

After the communication is examined, the CESCR will transmit the petition to the State Party, who will have six months to submit written explanations or statements clarifying the matter and the remedy, if any, that it may have provided (Article 6).

The Committee will then proceed with the examination on the merits, analyzing the facts and the arguments contained in the communication and submitted by the State Party to determine whether the State concerned has complied with its obligations under the ICESCR.

The examination will be based on the explanations and statements of both parties and on documentation from other sources. Article 8.3 of the OP-ICESCR was modeled on provisions in the rules of procedure of the CERD, CAT and CEDAW Committees, which allow those Committees to obtain, through the Secretary-General, additional information from UN bodies or specialized agencies. However, the OP-ICESCR goes further to also identify a range of possible sources beyond those within the UN system, including from other UN bodies specialized agencies, funds, programs and mechanisms, and other international organizations, including from regional human rights systems and interested third parties (Article 8).⁷² The CESCR may also look, for example, to Concluding Observations or General Recommendations made by the CEDAW Committee for the State in question in relation to the women’s economic, social and cultural rights issues raised in the communication; or to reports released by regional human rights systems, among others.

Based on their review of all the information provided by both sides, the Committee will adopt “views and recommendations” on whether a violation has occurred and if so, identify the steps that must be taken to provide a remedy. These “views and recommendations” will be sent to the

author of the communication and the State Party, be published in the Committee's annual report and posted on the website. Decisions under comparable procedures for the ICCPR, CERD and CAT are posted on the website of the Office of the High Commissioner for Human Rights regularly and the CESCR is expected to follow this practice. See Resource section at the end of this Guide for contact information.

As discussed in Part Two of this manual, in considering the merits, the CESCR will look to see if the actions or omissions in your complaint show failure by the state to take steps on a basis of non-discrimination to progressively realize women's ESCR using maximum available resources, as well as meeting minimum core obligations. To make this assessment, the OP-ICESCR has integrated a standard of review, largely drawn from South African jurisprudence, of the reasonableness of State action or omission.

Reasonable steps

Article 8.4 states that when examining communications the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

The Optional Protocol to the ICESCR is different from the other similar procedures in that it provides the CESCR with a standard of review to determine if a violation of the Covenant has occurred. The CESCR must consider the reasonableness of the measures taken by the State in relation to its obligations under Article 2.1 of the Covenant, while keeping in mind that the State Party can adopt a variety of measures to implement the rights protected by the Covenant.

Article 8.4 makes clear that the unique wording of Article 2.1 of the ICESCR— acknowledgement of the progressive dimension of fulfillment, the link with the availability of resources and the necessity to adopt positive measures— is not to be used as a basis for denying effective adjudication and relief.

In considering a communication, the Committee will examine the measures that the State Party has taken or failed to take, legislative or otherwise, to realize women's ESC rights. Based on the facts and analysis submitted in the

case, the Committee will evaluate whether the steps the State took were reasonable in light of its obligation to realize the right/s in question on a progressive basis using maximum available resources.

The criteria developed by the CESCR reiterates similar elements to those developed under existing jurisprudence at the national, regional and international levels. For instance, the South African Constitutional Court has explored the reasonableness of measures taken by the State with regard to the right to health, the right to adequate housing, access to water, right to education and the right to food.⁷³

The reasonableness test gives governments the space to design and formulate appropriate policies to meet its socio-economic rights obligations. The acceptable implementation of women's ESC rights could entail a range of potential policy choices and policy-making is not the role of the courts in a democracy. Therefore, under Article 8.4 the State retains the responsibility for developing and implementing laws, policies and programs to realize women's ESC rights that are most relevant to the national context.

However, it is important for complainants to be clear that the reasonableness standard does not direct the Committee to defer to the decisions of the State Party on the question of compliance with Article 2.1 of the ICESCR. The Committee may recognize that a range of measures and policies could be implemented to progressively realize women's ESC rights within maximum available resources, but the Committee retains the clear jurisdiction to analyze State action or inaction and identify violations of an ESC right.⁷⁴ This analysis must be grounded in the circumstances of the claimant,

Factors in Determining Reasonableness

In applying a reasonableness standard, a number of questions might be asked such as: is the program or policy comprehensive, coherent, and coordinated; are appropriate financial and human resources made available for the program; is there appropriate provision for short, medium and long-term plans; is the policy reasonably conceived and implemented; and does it cater to those in most urgent need? (See, *Government of the Republic of South Africa. & Ors v Grootboom & Ors*, 2000).

the right at issue, the context of the State, together with the values and purposes of the ICESCR. Hence, reasonableness will be developed on a case by case basis, with reference not only to measurable indicators but also the broader purposes and values of the ICESCR.

For example, a State can not evade its duty to respect and enforce the rights guaranteed in international treaties by citing its government structure and decentralization of health care services to local government units as justification for non-compliance. See, for instance, case study *Lourdes Osil et al. v. Mayor of Manila* (page 113).⁷⁵ Further, in the *TAC* case in South Africa, using a reasonableness standard of review, the South African Constitutional Court found that the States failure to progressively increase access to anti-retroviral drugs, which inhibit mother to child transmission of HIV/AIDS during child birth, was unreasonable as there were available resources which were not fully utilized.⁷⁶

It must be acknowledged that if interpreted narrowly, the reasonableness standard could be used by State Parties to inappropriately “focus the adjudication of ESC rights on the rationale for State decision-making rather than on the content of rights, and ...as a basis for denying concrete, entitlement based remedies to claimants.”⁷⁷ If exercised in harmony with the intentions and purpose of the OP-ICESCR, “reasonableness review means determining whether the State has met the standard of reasonableness in the measures or steps taken—in resource allocation and program design—in order to ensure the petitioners’ rights.”⁷⁸

5.2.6 Remedies

Remedies, under international law, are aimed at providing redress to victims through restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition to those who suffered a human rights violation.⁷⁹

Complainants can have a key role in the articulation and creativity of the remedies adopted by the Committee.

When designing the strategy for a communication under the OP-ICESCR, complainants should have in mind what they expect to obtain from the litigation and what they want the CESCR to say and order the State to do. Individuals and women’s groups are, in general, in a better position to analyze the context and circumstances that lead to the violation

and the measures required to remedy the situation and prevent similar harms from occurring in the future. Educating the Committee (within the complaint) will be key in order to encourage the Committee to incorporate remedies with a public interest or structural component in its recommendations. These remedies could include:

- Developing directives, guidelines or policies to monitor implementation of views and recommendations issued by the CESCR, provide early warning and address violations of women’s ESC rights;
- Endorsing a general review and amendment of laws, policies and practices inconsistent with the provisions of the ICESCR using a substantive equality lens;⁸⁰
- Enacting new laws if appropriate;⁸¹
- Encouraging State reporting, including disaggregated data on ESC rights, not only highlighting disparities between women and men, but also between women, such as women with disabilities, women of racial or ethnic minorities, migrant women, indigenous women, older women, etc.;
- Taking concrete steps to stop on-going violations and preventing the repetition of similar violations in the future.⁸² These may include legal and administrative measures addressing a wide range of issues, including building capacity of the authorities concerned and budgetary allocations;
- Promoting training programs on women’s economic, social and cultural rights with a substantive equality perspective, for personnel in the relevant implementing agency and other government employees;⁸³
- Establishing accessible, affordable programs or institutions to assist women (e.g. legal aid, shelters, adult education programs, rural health clinics, etc.);
- Improving the effectiveness of investigative methods from a substantive equality perspective; and improving the involvement of victim in the process;⁸⁴
- Implementing regular inspections of public facilities to ensure compliance with the Covenant (e.g. women’s prisons; detention centers where women immigrants are housed, public and private health centers;⁸⁵)
- Creating a national human rights commission and/or commission for women’s human rights;

- Taking steps to condemn and sanction discrimination by private and public actors;⁸⁶
- Adopting temporary special measures;
- Implement a mechanism or channels for efficient and expeditious receipt and processing of claims of violations of women’s human rights by public or private actors;⁸⁷
- Ensuring legal and other support for victims to access the justice system;⁸⁸
- Developing a plan of action to implement recommendations of the Committee and strengthen relationships with civil society organizations to carry out the plan;
- Setting of a timeframe for the government to give feedback to the CDESCR on steps taken to implement its recommendations;
- Funding of women’s NGOs promoting equality;
- Gender audits and gender and human rights budget analysis; and
- Development of gender based indicators on equality.

As analyzed in the case study *Yean and Bosico case*,⁸⁹ (see page 17) the Inter-American Court ordered the State, as a non-repetition guarantee, to adopt measures to eliminate the historical discrimination caused by its birth record system and education system. In particular, the State was ordered to adopt simple, accessible and reasonable procedures for Dominican children of Haitian descent to obtain a birth certificate; and the Court requested the State to guarantee access to free elementary education for all children regardless of their background or origin.

In the case of *Mamérita Mestanza v. Perú*, (see page 108) the Peruvian Government signed a friendly settlement agreement committing itself to provide education, psychological and medical attention, and housing to the family of a woman who was victimized by the State’s practice of forced sterilization. But the State was also required to reform and pass legislation related to family planning as measures of non repetition (or systemic remedy). These measures were proposed by the national and international NGOs involved in the case in consultation with the victim’s family and in light of the impact of forced sterilization on women in Peru and the social and economic factors that surrounded this violation.

5.2.7 Friendly Settlement

Article 7 establishes a friendly settlement procedure by stating that “[t]he Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.”

A friendly settlement consists of a conciliation procedure in which both parties agree to terminate the Committee’s review of the communication by committing themselves to certain obligations; provided that this agreement is in compliance with the obligations under the ICESCR.

The success of a friendly settlement mechanism depends on its ability to protect the rights of victims while ensuring States Parties act in good faith. The friendly settlement procedure often allows petitioners and victims to have a more participatory role and voice in the definition of the terms and conditions to remedy the violation. Accordingly, the State could be more willing to comply with the measure that itself agreed upon. Negotiation can also potentially allow both parties to explore more comprehensive, creative and integral solutions.

The most important consideration to make in deciding whether or not to make use of the friendly settlement option is the goal of the communication. If the communication was submitted under OP-ICESCR as part of a strategic litigation strategy on a particular issue or to advance jurisprudence generally under the OP-ICESCR, agreeing to a friendly settlement will undermine this goal. Any agreements or admissions of violations made by the State in a friendly settlement procedure do not become part of the established law of the CDESCR. The agreement cannot be cited by future complaints on the issue.

Monitoring by the Committee on implementation of a friendly settlement is essential, especially in ensuring that the friendly settlement is consistent with the objects and purpose of the Covenant and that the mechanism is not used to delay a case indefinitely. The terms of a friendly settlement should be subject to review and approval by the Committee, and must also be subject to follow-up procedures in order to monitor its implementation. Further, if a State Party fails to comply with the terms of the friendly settlement, the complainant should have the ability to revive

the communication from the last point of consideration by the CESCR, without having to resubmit.⁹⁰ Further, advocates also need to ensure that use of the friendly settlement procedure will not expose the complainant to undue pressure or intimidation by the State.

5.2.8 Follow Up

Article 9 of the OP-ICESCR establishes the Committee's competence to issue its views and recommendations on a communication and creates the basic framework for follow-up procedures with the State.

After examining a communication, if the Committee finds that the State Party has committed the violation/s alleged in the communication, it will transmit its views together with its recommendations to the parties concerned.

As a follow up mechanism, the State Party must submit to the Committee, within six months after the Committee releases its recommendations, a written response including information on any action taken in the light of the views of the Committee.

The Committee can ask the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations in the State Party's subsequent periodic reports under Articles 16 and 17 of the Covenant.⁹¹

OP-ICESCR is the first treaty Optional Protocol in which a follow-up procedure has been expressly included in the text, building on the existing practice of other treaty bodies.⁹²

5.3 The Inquiry procedure

In addition to the examination of individual communications on alleged violations, Article 11 of the Optional Protocol provides the CESCR with the ability to conduct inquiries when it has received reliable information on **grave or systematic violations** by a State Party of rights of the ICESCR. The CESCR then would be able to launch inquiries into grave or systematic violations of economic, social or cultural rights on its own initiative in response to information it receives from "reliable" sources.

The value of the mechanism is that it complements the OP-ICESCR communications procedure as it allows the CESCR to address a broader range of issues, including structural

causes of violations that would not be possible under the individual complaints mechanism. The OP-ICESCR enables the CESCR to initiate and conduct investigations on a large-scale and into widespread violations of economic and social rights occurring within the jurisdiction of a State Party. It also contemplates situations where individuals or groups are unable to submit communications due to practical constraints, fear of reprisals, lack of resources or other reasons unrelated to the merits of the communication.

Therefore, one of the main differences between an inquiry procedure and a communications procedure is that the inquiry procedure does not require a formal complaint or a victim for the Committee to initiate the procedure; individuals, civil society, local, national or international human rights organizations, may submit reliable information about a situation of a grave or systematic violation. However, their participation and involvement in the process differ from the communication in which they are not considered a party of the procedure.⁹³

Contrasts between the individual communications and inquiry procedures:

- the inquiry mechanism does not require a formal complaint or a victim for the Committee to initiate the procedure; while the individual communication needs an identified victim;
- a petition for inquiry may be made anonymously, although this may undermine the requirement that the information be reliable before an investigation is commenced; a communication may not be anonymous;
- an investigation may be sought on behalf of others, unlike a communication;
- domestic remedies need not be exhausted as a prerequisite to an inquiry;
- interim measures are not available pursuant to the investigation procedure;
- unlike with the individual communication procedure, the State must explicitly recognize the competence of the CESCR to conduct an inquiry when ratifying or acceding the OP-ICESCR; and
- according to the experience of other UN treaty bodies, there have been very few inquiry investigations as compared to individual communications;

In the acknowledgment that violations of economic, social and cultural rights are widespread, the inquiry procedure also allows the Committee to respond directly to serious violations taking place within a State Party to the ICESCR instead of waiting until the next State report is due to be submitted. However, this procedure is not necessarily more timely than an individual communication.⁹⁴

However, this procedure must be explicitly accepted by States Parties. **The CESCR can only undertake this procedure if the State expressly recognizes the competence of the CESCR to do so when ratifying or acceding the OP-ICESCR.** The “opt-in” formula constitutes a step back from other instruments, such as OP-CEDAW,⁹⁵ which do not require States to take the explicit step of affirming their willingness to be subject to this procedure, rather it requires them to “opt-out.” Therefore, before considering possibilities for encouraging an inquiry in a particular case, claimants must ensure the relevant State has accepted this provision.

5.3.1 Grave and systematic violation

A “grave” violation refers to the severity of the violation –e.g. discrimination against women linked to violations of their right to life, physical and mental integrity, and security. A grave violation can be a single act. The Committee may determine that an inquiry into a single “grave” violation is appropriate on the basis of the facts of a particular situation, e.g., State failing to take measures to eliminate female genital mutilation, or forced virginity testing by the State to hold certain jobs.⁹⁶

The term “systematic” refers to the scale or prevalence of a violation, or to the existence of a scheme or policy directing a violation. A violation not rising to the level of severity implied by “grave” may still be the focus of inquiry if there is a pattern, or if abuses are committed pursuant to a scheme or policy. A violation may be systematic in character without resulting from the direct intention of a State Party –e.g. a government policy promoting population control in rural areas resulting in the sterilization of a large group of indigenous women without their consent, such as was done in the case of *Mamerita Mestanza* in the Inter-American Court of Human Rights (see page 108).⁹⁷ In addition a policy may produce systematic restriction on women’s rights even without implementation if, for example, it deters women from enjoying their social and cultural practices.⁹⁸

5.3.2 Reliable information

The term “reliable” means that the Committee must find the information to be plausible and credible. In assessing the standard of reliability the Committee can examine the specificity of the information submitted; whether there is corroborating evidence; whether the information is consistent with that from other sources; and whether the source has a credible record in fact-finding and reporting. The CESCR can also examine the context and situation of the country, through the examination, for example, of country reports under the periodic reporting mechanism; information from other UN bodies or experts, regional human rights bodies, from NGOs, women’s groups, agencies, organizations working with refugees and internally displaced persons,⁹⁹ etc. There are no restrictions regarding the sources of such information or the format in which it may be received.

The inquiry procedure is most commonly initiated by NGO’s which may be in a better position to document a pattern of violations.¹⁰⁰ Nevertheless, individuals are not barred from providing information to CESCR and suggesting to the Committee that an investigation is warranted according to the information provided.¹⁰¹

5.3.3 Procedure for Requesting an Inquiry

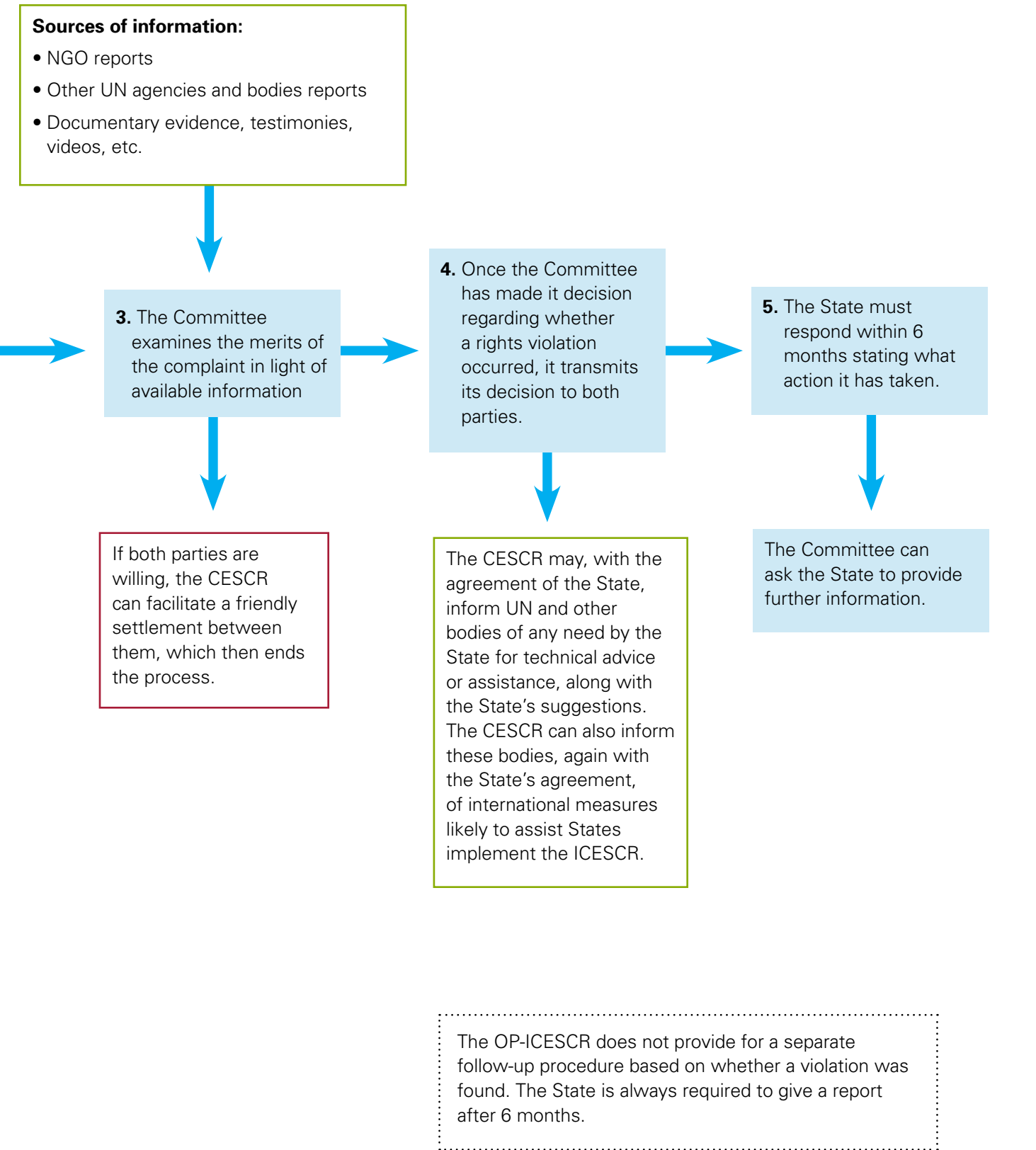
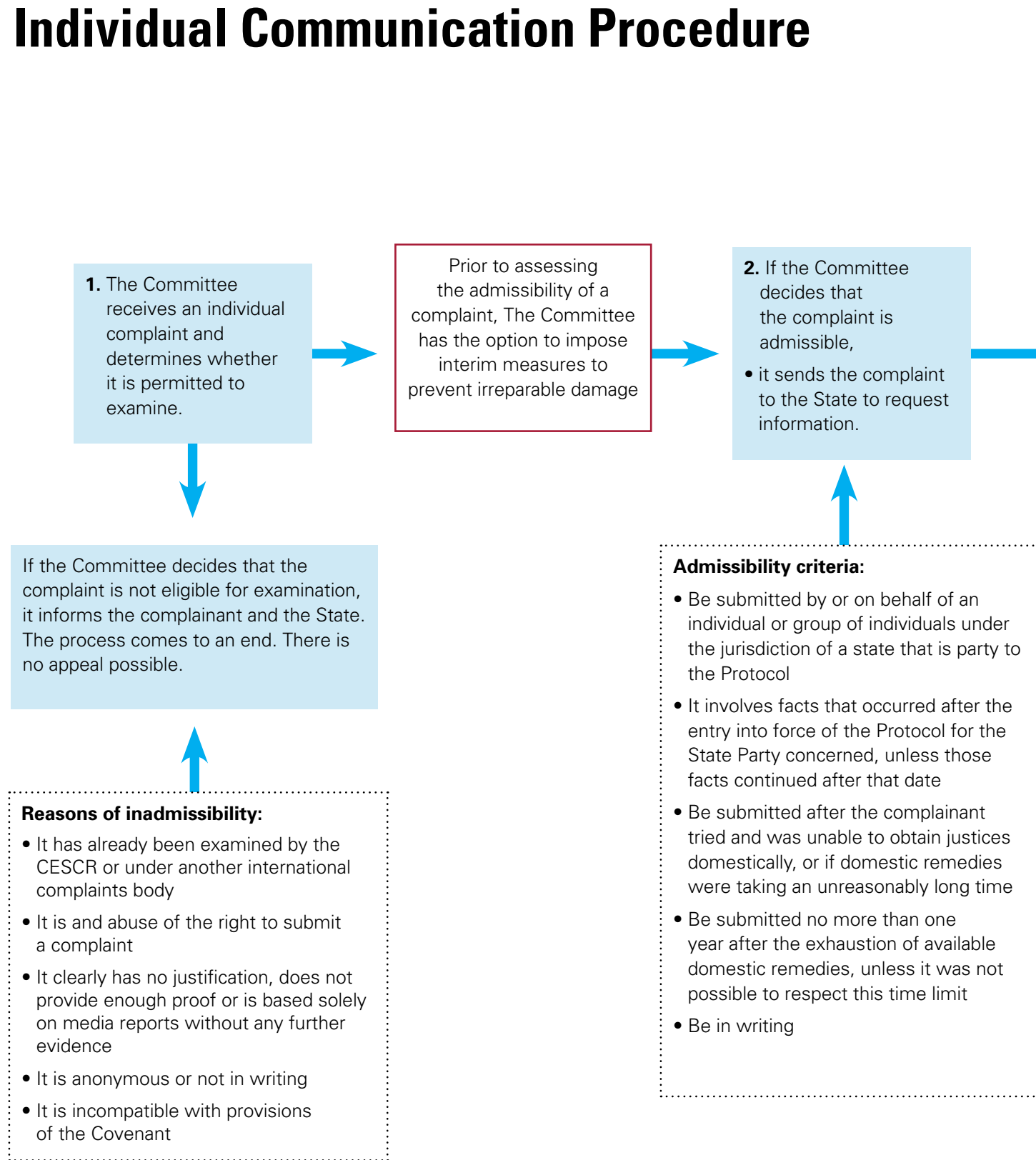
The information submitted to the Committee for the purpose of triggering an inquiry should state explicitly that it is submitted for this purpose. The information can be received from any source (individuals, civil society, local, national or international human rights organizations). In addition, information arising from the State reporting process may be sufficient in form and substance to suggest to the Committee that an Article 20 investigation is warranted.

After the CESCR receives information concerning a grave or systematic violations of any of the rights set forth in the ICESCR, the CESCR will study it and decide whether the information is reliable and indicative of grave or systematic violations of rights. Nothing impedes the Committee from requesting further information (from the same source or a different one), when necessary in order to proceed with the inquiry.

The entire inquiry process is confidential, and is conducted in consultation and cooperation with the concerned State.

• Invitation to cooperate

Individual Communication Procedure



After receiving the information regarding a systematic violation of ESC rights by a State Party that has consented to be subject to the inquiry procedure, the CESCR will invite the State Party to cooperate by submitting a response or information with regard to the information concerned.

- **Decision to proceed and transmission to the State**

On the basis of this information, the Committee decides whether to conduct a confidential inquiry and submit an urgent report.

5.3.4 Country Visits

The inquiry procedure can include a visit to the territory. Hearings may also be conducted as part of the visit. The State Party's consent is a prerequisite to any visit and any hearings that occurs during the visit. The visits are also envisaged under the CAT and CEDAW procedures.

Country visits can be a key component of the inquiry to open constructive dialogue with the State, victims, and other relevant organizations, and examine the situation in more depth.

Most UN treaty bodies, UN Special Rapporteurs and regional human rights mechanisms provide the competent bodies with the capacity to do *in situ* (on site) examination of the situation of human rights in the country under scrutiny.

5.3.5 Remedies

Under the inquiry procedure, the CESCR will address and analyze patterns of illegal conduct—patterns that sometimes reveal structural or institutionally sanctioned actions or omissions—that are responsible for systematic ESC rights violations. The comprehensive analysis will offer the CESCR the opportunity to think broadly about measures, remedies and reparations to respond to the context and circumstances of the illegal conduct.

Therefore, and given its rationale, remedies for inquiries are expected to be more public interest oriented than for communications.

The CESCR must strive to address structural inequalities that shape the lives of women.

While under the communication procedure complainants are able to strategize around the remedies that they would like the CESCR to endorse, the inquiry mechanism leaves a

narrower space for women and NGO's to request specific remedies. However, individuals and NGOs can take advantage of CESCR country visits to provide information to the Committee, denounce the situation through other UN bodies (to which the CESCR may reach out according to Article 14) or through the submission of shadow reports under the periodic review.

The inquiry mechanism, although confidential in its proceeding,¹⁰² can influence systematic patterns of human rights violations; challenge the content, orientation or implementation of public policies that affect broad social sectors; and promote legal and structural reforms that improve the quality of democratic institutions.

5.3.6 Extraterritorial obligations

As discussed on page 64, the OP-ICESCR offers a platform to discuss States' extraterritorial obligations. The restrictions in doing so through an individual communication were analyzed above; however, the inquiry procedure—as well as Inter-State¹⁰³ complaint procedure—could be seen as more likely possibilities for the articulation of complaints of violations of extraterritorial obligations before the CESCR.¹⁰⁴ This is because the text of the OP-ICESCR with regards to individual communications introduces a limitation on the submission of communications to individuals or groups of individuals “under the jurisdiction” of the State Party indicated in the communication. The text on initiation of the inquiry procedure, however, does not include this language.

The United Nations Special Rapporteur on Violence against Women has noted that a State “can not delegate its obligation to exercise due diligence, even in situations where certain functions are being performed by another State or by a non-State actor. It is the territorial State as well as any other States exercising jurisdiction or effective control in the territory that remain, in the end, ultimately responsible for ensuring that obligations of due diligence are met. Related to this point is the notion that due diligence may imply extraterritorial obligations for States that are exercising jurisdiction and effective control abroad.”¹⁰⁵

5.3.7 Follow-up

Article 12 regulates the follow-up to the recommendations made in the inquiry procedure.

Inter-State Procedure under the OP-ICESCR

Before submitting the matter to the CESCR

If a State considers that another State Party is not fulfilling its obligations under the Covenant it will bring the matter to the attention of that State Party

- by written communication
- The State Party may also inform the Committee of the matter.



Within three months after the receipt of the communication the receiving State will afford the State an explanation, clarifying the matter

- In written
- it can include: reference to domestic procedures and remedies taken, pending or available;

Proceure Before The CESCR

If the matter concerned is not settled within six months after the initial communication, either State shall have the right to refer the matter to the Committee. Notice must also be given to the other State.

Admissibility criteria:

Exhaustion of domestic remedies (unless the application of the remedies is unreasonably prolonged);

Friendly solution: The Committee will make available its good offices to the State Parties concerned with a view to a friendly solution on the basis of the respect for the obligations set forth in the Covenant.

During the procedure, the CESCR will

- Hold closed meetings
- Request information
- Receive States submissions orally and/or in writing;

The Committee has two mechanisms through which it can follow up on its recommendations.

- a) Six months after the State has been notified of the findings of the inquiry and the Committee's comments and recommendations, the Committee may ask the State to inform it of any measures it has taken in response to the inquiry (Article 12.2). The CESCR may also ask the State Party to keep it informed about further measures.
- b) It can request the State Party concerned to include details of any measures it takes to comply with the recommendations in its next periodic report (Article 12.1).

Given the nature of economic, social and cultural rights and the obligation of progressive realization within maximum available resources, which also applies to remedies; including a procedure for long-term follow-up is in line with the spirit of the ICESCR.¹⁰⁶

Technical Assistance

Article 13.1 allows the Committee, with the consent of the State concerned, to request United Nations specialized agencies, funds and programmes and other competent bodies, for technical advice or regarding measures included in the Committee's findings, conclusions and recommendations.

As highlighted under each section, this can be done in the context of both communications procedures and inquiry procedures. Given that many of the rights included in the ICESCR also fall within the sphere of competence and operation of several different specialized bodies and programmes in the UN and regional human rights system, including the Office of the High Commissioner for Human Rights (OHCHR), International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), UN-Habitat, UNAIDS, UNFPA, the United Nations Development Programme (UNDP), UN Women, the IASHR, the EHRS and the ACHPR; the CESCR could benefit from and enhance the work they do in ensuring those rights are realized.

In addition, it mandates the establishment of a trust fund to provide expert and technical assistance to State Parties for the "enhanced implementation" of the rights contained in the Covenant.

5.4. The Inter-State procedure

The Inter-State procedure (see diagram on page 81) allows for a State to submit a complaint to the CESCR about alleged violations of the ICESCR committed by another State. Both States must be parties to the OP-ICESCR and both States must have "opted-in" to this procedure in order to submit this complaint. The State must first bring the matter to the attention of that State Party and may also inform the Committee. If the matter is not settled to the satisfaction of both State Parties concerned within six months, either State can refer the matter to the Committee.

So far, this procedure has never been used by any of the four of the human rights treaties that contain provisions to allow for States Parties to complain to the relevant treaty body about alleged violations of the treaty by another State Party,¹⁰⁷ which is mostly likely due to the political implications of this type of procedure.

Notes

¹ It should be noted that at the time of publication of this guide, the OP-ICESCR has not yet come into force and its Rules of Procedure have not yet been adopted. Therefore, much of what follows is informed by the CESCR General Comments, Concluding Observations and approach of the CESCR during the drafting of the OP-ICESCR. In addition, it integrates the views of the International NGO Coalition for the OP-ICESCR, composed of many of leading civil society experts on this subject.

² The necessity of implementing the provisions of the Covenant through domestic legislation is consistent with Article 27 of the 1969 Vienna Convention on the Law of Treaties, which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

³ The ESCR Committee is in the process of adopting Rules of Procedure for the OP-ICESCR. A number of key issues that will be influential in determining the mechanisms" proceeding as well as the effectiveness and competence of the ESCR Committee will be considered under this set of Rules (let's see whether the rules will be released by the time we publish the manual)

⁴ See, for example, OP-CEDAW, cases *Şahide Goekce (deceased) v. Austria (domestic violence)*, CEDAW/C/39/D/5/2005, 6 August 2007; and *Fatma Yildirim (deceased) v. Austria (domestic violence)* CEDAW/C/39/D/6/2005, 1 October 2007; OP-ICCPR, case *Brough v Australia*, CCPR/C/86/D/1184/2003, 27 April 2006; among others.

⁵ OP-ICESCR, "Article 4—The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance." According to the Considerations of the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure Article 4 should not (and does not) constitute an additional requirement to be satisfied by the authors of communications. "If it were to be applied routinely in this manner or States were to be permitted to invoke it as an additional defense, Article 4 would have the opposite effect to its intended purpose, by expanding rather than reducing the

Committee”s workload.

⁶ Although the OP-ICESCR adheres fairly closely to the models for communications and previously established within the universal human rights system, it includes two new criteria for admissibility, one of which is obligatory (Article 3.2.a) and the other an option for the Committee (Article 4);

⁷ For a complete list of the General Comments issued by the CESCR please visit the official website of the ESCR Committee [http://www2.ohchr.org/english/bodies/cESC rights/comments.htm](http://www2.ohchr.org/english/bodies/cESC%20rights/comments.htm).

⁸ CESCR *General Comment No 13: The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), para. 1.

⁹ CESCR, General Comment 19, *supra* n. 25 above.

¹⁰ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135.

¹¹ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997.

¹² Montreal Principles, *supra* n. 13 above.

¹³ See IWRAW Asia Pacific, OP-CEDAW, *supra* n. 75 above.

¹⁴ See CESCR, General Comment 15, *supra* n. 49 above; CESCR General Comment 14, *supra* n. 14 above, para.11.

¹⁵ See IWRAW Pacific, “Our right are not negotiable”; available at https://www.iwraw-ap.org/aboutus/.../OPS12_Final_for_publication_April_28.pdf

¹⁶ See, for example, CEDAW, *Alyne da Silva Pimental v Brazil*, *supra* n. 54 above. in which the family of Alyne—together with the Center for Reproductive Rights and ADOVACI, a Brazilian NGO, filed an individual complaint before the CEDAW Committee.

¹⁷ See, for example, the petition submitted by the Defensoria General de la Nacion in, IACtHR, *Minors Convicted to Life Sentences v. Argentina*, Petition No. 12.651; also the Ombudsman of Bolivia in case *Ticona Estrada et al. v. Bolivia*, petition No. 12.527. The increase in procedural flexibility is well discerned in another IACtHR case, *Yatama vs. Nicaragua*, Petition No. 12.388, which involved hundreds of candidates unfairly excluded from municipal elections. In *Yatama* the Court dismissed Nicaragua’s preliminary objection concerning the failure of some alleged victims to present powers of attorney

¹⁸ Rule 96(b) of the Rules of HRC in Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies HRC/GEN/3/Rev.2 at <http://www.law.wits.ac.za/humanrts//esc/compilationprocedures2001.html>.

¹⁹ HRC, *Lanza v Uruguay*, Communication No. 8/1997, UN Doc CCPR/C/9/D/8/1997.

²⁰ HRC, *Weinberger v Uruguay*, Communication No. 28/1978, UN Doc CCPR/C/11/D/28/1978

²¹ HRC, *Miango v Democratic Republic of Congo*, Communication No. 194/1985, UN Doc CCPR/C/31/D/194/1995.

²² HRC, *Sahid v New Zealand*, Communication No. 893/1999, UN Doc CCPR/C/77/D/893/1999.

²³ International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations of the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure*, (2009).

²⁴ Collective complaints were provided for in Article 3 of the Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina Albuquerque, 23 April 2007, A/HRC/6/WG.4/2 (containing the Explanatory Memorandum). Even though

the collective complaints were removed from the final version of the Optional Protocol, this would not prevent the CESCR to consider complaints that involve the violation of a group.

²⁵ Indeed, the notion that jurisdiction must not be confined to the territory alone has been supported by the European Court of Human Rights and the UN Human Rights Committee with respect to human rights violations by police, diplomatic personnel, and foreign security services for example. See, Fons Coomans and Menno Kamminga (eds.) *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (Antwerp: Intersentia 2004).

²⁶ See, Christian Curtis and Magdalena Sepúlveda, “Are extra-territorial obligations reviewable under the Optional Protocol to the ICESCR?,” in *Nordic Journal of Human Rights*, No 1, (2009).

²⁷ CESCR, *Concluding Observations on the Netherlands* U.N. Doc. E/1999/22 para. 194.

²⁸ See Jane Connors, “Introduction to the Optional Protocol and its Mechanisms,” in *The Optional Protocol to CEDAW: mitigating violations of women’s human rights. International training seminar for NGOs and women’s rights activists*, 13-15 March, 2003, Seminar documentation, (Berlin: German Institute of Human Rights, 2003), p. 18.

²⁹ See for example Article 12, International Law Commission, Articles on responsibility of states for internationally wrongful acts, adopted at the fifty-third session (2001), text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4; and Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

³⁰ Migrant workers are especially vulnerable to racism, xenophobia and discrimination. Migrants themselves are criminalized, most dramatically through widespread characterization of irregular migrants as “illegal,” implicitly placing them outside the scope and protection of the rule of law (see Committee on Migrant Workers—Frequently Asked Questions (FAQs) at <http://www2.ohchr.org/english/bodies/cmw/faqs.htm> In addition to submitting a communication to the CESCR, The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provide for inter-state and individual communications.

³¹ FIAN, *Extra-territorial Obligations—The Human Rights Response to Globalisation*, (2005) available at: <http://www.fian.org/news/press-releases/extra-territorial-obligations-the-human-rights-response-to-globalisation>.

³² See, Commission on Human Rights, *Report by UN Special Rapporteur on the Right to Food, Jean Zeigler on the Mission to the Occupied Palestinian Territories*, Sixtieth session, E/CN.4/2004/10/Add.1, (31 October 2003).

³³ Though communication mechanism provides one way to claim for State Parties’ extraterritoriality obligation, as it will be addressed, inter-state mechanism and inquiry procedure offer useful venues to claim for extraterritorial violations of ESC rights under the ICESCR. See, Curtis and Sepúlveda, *supra* n. 109 above.

³⁴ See generally, contributions to thematic issue of 27 *Nordic Journal on Human Rights* (2009); a pre-assessment on the specific issue of extraterritorial obligations was made in Magdalena Sepúlveda, “*Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*,” 24 *Netherlands Quarterly of Human Rights* 271 (2006).

³⁵ Several human rights instruments refer to a State’s jurisdiction in defining the scope of application for treaty obligations. For example, the ICCPR states “all individuals within [a State’s] territory and subject to its jurisdiction.” The CRC indicates “each child within [a State’s] jurisdiction.” The American Convention requires member States to “respect the rights and freedoms recognized herein

and [to] ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” However, the ICESCR contains no jurisdictional clause.

³⁶ For example, the subsidiary role of human rights system in the protection of human rights is referenced expressly in the American Convention, which refers to international efforts as necessarily “reinforcing or complementing the protection provided by the domestic law of the American states.” American Convention, Preamble, para. 2. It is ensured through the rule of prior exhaustion of domestic remedies, allowing states to resolve problems under their internal law before being confronted with an international proceeding, and the “fourth instance formula,” which prevents an international body from examining internal issues unless a violation of a provision of international law is alleged. See, e.g., *Velásquez Rodríguez*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paras. 60-61; *Juan Carlos Abella v. Argentina*, Case 11.137, OEA/Ser.L/V/II.98, doc. 6 rev. (1998), paras. 141-42. Similarly, in spite of the fact that the ECHR does not expressly mention the principle the Court held that the protection of the ECHR is subsidiary to that of national law. It stated that “... the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26). ECHR, *Issa and Others v. Turkey*, Application No:31821/96 par. 48; The court reached the same conclusion in the *Belgian Linguistic Case*, Application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (23 July 1968), para. 10 stating “... In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.”(emphasis added), Strasbourg reaffirmed this notion in its case *Akdivar v. Turkey*, 99/1995/605/693, European Court of Human Rights, (30 August 1996), “... [I]t is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.”

³⁷ See, e.g., Human Rights Committee, *Celal v. Greece*, Communication No. 1235/2003 (2004), para. 6.3; CEDAW, *Fatma Yildirim (deceased) v. Austria*, Communication No. 6/2005 (2007) para. 7.2; African Commission on Human and Peoples’ Rights, *Rencontre Africaine pour la Défense des Droits de l’Homme v. Zambia*, Communication No. 71/92, 10th Annual Activity Report (1996), para. 10; Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Merits, Judgment of 29 July 1988, Series C, No. 4, para. 61; European Court of Human Rights, *Akdivar and Others v. Turkey*, Judgment of 16 Sept. 1996, Reports, 1996-IV, para. 65.

³⁸ See, ECHR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, § 89; *Lehtinen v. Finland* (dec.), no. 39076/97, ECHR 1999-VII); Inter-American Court of Human Rights, *Cayara v. Peru*, Preliminary Objections, Judgment of 3 Feb. 3, 1993. Series C, No. 14, para. 42; ACHPR, *Free Legal Assistance Group and Others v. Zaire*, Communication No. 25/89, 47/90, 56/91, 100/9, 9th Annual Activity Report 1995-96, para. 37.

³⁹ Following the interpretation of the CESC, “[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate (...)

In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary”; see also, CESC, *General Comment No. 9: The domestic application of the Covenant*, U.N. Doc. E/C.12/1998/24, adopted 3 December 1998, para. 3.

⁴⁰ The obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case law of the International Court of Justice (See The Interhandel case (*Switzerland v. United States*), judgment of 21 March 1959). It is also to be found in other international human rights treaties: the International Covenant on Civil and Political Rights (Article 41(1)(c)) and the Optional Protocol (Articles 2 and 5(2)(b)), the American Convention on Human Rights (Article 46), the African Charter on Human and Peoples’ Rights (Articles 50 and 56(5)).

⁴¹ HRC, *C. F. v. Canada*, Comm. No. 113/1981, UN Doc. CCPR/C/OP/2, UN Sales No. 89.XIV.1 (1990); *Croes v. The Netherlands*, Comm. No. 164/1984, (Nov. 16, 1988).

⁴² IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68, 20 Jan. 2007, Chapter II A.4-6; IACHR, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, Chapter II, available at <http://www.cidh.org/countryrep/AccessoDESC07eng/Accessodesciv.eng.htm>

⁴³ In CEDAW cases, *Goekce v. Austria*, and *Yildirim v. Austria*, CEDAW/C/39/D/5/2005, it was argued that existing legal and administrative measures for preventing and responding to domestic violence were inadequate, as they did not provide for preventive detention of offenders and were ineffective in preventing such violence in practice. They alleged that criminal justice personnel had failed to act with due diligence to investigate and prosecute acts of violence against the deceased victims. In essence, they argued that the only effective remedies would have been a “pro-arrest and detention” policy in order effectively to provide safety for women victims of domestic violence and a “pro-prosecution” policy.

⁴⁴ “The jurisprudence of the inter-American system has also established that an essential element of effectiveness is timeliness. The right to judicial protection requires that courts adjudicate and decide cases expeditiously, particularly in urgent cases. The Commission has emphasized in this regard that there is no question but that the duty to conduct a proceeding expeditiously and swiftly is a duty of the organs entrusted with the administration of justice” IACHR, *Maya Indigenous Communities of the Toledo District v Belize*, Report N° 40/04, Case 12.053, October 12, 2004.

⁴⁵ See, for example, ECtHR, *Selmouni v. France*, Judgment of 28 July 1999, Reports 1999-V, para. 76; *Vernillo v. France*, judgment of 20 February 1991, § 27; ACHPR, *Article 19 v. Eritrea*, Communication No. 275/2003, 22nd Annual Activity Report (2006-2007), para. 51; IACtHR, *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 1, para. 88; and *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, para. 90; IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, para.). ACHPR, *Rencontre Africaine pour la Défense de Droits de l’Homme [RADDHO] v. Zambia*, Comm. No. 71/92, para. 11, 1996-1997 Afr. Ann. Act. Rep., Annex X; UN HRC, *C.F. v. Canada*, Communication No. 118/81, 4 Dec. 1985, para. 6.2.

⁴⁶ See HRC, *Sankara v. Burkina Faso*, Communication No. 1159/2003, 28 Mar. 2006, para. 6.5.

⁴⁷ See CEDAW, *Goekce v. Austria*, supra n. 126 above, it noted that it is necessary to give State Parties “an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems” before the Committee addresses the same issues. See also, *Kayhan v. Turkey*, Communication 8/2005, in which The Committee concluded that the author had failed on multiple occasions in domestic fora to “put forward arguments that raised the matter

of discrimination based on sex in substance” and in accordance with domestic procedural requirements.

- ⁴⁸ See, e.g., ECHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 Nov. 1971, Series A No. 12, para. 55; *Artico v. Italy*, Judgment of 13 May 1980, Series A, No. 37, para. 27; IA Court of Human Rights, *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 July 2004, Series C, No. 107, par. 81; *Velásquez Rodríguez v. El Salvador*, Preliminary Objections; IACHR, *Abu-Ali Rahman v. United States*, Report No. 39/03, Petition 136/2002, 6 June 2003, para. 27. The UN Human Rights Committee has also recognized that in certain circumstances a State may waive the exhaustion requirement. Annual Report of the Human Rights Committee, UN Doc. A/54/40 (1999), para. 417.
- ⁴⁹ HRC, *Sandra Lovelace v. Canada*, 11 HRC, Comm. No. 24/1977 (30 July 1981), U.N. Doc. CCPR/C/OP/1 (1984), para 83. See also, Tom Zwart, *The Admissibility of Human Rights Petitions: the Case Law of the European Commission of Human Rights and the Human Rights Committee*, 1st Ed. (Springer: 1994).
- ⁵⁰ HRC, *Könye and Könye v. Hungary*, Communication No. 520/1992, U.N. Doc. CCPR/C/50/D/520/1992 (1994).
- ⁵¹ HRC, General Comment No 31, supra n. 114 above, para. 9.
- ⁵² Article 46.1.b of the American Convention establishes that a case must be filed in a timely manner, *within six months* of the date the interested party received notification of the final judgment within the domestic system. As the Commission has previously stated, this rule exists to allow for juridical certainty while still providing sufficient time for a potential petitioner to consider her position. “While an issue of timeliness would have arisen had the petitioners specifically challenged the decision of the Court of Constitutionality or had they complained about specific past occurrences, they are in fact complaining about what they allege to be a continuing violation.” See generally, IACtHR, *Blake Case*, Preliminary Exceptions, Judgment of July 2, 1996, pars. 29–40.
- ⁵³ IACHR, *Maria Eugenia Morales de Sierra v Guatemala*, CASE 11.625, Admissibility Report, March 6, 1998.
- ⁵⁴ The petition challenges continues violation of the petitioner rights to equality, and to equal protection of and before the law, under Articles 2, 17 and 24 of the American Convention, by reason of her gender. The challenged legislation provides that her husband has the exclusive competence to administer family property, and the goods of their minor child, and that, notwithstanding that the law requires women to bear primary responsibility for child care and the home, it excuses them from exercising certain forms of guardianship by virtue of their sex. Accordingly, the victim maintains that the legislation in question constitutes an attack on her human dignity, and contravenes her right to a life free of discrimination based on gender.
- ⁵⁵ See *Yean Bosico case*, supra n. 8 above. See also IACtHR, *Case of the Moiwana Community v. Suriname*, Judgment of June 15, 2005. Series C N^o. 124, par. 164. In the case the Court found the state liable for a violation of the right to property of a maroon tribe, based on a massacre and forced displacement which occurred a year before the critical date. Because their survival depends upon their right to their lands, this right may be said to arise directly from their status as an indigenous or tribal people. Such status is without temporal limitation; it can be neither created nor destroyed by the state.” In *Loizidou v Turkey*, the European Court recalled “...that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs; see, also, the *Papamichalopoulos and Others v. Greece* judgment of 24 June 1993, Series A no. 260-B, pp. 20–21, s 46, and the *Agrotexim and Others v. Greece* Judgment of 24 October 1995, Series A, no. 330, p. 22, s 58).” Corte Europea de Derechos Humanos, *Loizidou c. Turkey*, Fondo, 18 de diciembre de 1996, Serie A, p. 41. See also Kerem Alt Parmak, *The Application of the Concept of Continuing Violation to the Duty to Investigate, Prosecute and Punish under International Human Rights Law*, Turkish Yearbook of Human Rights, Ankara, vols. 21–25, 1999–2004, pp. 6–12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926281.
- ⁵⁶ See, *Bakweri Land Claims Committee v. Cameroon*, (2004) AHRLR 54 (ACHPR 2004). In this respect Frans Viljoen observes, “[T]he rule *ne bis in idem* applies. This is clearly sound, because a State should not be found in violation twice for one violating action or conduct, and a complaint that has been finalized on the merits should not be reopened. This principle is similar to those of *autrefois acquit* and *autrefois convict*, which entail that an accused in a criminal trial may not be tried again for an offence similar to one for which he or she has already been either acquitted or convicted.” Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in Malcolm Evans & Rachel Murray, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE 1986–2006* 126 (2nd Ed. 2008).
- ⁵⁷ IACHR, *Jose Bernardo Diaz et al v. Colombia*, Report No. 5/97, Case 11.227, March 12, 1997, par. 69.
- ⁵⁸ CEDAW, *Ms. A.T. vs. Hungary*, Communication No. 2/2003, (26 January 2005).
- ⁵⁹ HRC, *Fanali vs. Italy* (Communication No. 075/1980). See also, CEDAW, *Rahime Kayhan vs. Turkey* CEDAW/C/34/D/8/2005, Communication No. 8/2005, in which the Committee did not agree with the State party in that the communication was inadmissible under Article 4, paragraph 2 (a) of the OP because the European Court of Human Rights had examined a case that was similar, because the identity of the author was one of the elements that it considered when deciding whether a communication was the same matter that was being examined under another procedure of international investigation or settlement. http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8_2005.pdf.
- ⁶⁰ For a detailed understanding of the rules and standards under Regional Human Rights Systems, see Andres Pizarro Sotomayor, “The Rule Against Duplication of Procedures in the Regional Systems of Human Rights Protection” University of Notre Dame, *Center for Civil and Human Rights, Working Paper No. 2*, Spring 2009.
- ⁶¹ See, ICCPR, Concluding observations, Peru, November 15th, 2000, CCPR/CO/70/PER, in which the Committee stated that it “is concerned about recent reports of forced sterilizations, particularly of indigenous women in rural areas and women from the most vulnerable social sectors. The State party must take the necessary measures to ensure that persons who undergo surgical contraception procedures are fully informed and give their consent freely. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.70.PER.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.70.PER.En?Opendocument) 6/6/2007.
- ⁶² In the case of *V.Ø. v. Norway*, a father complained of the denial of a fair hearing in a custody case, which allegedly violated his right to a fair trial, his right to respect for family life and his right not to be discriminated against. The European Commission had declared the complaint inadmissible as manifestly ill-founded. (HRC Comm. No. 168/1984, *V.Ø. v. Norway*, inadmissibility decision of 17 July 1985, A/40/40, Annex XIX, par. 4.4).
- ⁶³ See, e.g. CEDAW, *Ms. B.J. vs. Germany*, A/59/38 Annex III Communication No.: 1/2003, available at http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/BJ%20v.%20Germany_E_.pdf; *Ms. A.T. vs. Hungary*, supra n. 143 above, among others. See also IACHR “*PM 43-10—‘Amelia’, Nicaragua*.” On February 26, 2010, the IACHR granted precautionary measures for a person who the IACHR will identify as Amelia, in Nicaragua. The request seeking precautionary measures alleges that Amelia, mother of a 10-year-old girl, is not receiving the necessary medical attention to treat the cancer she had, because of her pregnancy. The request alleges that the doctors had recommended to urgently initiate chemotherapy or radiotherapy treatment, but the hospital

informed Amelia's mother and representatives that the treatment would not be given, due to the high risk that it could provoke an abortion. The Inter-American Commission asked the State of Nicaragua to adopt the measures necessary to ensure that the beneficiary has access to the medical treatment she needs to treat her metastatic cancer; to adopt the measures in agreement with the beneficiary and her representatives; and to keep her identity and that of her family under seal. Within the deadline set to receive an answer, the State of Nicaragua informed the IACHR that the requested treatment has been initiated; ECHR, *K.H. and Others v. Slovakia*, (Application No. 32881/04); ACHPR, *B. v. Kenya*, Communication 283/2003, Seventeenth Activity Report.

⁶⁴ See, Catarina de Albuquerque, "Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights. Analytical paper by the Chairperson-Rapporteur, E/CN.4/2006/WG.23/2, 30 November 2005.

⁶⁵ See IACHR, *Detainees in Guantanamo Bay, Cuba*, Precautionary measures No 259, October 8th, 2005 available at <http://www.asil.org/pdfs/ilibmeasures051115.pdf>

⁶⁶ HRC, *Maksudov v. Kyrgyzstan* Communication No. 1461/2006; *Rakhimov v. Kyrgyzstan*, Communication No 1462/2006; *Tashbaev v. Kyrgyzstan*, Communication No. 1476/2006; *Pirmatov v. Kyrgyzstan*, Communication No. 1477/2006, 16 July 2008, paras. 10.2 -10.3. See also HRC, *The Obligations of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, General Comment 33, 5 Nov. 2008, para. 19: "[f]ailure to implement ... interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

⁶⁷ See e.g., *Jorge Odir Miranda Cortez y Otros* (El Salvador), Report No. 29/01 of 2000. The American Convention on Human Rights expressly stipulates that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission." See American Convention on Human Rights, art. 63(2). See also, IACHR, *Precautionary measures of ten carriers of HIV/AIDS v Dominican Republic*, August 14, 2002.

⁶⁸ IACHR, *Fourteen Women in a Situation of Displacement, Colombia*, PM 1-10, March 25, 2010. The IACHR granted precautionary measures for 14 women in a situation of displacement in Colombia, who are leaders of the displaced community in Bogotá and that as a result of these activities, they have been victims of sexual violence, physical attacks, threats, acts of harassment, and a violent home raid.

⁶⁹ CEDAW, *N.S.F. vs. the United Kingdom of Great Britain and Northern Ireland*, Communication No.10/2005, CEDAW/C/38/D/10/2005.

⁷⁰ *Jean Bosico v. Dominican Republic*, supra n. 8 above.

⁷¹ One solution that has been suggested is a procedure for the Committee to identify cases where it would benefit from submissions from third parties and ensure that in those cases, the admissibility decision is rendered separately and reported along with a summary of the issues raised in the communication, on the Committee's website. In this way, organizations or institutions with relevant expertise would have the opportunity to make submissions or to provide relevant information or documentation. It is expected that the Committee clarifies the criteria when to merge or separate the Merits and Admissibility when elaborating the Rules of Procedure.

⁷² The issue of third party amicus submissions from NGOs and human rights institutions was specifically considered by the Open-Ended Working Group, initially in relation to standing for non-governmental organizations and institutions in Article 2.31. While there was considerable support for the concept

of amicus submissions, there was little support for granting NGO's independent standing to submit collective communications in the model of the European Social Charter. As a result, references to standing for non-governmental organizations and institutions were removed from Article 2 and the question of whether or how procedures might be developed for amicus submissions was left to the Committee to consider in its Rules.

⁷³ Sandra Liebenberg, "Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review," in J. Squires, M. Langford, B. Thiele, (eds.) *THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, (Sydney: Australian Human Rights Centre, 2005), pp.73-88; Danie Brand, "Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale," in F. Coomans, (ed.) *JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS*, Maastricht Center for Human Rights, (Intersentia, 2006), pp. 207-236; Marius Pieterse, "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience," *Human Rights Quarterly*, Vol. 26, (2004), pp. 882-905; M. Tveiten, *Justiciability of Socio-Economic rights: Reflections on Norwegian and South African Debate and Experience*, in W. Barth Eide, U. Kracht (eds), *Food and Human rights in Development: Legal and Institutional Dimensions and Selected Topics*, Intersentia, 2005.

⁷⁴ The CESCR will examine both level of compliance, substantial –available resources, content of the rights, progressive adoption of measures etc- and procedural—the democratic component of the right, stakeholders' participation-. See, Bruce Porter and Sandra Liebenberg, *Consideration of Merits Under the OP-ICESCR: Reasonableness Review under 8(4) and the Maximum of Available Resources Standard—Notes for Discussion at the Workshop on Strategic Litigation under the OP-ICESCR* (with the authors).

⁷⁵ Since the Philippines lacks a national reproductive health policy which ensures women's access to sexual and reproductive health information and services in the Philippines, units are left to pass laws and develop policies and programs with little to no oversight by the national government; thus exacerbating inequities in access to health services.

⁷⁶ Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000 (11) BCLR 1169. (CC).

⁷⁷ See Porter and Liebenberg, supra n. 159 above; and Bruce Porter, Chapter 8: Reasonableness, in *An Expert Commentary on the OP-ICESCR*, Malcolm Langford, Bruce Porter, Julieta Rossi and Rebecca Brown (eds), (Pretoria University Law Press, forthcoming 2012).

⁷⁸ Id.

⁷⁹ See, for example, UN, ECOSOC, Final Report of the Special Rapporteur Cherif Biassiouni pursuant to Resolution 1999/33 of the Commission on Human Rights on *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, E/CN.4/2000/62 January 18, 2000.

⁸⁰ See UN CEDAW, case *Ms. A.S. vs. Hungary* -CEDAW/C/36/D/4/2004- Communication No. 4/2004, in which the CEDAW Committee ordered the State to review domestic legislation on the principle of informed consent in cases of sterilization and ensure its conformity with international human rights and medical standards, including the Convention of the Council of Europe on Human Rights and Biomedicine ("the Oviedo Convention") and World Health Organization guidelines; and consider amending the provision in the Public Health Act whereby a physician is allowed "to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances."

⁸¹ For example, the CEDAW Committee in Case *Ms. A.T. vs. Hungary* -A/59/38

Annex III, Communication No.: 2/2003-, ordered Hungary to introduce a specific law prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

⁸² ECHR, In *Kaya v. Turkey*, the European Court stated that when there is a general pattern that is known to the authorities, the state has a duty to take reasonable operational steps to prevent abuses. ECHR, *Kaya v. Turkey*, App. No. 22535/93, 129 (2000). IACHR, *The Situation of the Rights of Women in Ciudad Juárez Mexico: The Right to Be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44 (March 7, 2003). The Commission has noted many of the responses by the Mexican government to prevent further violence, such as special training programs for law enforcement officers and “measures to install more lights, pave more roads, increase security in high-risk areas and improve the screening and oversight over the bus drivers who transport workers at all hours of the day and night

⁸³ UN CEDAW Case *Ms. A.T. vs. Hungary*, *supra*, where the Committee ordered to provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution method.

⁸⁴ Antônio Augusto Cançado Trindade, *The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of Its Mechanism of Protection, in The Inter-American System of Human Rights* 414 (David J. Harris & Stephen Livingstone eds., 1998). As the President of the Court wrote, “no one better than the victims themselves (or their legal representatives) can defend their rights before the Court.... No one better than the victims themselves are well motivated to avoid and overcome procedural ‘incidents’ which may render them defenseless.” See also, IA Court of Human Rights, *Luis Uzcátegui v Venezuela case*, 2002, in which the Court ordered Venezuela to “allow the applicants to participate in planning and implementation of the protection measures and, in general, to inform them of progress regarding the measures ordered by the Inter-American Court of Human Rights” as well as “to investigate the facts stated in the complaint that gave rise to the instant measures, with the aim of discovering and punishing those responsible.”

⁸⁵ See, UN CEDAW, case *Ms. A.S. vs. Hungary*, *supra*, where the Committee asked the State to “monitor public and private health centers, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.”

⁸⁶ See IACHR, Maria Mamerita Mestanza, *supra*, where the parties in the friendly settlement agreed that the State should “[c]onduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning” and “[a]dopt drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country’s health centres.”

⁸⁷ *Ibidem* “[i]mplement a mechanism or channels for efficient and expeditious receipt and processing of denunciations of violation of human rights in the health establishments, in order to prevent or redress injury caused.”

⁸⁸ See UN CEDAW, Case *Ms. A.T. vs. Hungary*, in which the Committee ordered Hungary to provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation.

⁸⁹ IA Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130. Petition related to the rights to nationality and education of girls of Haitian descent born in the Dominican Republic.

⁹⁰ NGO Coalition Commentary, although this will be subject to the Rules of Procedure to be adopted by the CESCR.

⁹¹ This is the traditional mechanism under the ICESCR, according to which all State Parties are obliged to submit regular reports to the Committee on how the rights are being implemented every five years.

⁹² While all treaty bodies have developed a practice of following up on decisions taken with regard to a specific communication, the OP-ICESCR expressly introduce a follow up mechanism. Follow-up procedures “constitute an incentive for States promptly to adopt measures aimed at giving effect to Committee’s views, a way for States to report publicly on those measures, a source of best practices by States on their implementation of Committee’s views and therefore a crucial element in making the communications system more effective. *Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque*, Commission on Human Rights, Sixty-second session Open-ended working group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Third session, Geneva, 6-17 February 2006 E/CN.4/2006/WG.23/2, 30 November 2005 (also available at <http://www.opicESC-rights-coalition.org/Elements%20Paper-e.pdf>).

⁹³ A request for investigation may be made anonymously, although this may undermine the requirement that the information be reliable before an investigation is commenced; a communication may not be anonymous.

⁹⁴ Under OP-CEDAW and CAT it has taken on average of 2-4 years for the Committee to issue findings under the inquiry procedures. Therefore, whether the inquiry procedure or individual communication procedure is a more timely option, may largely depend on whether domestic remedies have been exhausted as this is required to submit an individual communication but not to initiate an inquiry procedure. See, Donna Sullivan, Chapter 3: Inquiry Procedure, in *An Expert Commentary on the OP-ICESCR*, Malcolm Langford, Bruce Porter, Julieta Rossi and Rebecca Brown (eds), (Pretoria University Law Press, forthcoming 2012).

⁹⁵ Under the OP to CEDAW, States may “opt-out” of the inquiry procedure at the time of signature, accession or ratification (Article 10). Under the Convention Against Torture (CAT) a State may enter a reservation declaring that it does not recognize the competence of the Committee to initiate inquiry procedures (Article 20).

⁹⁶ Chanté Lasco, *Virginity Testing in Turkey: A Violation of Women’s Human Rights*, 9 No. 3 Hum. Rts. Brief 10 (2002).

⁹⁷ As referred in Mamerita Mestanza case study, the petitioners alleged that her case represented just one of several cases of women affected by the application of a massive, compulsory, and systematic government policy that emphasized sterilization as a method for rapidly changing the population’s reproductive behavior, particularly poor, indigenous, and rural women. The State also agreed to adopt the recommendations made by the Ombudsman’s Office to protect women’s personal integrity, including: improving pre-operative evaluation of women who undergo a surgical contraceptive procedure; providing medical personnel with better training; creating mechanisms for receiving and efficiently processing complaints within the health system; and implementing measures to guarantee that women are able to provide informed consent within a period of 72 hours prior to sterilization. The IACHR is monitoring the implementation of the agreement.

⁹⁸ Inter-American Institute of Human Rights. *Optional Protocol: Convention on the Elimination of All Forms of Discrimination Against Women*. (San Jose, Costa Rica, Instituto Interamericano de Derechos Humanos, 2000)

⁹⁹ As for the scope of the term “reliable information,” it has been defined in the following terms: “[T]he reliability of the information can be evaluated in the light of factors such as: its specificity; its internal coherence and the similarities between reports of events from different sources; the existence of corroborating evidence; the credibility of the source in terms of their recognized ability to investigate and report on the facts; and, in the case of sources related to the media,

the extent to which they are independent and non-partisan.” See Inter-American Institute of Human Rights, *Convención CEDAW y Protocolo Facultativo. Convención sobre la eliminación de todas las formas de discriminación contra la mujer*, IIDH-UNIFEM, 2nd. Ed., San José, 2004, pp. 73-74.

¹⁰⁰ How To Complain About Human Rights Treaty Violations. The Investigative Mechanisms, available at http://www.bayefsky.com/complain/46_investigations.php

¹⁰¹ Confidentiality may end once the investigation has been completed, the findings transmitted to the state party, and the state party has had the opportunity to indicate what measures it may take in response. Although the confidential characteristic of the process may mean that the scrutiny and shaming occasioned by publication of a report may only emerge years after the incidents have taken place, given that the inquiry aim at addressing systematic and grave violations, the publication and recommendations will be key to reverse patterns of violations of ESCR.

¹⁰² The reliance of inter-state communications may pose some obstacles as an effective remedy to redress the violations of the ESCR of victims affected by the extra-territorial activity of a State party since individuals and groups of individuals cannot file a communication, which is left to the discretion of the State.

¹⁰³ See Courtis, Sepulveda, *Are extra-territorial obligations reviewable under the Optional Protocol to the ICESCR?*, in *Nordic Journal of Human Rights*, supra.

¹⁰⁴ Report of the Special Rapporteur on violence against women, its causes and consequences; *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, Commission on Human Rights, Sixty-second session, E/CN.4/2006/61, January 20, 2006, para. 34.

¹⁰⁵ Accordingly, Article 9 of CEDAW authorizes the CEDAW Committee to request that the State party provide information on how it has addressed violations in its next periodic report or alternatively, authorizes the Committee to request that the State party informs it of the steps taken to correct the violations six months after the transmission of the findings and recommendations.

¹⁰⁶ See UN website, *Human Rights Bodies—Complaints Procedures: Complaining about human rights violations*, at <http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate>



Part Six:

**Advocacy and Litigation on
Women's ESC Rights**

6

6. Advocacy and Litigation on Women's ESC Rights

Women globally have witnessed a strong resistance to their activism in the recognition and realisation of their universal human rights to equality and non-discrimination. There is still a long way to go for women to be acknowledged and accepted as full and equal participants in shaping and implementing international as well as national norms and standards guaranteeing basic rights and fundamental freedoms.

Advocacy on economic, social and cultural rights has increasingly been integrated into the work of mainstream human rights groups and organisations, but women's realities in relation to violations of economic, social and cultural rights are rarely given specific attention in terms of the nature and scope of violations as well as the relevance for the realisation of economic, social and cultural rights for all. Moreover, women's rights groups have not integrated a focus on ESC rights in their work to this same degree, rather entrenching the silence around women's ESC rights in human rights debates. Within NGOs and women's rights organisations there has been a high reliance on using CEDAW to understand, interpret and analyse the realities of women in the context of ESC rights and a strategic focus on the effectiveness of using ICESCR to advance women's ESC rights has not been considered as a priority. The significance of looking at the intersections of CEDAW based discourse on women's equality rights together with the meaning, scope and impact of specific rights recognised and articulated in the ICESCR, and vice versa, is critical for addressing the gaps and challenges faced by NGOs and groups advocating on women's ESC rights. This section aims to provide interested NGOs and women's rights groups with information on the range of mechanisms and strategies/tools available for building evidence-based advocacy and litigation on women's ESC rights.

Both NGOs advocating on ESC rights and women's rights groups advocating women's ESC rights have successfully utilised the multiple opportunities to advocate for ESC rights at the international and national levels. Analysis of and engagement by international organisations (such as IWRAP Asia Pacific and ESCR-Net) with the mechanisms available

to advocate on human rights at international and national level indicates that it is important for women's groups and human rights organizations to expand their approaches to integrate their advocacy on women's rights and their advocacy on economic, social and cultural rights.

6.1 International Advocacy

NGOs working on ESC rights and women's rights groups have to be strategic in identifying and engaging with the mechanisms at international level. There is a wide range of mechanisms available for ESC rights NGOs and women's organisations to pursue their advocacy on recognition and implementation of women's ESC rights. The nature of a human rights mechanism at international level usually determines the scope and impact of advocacy by activists and organisations, as well as its relevance for national level activism and lobbying.

6.1.1 Human Rights Council

The special procedures of the Human Rights Council, for example, the Special Rapporteur on Education, the Right to Health, etc., do not have an elaborate process to monitor human rights implementation nationally, but these procedures are of immense value and importance for NGOs and human rights groups when urgent attention is required to be brought to an urgent or ongoing violation of women's ESC rights. These procedures are strategic for "naming and shaming" of the government and key actors and initiating a public debate on fulfilment by the State of its international obligations.

The Human Rights Council itself, along with its mechanism of Universal Periodic Review, provides another opportunity for NGOs to advocate for women's ESC rights as does the Commission on the Status of Women which meets annually in New York and various ad hoc international conferences, platforms and NGO events such as World Conferences and follow-up activities to the Beijing Platform of Action, follow-up to the Earth Summit such as Rio +20 and annual NGO events such as the AWID Conference. Further venues for



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international advocacy exist at the regional level in various regions such as through the European human rights system including the European Court of Human Rights, the African Union and the African Court of Human and People’s Rights, the Inter-American human rights system and the Inter-American Court of Human Rights, and the newly developing Association of South East Asian Nations regional system.

6.1.2 UN Human Rights Treaty Monitoring Bodies

Each of the nine core international human rights treaties, is supported by a Committee of independent experts.

Each of these Committees carries out a variety of functions, including the examination of complaints under the Optional Protocols and the development of General Comments/Recommendations. Through the development of General Comments/Recommendations, the Committees elaborate on

the interpretation of the normative standards contained in the treaties and clarify State obligation with regard to specific rights or issues. The General Comments by the CESCR and General Recommendations by the CEDAW Committee can be extremely useful advocacy tools for NGOs as they set out in detail the extent to which States are obliged to respect, protect and fulfill women’s ESC rights. Some particularly useful General Recommendations/General Comments for advocacy on women’s ESC rights are GC 16 and 20 of the CESCR and GR 24, 26 and 28 of the CEDAW Committee.¹

The reporting procedure under each treaty, including CEDAW and the ICESCR, mandates State Parties to submit periodically a detailed report on the status of implementation of the rights recognised under these human rights treaties. The Committees constituted under these treaties have obligated the State to undertake a consultative process towards the compilation of the State report, and at the same time these Committees have encouraged civil society groups

and organisations to provide alternative information on the extent to which the State has undertaken measures or steps towards the realisation of rights under CEDAW and ICESCR. The result of this reporting process at the international level will greatly contribute towards shaping the agenda and development of strategies for women's organisations and ESC rights NGOs in their advocacy on women's ESC rights.

Using the Reporting Process as a platform to advocate for Women's ESC Rights

At the international level, the human rights treaty reporting process is a key mechanism through which NGOs can advocate for the recognition of women's ESC rights and for the redress of violations of these rights. It is an important means by which NGOs can advocate for States to be held accountable to their obligations under a treaty. The main way that NGOs can contribute to the treaty reporting process is through producing shadow reports or alternative reports to be considered as part of the regular review of State Parties who have ratified a treaty.

NGOs have successfully raised women's narratives and specific case studies that illustrate systemic problems or patterns of human rights violations of women's ESC rights in shadow reports. Shadow/alternative reports can be produced for both the CEDAW Committee and the CESCR, on women's ESC rights that are recognised under their respective treaties.

The reporting guidelines² developed by IWRAW Asia Pacific on CEDAW and on women's ESC rights jointly with ESCR-Net (see page 63) provide assistance to individuals and organisations who are working within the shadow reporting processes of CEDAW and ICESCR on how to incorporate information on the women's rights related dimensions of economic, social and cultural rights in parallel reports for both processes. The guidelines provide clarity on how NGOs should package information to ensure a more effective impact on the review process in a way that is useful for the CEDAW and CESCR Committees. They also contain information about how to most effectively use the review process and the outcomes of the review (the recommendations contained in the Concluding

Observations) to effect change.

Although the two treaties relate to specific and distinct areas of human rights both the CEDAW and ESCR Committees have recognized the need for a greater integration of women's rights and economic social and cultural rights in their respective processes. Thus in reporting on women's ESC rights there can be substantial value in not limiting reporting to one of these treaties, but rather reporting under both CEDAW and ICESCR.

In addition to producing reports for the CEDAW and CESCR Committees, women's ESC rights can also be addressed

through shadow/alternative reports to human rights treaty bodies under other Conventions including the ICCPR, CAT, CERD, CRC CPRD and the CMW. Particularly where States may not have ratified CEDAW or ICESCR, or have reservations to CEDAW and ICESCR, it can be useful to advocate for women's ESC rights through other treaties that have been ratified. For example, the CRPD is an important means for advocating for the economic, social and cultural rights of women with disabilities. Further, building on the indivisible and inter-related nature of rights, some NGOs have been successful in advocating for economic, social and cultural rights such as the right

to housing, by reporting on the impact of violations of economic, social and cultural rights on other rights such as the right to life under the ICCPR.

NGO shadow reporting can be strategically utilized to increase awareness of the rights and obligations contained in the treaties, promote integration of all women's human rights and improve State accountability for fulfilling its obligations under the treaties.

Using litigation as a strategy or as a tool in national level advocacy is critical for the domestication of standards and of the legal framework adopted under the international human rights treaties.

6.2. National Level Advocacy

Bringing International Human Rights Law Home

Often the international advocacy advancing women's ESC rights using human rights monitoring mechanisms provides

support to national level advocacy. The specific recommendations given by the Committees through concluding observations in their review of State reports can provide a platform for NGOs and women's rights groups to raise issues of women's ESCR.

To maximise the transformative potential of human rights treaty processes, NGOs can hold States accountable to their obligations under both CEDAW and ICESCR through a range of advocacy strategies at the national level, including monitoring, policy and law reform, litigation, and community education. It is important that capacity building of NGOs and activists on strategic use of international human rights mechanisms is undertaken to enhance the impact of international level advocacy, and make a shift in the understanding of NGOs and local level women's rights organisations on the potential and scope of international advocacy on women's ESC rights. NGOs can also advocate for policy and law reform initiatives to be consistent with the human rights standards and obligations expressed in CEDAW and ICESCR. For example, advocating for national development plans or framework legislations to incorporate specific policies and programs for the implementation of women's rights to housing, food, education and health care.

6.3. Using Strategic Litigation as a strategy in national level advocacy on Women's ESC Rights

Litigation can be used as a strategy both at international and national levels to advance women's ESC rights. NGOs can use litigation as a source of remedy, and ensure that the CEDAW and ICESCR standards and obligations are reflected in their litigation strategy. Using litigation as a strategy or as a tool in national level advocacy is critical for the domestication of standards and of the legal framework adopted under the international human rights treaties. In legal systems, for example the common law system, where the decisions by an appellate level or apex court become law with equal stature as that of a law enacted by a national legislature or parliament, litigation is a critical tool for local NGOs and women's rights organisations in raising discrimination experienced by women in the context of their ESC rights, as well as towards setting standards for national level implementation of international human rights.

Strategic litigation is a useful strategy when the change desired is of broader application, such as seeking the enforcement of an existing law, remedy a widespread violation of State's obligations, change or establish a national/provincial policy, reform public institutions, or inspire social/political change. Also, strategic litigation is very useful in cases where an issue may be unpopular, is not in line with the current power structure in the country, there are strong opposing interests, or represents the rights of marginalized groups, and would therefore have little traction in the formal legislative process. Strategic litigation at the international level has the added importance of helping to flesh out the scope and obligations of women's ESC rights, which can be used in other international fora as well as for domestic litigation and advocacy.

Strategic litigation at the international level can also be a useful strategy for civil law States. For example, although decisions made in cases at the national level in civil law jurisdictions will not generally apply beyond the specifics of that case, a pronouncement by an international legal body on the content and obligations related to women's ESCR could potentially be used quite broadly in national level advocacy and future national level cases on the issue.

Primary Elements to Consider

1. Is there a clear violation of an economic, social or cultural right?
2. Can the issue be adjudicated in court? Do adequate and effective remedies exist at the national level?
3. Will it be possible to sustain support (both human and financial) for the duration of the case?
4. If successful, will the outcome of the case have widespread effects on the right at issue?

Critical Factors in Determining a Strong Case for Strategic Litigation

1. Will successful litigation of the case encourage social change and legal reform?
2. Can you link the individual or group case to a more systemic/collective remedy?
3. How political is the particular issue in the case in both the domestic and international context?
4. Is there internal capacity to litigate the case or will you need external support?

5. Can you link with allies and other stakeholders to strengthen support for the case?
6. Can a positive decision in the case be effectively monitored and implemented?

Integrating Substantive Equality and ESCR in your Case

1. Ensure intersectional experience of rights violation (if present) is highlighted in the complaint.
2. Look for opportunities to build capacity of the court to understand the unique nature of women's ESCR violations—could be through *amicus curiae* submissions.
3. Use the case to build capacity of service providers, local lawyers and government agencies to recognize human rights violations and address them through policy change.
4. Be aware of when to use an integrated approach to issues and when it might not be successful.

6.3.1 Developing a Case Strategy

It is important to keep in mind in developing a case selection criteria and identifying cases which have the potential of being used for strategic litigation that most often these cases will emerge on an *ad hoc* basis. It will be infrequent that you will have an array of strong potential cases to choose from. However, because litigation is often a long and expensive process, it remains important to have an understanding of what some of the key factors are to be able to identify a potentially successful case. Below some of these key factors are explored.

✓ Is litigation the right strategy?

Before beginning to identify a case for strategic litigation, the most important question to consider is whether litigation is in fact the best strategy for that issue. In many cases, traditional legislative processes and popular social reform can be equally or more effective in changing law and policy. This will depend on many factors, but particularly, the political/social climate surrounding the issue. If there is an opportunity to gain support for the issue from a majority of the public, if you have support of the media, or key allies within the legislative or executive branch, the traditional legislative process may be the faster, less expensive and more effective means of making change on the particular law or policy in

question. Also, if the main goal is to raise public awareness and support for an issue, a media campaign will likely be more effective.

It is also important to assess whether the relevant group of women implicated in the litigation will be supportive of the case and if they are aware of the violation of their rights by the practice or policy. If not, perhaps awareness-raising needs to happen first to ensure that future litigation not only changes law or policy, but is also inclusive and empowering for the women affected. You also must consider whether there could be retaliation or further marginalization for the women involved in the case. If so, it might be safer and/or more effective to engage in public education prior to litigation. Finally, practical considerations like availability of evidence or available funds will also be highly relevant to the strategy chosen.

The ultimate consideration in deciding whether to engage on strategic litigation in a particular case, however, is whether litigation as part of a larger advocacy strategy or indeed litigation at all is the best option for the particular woman or women involved. If there are more effective ways for the victim to obtain redress or to obtain more appropriate redress, she must be fully informed of these options and facilitated in making the decision that is right for her.

✓ Assessment of impact of potential case

One important consideration on whether a case is potentially good for strategic litigation is the expected impact it may have on the affected group represented by the facts in the case.

There are a variety of reasons that it is important to develop clear criteria for selecting cases for strategic litigation. First, it will benefit your organization to have an equitable and transparent process for choosing cases to help dispel potential conflict if a case needs to be rejected or to ensure compliance with the mission and focus of your organization. Further, if additional funding will need to be acquired to pursue the case, the likelihood of finding support for a particular issue or group will also be relevant.

The "representative victim" and the seriousness of the violations involved in the case should also be considered. Also, support for the individual or group in the case will likely be critical to her willingness to pursue it over the long-term. If an individual is represented, does she have a family and/or

Case Selection Criteria

The Importance Of The Issue For Women's ESC rights

- How widespread is the issue/practice in the country?
- Does it reflect a systemic problem?
- Does it affect an individual or group of individuals?
- How serious is the violation complained of?

Anticipated Impact Of Case On Women's ESC rights Standards

- What is the likelihood of "success"?
- What is the potential impact on women's access to ESC rights likely to be?
- Does the anticipated scope of impact reach beyond the individual woman or group of women in the case?
- What other possible impact might the case have (e.g. on public opinion)?
- Is there some other objective, notably capacity building or relationship building that might, exceptionally, justify case selection?
- What are the potential consequences/negative impacts on women or other rights?
- Is the case politically sensitive?
- Is there a risk that success in this case might negatively impact on standards of human rights protection elsewhere?

What is the likelihood of a successful judgment being enforced/implemented?

- What would your organization's role be in enforcement? Who could you work with?

Your Organization's Contribution

- Could your involvement bring real added value to the case?
- Do you/your organization have sufficient expertise on the subject matter?
- Is there relevant experience from other lawyers/organizations with whom you work?
- Are there other organizations better placed to do this or with whom you could usefully collaborate e.g. through partnerships.

Resources

- How much time is likely to be taken on this case?
- Do you have the time to do it in view of other commitments?
- Are there cost implications?
- Is this the most appropriate and best use of limited resources?

Source: adapted from International Centre for the Legal Protection of Human Rights (INTERIGHTS), Background Note on Case Selection (2010).

community that are supportive of the case? If the clients are a group of individuals, do they have support from the community or class in which they are a part?

In relation to strategic litigation at the international level through use of Optional Protocols, the communications to CEDAW and CESCR must be on behalf of an individual or group of individuals. To be a good candidate for strategic litigation it should be representative of a wider pattern of violations or the impact of a law or policy on different groups of women, such as women with disabilities, poor women, indigenous women, etc.

Furthermore, potential impact should be assessed beyond

the impacts actual implementation of the judgement may have. In case of international communication/litigation, it is clear that getting complete implementation of the views and recommendations of the Committee may be very difficult. However, sometimes there can be positive impacts for the affected groups in the case even where implementation is lacking. For example, if a large amount of national and international attention is brought to the issue, the State may refrain from moving forward with a policy which violated women's human rights, or it may better educate the public and advance domestic discourse on the issue making legislative change more likely in the future.

Important Strategies to Increase the Likelihood of Implementation:

- The enforcement strategy should be developed and integrated into the overall litigation strategy from the start of the case;
- Be specific in the communication about the desired remedy and be aware of the current institutional capacity of the relevant national agencies which will be responsible for implementing the recommendations—consider working with the relevant government agency to better implement a decision;
- Ask the Committee to appoint a special rapporteur to oversee follow up and require the State to specifically report on progress in implementation of the case in its periodic review;
- Develop a large cross-section of allies for the case, including social movements and grassroots groups, academics, the media and a broad cross-section of national civil society groups and international NGOs;
- Build national and international awareness around the case through a concerted media strategy and relationships with international groups;
- Use human rights budgeting, gender budgeting and tax information to oppose State arguments on lack of resources for implementation;
- Present the views and recommendations made by the Committee to domestic level courts to support enforcement; and
- Widely disseminate the recommendations of the Committee so all stakeholders are aware if there is a lack of implementation.

Source: ESCR-Net, Analytical Report—Enforcement of Judgments on Economic, Social and Cultural Rights (2010).

✓ Non-legal strategies and ensuring strong coalitions of strategic actors

In strategic litigation, the involvement of various stakeholders and particularly affected groups and social movements is

critical to ensuring the broader impacts of the case and that the claim advanced is truly representative of a widespread violation that needs to be addressed. It is always important to also engage in non-legal strategies and to reach out to social movements or other civil society groups. Strategic litigation on a particular case is greatly strengthened when linked with domestic and international advocacy and a media awareness campaign. Linking with a variety of stakeholders, and particularly social movements, will increase awareness of human rights within society and build popular pressure and support during the litigation itself, but often more importantly afterward, to ensure the State implements the recommendations of the Committee.

✓ Financing the case / finding litigation support

Issues of financing or legal costs will primarily arise at the domestic level, for example whether the court requires the losing party to cover both parties legal fees, in addition to the actual costs of the litigation itself. In most countries, legal aid organizations exist which can help cover some costs of the litigation, however, most often it is necessary to undertake fundraising work to locate funds to cover impact litigation at the national level. It may also be possible to link with regional/international groups that may be interested in potentially working collaboratively to take the case through the appeal process and to the regional/international level to also help cover some of the national level litigation costs. On page 119, you can find a list of potential sources of litigation support or funding for national level litigation on women's ESC rights

Once the case is ready for presentation before OP-CEDAW or OP-ICESCR, financial resources may present less of a barrier. There are no filing fees for communications, evidence, etc., in international treaty bodies. In addition, international NGO's are often available to support the development of a communication and may also be willing to submit amicus curiae briefs in support of the case on certain issues. On page 119 of this Guide, you can find a list of international organizations available to assist in presenting communications or potentially calling for an inquiry under OP-CEDAW or OP-ICESCR.

✓ Litigation at international and regional level:

There are many potential venues for any complaint and it is

Comparison of Regional Human Rights Mechanisms

Feature	Inter-American system (Commission and Court)	European Ct HR	ECSR	African System (Commission and Court)
Actio Popularis	✓	X	Collective complaints from registered NGOs only	✓
Time limits	Within 6 months of exhaustion of domestic remedies	Within 6 months of exhaustion of domestic remedies	Not specified	within a “reasonable” period of time after exhaustion of remedies
Admissible if Examined by other systems/bodies	X	X	Not specified	Not specified
Evidence	Written Communications / Public Oral hearings	Written Communications / Public and Oral hearings/on-site investigations/ witnesses/experts	Written Communications /Oral hearings and third parties intervention	Written Communication (Commission) / Written Communications, Oral hearing, witnesses and experts (Court)
Remedies	Individual remedies (monetary and symbolic reparation, restitution, rehabilitation; investigation and punishment of those in charge of the violation)/ Structural or General measures (Non-repetition; legislative amendments; and policy changes)	Individual measures (just satisfaction and restoration of the injured party) / General measures— policy and legislative amendments	Decides on whether the Charter’s provisions have been violated and provides recommendations, but does not provide specific remedies	Individual measures; limited remedies (Commission)/ General measures /Commission)
Follow-up procedure	An interpretation of the judgment /Hearings for monitoring compliance of the judgments	Committee of Ministers of the CoE	Committee of Ministers of the CoE/ States submit reports on the implementation of the decision	The Executive Council on behalf of the Assembly (Court)
Legally binding	✓ (Court)	✓	X	X (Commission) ✓(Court- stipulated only in its Rules of Procedure)
Enforcement Mechanism	X	✓ (Committee of Ministers— a political body)	X	X
Filing Costs	X	X	X	X



UN PHOTO/Eskinder Debebe

important that you are aware of all relevant possibilities to make an informed decision in the best interests of the victim. (See table on page 97).

✓ **Forum Selection: When is the OP-ICESCR /OP-CEDAW the most strategic venue for a complaint?**

Deciding whether to bring your case to OP-CEDAW or OP-ICESCR or another international or regional mechanism will depend on many factors:

- The first question should be what is the primary right at issue in the claim? If it relates to women and issues of economic, social or cultural rights, OP-CEDAW or OP-ICESCR may not be the only relevant forum, however, given their greater expertise on these issues respectively they are likely to be the best choice.
- Once you establish the main issue of the case relates to a violation of women's ESC Rights, then you will need to choose between OP-CEDAW and OP-ICESCR.

1) First, is your State a party to both instruments? If not, then you will be limited to the mechanism your country has ratified. If yes, then there are several more factors to consider:

2) It might be important to analyze any reservations made by your country to Articles of both Conventions. If there was a reservation made on a relevant Article in one of the Conventions to your claim, you should use the other mechanism instead.

3) Another important factor to consider is the facts underlying your case. Is the focus of the claim on the substantive aspects of economic, social and cultural rights, i.e. fulfilment and access; or is the focus of the claim on inequality / discrimination against women and girls in relation to the right?

4) Another factor to consider is the political position of your State. For example, some States are more likely to

work constructively with the UN on issues of economic and social rights than issues around discrimination against women and vice versa. Having an awareness of your State's position both domestically and internationally on these issues is important in the assessment.

5) If the issue in your case has already been the subject of communication before either body and, the result was positive, this would be a good indication that a favourable decision might also be made on your submission. If the Committee's finding was negative, are there significant differences between your case and the one previously considered? If so, you might still choose to submit to this body.

6) Has more than one year passed since a final decision was made in the case at the domestic level? If so, the case is ineligible for review under OP-ICESCR, and will have to be submitted to OP-CEDAW.

7) The OP-ICESCR allows for the possibility of a friendly settlement, whereas this is not possible under OP-CEDAW. This can be useful for its flexibility in the type of remedies available and it may allow the process to resolve much quicker than proceeding through to a Committee decision, however, it is critical to remember that friendly settlements do not establish law.

8) Once you have chosen between OP-CEDAW and OP-ICESCR, you will also need to decide whether to file a communication or request an inquiry. Both ICESCR and CEDAW prohibit the Committees to review a case which has previously been reviewed by it or another UN body, so this choice should be carefully made. There are also significant differences in the two procedures, i.e. the severity and widespread nature of the violation. In addition, there is not a formal mechanism for requesting an inquiry—it is the will of Committee which is the sole determinant for the initiation of an inquiry procedure—although compelling evidence may support such a decision.

✓ **Reservations to OP-CEDAW or OP-ICESCR**

A reservation to a treaty is a statement by a State claiming to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. A reservation is allowed unless the treaty itself prohibits it, or the treaty permits only certain reservations not including the one in question, or the reservation is incompatible with the

object and purpose of the treaty. If the right at issue in your complaint is subject to a reservation by your State, you will need to argue this reservation violates one of the three exceptions above. Legal argumentation around the interpretation of State reservations can be quite technical. The Human Rights Committee decisions and the International Law Commission provide the most authoritative interpretations on this issue, however, it would be advisable to reach out to experts with specific expertise to help develop your argument on this issue.

✓ **Effect of OP-ICESCR /OP-CEDAW decision on domestic legal system**

Treaty monitoring bodies are the definitive source of interpretation of rights and obligations under their treaty of competence. State Parties have the obligation to implement the views and recommendations made under OP-CEDAW and OP-ICESCR.³ This arises from the obligation to fulfill treaties in good faith (1969 Vienna Convention on the Law of Treaties, Article 26). The failure to implement the views and recommendations made under OP-CEDAW or OP-ICESCR should be considered violations of the States duty to work with the Committee and the duty to act in good faith in compliance with the treaty itself.⁴

✓ **Implementation of OP-CEDAW/OP-ICESCR Decisions**

It is important to keep in mind that the UN treaty bodies have no enforcement mechanisms. As mentioned above, States are obligated to work with CEDAW and CESC and implement their views and recommendations, however, this process will almost always require advocates to be involved in pressing for implementation.

There are several important factors influencing likelihood of enforcement such as:

- involvement of social movements or other affected groups in the case to ensure there is broad-based pressure on the government to enforce the decision once finalized;
- social, economic and political costs of compliance, i.e. the internal/external pressure to comply or not to comply;
- breadth of the remedy sought—potentially the broader or more resource-intensive the remedy the less likely it will be implemented; and

Comparison of UN Human Rights Treaty Complaint Mechanisms

✓ Yes, or has competence X No, or does not have competence ? Not yet sure approach Committee will take

Mechanism	CERD	CESCR	HRC	CEDAW	CAT	CRC	CRPD
Competency to consider individual communications	✓	✓	✓	✓	✓	X	✓
Competency to consider communications from groups of individuals	✓	✓	✓	✓	✓	X	✓
Time Limits after the exhaustion of domestic remedies	6 months	1 year	5 years	Not specified, but not unreasonably prolonged	Not specified, but not unreasonably prolonged	X	Not specified
Admissible if Examined by other systems/bodies	✓	X	Inadmissible if the case is being examined under another procedure of international investigation or settlement	X	X	X	X
Evidence / Victim can Testify	- Written communications—Oral hearings	- Written communications Statement	Written communications	Written communications	Oral hearings	X	Written communications Complaints may be submitted in alternative formats, including Braille, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication
Remedies Structural/ Specific	Individual but not specific remedies / Occasionally structural	?	Individual but few specific remedies / Occasionally structural	Individual and relatively specific / prescriptive / Structural	Individual but not specific remedies / Occasionally structural	X	X
Friendly Settlement	X	✓	X	X	X	X	X
Conduct inquiries through country visits	X	✓	X	✓	✓	X	✓
Competency to consider Inter-State complaints	✓	✓	✓	X	✓	X	X
Follow-up procedure	✓	✓	✓	✓	✓	X	✓
Early-warning or urgent action procedure	✓	X	X	X	X	X	X
Interim Measures	✓	✓	✓	✓	✓	X	✓
Enforcement Mechanism	X	X	X	X	X	X	X
Filing Costs	X	X	X	X	X	X	X

- resource and knowledge capacity of national level agencies to implement the remedy.⁵

Advocates who are interested in using these mechanisms should develop a plan to create pressure for effective enforcement within the litigation and advocacy strategy from the beginning of the case.

6.3.2 Need for Strengthening Advocacy on Women's ESC Rights

Consideration should also be given to how NGOs can combine their international and national level advocacy strategies for women's ESC rights. This can be important in ensuring that international and national level advocacy are mutually reinforcing and States Parties are held accountable at both levels. For example, in the Philippines, NGOs built into a campaign for the protection of women's right to access reproductive health care, the following range of national and international strategies:

- **International**—producing shadow reports for the CEDAW and ICESCR Committee; reporting to specific UN Special Rapporteurs; submitting a request for an inquiry under OP-CEDAW.
- **National**—education campaigns on women's right to health recognised under both CEDAW and ICESCR and the ways this is being violated in the Philippines; law reform campaigns to challenge existing laws that limited women's right to reproductive health care; national level litigation; and working with both women's groups and economic, social and cultural rights groups to monitor the ways in which women's right to health care was being addressed in the Philippines.

Advocacy on women's ESC rights is not without any challenges. There is still a widespread lack of understanding of CEDAW and ICESCR in most countries, across government agencies, the private sector, in the community and the media. Community education on the standards and obligations in CEDAW and ICESCR and, specifically, what these are in relation to women's ESC rights, is an important aspect of ensuring there is widespread awareness and understanding of women's ESC rights, the obligation of States to respect, protect and fulfil these rights, and how women's ESC rights can be implemented at the local and national level. There is no set of perfect strategies

for advancing women's ESC rights nationally and internationally, but in a given national context and in relation to the discrimination or violation of women's ESC rights, the respective NGO or coalition of NGOs need to work out best possible strategies for pushing its advocacy agenda towards realisation of women's ESC rights.

The impact of advocacy nationally and internationally is determined by:

- identification of the violation/discrimination,
- framing of the issue based on existing national and international legal & human rights normative standards,
- identification of key actors and stakeholders involved,
- mapping and assessment of opportunities, resources, challenges and strategies,
- ability to mobilise a critical mass to support the advocacy—within the NGO or civil society sector as well as within the bodies capable and mandated to make a decision in regards to the violation/discrimination, and finally
- capacity and ability of the NGO or its coalition to consolidate its gains and positive outcomes from the advocacy and to build a consensus amongst the key stakeholders on recognition, protection and implementation of women's ESC rights towards necessary policy change or law reform.

6.4 Case Studies

Alyne Da Silva Pimentel v. Brazil (CEDAW, 2011)

1. Facts and Issues in the Case

Alyne da Silva Pimentel, an Afro-Brazilian woman who resided in one of Rio de Janeiro's poorest districts died as a result of repeated delays in receiving access to emergency obstetric care when she was six months pregnant.⁶ Timely access to induced delivery and post-delivery care would have prevented life-threatening complications and ultimately saved Alyne's life.

Alyne first sought medical attention at her local health center when she experienced vomiting and severe abdominal pain. Although these signs indicated a high-risk pregnancy, doctors performed no tests and Alyne was sent home with

vitamins, vaginal cream, and anti-nausea medication. She continued to experience severe pain and returned to the health center two days later. At this time, doctors discovered that there was no fetal heartbeat. Alyne was left unattended, and a few hours later, she delivered a stillborn fetus. Despite medical standards dictating that Alyne should have undergone an immediate curettage surgery to remove placental parts and to prevent hemorrhage and infection, she did not undergo surgery until approximately 14 hours later.

Following surgery, Alyne experienced severe hemorrhaging, low blood pressure, and disorientation. Despite these serious symptoms, doctors once again neglected to perform any tests. As her condition worsened, it was determined that she needed to be transferred to a hospital with adequate equipment to treat her condition (General Hospital of Nova Iguaçu). However, the health center refused to use their only ambulance to transport Alyne. Alyne's mother and husband attempted to secure a private ambulance, to no avail. Eventually, the General hospital authorized the use of their ambulance to transport Alyne. However, the health center failed to transfer Alyne's medical records to the hospital where doctors were only given a brief oral account of Alyne's medical condition and, according to subsequent medical records, they treated Alyne without knowledge that she had just delivered a stillborn fetus.

After arriving at the hospital, Alyne's blood pressure plummeted to zero, but she was resuscitated. She was then placed in an emergency room hallway where she was largely left unattended. She was found there by her mother with blood on her mouth and clothes. Alyne died on November 16, 2002, 21 hours after her arrival at the hospital, of an entirely preventable condition. Alyne is survived by her family and young daughter.

A few months after Alyne's death, her family sought civil redress within the Brazilian court system by filing a petition for civil indemnification for material and moral damages against the state-sponsored healthcare system. To date, the Brazilian judiciary has failed to provide any effective or timely

remedy. Unable to obtain any effective state relief for over four and a half years, Alyne's family, in conjunction with the Center for Reproductive Rights (CRR) and ADVOCACI, a Brazilian nongovernmental organization, filed an individual complaint before the Committee on the Elimination of Discrimination against Women (CEDAW Committee) on November 30, 2007.⁷ The petition alleges that Brazil's state-sponsored healthcare system was responsible for Alyne's death and as such, the government violated her rights to life, health, non-discrimination, and redress. These rights are grounded in

both Brazil's constitution and international human rights treaties, including Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2. Context in Country and Legal Framework

Article 196 of the constitution of Brazil explicitly guarantees the right to health "by means of social and economic policies aimed at reducing the risk of illness and other hazards and at universal and equal access to all actions and services for the promotion, protection and recovery of health."⁸ Maternal health is also protected under Article 6, which concerns social rights, whereby the State is further required to allocate a percentage of public funds for the protection of maternal health.⁹ The right to be free from discrim-

ination on the basis of sex and race is enshrined in Brazil's constitution as well.¹⁰

Notwithstanding these constitutional-level protections for the right to health generally and maternal health specifically, the Brazilian state has failed systematically to guarantee these rights and to provide an effective remedy and redress.

Despite making significant strides in other areas of public health, Brazil has failed to prioritize the reduction of maternal mortality. With approximately 1,800 women dying every year, Brazil's maternal deaths account for 20% of all maternal deaths in Latin America and the Caribbean.¹¹ Racial, gender and socio-economic factors play an important role in

Alyne's case highlights Brazil's systemic failure to reduce maternal mortality and provide access to quality maternal healthcare. Furthermore, this case highlights the barriers in accessing justice for violations of women's economic and social rights.

Argentina—Campaign against compulsory religious education in public schools

In 2008 the Province of Salta, Argentina,¹² adopted law 7.456/09 which imposed compulsory religious education in public schools.¹³

Although in practice religion already existed as part of the curricula of public schools and was taught in class before the enactment of the law, the enactment of the law came to provide legal support for the incorporation of religion in schools, thus violating rights and freedoms established under the Argentinean National Constitution, Salta's Constitution, as well as under international human rights instruments.

Law 7.456/09 proclaims religious plurality but the lack of governmental policies, through the Ministry of Education and other State agencies, make the law unconstitutional in its implementation and practical application because the only religion that has presence in the classroom is the Roman Catholic Church.

The role of education is essential since through education children are able to build their autonomy, freedom of personality and critical thinking. Privileging one religion over others through religious education creates the impression that the State professes a particular religious belief. States must assure religious neutrality in the context of public education and guaranteeing access to education regardless of the individual religion. States should

inculcate in students a neutral belief guaranteeing all citizens freedom of consciousness.

The Catholic Church's statements in public education prevent children from access to qualified and reliable sex education. The absence of comprehensive sexuality education and reproductive health services increases the risk of unwanted pregnancy and STIs including HIV; which has direct impact in girls' access to education since pregnancy and motherhood in teenage girls are also common motives for discrimination in education.

In reaction to the enactment of the law, some non-Catholic students' parents decided to make public their dissatisfaction in various local media. This group of parents, with the support of the National Institute against Discrimination, Xenophobia and Racism (INADI), and the Association for Civil Rights (ADC) decided to fight the law in courts. The litigation strategy was accompanied by mobilization and street demonstrations, broadcast journalism and testimony gathering of children and parents.

The campaign and litigation strategies seek to eliminate the provision that in applying this standard, imposes the compulsory teaching of Catholic religion in public schools in the province, violating the constitutional rights of freedom of religion, religion and beliefs, right to equality, right to education free from discrimination, privacy and the principle of freedom of conscience, and respect for ethnic and religious minorities.

maternal mortality rates, as Afro-descendant, indigenous and low-income women are disproportionately affected by maternal mortality.

Brazil identified seven health priorities in its Multi-Year Plan for 2004-2007; however, not one of those priorities was reducing maternal mortality. Brazil's failure to even reference maternal mortality indicates the country's failure to treat it as a pressing problem. Generally, maternal mortality is easily preventable and at a low cost. In fact, the Federal Parliamentary Commission of Inquiry on Maternal Mortality in Brazil recently reported that 90% of maternal death cases in Brazil are preventable.¹⁴ Nevertheless, according to the Commission, "maternal mortality rates [in Brazil] have

not decreased in the past fifteen years, despite subsequent economic improvements."¹⁵

Alyne's case highlights Brazil's systemic failure to reduce maternal mortality and provide access to quality maternal healthcare. Furthermore, this case highlights the barriers in accessing justice for violations of women's economic and social rights. As the report of the Special Rapporteur on the independence of judges and lawyers indicated, Brazil has problems with "access to justice...slowness and notorious delays," and the people who are most affected by this denial of access to justice are, among others, women and people of low-income.¹⁶

3. Legal Framework

As a party to CEDAW, Brazil has a duty to ensure women's equal enjoyment of the rights to life and health.¹⁷ The State is obliged to eliminate discrimination in the field of health care, ensure access to quality medical treatment in conditions of equality and ensure appropriate services to women in connection with pregnancy and childbirth including pre-natal services and timely emergency obstetric care. The government "cannot, under any circumstances whatsoever, justify its non-compliance with core obligations," particularly the right to health¹⁸ and should devote the maximum available resources to guarantee that women can go safely through pregnancy and childbirth.¹⁹ In addition, the State has an obligation to protect women's right to equality and non-discrimination through competent national tribunals and other public institutions.²⁰ Article 2(c) of CEDAW not only requires States to establish legal and other remedies to combat discrimination against women, but to also strengthen implementation of and monitoring of relevant laws.²¹ The Brazilian government has a duty to put into place a system that ensures effective judicial action and protection in the context of reproductive health violations.

These obligations to provide quality healthcare services in the context of pregnancy and childbirth are also enshrined in the ICESCR, which Brazil is a party. The ICESCR guarantees the right to the highest attainable standard of health, including sexual and reproductive health (Article 12); the right to non discrimination (Article 3); the special rights of pregnant women (Article 10); the right to an effective remedy (Article 4), and the right to benefit from scientific progress (Article 15).²² In General Comment No. 14 on the right to the highest attainable standard of the health, the Committee on Economic, Social, and Cultural Rights made specific reference to the application of Article 12 to reproductive health: "[r]eproductive health means that women and men have...the right to...have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth."²³

In the Alyne case the State clearly violated its obligations under the CEDAW and ICESCR by not providing appropriate and quality maternal health care serviced and by failing to provide an effective remedy and redress to Alynes' family.

4. Impact of the case

Around the world, pregnancy poses profound risks for women: one woman dies every minute from causes related to pregnancy and childbirth, with over half a million women dying each year.²⁴ Men between the ages of 15 and 44 face no single threat to their health and lives that is comparable to maternal death and disability. Complications from pregnancy and childbirth are the leading cause of death for young women and girls between the ages of 15-19 in developing countries.²⁵ Rural and low-income women are at greatest risk of suffering maternal death and disability.

The Alyne case is aimed at bringing to light and remedying the stark injustices surrounding maternal mortality, particularly in the context of Brazil. It is the first individual case filed before a UN human rights body, the CEDAW Committee, to frame maternal mortality as a human rights violation and to seek government accountability for the systematic failure to prevent maternal deaths. The claims set forth in the complaint build upon international reproductive rights standards, which have gained increasing recognition over the last 15 years.

The CEDAW Committee, in deciding this case, has the potential to issue a landmark precedent that would impact interpretation and application of women's human rights worldwide. It also has the opportunity to clarify the extent of governments' obligations to reduce maternal mortality, particularly in countries with social, economic, and political conditions that are similar to Brazil's.

5. Factors affecting the result in this case/ Strategies used to advance the case

The case is still pending before the CEDAW Committee. As part of the strategy to gain support for the case at the national level and prepare for the implementation once a decision comes out, the Center has engaged with civil society organizations, academics, health professionals and other key stakeholders. In addition, it has organized various advocacy activities to raise the public profile of the case. In 2008, on the Maternal Health Day, the Center together with various Brazilian networks and organizations held a vigil outside the Congress in Rio de Janeiro. The Center developed a media strategy and the case appeared in the most important newspapers in the country and a long article about the case appeared in one of the most prestigious magazines. In 2009, the Center

and the national NGO Center for Citizenship and Democracy organized a seminar on maternal mortality and human rights in Brazil. The seminar brought together academics, health professionals, and civil society representatives to discuss the obstacles and challenges in improving maternal health in the country. The Alyne case was discussed in depth and some of the strategies that can be used to push for the implementation of the decision of the case were discussed. These activities have been very important to consolidate a strong informal coalition of supporters for the case, to raise its profile and to shape an implementation strategy.

➤ Inquiry in the Republic of Philippines²⁶

(CEDAW, requested June 4, 2008)

1. Facts and issues in the inquiry

In 2000, former Manila City Mayor Jose “Lito” Atienza, Jr. introduced Executive Order No. 003: Declaring Total Commitment and Support to the Responsible Parenthood Movement in the City of Manila and Enunciating Policy Declarations in Pursuit Thereof (the Executive Order) in the City of Manila, the Philippines.

The implementation of this Executive Order resulted in a ban in all Manila public health facilities on the provision of modern contraceptives, on information about contraceptives, and in referrals for family planning services.²⁷

The implementation of the Executive Order has harmed women by causing unwanted pregnancies, which in turn, have contributed to the high incidence of unsafe abortion and maternal mortality and morbidity. The Center for Reproductive Rights has also documented many cases where the Executive Order has resulted in increased hunger and poverty for women and their families.²⁸ Approximately 30% of Filipinos live under the poverty line,²⁹ and the lack of access to modern contraception has particularly impacted on low-income women in Manila, most of whom simply cannot afford to purchase their own contraceptive supplies.

In 2008 the Centre for Reproductive Rights, IRAW Asia Pacific and Taskforce CEDAW Inquiry (Philippines) submitted a request to the CEDAW Committee to undertake an inquiry under article 8 of the OP CEDAW on systematic and grave violations of women’s rights in the City of Manila, Philippines.

The initial submission claimed violation of rights under

CEDAW pertaining to the restriction of access to modern contraception in Manila City and the harassment of providers of contraception. The submission claimed violation of CEDAW Articles 2, 3, 5, 10, 11, 12, and 16 (i.e. rights to life, health, non-discrimination, self-determination and bodily integrity, education, an adequate standard of living, freedom from violence, freedom of religion and belief).

Four submissions have been made in total including:

- Initial Request for Inquiry—June 4, 2008
- 2nd Supplemental Request for Inquiry—October 27, 2008
- 3rd Supplemental Request for Inquiry—April 23, 2009
- 4th Supplemental Request for Inquiry—July 13, 2010

The NGOs also submitted to the CEDAW Committee a Petition and signatures in January 2010.

In addition the NGOs made a submission for urgent action to the following UN Special Rapporteurs in 2009:

- Mr. Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
- Ms. Yakin Erturk, Special Rapporteur on violence against women, its causes and consequences
- Mr. Vernor Munoz Villalobos, Special Rapporteur on the right to education
- Ms. Margaret Sekaggya, Special Rapporteur on the situation of human rights defenders
- Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief
- Ms. Maria Magdalena Sepulveda Carmona, Independent Expert on the question of human rights and extreme poverty

2. Context in the Philippines

The Philippines has a population of about 90 million people, the 12th largest in the world. Of the estimated 11.2 million people living in Metro Manila, 5.7 million are women. In the Metro Manila area, more than 1.1 million people (10.4% of the population) live below the official poverty threshold and of these, 17, 214 are classified as extremely poor.³⁰ Women from the poorest households have six children on

average, while the national average is 3.5 children, according to the Manila-based University of the Philippines Population Institute.³¹

Nearly half of all Filipino women have an unmet need for contraception. According to the 2003 National Demographic and Health Survey, the total contraceptive prevalence rate among all women was 31.6% (any method), but only 21.6% used modern methods.³² Notably, the contraceptive prevalence rate in the Philippines is far lower than that in neighbouring countries in the region.³³

Women die from pregnancy-related causes in significant numbers in the Philippines. The maternal mortality rate in 2005 was 230 maternal deaths per 100,000 live births, one of the highest rates in East and South East Asia. Nationwide, approximately one-third of women who experience an unintended pregnancy have an abortion. An estimated 800 women die due to unsafe abortion each year, as a result of unplanned and/or unwanted pregnancy and lack of access to safe abortion services. In 2000, it is estimated that more than 473,000 Filipino women unsafely terminated their pregnancy, a statistic that reflects the reality that a substantial proportion of women in the Philippines are forced to rely on pregnancy termination to control their fertility.³⁴

Contraceptive use in the Philippines is strongly correlated to wealth. In the richest quintile, 35.2% used modern methods of contraception, while in the poorest quintile the rate of use was less than 24%.

In 2004, there were a total of 2,719,781 Catholics in the Archdiocese of Manila out of an estimated total population of 2,993,000. Although the Philippines is a constitutionally secular state the Catholic Church has involved itself with various political issues, such as pending legislation on reproductive health and rights, and the abolition of capital punishment. The Catholic Bishops Conference of the Philippines' (CBCP) has opposed the introduction of any bills on sexual and reproductive health, through prayer rallies, petitions, sermons and adverts in the media.

Legal context

The Philippines ratified CEDAW in 1981 and ratified the OP CEDAW in 2004. At the time of ratifying the OP CEDAW, Philippines did not opt-out of the inquiry procedure (Article 8).

The Philippines does not have a national sexual and

reproductive health law. Under the Local Government Code of 1991, the Philippines has decentralized responsibility for "people's health and safety" to the local level. Section 17 of the Code provides that the local government units are responsible for the provision of basic services and facilities, among which are health services, family planning services, and population development services. For most Filipinos, the government is the major source of family planning services, with about 70% of people relying on the public sector for services, including female sterilization, oral pills, intrauterine devices (IUDs) and injectables.³⁵

The Executive Order introduced in 2000, has continued to be implemented since the change in administration from Mayor Lito Atienza to Mayor Alfredo Lim in 2007.³⁶

There is national legislation pending before the Philippine Congress, the Reproductive Health and Population Development Bill, which would require all levels of government to provide free or low-cost reproductive health services, including condoms, birth control pills, tubal ligations and vasectomies. Should the reproductive health bill be adopted it would nullify the EO.³⁷

3. The Decision

The CEDAW Committee asked the Philippines Government and the UN Country Team to submit a response to the CEDAW Committee by February 2009. The Government of Philippines.

The UN Country Team submitted their confidential report to the CEDAW Committee during the first quarter of 2009. Subsequently, the Philippine Department of Foreign Affairs submitted two responses to the CEDAW Committee: 1) the response from the Philippine Commission on Women confirming the importance of the conduct of the inquiry and consenting to the visit; and 2) the response from the Manila City Office alleging that the EO is no longer being implemented.³⁸

Currently, the CEDAW Committee is awaiting permission to conduct a Country Visit. Should the Philippines Government not consent to a country visit, the CEDAW Committee can still proceed with the inquiry based on the information provided to the Committee and information provided by Filipino women affected by the contraception ban in Manila City provided in meetings with the CEDAW Committee conducted outside of the Philippines.

4. Strategies

The NGOs involved in this submission have used a combination of strategies in the course of the Inquiry.

The NGOs have developed a small coalition of international and national NGOs to work together on the Inquiry. This has enabled the demands of the inquiry to be shared amongst several organisations, and has maximised the benefits of drawing on the different areas of expertise of different organisations. The national NGOs have used a number of data gathering methods to collect information directly from women in Manila affected by the Executive Order—including surveys, interviews, meetings etc. It has been beneficial to link this work of national NGOs with the work of international NGOs on this issue.

One of the factors of this inquiry has been the long timeframe for the inquiry which has currently been running for three years. The NGOs have countered this by providing updated information through supplementary submissions. In addition the NGOs have collaborated on taking supplementary action including making submissions to Special Rapporteurs and creating a petition. Such actions have also assisted in raising awareness within Manila and internationally of the issues as well as of the Inquiry.

5. Importance of OP-CEDAW

During its 45th session (1—19 November 2010), the Committee on Economic, Social and Cultural rights held a Day of General Discussion on the right to sexual and reproductive health in accordance with articles 12 and 10 (2) of ICESCR. The Day of General Discussion is part of the preparatory work leading to the formulation of a general comment on the right to sexual and reproductive health. A General Comment on right to sexual and reproductive health will positively inform any future consideration of these issues under either CEDAW or ICESCR or their relative Optional Protocols.

Maria Mamerita Mestanza v. Peru

(IACHR, 2008)

1. Facts and issues in the case

In 1996, officials from the Encañada District Health Center in Peru continually threatened to report Ms. María Mamerita Mestanza and her partner to the police if she did not agree

to undergo surgical sterilization, claiming that having more than five children was a crime.³⁹ Under coercion, Ms. Mestanza a rural woman about 32 years old and mother of seven children, agreed to have tubal ligation surgery. The procedure was performed on March 27, 1998 at the Cajamarca Regional Hospital, without any pre-surgery medical examination. Ms. Mestanza was released few hours later, although she had serious symptoms including nausea and sharp headaches. In the following days her husband reported to personnel of La Encañada Health Center on Ms. Mestanza's condition, which worsened daily, and was told by them that this was due to post-operative effects of the anesthesia. Ms. Mestanza died at home on April 5, 1998 due to a post-operative general infection as the direct cause of death.⁴⁰

A few days later a doctor from the Health Center offered a sum of money to Mr. Jacinto Salazar to cover funeral costs and to sign a document (an "agreement") in an effort to put an end to the matter. Despite this, on April 15, 1998 Mr. Jacinto Salazar filed charges with the Provisional Combined Prosecutor of Baños del Inca against Martín Ormeño Gutiérrez, Chief of La Encañada Health Center, in connection with the death of Ms. Mestanza, for crimes against life, body, and health, and premeditated homicide (first degree murder). On May 15, 1998, the Provincial Prosecutor indicted Mr. Ormeño Gutiérrez and others before the local provincial judge, who on June 4, 1998 ruled that there were insufficient grounds to prosecute. This decision was confirmed on July 1, 1998 by the Circuit Criminal Court; on December 16, 1998 the Provincial Prosecutor ordered the case dismissed.

The Mestanza case is one among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indigenous, and rural women. The Ombudsman had received several complaints on this matter and between November 1996 and November 1998 CLADEM documented 243 cases of human rights violations through the performance of birth control surgery in Peru.

Having exhausted domestic remedies, on June 19th, 1999 petitioners⁴¹ brought a case against the Peruvian Government before the Inter-American Commission on Human Rights (IACHR). The petitioners alleged that the facts constituted violation of the rights to life (article 4), personal integrity (article 5), and equality before the law (articles 1 and 24),

of the American Convention on Human Rights; and violation of Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (hereinafter the “Convention of Belém do Pará”), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter the “Protocol of San Salvador.”) and Articles 12 and 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

On October 3, 2000 the Inter-American Commission on Human Rights approved the Report on Admissibility N° 66/00. The Report opened the scenario for the exploration of a possible friendly settlement procedure.⁴² On March 2, 2001, during the 110th session of the Inter-American Commission on Human Rights, the Peruvian State and the victims’ representatives signed the Preliminary Agreement for Friendly Settlement with intervention and approval by the IACHR. The Peruvian State recognized its responsibility for the violation of article 1.1, 4, 5 and 24 of the American Convention and article 7 of the Convention of Belem do Para. The final friendly settlement was agreed upon on August 26, 2003, when the act setting out the friendly settlement reached by the parties was signed in Lima.⁴³

To date, Peru has partially complied with the provisions established in the friendly settlement. Peru has not complied with the portion of the agreement in which they had pledged to “conduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning, to break out and duly punish the perpetrators.” There has been no investigation or prosecution of those responsible for Maria Mamérita Mestanza’s death, and her case has been archived.

2. Context in Peru

Health is recognized as a fundamental right under the Peruvian Constitution (Article 7 and 11) according to which

the State must guarantee free access to public health care. This constitutional recognition is complemented by domestic laws that define Peruvian public health policy and makes it a justiciable right.⁴⁴ Reproductive and sexual policy is defined by Peru’s National Population Policy, Legislative-Decree N° 346, of July 5, 1995—article 1.2 promotes and ensures free and informed decision and responsibility of individuals and couples about the number of births (family planning);⁴⁵ and by the National Health General Act, law 26.842 of July 15, 1997—article 6 establishes the right of women to choose a contraceptive method, including natural ones.

However, during the regime of former President Alberto Fujimori the government developed a “birth control policy” as a way to bring equal access to contraception for the nation’s poor. In 1992, the Government approved the Family Planning Manual -RM N° 0738-92-SA/DM, to permit sterilization as a family planning method in cases of “reproductive risk”; which was the antecedent for sterilizations in public clinics in urban and rural areas of Peru.

At the same time, Fujimori attended the Fourth International World Conference on Women (Beijing, 1995) where his statements made clear that the sterilization law was approved to reduce the birth rate and combat poverty rather than as an expression of women’s reproductive health or rights. At the convening he argued that Peru had to implement rational policies to reduce family size in order to eliminate poverty and to “democratized” family planning services in order to guarantee the poorest people access to these methods.⁴⁶

In September 1995, to support Fujimori’s regime, the Congress modified the National Family Planning Program, (law No. 26,530) and implemented sterilization as a family planning method. Pursuant to this law, the Ministry of Health began an intensive campaign to raise awareness, through health fairs, to induce women to make use of irreversible contraceptive methods to control the birth rate, especially in peasant women. This was followed, in 1996, by

The Mestanza case is among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population.

Government's approval of the National Program of Reproductive Rights and Family Planning (Programa Nacional de Salud Reproductiva y Planificación Familiar 1996-2000 (PNSRPF 1996-2000) -RM No. 0738-92-SA/DM- through which it was legalized the Voluntary Contraceptive Surgery (VCS) - (AQV: Anticoncepción Quirúrgica Voluntaria).

The government's aggressive Family Planning Program focused on increasing the number of sterilizations performed on Peruvian women, specifically targeting low-income and indigenous women, through "tubal ligation festivals," fairs and campaigns. According to a CLADEM report "Nothing Personal" reports released by the Peruvian Ombudsman⁴⁷ on health care provider practices, measures that did not include informed consent such as subjecting women to aggression, intimidation, and humiliation were allowed. For example, health care providers stated that sterilization was the only free method of contraception available, deliberately gave inaccurate information about the risks and consequences of surgical sterilization procedures, and did not give women time between the decision and the surgery.

There were at least 18 documented cases of women that died after forced sterilization procedures⁴⁸ due to conditions of health services and lack of pre and post-surgery monitoring. This coercive policy of sterilization increased the number of surgeries from 81.762 in 1996 to 109.689 in 1997.⁴⁹

3. The Decision

On October 10th, 2003, the IACHR approved and published the Friendly Settlement, signed by the representatives of the victims and the State. One of the main outcomes of the settlement was Peru's recognition of its international responsibility for violating the victim's human rights. The rights violated included, among others, the right to life, to physical integrity and humane treatment, to equal protection before the law, and to be free from gender-based violence.

In the settlement agreement signed, the Peruvian government agreed to pay moral damages to Mestanza's husband and seven children, as well as significant compensation for their health care, education and housing. The government also agreed to conduct an in-depth investigation and to punish those responsible for the violations of Peruvian and international legal standards. The Peruvian State pledged to carry

out administrative and criminal investigations to the attacks on the personal liberty, life, body, and health of the victim.⁵⁰

The government agreed to modify discriminatory legislation and implement policies that included: improving pre-operative evaluations of women being sterilized; requiring better training of health personnel; creating a procedure to ensure timely handling of patient complaints within the health care system; and implementing measures to ensure that women give genuine informed consent, including enforcing a 72-hour waiting period for sterilization. This agreement represents an important precedent, not only for Peruvian women but also for international human rights law and for future cases where reproductive rights and women's access to family planning violations occur in Latin America and around the world.

4. Impact of Case on Women's ESC Rights

The agreement had broad implications for Peru's reproductive health policies, as well as improved access of women to family planning and reproductive healthcare. Through this landmark settlement Peru agreed to modify discriminatory legislation and policies including those that fail to ensure women's right to be autonomous decision-makers in the context of their exercise of their right to health.

Through settlement negotiations the Minister of Health committed to evaluate practices and modify legislation accordingly. Consequently, in 2004, the National Health Care Strategy on Sexual and Reproductive Health (Estrategia Sanitaria Nacional de Salud Sexual y Reproductiva) was implemented. This Program included national guidelines, which incorporated the friendly settlement's recommendations. Most of these recommendations, concerning public policies on reproductive health and family planning, were made by the Peruvian Ombudsman.

One of the main concerns raised during the litigation was the lack of (or inaccurate) information provided to women subject to surgical sterilization and the deficient pre-surgery evaluation of women who underwent sterilization, which speaks to international human rights standards of the quality of the service. Therefore, the State was urged to adopt the necessary administrative measures ensuring that the respect for the right to informed consent is scrupulously

followed by health personnel; to take strict measures to ensure that the compulsory reflection period of 72 hours is faithfully and universally honored; to guarantee “drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country’s health centers. Although the rules of the Family Planning Program required this evaluation in practice those were not followed. In addition, the government was committed to implement a mechanism for efficient and expeditious receipt and processing of complaints for the violation of human rights in the health establishments, in order to prevent or redress injury caused.

Despite these important changes to national policy and practices, Mestanza’s family has encountered many obstacles in accessing education and health services, despite the commitment of the State to “to give the victim’s children free primary and secondary education in public schools” and “tuition-free university education for a single degree at state schools”; as well as psychological rehabilitation treatment” and “permanent health insurance” for her husband and the children. Because the family lives in a rural area, secondary education is not available nearby and the distance to the nearest school prevents their attendance, therefore the children are currently not receiving secondary education. Further, living in a rural area also limits their access to health-care services.

5. Factors affecting the result in this case

There are internal and external factors that affected the outcome of the particular case. The internal factors relate to the methodology used in its development and the alliances to file it. The external factors relate to the political context after the Fujimori regime and the collective desire for accountability, as well as the instrumental changes on the view of reproductive rights in the international human rights standards.

The methodology used by the petitioners through research, documentation of cases nationwide and systematization of information (interviews, archive news, testimonials, etc..) allowed the identification of an emblematic case, as well as substantial support of the case through the documentation of systemic impact of the policy. Another important factor was the intervention of the Ombudsman who received numerous complaints about cases of forced sterilization, as researched and published in CLADEM’s report with findings

and recommendations on the issue. Another important factor was the alliance between organizations as petitioners in the case. It brought together the feminist organizations of CLADEM and DEMUS, with APRODEH, a leading human rights NGO in Peru, and international human rights organizations, CEJIL and CRR. The political context of transition after the Fujimori government was also favorable, as it gave priority attention to cases of human rights violations striving for accountability of the regime.

In addition, since 1990, a new paradigm has emerged from two UN World Conferences held in Cairo and Beijing which place women’s reproductive rights within the human rights framework, and recognize them as part of the right to health and core human rights. This profound shift stemmed from the emerging international consensus that “reproductive rights embrace certain human rights that are already recognized in national law, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.”⁵¹ Since Cairo, an increasing framework of norms and jurisprudence has advanced interpretation of the right to access reproductive healthcare.

6. Strategies

Litigation of Mamerita Mestanza case was complemented with a communication strategy aimed at denouncing the Peruvian program of massive sterilization of mainly poor women in Peru. The media strategy was also useful to create pressure on the government to sign and implement the settlement in the case; the dissemination and publication of the agreements signed before the Commission were key to this end.⁵²

In addition, given the difficulties in the execution of the obligations related to access to health care and education for victim’s children, the petitioners held several meetings with state representatives of the agencies involved in the implementation of those measures.

To assist in the judicial investigation and prosecution of those responsible for Mestanza’s death, the petitioners prepared a report in which the organization presented arguments based in international human rights law for the

judiciary to take into consideration. The goal was to encourage courts to apply human rights standards in the investigation, however, the report was rejected and the case was finally archived by the public prosecutor. The petitioners have communicated this decision to the IACHR arguing that the archive of the investigation is in breach of the friendly settlement.

Therefore, if litigants are able to combine litigation with movement building and a media strategy, it increases success in achieving the legal remedies by broadening the knowledge of the case as a systematic problem, pressuring the government through a shaming strategy, and generating a grassroots movement that can hold the government accountable for its actions. Likewise, such strategy broadens and deepens the understanding of each right to include the international human rights legal framework on women and ESC rights within the larger public.

The case in itself constitutes a strategy towards the building of what has been addressed as an external factor in the previous section in relation to the advances of the international human rights framework around the recognition and protection of reproductive rights. The decision to make an emblematic case accountable in the international human rights fora builds regional precedents that, as this case, nurture the international legal standards and understanding of reproductive rights, as a framework applicable in the region, and possible worldwide.

7. Lessons Learned

When strategizing for the presentation of future cases, careful attention should be given to the development of convincing gender-sensitive legal arguments. It remains key to take the time to frame the violation of the rights at issue in light of international human rights standards on ESC rights and women discrimination under the Belem do Para and CEDAW Conventions.

Initiatives should include broader and more targeted allegations to further expand human rights interpretations and recognition of women's rights. Arguments presented should seek to enhance a global understanding that access to healthcare is in fact a human right and one which is necessary to ensure the protection and exercise of other rights such as the rights to life, equality and non-discrimination.

In Mamérita Mestanza case, although organizations introduced this perspective that links the traditional understanding of human rights with ESC rights through a gender perspective, the arguments could have been developed more thoroughly. Such fact has to take into consideration the lack of international human rights standards at such point, and possibly a strategy to incorporate such understandings in an increasing fashion. Organizations need to elaborate on the interrelationship between women human rights violations and the economic and social rights at issue and use the standards that today have been created, not only in the regional human rights systems but also in the universal human rights systems.

In addition, organizations should insist on including ESC rights with a gender perspective in their work. In this case, while the initial petition framed the violations in terms of ESC rights –particularly violations of article 3 and 8 of San Salvador Protocol- during the negotiations of the friendly settlement that strategy was abandoned. This was a strategic decision due to the progressive nature of ESC rights and if they are judicially enforceable. In spite of this the IACHR, it has stated that both the Commission and the Court can consider the Protocol of San Salvador in the interpretation of other applicable provisions, in light of the content of Articles 26 and 29 of the American Convention.⁵³ With this in mind, and the few precedents issued by IAHR system regarding ESC rights, women rights advocates should relate and reinforce their arguments on ESC rights violations of the Protocol of San Salvador in harmony with the provisions of the ACHR.

Finally, despite the fact that international law is sometimes challenging to enforce, settlements such as that in the Mestanza case prove that the threat of international admonishment can be an effective motivator in securing redress.

8. What new possibilities could exist for realization of the rights at issue in the case if it was brought before OP-CEDAW / OP-ICESCR?

Under OP-CEDAW the petitioners could have used Article 12 of CEDAW, relating to equality in health services, especially family planning in combination with Article 14.2(a) to clearly show how Mestanza's experience of intersectional discrimination as a rural woman was central in her experience of the rights violation. The CEDAW Committee has also developed

specific legal interpretation on this issue including General Recommendation 21, which stresses the importance of access to information, specifically in the context of sterilization, noting the need for women to access information about sexual and reproductive health in order to make informed decisions, according to paragraph h) of Article 10 of the Convention. Additionally, in its General Recommendation 24, the CEDAW Committee explains that services that are acceptable are those that are delivered in a way that ensures that a woman delivering their full informed consent, respect for their dignity, guarantees her confidentiality and is sensitive to their needs and perspectives. The Committee urges States parties not to permit forms of coercion, such as non-consensual sterilization ... that violate women's rights to dignity and informed consent." OP-CEDAW has also established important precedents on this issue under the case of *A. S. v. Hungary*, involving lack of informed consent in the sterilization of a Roma woman, in which the CEDAW Committee found Hungary in violation of the rights set out in paragraph h) of Article 10, Article 12 and paragraph e) of paragraph 1 of Article 16 of CEDAW.

Under OP-ICESCR, the right to highest attainable degree of physical and mental health becomes justiciable as a substantive right defined under international law, which can also include references to interpretations by CEDAW, CRC and ICCPR, among others. According to CESCR, the right to health must be understood as "a right to enjoy a range of facilities, goods, services and conditions necessary to achieve the highest level of health" both physically and mentally. In General Comment 14, the CESCR has also emphasized the close relationship the right to health and other fundamental rights such as the right to education, which could enhance claims on the relationship between violations of these rights, particularly in relation to access to information and family planning. Finally, the ESCR Committee is currently elaborating a General Comment on the content and scope of state's obligations related to sexual and reproductive health. This will be an important source of law for the Committee to draw upon once it begins receiving cases under the OP-ICESCR on these issues.

Lourdes Osil et. al. v. Mayor Of Manila

(Court of Appeals, 2008)

1. Facts and issues in the case

In February 2000, the mayor of Manila issued Executive Order 003 (EO 003) to "promote" natural family planning and "discourage" so-called "artificial methods of contraception." Since then, EO 003 has operated as a de facto ban on modern contraceptives in public health centers in Manila City. In addition to preventing women in Manila City from being able to obtain modern contraceptives from public health facilities, EO 003 has had a "chilling effect" on private and non-city health service providers who, as a result of the order, are afraid of reprisals for giving information to women about modern methods of family planning.

Thus, for 9 years, women, especially low-income women, have been arbitrarily denied access to a full range of modern contraceptives in blatant violation of their right to access the full range of family planning methods and services as recognized in international law. The withdrawal of modern contraceptives from clinics funded by the local government in Manila City has left low-income women of childbearing age residing in Manila City without access to their main source of family planning methods, information and services, thereby significantly increasing the risk of unplanned and unwanted pregnancy among these women. Examples of the devastating impact of EO 003 and its implementation on women have been documented in CRR's, Likhaan and REPROCEN report *Imposing Misery: The Impact of Manila's Contraception Ban on Women and Families*.⁵⁴ The report found that already poor families are driven deeper into poverty; that women's life and physical and mental health are jeopardized by too-frequent deliveries; and that more women resort to unsafe abortions, causing injuries, disabilities and numerous deaths.

In January 2008, a group of 20 men and women filed a lawsuit against the Office of the Mayor of Manila in the Court of Appeals, asking the court to declare EO 003 unconstitutional and to call for its revocation. The petitioner relied on their individual experiences of being denied access to modern contraception and evidence from *Imposing Misery*, to claim that EO 003 had severely and irreparably damaged their lives and health, as well as that of many low-income women and families in Manila City. Unfortunately, the case was dismissed by the Court of Appeals in May 2008, on arguably flawed procedural grounds.

The petitioners next filed an appeal with the Philippine

Supreme Court in September 2008, but it was dismissed the following month on the ground that one of the petitioners failed to sign the petition. Notably, the past practice of the Supreme Court in these circumstances has been to simply drop the non-signing petitioner from the case and to proceed with rendering a decision on the merits. A Motion for Reconsideration was filed with the Supreme Court, but it was subsequently denied in February 2009.

In April 2009, the petitioners re-filed the case with the Regional Trial Court in a final attempt to obtain redress through the Philippine judicial system. The Manila City Mayor's Office then filed a motion asking the Regional Trial Court to dismiss the suit. Soon thereafter, in December 2009, the Petitioners filed a response opposing the potential dismissal of their suit. The Regional Trial Court has yet to issue a decision on this matter. The failed trajectory of the Osil case confirms the Philippine judiciary's general unwillingness to engage with the issue of modern contraception and refusal to enforce Filipino women's sexual and reproductive health and rights.

2. Context in Philippines

Article 15 of the Constitution of the Philippines protects the "right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood."⁵⁵ Article 15 guarantees that spouses' right to use whatever form of contraception they choose must be ensured by the state.⁵⁶ Furthermore, the Philippines' National Population Act, Act No. 6365, states that "family planning will be made part of a broad educational program; safe and effective means will be provided to couples desiring to space or limit family size."⁵⁷ Article 2 of the Constitution protects the right to health, and further specifies that the state must "make essential goods, health and other social services available to all the people at an affordable cost. There should be priority for the needs of the underprivileged ... women, and children. The State shall endeavor to provide free medical care to paupers."⁵⁸ The right to privacy is also constitutionally protected, under Article 3.⁵⁹

With a population of almost 90 million people, the

Philippines is the world's 12th most populous country.⁶⁰ Nearly half of all Filipino women have an unmet need for contraception. Approximately 48.8% of women in the Philippines use contraception, but only 35.1% use modern methods. Notably, the Metro Manila region has experienced a decline in modern contraceptive use in recent years, while other in other regions, use of modern methods is on the increase.⁶¹ In 2000, it was estimated that more than 473,000 unsafe abortions took place in the Philippines.⁶² An estimated 100,000 women are hospitalized and treated each year for complications due to induced abortion.⁶³

In effect, the EO 003 has forcibly required women and families, particularly from low-income backgrounds, to use natural family planning to the exclusion of any other method. Through deprivation of access to contraception, the City of Manila has dictated petitioners' reproductive choices for them. The implementation of EO 003 has led to higher rates of unwanted pregnancies and unsafe abortions, increased maternal mortality and morbidity, undermined women's and girls' education and employment opportunities, and driven women and their families deeper into poverty. The EO 003 violates the petitioners' rights to family planning, health, privacy, gender equality, including as it relates to access to healthcare services, and to autonomy and decision making. Moreover, the EO 003 exceeds the executive's scope of authority, as the State has a legal duty to provide access to reproductive healthcare, and that the City of Manila abused its discretion by passing and continuing to enforce EO 003 in an unconstitutional manner. Finally, under Article 2 of the Constitution, Petitioners make two arguments relating to the constitutional protection concerning equality in access to health and equality in autonomy and decision-making.

In addition, the Philippines is a party to several international treaties, including CEDAW, ICESCR, and the International Covenant on Civil and Political Rights (ICCPR), which protect women's rights to life, health, and non-discrimination. These treaties and several other international policy documents support the right to contraception and to information

In effect, the EO 003 has forcibly required women and families, particularly from low-income backgrounds, to use natural family planning to the exclusion of any other method.

on family planning. Under Article 23 (2) of the ICCPR, men and women have the equal right “to found a family.”⁶⁴ This article has been interpreted by the Human Rights Committee (HRC) to mean that “women should be given access to family planning methods.”⁶⁵ In addition, under Article 16(1)(e) of CEDAW, women have the right “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”⁶⁶ Accordingly, CEDAW General Recommendation No. 21 states that “women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services.”⁶⁷ Moreover, Article 12 of the ICESCR, provides for the right to “the highest attainable standard of health.”⁶⁸ The Committee on Economic, Social and Cultural Rights has noted that the right to health includes “access to health-related...information, including on sexual and reproductive health.”⁶⁹

3. Impact of the case

The EO 003 constitutes a violation of a number of women’s human rights. By allowing the EO 003—a de facto contraception ban—to continue, the government of the Philippines is failing to uphold its international treaty obligations and is violating Philippine constitutional law. This case is being followed by activists around the world, as it has implications for the recognition of women’s right to control their fertility and for the application of international human rights norms in the face of religious-based laws and policies.

4. Factors affecting the result in this case

The State has inappropriately attempted to evade its duty to respect and enforce the rights guaranteed in international treaties by citing its government structure as justification for non-compliance, in part, through decentralization of health care services to local government units (LGUs). As a matter of international law, devolution of functions to lower level government authorities does not reduce the scope of a government’s obligations and, in any event, as noted above, the acts and omissions of local government authorities are attributable to the Philippine government.

Since the Philippines lacks a national reproductive health policy which ensures women’s access to sexual and reproductive health information and services in the Philippines,

LGUs are left to pass laws and develop policies and programs with little to no oversight by the national government. Unfortunately, LGUs often lack institutional capacity, thus exacerbating inequities in access to health services, and are subject to the caprice and individual biases of local politicians such as former Mayor Atienza and current Mayor Lim, in Manila City.

LGUs are also heavily influenced by conservative religious forces when addressing issues of contraception and family planning. In a nation where 90 million people are predominantly Catholic, the Church has immense influence over the public and government policy making. In fact, the Catholic Church has been known to spread misinformation about modern methods of contraception, creating a hostile environment preventing women from making informed choices about their sexual and reproductive health and family planning.

5. Strategies

Since the issuance of the EO 003 a decade ago, national and international non-governmental organizations have developed a variety of advocacy strategies to get the EO 003 revoked and to restore access to family planning information and services in Manila City. These efforts have been important to unveil at the national and international level, the devastating impact of the EO 003. However, they have proven unsuccessful in getting the EO 003 revoked.

Nonetheless, advocacy efforts have been instrumental in generating an international outcry against the contraception ban in Manila City. Due to the Philippine government’s overall unwillingness to address women’s lack of access to comprehensive sexual and reproductive health information and services, advocates have attempted to seek recourse within the UN human rights system. Notably, a number of UN human rights bodies and Special Procedures have spoken out against the dire state of Filipino women’s sexual and reproductive health and rights. For example, the CEDAW Committee has articulated its apprehension about the availability of family planning services and information in the Philippines. As recently as 2006, the CEDAW Committee “request[ed]” that the Philippines “strengthen measures aimed at the prevention of unwanted pregnancies, including by making a comprehensive range of contraceptives more widely available and without any restriction and by increasing knowledge

and awareness about family planning.”⁷⁰ Despite the concrete concerns and recommendations voiced by these treaty monitoring bodies and other UN representatives, the Philippine government has failed to heed the principled recommendations, particularly as they relate to promoting women’s access to contraception and family planning information and services.

In light of the limited success of these non-adversarial advocacy strategies, the *Osil* case represents an appeal to the judicial branch of the Philippine government to recognize that the continued implementation of EO 003 perpetuates the violation of a spectrum of rights guaranteed by both domestic and international law.

6. Importance of OP-CEDAW

The Manila City EO 003 and the highly discriminatory policy that it embodies has caused, and will continue to cause, systematic and grave violations of women’s human rights as guaranteed by the CEDAW Convention in Articles 1, 2, 3, 5, 10, 11, 12 and 16, the ICESCR in articles 2, 3, 10 and 12, and the ICCPR in articles 2, 3, 17, 23 and 26, as well as article 14 of the Declaration on Human Rights Defenders. The adjudication of this case before an international treaty monitoring body would serve as a critical recognition of these violations.

➤ Women’s Inheritance Rights — South African cases

1. Introduction

The following “case study” includes a series of cases litigated by the Women’s Legal Centre challenging the constitutionality of domestic legal provisions related to women’s inheritance rights under customary law in South Africa. Although cases were litigated separately, they are all part the Women’s Legal Centre strategy for claiming women’s ESC rights.

2. Context in South Africa

Prior to 1994 very few mechanisms existed in South Africa for public interest litigation. There was no Bill of Rights, almost complete parliamentary sovereignty, very strict prescriptive laws that favoured the state and a judiciary that followed the strict letter of the law and was not responsive to injustice.

The post 1994 era saw the enactment of a new Constitution which guaranteed fundamental rights for the first time through the Bill of Rights, as well as the creation of a liberal Constitutional Court. The 1997 Constitution provided a wide array of opportunities for effective public interest litigation. These included extensive fundamental rights –including justiciable socioeconomic rights– as well as generous standing provisions and wide remedial powers.

In addition, the period since 2000 has seen a major shift in the nature of public interest litigation. The litigation in question has tended to focus to a far greater degree on socio-economic rights and has, in many ways, been groundbreaking. Nevertheless, this has been insufficient and there remains an inadequate focus on socio-economic rights litigation given how critical these are to addressing the persistent concerns of poor and marginalized South African people.

3. The Inheritance Cases

The cases under study challenge the constitutionality of domestic legal provisions related to women’s inheritance rights under customary law. WLC has dealt with many cases over the past few years involving the rights of women married under Muslim personal law, including those in polygamous marriages.

a) The *Amod* case

The *Amod* case was one of the first articulations that women married under Islamic law in South Africa, whose marriages did not constitute valid legal marriages due to the historical lack of recognition under apartheid, were nevertheless entitled to claim loss of support on the death of their spouses. Given that the Islamic marriage was not registered as a civil marriage in terms of the provisions of the South African Marriage Act of 1961, these marriages are not recognized as a legal under South African law.

This case was one of the first in a line of cases which have created limited protections for widows and orphans whose rights of inheritance had not enjoyed protection under the prevailing statutory and common law regimes. The case firmly established that the arbitrary, intolerant and unequal treatment of certain cultures could not be tolerated under the new legal structure which established the protection of fundamental human rights for all.

b) Case *Nontupheko Maretha Bhe (Ms Bhe)*

The case was brought by Nonkululeko Bhe, whose father-in-law had planned to sell the house she and her daughters were living in when her husband died.⁷¹ At the time, black South African women were denied inheritance rights under the customary law of primogeniture which gives the entire estate to the eldest male child of the deceased. Under the system of intestate succession flowing from section 23 of the Black Administration Act 38 of 1927 and its regulations, the female children did not qualify to be the heirs in the intestate estate of their deceased father. In 2004 the Constitutional Court struck down the African customary law rule of primogeniture and affirmed the rights of women and girls to inherit and to claim maintenance from deceased estates.

c) Mrs Daniels

This case established that surviving partners in a monogamous Muslim marriage can claim maintenance from their deceased partner's estate and inherit as an intestate heir if their deceased partner dies without a will. The case was brought at a time when the effects of non-recognition of Muslim marriages had been highlighted in a number of cases. The WLC realized that the attitudes of society had changed to such an extent that there was broad support for equitable treatment of widows who had been disadvantaged due to legal regimes established under apartheid. The case builds on the decision in *Amod* and further establishes that Muslim women must be treated equally in society.

d) Ms Gumede⁷²

The judgment in this case abolished the customary law which vested the ownership of property in a marriage in the husband for customary marriages which commenced following the establishment of the Customary Marriages Act 120 of 1998. After *Gumede*, all customary marriages are in community of property, providing women with fair access to resources acquired during the course of their customary marriages.

f) Gasa vs Road Accident Fund⁷³

Mrs Gasa had been a partner in a polygamous marriage. After her husband was killed in a road accident, Mrs Gasa and her husband's first wife both applied for compensation. Mrs Gasa was refused on the grounds that although the law now recognises polygamous marriages, her

customary marriage was nullified because her husband had previously married another woman in terms of the Marriage Act. The ruling relied on the Black Laws Amendment Act, an apartheid-era law which remains on the statute books. On November 21 the Supreme Court of Appeal, by agreement between the parties, awarded Mrs Gasa her damages claim.

The case was another in the growing line of cases which recognized the rights of widows in customary and/or religious unions to claim loss of support on the death of their spouses where such claims had been denied in the past. This is an important case not only for Ms Gasa but for all women in her position with claims for loss of support. It also lays the groundwork for future challenges to the discrimination against women inherent in a dual system where civil law enjoys primacy over customary law.

g) Robinson and Another v. Volks NO and Others

This case is significant in that it limits the protections offered by the law to women in vulnerable economic situations. However, the significance of the case lies in the two dissenting opinions which highlight the gendered nature of marital relationships and the limited bargaining power of women to force the issue of marriage, and on the inequalities faced by women on dissolution of marriage in particular in respect of the economic and other patrimonial consequences of marriage where no legal protection is offered.

4. Factors Impacting the Results in these cases

As mentioned above, despite some important gains, there has been an inadequate focus on socio-economic rights litigation as it specifically relates to poor and marginalized South African women. These inadequacies in the socio-economic rights litigation include

- 1.** A focus on certain socio-economic rights—for example housing, health care and land—to the exclusion of others which have not yet been addressed;
- 2.** Inadequate attention being given to considering new issues that could have been the subject of public interest litigation; and
- 3.** Insufficient monitoring, awareness-raising and related lobbying and advocacy initiatives.

4. Limited integration of a fulsome gender analysis in the highest profile ESCR cases, even where a woman was the lead applicant.

The limited attention on women's socio-economic rights is often due to the inability of women and communities that were the victims of such violations to bring their concerns to a legal forum.

Another obstacle to effective public interest litigation is the attitude of the government. In addition to the difficulty of getting the government to comply with court orders, the apparent strategy of certain government departments is to settle matters at the last moment, thereby avoiding legal precedents being set that would inform future public interest litigation and that would allow proper jurisprudence to be built. This is of particular concern as it should not be taken for granted that South Africa will necessarily have judges sympathetic to public interest positions beyond the next few years.

5. Strategies

The Women's Legal Centre primary goal is to further women's equality in South Africa, with particular attention to the rights of socially and economically disadvantaged women. The involvement of the Centre in the litigation strategy is conducted through the submission of *amicus curiae* which has allowed it to place arguments regarding the broader social and economic context before the court without being restricted to the facts of a particular case.

On some occasions, the Centre partner with another organization –for instance the Human Rights Commission- for direct access the Court in the public interest - to advance arguments to strike down legislation due to its pervasively discriminatory nature.⁷⁴ This strategy has allowed the Centre to ensure individual claimant's interests while granting it the opportunity of advancing arguments in the public interest which went beyond the relief sought the individual. Similarly, the Centre also join with allies as *amicus curiae* to place more risky arguments before the Court while still ensuring that client's rights were safeguarded through the litigation.

In the cases discussed above, the WLC harnessed the excitement and uncertainty surrounding the new Constitution to make incremental but significant gains for women's ESC rights. In addition, the support of the public and influential public figures proved to be key to the success of the

case.⁷⁵ Similarly, the cooperation of various religious and cultural groups that supported the case in the media ensured wide spread public backing for the case (especially in cases of polygamous marriages, such as the Gasas case).

Interestingly, in the Gasas case, WCL was invited to intervene as *amicus curiae* by the Court which allowed WCL an opportunity to fully canvas the issues in the case. It submitted a brief in which they analyzed the relevant statutory and customary law provisions which were used by the High Court and offered an alternative interpretation of these provisions in line with the Constitution's provisions on dignity and equality; in so doing they were able to highlight the inherent inequality in the High Court's reasoning as well as offering the Court an opportunity to reinterpret the common law in a manner which did not violate the Constitution.

6. Legal framework

South Africa has committed itself to some international and regional African human rights instruments. Women's right to equality must be protected even where communities are governed by customary laws. This principle is enshrined in the South African Constitution.

While customary law has place in the Constitution, like other law it is still subject to the Bill of Rights and international law. Article 18(3) of the African Charter places an obligation upon states to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." Article 6 of the Protocol on the Rights of Women in Africa (entitled "Marriage") obliges state parties to enact "appropriate national legislative measures to guarantee that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected."

Article 16 of CEDAW requires States to "... take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" and that that States parties should "take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights" (Article 13). It also states that States should ensure "on a basis of equality of men and women ... [t]he same rights for both spouses in respect of ownership, acquisition, management,

administration, enjoyment and disposition of property, whether free of charge or for valuable consideration” (Article 16).

The ICESCR also requires “the equal right of men and women to the enjoyment of all economic, social, and cultural rights.” Through General Comment 16 the CESCR makes clear that States have to “ensure that women have equal rights to marital property and inheritance upon their husband’s death.”⁷⁶

6.5 Organizations Supporting Strategic Litigation on Women’s ESCR

- ESCR-Net, www.escr-net.org/ / info@escr-net.org
- IWRAP Asia Pacific, www.iwraw-ap.org/ / iwraw-ap@iwraw-ap.org
- Center for Reproductive Rights, www.reprorights.org/ / info@reprorights.org
- Interights (Europe and Africa focus), www.interights.org/ / <http://www.interights.org/contact-us/index.html>
- Global Initiative for ESCR, <http://globalinitiative-escr.org/> / globalinitiative@globalinitiative-escr.org
- CLADEM (Latin America focus), <http://www.cladem.org/> / http://www.cladem.org/index.php?option=com_contact&view=contact&id=1&Itemid=223
- Humanas (Latin America focus), <http://www.humanas.cl/> / http://www.humanas.cl/?page_id=290
- Women’s Legal Centre (South Africa focus), <http://www.wlce.co.za/> / http://www.wlce.co.za/index.php?option=com_contact&view=contact&id=1
- FIDA Kenya (Kenya focus), www.fidakenya.org/ / info@fidakenya.org,
- Equis: Justicia para Mujeres (Mexico focus), <http://equis.org.mx/> and contacto@equis.org.mx

Notes

¹ Respectively relating to women and health, women migrant workers and the core obligations of State Parties under Article 2.

² Reporting Guidelines on Shadow Report Writing on CEDAW (IWRAP Asia Pacific), and on Shadow Report Writing on Women’s ESC Rights (IWRAP Asia Pacific and ESCR-Net)

³ Human Rights Committee, General Comment 33, para. 15.

⁴ International NGO Coalition for an OP-ICESCR, Considerations, (2009) at p. 31, available at: http://www.escr-net.org/usr_doc/NGO_Coalition_submission_to_the_CESCR_on_OP-ICESCR.pdf.

⁵ See, ESCR-Net, Analytical Report from an Enforcement of Judgments Workshop, held in Bogota, Colombia (May 6-7, 2010) available at: http://www.escr-net.org/usr_doc/Analytical_Report_-_Enforcement_of_Judgments_workshop_May_6-7,_2010.pdf

⁶ See CENTER FOR REPRODUCTIVE RIGHTS, LITIGATION BRIEFING SERIES: ALYNE DA SILVA PIMENTEL (2009).

⁷ See *Alyne da Silva Pimentel v. Brazil*, United Nations Committee on the Elimination of Discrimination against Women (filed 30 November 2007)

⁸ Braz. Const. 2 ART. 196 (1988).

⁹ *Id.* at ART. 6.

¹⁰ *Id.* at ART. 5.

¹¹ WHO, UNFPA, UNICEF, WORLD BANK: MATERNAL MORTALITY IN 2010, annex 1 (2008), [hereinafter MATERNAL MORTALITY REPORT 2010] available at http://whqlibdoc.who.int/publications/2010/9789241500265_eng.pdf

¹² The province of Salta is located in the north west of Argentina. According to official information, 44 creeds are registered with the Ministry of Religious Affairs of the Nation. Like the rest of Argentina’s northwestern, Salta, has a conservative society with old elites who hold power in a context of great social and ethnic inequality.

¹³ Published in Boletín Oficial of Salta, January 6, 2009 and enacted by Decree 5.986 on December 22nd, 2008.

¹⁴ See *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Brazil*, para. 418, UN Doc. No. E/C.12/BRA/2 (Jan. 28, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/04/PDF/G0840304.pdf?OpenElement>

¹⁵ See LATIN AMERICAN AND CARIBBEAN COMMITTEE FOR THE DEFENSE OF WOMEN’S RIGHTS (CLADEM), *Monitoring Alternative Report on the Situation of Maternal Mortality in Brazil to the International Covenant on Economic, Social and Cultural Rights*, available at http://www.cladem.org/english/regional/monitoreo_convenios/descMMbrasil.asp

¹⁶ See Economic and Social Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Leandro Despouy: Mission to Brazil, 2005, U.N. Doc. E/CN.4/2005/60/Add. 3.

¹⁷ Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, art. 2, 12, G.A. Res. 34/189, UN GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

¹⁸ Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health*, (22nd Sess., 2000), para. 47, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter CESCR, *General Comment 14*].

¹⁹ Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and health*, (20th Sess., para 27, U.N. Doc. A/54/38 (1999) [hereinafter CEDAW Committee, *General Recommendation 24*].

²⁰ CEDAW, *supra* note 10, at art. 2.

²¹ See *Sahide Goekce (deceased) v. Austria*, CEDAW Comm. No. 5/2005, para. 12.1.2, U.N. Doc. CEDAW/C/39/D/5/2005 (2007); *Fatma Yildirim (deceased)*

- v. *Austria*, CEDAW Comm. No. 6/2005, para. 12.1.2, U.N. Doc. CEDAW/C/39/D/6/2005 (2007).
- ²² International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 3, 4, 10, 12, 15, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976), [hereinafter ICESCR].
- ²³ CESCR, *General Comment 14*, *supra* note 11, at para. 12.
- ²⁴ MATERNAL MORTALITY REPORT 2005, *supra* note 6.
- ²⁵ WHO, *Women and Health: Today's Evidence, Tomorrow's Agenda* (Geneva, 2009), p. 31.
- ²⁶ Submissions 1-5 by CRR, IWRAP-AP and EnGENDER to the Committee on the Elimination of Discrimination Against Women (2008-2010); "Philippine Context—Strategic Litigation at National, Regional, and International Level", Presentation by Clara Rita A. Padilla, JD of EnGendeRights, Inc. at *Claiming Women's Economic, Social and Cultural Rights - Pilot-testing and Capacity Building Workshop on Bringing Women's ESCR Claims before CEDAW/OP-CEDAW and ICESCR/OP-ICESCR*, by IWRAP Asia Pacific and International Network for Economic, Social and Cultural Rights (Dec 2010); *Advancing Reproductive Rights Using the Inquiry Procedure of the OP CEDAW and the UN special Procedures: The Philippines Experience*, EnGendeRights Inc, Clara Rita A. Padilla and Anita B Visbal (2009/10)
- ²⁷ See discussion of the even higher rates of unmet need for contraception amongst uneducated Filipino women in Population Action International, *Family Planning in the Philippines: A Global Wake-Up Call for Policymakers* (Apr. 24, 2008) available at http://www.populationaction.org/Press_Room/Viewpoints_and_Statements/2008/04_24_Philippines.shtml.
- ²⁸ Centre for Reproductive Rights, Linangan Ng Kababihan Inc (Likkhan) and Reproductive Health, Rights and Ethics Centre for Studies and Training (ReproCen), *Imposing Misery: The Impact of Manila's Contraception Ban on Women and Families* (2007).
- ²⁹ See Index Mundi, *Philippines Population below Poverty Line* (2008), available at http://indexmundi.com/philippines/population_below_poverty_line.html (based on information from the Central Intelligence Agency: World Fact Book).
- ³⁰ CRR cited in "Handout 3, Women's Reproductive Rights in the Philippines - Case Study", in *A Training on Optional Protocol to CEDAW for Lawyers 22-27 February 2010 Kathmandu, Nepal, IWRAP Asia Pacific*.
- ³¹ IPPF cited in "Handout 3, Women's Reproductive Rights in the Philippines - Case Study", in *A Training on Optional Protocol to CEDAW for Lawyers 22-27 February 2010 Kathmandu, Nepal, IWRAP Asia Pacific*.
- ³² NHDS 2003, *supra* note 2, at Ch. 5, tbl. 5.4, available at http://www.census.gov.ph/hhld/Ch5_tab5.4.htm (Among married women, the rates rise to 49% - any method, and 33% - modern methods.).
- ³³ According to the United Nations Development Program, the Philippines contraceptive prevalence rate (1997-2005) among married women is 49%. In Thailand, the rate is 79%; China 87%; Vietnam 77%; Indonesia 57%; Malaysia 55%; Korea 81%; Singapore 62%. See UNDP, *Human Development Report 2007/2008*, available at <http://hdrstats.undp.org>.
- ³⁴ CRR cited in "Handout 3, Women's Reproductive Rights in the Philippines - Case Study", in *A Training on Optional Protocol to CEDAW for Lawyers 22-27 February 2010 Kathmandu, Nepal, IWRAP Asia Pacific*.
- ³⁵ CRR cited in "Handout 3, Women's Reproductive Rights in the Philippines - Case Study", in *A Training on Optional Protocol to CEDAW for Lawyers 22-27 February 2010 Kathmandu, Nepal, IWRAP Asia Pacific*.
- ³⁶ Former Mayor Atienza has expressed his intent to run for Manila City Mayor once again. Should he be re-elected into office, women's reproductive health rights will undoubtedly remain in jeopardy, as Atienza was the original author of the destructive EO.
- ³⁷ "Handout 3, Women's Reproductive Rights in the Philippines - Case Study", in *A Training on Optional Protocol to CEDAW for Lawyers 22-27 February 2010 Kathmandu, Nepal, IWRAP Asia Pacific*.
- ³⁸ *Advancing Reproductive Rights Using the Inquiry Procedure of the OP CEDAW and the UN special Procedures: The Philippines Experience*, EnGendeRights Inc, Clara Rita A. Padilla and Anita B Visbal (2009/10)
- ³⁹ IACHR, *María Mamérita Mestanza Chávez v. Perú*, Report 71/03. Petition 12.191. Friendly Settlement, October 10th, 2003, par. 10. Available at <http://www.cidh.org/annualrep/2003eng/peru.12191.htm>
- ⁴⁰ For more details about the case please visit PORTAL FARFAN Diana. *Esterilización Forzada de Mamérita Mestanza: un largo camino por justicia y reparación*, in: CLADEM. *Sistematización de experiencias en litigio internacional*. Lima: CLADEM, 2008, p 122 y ss. http://www.cladem.org/index.php?option=com_content&view=article&id=411&Itemid=91 (30/09/10 - in spanish)
- ⁴¹ CRR, CLADEM, CEJIL, DEMUS, APRODEH
- ⁴² On February 22, 2001, the Peruvian State signed a joint press release with the Inter-American Commission on Human Rights, in which it was agreed to pursue friendly settlement of some cases before the Commission, including this one, in accordance with Articles 48(1)(f) and 49 of the American Convention on Human Rights.
- ⁴³ See IACHR, *María Mamerita Mestanza v. Peru*, Report 71/03. Friendly Settlement, *supra*. (MISSING THE SUPRA NO HERE)
- ⁴⁴ Tribunal Constitucional del Perú. Exp. 1417-2005PA/TC, párrafo 14, en: <http://www.tc.gob.pe/jurisprudencia/2005/01417-2005-AA.html> (15/10/10)
- ⁴⁵ Ley de Política Nacional de Población Decreto Legislativo Nro. 346, del 5 de julio de 1985, cuyo artículo 1 inciso 2) *promueve y asegura la decisión libre e informada y responsable de las personas y las parejas sobre el número y espaciamiento de los nacimientos*,
- ⁴⁶ See, UN IV International World Conference on Women (Beijing, 1995) Fujimori's intervention, available at: <http://www.un.org/popcom/unpopcom/32ndsess/gass/state/peru.pdf> (30/09/10 - in Spanish)
- ⁴⁷ See *id.*; Villanueva, R. *Anticoncepción quirúrgica voluntaria I: casos investigados por la Defensoría del Pueblo*. Serie Informes Defensoriales No. Lima: Defensoría del Pueblo, 1998.
- ⁴⁸ Casos identificados en el proceso legal iniciado en el año 2002, que incluye a 2, 072 víctimas y que en diciembre de 2009 fue archivado por el Fiscal Superior Penal, señalando que los delitos habrían prescrito, que fueron hechos aislados de negligencia médica, desconociendo el marco internacional de derechos que lo identifica como graves violaciones de derechos humanos y de lesa humanidad. Sobre este aspecto revisar *Esterilizaciones forzadas en el Perú: delito de lesa humanidad en*: http://www.demus.org.pe/publicaciones.php?tema=esterilizacion_forzada (15/10/10).
- ⁴⁹ PORTAL FARFAN Diana. Ob. Cit. p 124.
- ⁵⁰ The Peruvian government pledged to conduct investigation of the facts and prosecution of those determined to have participated in the procedure, as either planner, perpetrator, accessory, or in other capacity, even if they be civilian or military officials or employees of the government. And to punish those responsible for the acts of pressuring the consent of Ms. María Mamérita Mestanza Chávez to submit to tubal ligation; health personnel who ignored the need for urgent care for Ms. Mestanza after her surgery; those responsible

for the death of Ms. María Mamérita Mestanza Chávez; the doctors who gave money to the spouse of the deceased woman in an attempt to cover up the circumstances of her demise; the Investigative Commission, named by Cajamarca Sub-Region IV of the Health Ministry, which questionably exonerated the health personal from responsibility for Ms. Mestanza's death. Apart from the administrative and criminal penalties, the Peruvian state pledges to report any ethical violations to the appropriate professional association so that it can apply sanctions to the medical personnel involved in these acts, as provided in its statutes. In addition, the State pledges to conduct administrative and criminal investigations into the conduct of agents of the Office of Public Prosecution and the judicial branch who failed to take action to clarify the facts alleged by Ms. Mamérita Mestanza's widower. See, IACHR, *María Mamérita Mestanza Chávez* (Peru), Report No. 71/03, Petition 12.191, Friendly Settlement, October 3, 2003.

⁵¹ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5–13 September 1994, U. N. Doc. A/CONF.171/13/Rev.1, at para. 7.3.

⁵² See, for instance, CLADEM media articles and news: http://www.cladem.org/index.php?option=com_content&view=article&id=401:caso-mamerita-mestanza-peru-esterilizacion-forzada&catid=46&Itemid=132 (in spanish)

⁵³ IACHR, Jorge Odir Miranda Cortez, Report N° 29/01, March 7, 2001, par 36: “The IACHR is not competent *ratione materiae* to determine independently, violations of Article 10 of the Protocol of San Salvador through the system of individual petitions. However, the Inter-American Commission can consider this Protocol in the interpretation of other applicable provisions, in light of the provisions of Articles 26 and 29 of the American Convention”.

⁵⁴ See CENTER FOR REPRODUCTIVE RIGHTS, IMPOSING MISERY THE IMPACT OF MANILA'S BAN ON CONTRACEPTION (2010), available at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Philippines%20report.pdf>

⁵⁵ 1987 Constitution, art. 15 (Phil.).

⁵⁶ *Id.*

⁵⁷ REPUBLIC ACT NO. 6365, *An Act Establishing a National Policy on Populations, Creating the Commission Populations and for Other Purposes*, at Section (2) (August 16, 1971).

⁵⁸ 1987 Constitution, *supra* note 19, at art. 2 (Phil.).

⁵⁹ *Id.* at art. 3.

⁶⁰ The Philippines' total population was 88.57 million in 2007. National Statistics Office, Press Release, April 16, 2008, at <http://www.census.gov.ph/data/pressrelease/2008/pr0830tx.html>.

⁶¹ 48.8% any method (nationally); 35.1% modern method (nationally). National Statistics Office, Press Release, May 8, 2003, *Use of Modern Methods Up in Most Regions*, at <http://www.census.gov.ph/data/pressrelease/2003/pr0345tx.html>. While use of modern methods increased in most of the Philippines from 2001 to 2002, “the National Capital Region had a significant decline in modern contraceptive use.”

⁶² Fatima Juarez et al., *The Incidence of Induced Abortion in the Philippines: Current Level and Recent Trends*, 31 INT'L FAM. PLANNING PERSPECTIVES 3 (Sept. 2005), summary available at <http://www.guttmacher.org/pubs/journals/3114005.html>

⁶³ Singh S et al., *Estimating the level of abortion in the Philippines and Bangladesh*, *International Family Planning Perspectives* 23 (1997).

⁶⁴ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, art. 23 (2), G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16,

U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

⁶⁵ Human Rights Committee, *General Comment 19, Article 23* (Thirty-ninth session, 1990), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at para. 4, U.N. Doc. HRI/GEN/1/Rev.1(1994).

⁶⁶ CEDAW, *supra* note 10, at art. 16 (1)(e).

⁶⁷ Committee on the Elimination of Discrimination Against Women, *General Recommendation 21: Equality in marriage and family relations*, (13th Sess., 1994), para. 22, U.N. Doc A/47/38. (1994).

⁶⁸ ICESCR, *supra* note 15, at art. 12.

⁶⁹ CESCR, *General Comment 14, supra* note 11, at para. 11.

⁷⁰ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Philippines*, 36th Sess., para. 28, U.N. Doc. 52 CEDAW/C/PHI/CO/6 (2006).

⁷¹ The challenge was to ensure the effective implementation of the judgment, so that our clients would actually have a house to live in. Since then the Centre has, through various donations, ensured that a home was built and our clients moved in. An attorney transferred the property into the children's names on a pro-bono basis and the City of Cape Town agreed to waive all costs and wrote off the outstanding debt. The property was transferred into our clients' names in March 2007 and we received the title deed in October 2007. See WLC Annual Report, 2007; *supra*.

⁷² High Court (Durban and Coastal Division) 6 December 2007 and handed down in 2008.

⁷³ SA Supreme Court of Appeal, November 21 2007

⁷⁴ That was the case of Case Nontupheko Maretha Bhe (Ms Bhe).

⁷⁵ See, for instance, Daniels case. (They do not explain more than this).

⁷⁶ UN, CESCR, General Comment 16, *supra*, par. 27.



Appendix

Appendix 7.1

Convention on the Elimination of All Forms of Discrimination against Women

Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1)

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of man and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women, Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, relaxation of international tension, mutual cooperation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

Part I

Article 1

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- a. To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- b. To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- c. To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- d. To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- e. To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

- f. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- g. To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

- a. To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- b. To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Part II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- a. To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- b. To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- c. To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Part III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- a. The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- b. Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- c. The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- d. The same opportunities to benefit from scholarships and other study grants;
- e. The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- f. The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- g. The same Opportunities to participate actively in sports and physical education;
- h. Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- a. The right to work as an inalienable right of all human beings;
- b. The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

- c. The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
 - d. The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
 - e. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
 - f. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
- a. To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
 - b. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
 - c. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
 - d. To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women,

access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- a. The right to family benefits;
- b. The right to bank loans, mortgages and other forms of financial credit;
- c. The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- a. To participate in the elaboration and implementation of development planning at all levels;
- b. To have access to adequate health care facilities, including information, counselling and services in family planning;
- c. To benefit directly from social security programmes;
- d. To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

- e. To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
- f. To participate in all community activities;
- g. To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- h. To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Part IV

Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - a. The same right to enter into marriage;
 - b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - c. The same rights and responsibilities during marriage and at its dissolution;
 - d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to

their children; in all cases the interests of the children shall be paramount;

- e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Part V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date

of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General

of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

- a. Within one year after the entry into force for the State concerned;
 - b. Thereafter at least every four years and further whenever the Committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies

to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

Part VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- a. In the legislation of a State Party; or
- b. In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or

accessing to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

Appendix 7.2

Optional Protocol to the Convention on the Elimination of Discrimination against Women

Adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day entry into force 22 December 2000

The States Parties to the present Protocol,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Also noting that the Universal Declaration of Human Rights Resolution 217 A (III). proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Recalling that the International Covenants on Human Rights Resolution 2200 A (XXI), annex. and other international human rights instruments prohibit discrimination on the basis of sex,

Also recalling the Convention on the Elimination of All Forms of Discrimination against Women⁴ ("the Convention"), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

Reaffirming their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

Have agreed as follows:

Article 1

A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2.

Article 2

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. 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 3

Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 4

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2. The Committee shall declare a communication inadmissible where:

- a. The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- b. It is incompatible with the provisions of the Convention;
- c. It is manifestly ill-founded or not sufficiently substantiated;
- d. It is an abuse of the right to submit a communication;
- e. The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 5

1. At any time after the receipt of a communication and

before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 6

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 7

1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications under the present Protocol.

3. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

4. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.

5. The Committee may invite the State Party to submit further information about any measures the State Party has taken in

response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under article 18 of the Convention.

Article 8

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 9

1. The Committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 10

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.

2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 11

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 12

The Committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

Article 13

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

Article 14

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

Article 15

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 16

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding

to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 17

No reservations to the present Protocol shall be permitted.

Article 18

1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States 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 the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 19

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

Article 20

The Secretary-General of the United Nations shall inform all States of:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 18;
- (c) Any denunciation under article 19.

Article 21

1. The present 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.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 25 of the Convention.

Appendix 7.3

OP-CEDAW Rules of Procedure

(Excerpt taken from A/56/38)

Part three

Rules of procedure for the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

XVI. Procedures for the consideration of communications received under the Optional Protocol

Rule 56

Transmission of communications to the Committee

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, communications that are, or appear to be, submitted for consideration by the Committee under article 2 of the Optional Protocol.
2. The Secretary-General may request clarification from the author or authors of a communication as to whether she, he or they wish to have the communication submitted to the Committee for consideration under the Optional Protocol. Where there is doubt as to the wish of the author or authors, the Secretary-General will bring the communication to the attention of the Committee.
3. No communication shall be received by the Committee if it:
 - (a) Concerns a State that is not a party to the Protocol;
 - (b) Is not in writing;
 - (c) Is anonymous.

Rule 57

List and register of communications

1. The Secretary-General shall maintain a permanent register of all communications submitted for consideration by the Committee under article 2 of the Optional Protocol.
2. The Secretary-General shall prepare lists of the communications submitted to the Committee, together with a brief summary of their contents.

Rule 58

Request for clarification or additional information

1. The Secretary-General may request clarification from the author of a communication, including:
 - (a) The name, address, date of birth and occupation of the victim and verification of the victim's identity;
 - (b) The name of the State party against which the communication is directed;
 - (c) The objective of the communication;
 - (d) The facts of the claim;
 - (e) Steps taken by the author and/or victim to exhaust domestic remedies;
 - (f) The extent to which the same matter is being or has been examined under another procedure of international investigation or settlement;
 - (g) The provision or provisions of the Convention alleged to have been violated.
2. When requesting clarification or information, the Secretary-General shall indicate to the author or authors of the communication a time limit within which such information is to be submitted.
3. The Committee may approve a questionnaire to facilitate requests for clarification or information from the victim and/or author of a communication.
4. A request for clarification or information shall not preclude the inclusion of the communication in the list provided for in rule 57 above.
5. The Secretary-General shall inform the author of a communication of the procedure that will be followed and in particular that, provided that the individual or individuals consent to the disclosure of her identity to the State party concerned, the communication will be brought confidentially to the attention of that State party.

Rule 59

Summary of information

1. A summary of the relevant information obtained with

respect to each registered communication shall be prepared and circulated to the members of the Committee by the Secretary-General at the next regular session of the Committee.

2. The full text of any communication brought to the attention of the Committee shall be made available to any member of the Committee upon that member's request.

Rule 60

Inability of a member to take part in the examination of a communication

1. A member of the Committee may not take part in the examination of a communication if:

- (a) The member has a personal interest in the case;
- (b) The member has participated in the making of any decision on the case covered by the communication in any capacity other than under the procedures applicable to this Optional Protocol;
- (c) The member is a national of the State party concerned.

2. Any question that may arise under paragraph 1 above shall be decided by the Committee without the participation of the member concerned.

Rule 61

Withdrawal of a member

If, for any reason, a member considers that she or he should not take part or continue to take part in the examination of a communication, the member shall inform the Chairperson of her or his withdrawal.

Rule 62

Establishment of working groups and designation of rapporteurs

1. The Committee may establish one or more working groups, each comprising no more than five of its members, and may designate one or more rapporteurs to make recommendations to the Committee and to assist it in any manner in which the Committee may decide.

2. In the present part of the rules, reference to a working group or rapporteur is a reference to a working group or rapporteur established under the present rules.

3. The rules of procedure of the Committee shall apply as far as possible to the meetings of its working groups.

Rule 63

Interim measures

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.

2. A working group or rapporteur may also request the State party concerned to take such interim measures as the working group or rapporteur considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.

3. When a request for interim measures is made by a working group or rapporteur under the present rule, the working group or rapporteur shall forthwith thereafter inform the Committee members of the nature of the request and the communication to which the request relates.

4. Where the Committee, a working group or a rapporteur requests interim measures under this rule, the request shall state that it does not imply a determination of the merits of the communication.

Rule 64

Method of dealing with communications

1. The Committee shall, by a simple majority and in accordance with the following rules, decide whether the communication is admissible or inadmissible under the Optional Protocol.

2. A working group may also declare that a communication is admissible under the Optional Protocol, provided that it is composed of five members and all of the members so decide.

Rule 65

Order of communications

1. Communications shall be dealt with in the order in which they are received by the Secretariat, unless the Committee or a working group decides otherwise.

2. The Committee may decide to consider two or more communications jointly.

Rule 66

Separate consideration of admissibility and merits

The Committee may decide to consider the question of admissibility of a communication and the merits of a communication separately.

Rule 67

Conditions of admissibility of communications

With a view to reaching a decision on the admissibility of a communication, the Committee, or a working group, shall apply the criteria set forth in articles 2, 3 and 4 of the Optional Protocol.

Rule 68

Authors of communications

1. Communications may be submitted by individuals or groups of individuals who claim to be victims of violations of the rights set forth in the Convention, or by their designated representatives, or by others on behalf of an alleged victim where the alleged victim consents.

2. In cases where the author can justify such action, communications may be submitted on behalf of an alleged victim without her consent.

3. Where an author seeks to submit a communication in accordance with paragraph 2 of the present rule, she or he shall provide written reasons justifying such action.

Rule 69

Procedures with regard to communications received

1. As soon as possible after the communication has been received, and provided that the individual or group of individuals consent to the disclosure of their identity to the State party concerned, the Committee, working group or rapporteur shall bring the communication confidentially to the attention of the State party and shall request that State party to submit a written reply to the communication.

2. Any request made in accordance with paragraph 1 of the present rule shall include a statement indicating that such a request does not imply that any decision has been reached on the question of admissibility of the communication.

3. Within six months after receipt of the Committee's request under the present rule, the State party shall submit to the Committee a written explanation or statement that relates to the admissibility of the communication and its merits, as well as to any remedy that may have been

provided in the matter.

4. The Committee, working group or rapporteur may request a written explanation or statement that relates only to the admissibility of a communication but, in such cases, the State party may nonetheless submit a written explanation or statement that relates to both the admissibility and the merits of a communication, provided that such written explanation or statement is submitted within six months of the Committee's request.

5. A State party that has received a request for a written reply in accordance with paragraph 1 of the present rule may submit a request in writing that the communication be rejected as inadmissible, setting out the grounds for such inadmissibility, provided that such a request is submitted to the Committee within two months of the request made under paragraph 1.

6. If the State party concerned disputes the contention of the author or authors, in accordance with article 4, paragraph 1, of the Optional Protocol, that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims in the particular circumstances of the case.

7. Submission by the State party of a request in accordance with paragraph 5 of the present rule shall not affect the period of six months given to the State party to submit its written explanation or statement unless the Committee, working group or rapporteur decides to extend the time for submission for such a period as the Committee considers appropriate.

8. The Committee, working group or rapporteur may request the State party or the author of the communication to submit, within fixed time limits, additional written explanations or statements relevant to the issues of the admissibility or merits of a communication.

9. The Committee, working group or rapporteur shall transmit to each party the submissions made by the other party pursuant to the present rule and shall afford each party an opportunity to comment on those submissions within fixed time limits.

Rule 70

Inadmissible communications

1. Where the Committee decides that a communication is

inadmissible, it shall, as soon as possible, communicate its decision and the reasons for that decision through the Secretary-General to the author of the communication and to the State party concerned.

2. A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request submitted by or on behalf of the author or authors of the communication, containing information indicating that the reasons for inadmissibility no longer apply.

3. Any member of the Committee who has participated in the decision regarding admissibility may request that a summary of her or his individual opinion be appended to the Committee's decision declaring a communication inadmissible.

Rule 71

Additional procedures whereby admissibility may be considered separately from the merits

1. Where the issue of admissibility is decided by the Committee or a working group before the State party's written explanations or statements on the merits of the communication are received, that decision and all other relevant information shall be submitted through the Secretary-General to the State party concerned. The author of the communication shall, through the Secretary-General, be informed of the decision.

2. The Committee may revoke its decision that a communication is admissible in the light of any explanation or statements submitted by the State party.

Rule 72

Views of the Committee on admissible communications

1. Where the parties have submitted information relating both to the admissibility and to the merits of a communication, or where a decision on admissibility has already been taken and the parties have submitted information on the merits of that communication, the Committee shall consider and shall formulate its views on the communication in the light of all written information made available to it by the author or authors of the communication and the State party concerned, provided that this information has been transmitted to the other party concerned.

2. The Committee or the working group set up by it to consider a communication may, at any time in the course of the

examination, obtain through the Secretary-General any documentation from organizations in the United Nations system or other bodies that may assist in the disposal of the communication, provided that the Committee shall afford each party an opportunity to comment on such documentation or information within fixed time limits.

3. The Committee may refer any communication to a working group to make recommendations to the Committee on the merits of the communication.

4. The Committee shall not decide on the merits of the communication without having considered the applicability of all of the admissibility grounds referred to in articles 2, 3 and 4 of the Optional Protocol.

5. The Secretary-General shall transmit the views of the Committee, determined by a simple majority, together with any recommendations, to the author or authors of the communication and to the State party concerned.

6. Any member of the Committee who has participated in the decision may request that a summary of her or his individual opinion be appended to the Committee's views.

Rule 73

Follow-up to the views of the Committee

1. Within six months of the Committee's issuing its views on a communication, the State party concerned shall submit to the Committee a written response, including any information on any action taken in the light of the views and recommendations of the Committee.

2. After the six-month period referred to in paragraph 1 of the present rule, the Committee may invite the State party concerned to submit further information about any measures the State party has taken in response to its views or recommendations.

3. The Committee may request the State party to include information on any action taken in response to its views or recommendations in its subsequent reports under article 18 of the Convention.

4. The Committee shall designate for follow-up on views adopted under article 7 of the Optional Protocol a rapporteur or working group to ascertain the measures taken by States parties to give effect to the Committee's views and recommendations.

5. The rapporteur or working group may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary.

6. The rapporteur or working group shall report to the Committee on follow-up activities on a regular basis.

7. The Committee shall include information on any follow-up activities in its annual report under article 21 of the Convention.

Rule 74

Confidentiality of communications

1. Communications submitted under the Optional Protocol shall be examined by the Committee, working group or rapporteur in closed meetings.

2. All working documents prepared by the Secretariat for the Committee, working group or rapporteur, including summaries of communications prepared prior to registration and the list of summaries of communications, shall be confidential unless the Committee decides otherwise.

3. The Committee, working group or rapporteur shall not make public any communication, submissions or information relating to a communication prior to the date on which its views are issued.

4. The author or authors of a communication or the individuals who are alleged to be the victim or victims of a violation of the rights set forth in the Convention may request that the names and identifying details of the alleged victim or victims (or any of them) not be published.

5. If the Committee, working group or rapporteur so decides, the name or names and identifying details of the author or authors of a communication or the individuals who are alleged to be the victim or victims of a violation of rights set forth in the Convention shall not be made public by the Committee, the author or the State party concerned.

6. The Committee, working group or rapporteur may request the author of a communication or the State party concerned to keep confidential the whole or part of any submission or information relating to the proceedings.

7. Subject to paragraphs 5 and 6 of the present rule, nothing in this rule shall affect the right of the author or authors or

the State party concerned to make public any submission or information bearing on the proceedings.

8. Subject to paragraphs 5 and 6 of the present rule, the Committee's decisions on admissibility, merits and discontinuance shall be made public.

9. The Secretariat shall be responsible for the distribution of the Committee's final decisions to the author or authors and the State party concerned.

10. The Committee shall include in its annual report under article 21 of the Convention a summary of the communications examined and, where appropriate, a summary of the explanations and statements of the States parties concerned, and of its own suggestions and recommendations.

11. Unless the Committee decides otherwise, information furnished by the parties in follow-up to the Committee's views and recommendations under paragraphs 4 and 5 of article 7 of the Optional Protocol shall not be confidential. Unless the Committee decides otherwise, decisions of the Committee with regard to follow-up activities shall not be confidential.

Rule 75

Communiqués

The Committee may issue communiqués regarding its activities under articles 1 to 7 of the Optional Protocol, through the Secretary-General, for the use of the information media and the general public.

XVII. Proceedings under the inquiry procedure of the Optional Protocol

Rule 76

Applicability

Rules 77 to 90 of the present rules shall not be applied to a State party that, in accordance with article 10, paragraph 1, of the Optional Protocol, declared at the time of ratification or accession to the Optional Protocol that it does not recognize the competence of the Committee as provided for in article 8 thereof, unless that State party has subsequently withdrawn its declaration in accordance with article 10, paragraph 2, of the Optional Protocol.

Rule 77

Transmission of information to the Committee

In accordance with the present rules, the Secretary-General shall bring to the attention of the Committee information that is or appears to be submitted for the Committee's consideration under article 8, paragraph 1, of the Optional Protocol.

Rule 78

Register of information

The Secretary-General shall maintain a permanent register of information brought to the attention of the Committee in accordance with rule 77 of the present rules and shall make the information available to any member of the Committee upon request.

Rule 79

Summary of information

The Secretary-General, when necessary, shall prepare and circulate to members of the Committee a brief summary of the information submitted in accordance with rule 77 of the present rules.

Rule 80

Confidentiality

1. Except in compliance with the obligations of the Committee under article 12 of the Optional Protocol, all documents and proceedings of the Committee relating to the conduct of the inquiry under article 8 of the Optional Protocol shall be confidential.

2. Before including a summary of the activities undertaken under articles 8 or 9 of the Optional Protocol in the annual report prepared in accordance with article 21 of the Convention and article 12 of the Optional Protocol, the Committee may consult with the State party concerned with respect to the summary.

Rule 81

Meetings related to proceedings under article 8

Meetings of the Committee during which inquiries under article 8 of the Optional Protocol are considered shall be closed.

Rule 82

Preliminary consideration of information by the Committee

1. The Committee may, through the Secretary-General,

ascertain the reliability of the information and/or the sources of the information brought to its attention under article 8 of the Optional Protocol and may obtain additional relevant information substantiating the facts of the situation.

2. The Committee shall determine whether the information received contains reliable information indicating grave or systematic violations of rights set forth in the Convention by the State party concerned.

3. The Committee may request a working group to assist it in carrying out its duties under the present rule.

Rule 83

Examination of information

1. If the Committee is satisfied that the information received is reliable and indicates grave or systematic violations of rights set forth in the Convention by the State party concerned, the Committee shall invite the State party, through the Secretary-General, to submit observations with regard to that information within fixed time limits.

2. The Committee shall take into account any observations that may have been submitted by the State party concerned, as well as any other relevant information.

3. The Committee may decide to obtain additional information from the following:

- (a) Representatives of the State party concerned;
- (b) Governmental organizations;
- (c) Non-governmental organizations;
- (d) Individuals.

4. The Committee shall decide the form and manner in which such additional information will be obtained.

5. The Committee may, through the Secretary-General, request any relevant documentation from the United Nations system.

Rule 84

Establishment of an inquiry

1. Taking into account any observations that may have been submitted by the State party concerned, as well as other reliable information, the Committee may designate one or more of its members to conduct an inquiry and to make a report within a fixed time limit.

2. An inquiry shall be conducted confidentially and in

accordance with any modalities determined by the Committee.

3. Taking into account the Convention, the Optional Protocol and the present rules of procedure, the members designated by the Committee to conduct the inquiry shall determine their own methods of work.

4. During the period of the inquiry, the Committee may defer the consideration of any report that the State party concerned may have submitted pursuant to article 18 of the Convention.

Rule 85

Cooperation of the State party concerned

1. The Committee shall seek the cooperation of the State party concerned at all stages of an inquiry.

2. The Committee may request the State party concerned to nominate a representative to meet with the member or members designated by the Committee.

3. The Committee may request the State party concerned to provide the member or members designated by the Committee with any information that they or the State party may consider relates to the inquiry.

Rule 86

Visits

1. Where the Committee deems it warranted, the inquiry may include a visit to the territory of the State party concerned.

2. Where the Committee decides, as a part of its inquiry, that there should be a visit to the State party concerned, it shall, through the Secretary-General, request the consent of the State party to such a visit.

3. The Committee shall inform the State party concerned of its wishes regarding the timing of the visit and the facilities required to allow those members designated by the Committee to conduct the inquiry to carry out their task.

Rule 87

Hearings

1. With the consent of the State party concerned, visits may include hearings to enable the designated members of the Committee to determine facts or issues relevant to the inquiry.

2. The conditions and guarantees concerning any hearings

held in accordance with paragraph 1 of the present rule shall be established by the designated members of the Committee visiting the State party in connection with an inquiry, and the State party concerned.

3. Any person appearing before the designated members of the Committee for the purpose of giving testimony shall make a solemn declaration as to the veracity of her or his testimony and the confidentiality of the procedure.

4. The Committee shall inform the State party that it shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill-treatment or intimidation as a consequence of participating in any hearings in connection with an inquiry or with meeting the designated members of the Committee conducting the inquiry.

Rule 88

Assistance during an inquiry

1. In addition to the staff and facilities that shall be provided by the Secretary-General in connection with an inquiry, including during a visit to the State party concerned, the designated members of the Committee may, through the Secretary-General, invite interpreters and/or such persons with special competence in the fields covered by the Convention as are deemed necessary by the Committee to provide assistance at all stages of the inquiry.

2. Where such interpreters or other persons of special competence are not bound by the oath of allegiance to the United Nations, they shall be required to declare solemnly that they will perform their duties honestly, faithfully and impartially, and that they will respect the confidentiality of the proceedings.

Rule 89

Transmission of findings, comments or suggestions

1. After examining the findings of the designated members submitted in accordance within rule 84 of the present rules, the Committee shall transmit the findings, through the Secretary-General, to the State party concerned, together with any comments and recommendations.

2. The State party concerned shall submit its observations on the findings, comments and recommendations to the Committee, through the Secretary-General, within six months of their receipt.

Rule 90

Follow-up action by the State party

1. The Committee may, through the Secretary-General, invite a State party that has been the subject of an inquiry to include, in its report under article 18 of the Convention, details of any measures taken in response to the Committee's findings, comments and recommendations.

2. The Committee may, after the end of the period of six months referred to in paragraph 2 of rule 89 above, invite the State party concerned, through the Secretary-General, to inform it of any measures taken in response to an inquiry.

Rule 91

Obligations under article 11 of the Optional Protocol

1. The Committee shall bring to the attention of the States parties concerned their obligation under article 11 of the Optional Protocol to take appropriate steps to ensure that individuals under their jurisdiction are not subjected to ill-treatment or intimidation as a consequence of communicating with the Committee under the Optional Protocol.

2. Where the Committee receives reliable information that a State party has breached its obligations under article 11, it may invite the State party concerned to submit written explanations or statements clarifying the matter and describing any action it is taking to ensure that its obligations under article 11 are fulfilled.

Part four

Interpretative rules

XVIII. Interpretation and amendments

Rule 92

Headings

For the purpose of the interpretation of the present rules, the headings, which were inserted for reference purposes only, shall be disregarded.

Rule 93

Amendments

The present rules may be amended by a decision of the Committee taken by a two-thirds majority of the members present and voting, and at least twenty-four (24) hours after

the proposal for the amendment has been circulated, provided that the amendment is not inconsistent with the provisions of the Convention.

Rule 94

Suspension

Any of the present rules may be suspended by a decision of the Committee taken by a two-thirds majority of the members present and voting, provided such suspension is not inconsistent with the provisions of the Convention and is restricted to the circumstances of the particular situation requiring the suspension.

Appendix 7.4

International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Part I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Part II

Article 2

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

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Part III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger,

shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of

action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Part IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

- (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;
- (b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts thereof, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these

reports, or parts thereof, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general

recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Part V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

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

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant 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 the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In

the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States 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 the present Covenant 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 the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 26;
- (b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

Appendix 7.5

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

The General Assembly,

Taking note of the adoption by the Human Rights Council, by its resolution 8/2 of 18 June 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

1. Adopts the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the text of which is annexed to the present resolution;
2. Recommends that the Optional Protocol be opened for signature at a signing ceremony to be held in 2009, and requests the Secretary-General and the United Nations High Commissioner for Human Rights to provide the necessary assistance.

Annex Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Preamble

The States Parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the Universal Declaration of Human Rights¹ proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that the Universal Declaration of Human Rights and the International Covenants on Human Rights² recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic,

political and social rights,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Recalling that each State Party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the 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 Covenant by all appropriate means, including particularly the adoption of legislative measures,

Considering that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

Article 1 Competence of the Committee to receive and consider communications

1. A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.

2. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2 Communications

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. 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 3 Admissibility

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.

2. The Committee shall declare a communication inadmissible when:

- (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;
- (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;
- (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (d) It is incompatible with the provisions of the Covenant;
- (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;
- (f) It is an abuse of the right to submit a communication; or when
- (g) It is anonymous or not in writing.

Article 4 Communications not revealing a clear disadvantage

The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

Article 5 Interim measures

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take

such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 6 Transmission of the communication

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 7 Friendly settlement

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.

2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

Article 8 Examination of communications

1. The Committee shall examine communications received under article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications under the present Protocol.

3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.

4. When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part

II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Article 9 Follow-up to the views of the Committee

1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.

3. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

Article 10 Inter-State communications

1. A State Party to the present Protocol may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under the present article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under the present article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party

may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the

communication an explanation, or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

(i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States

Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 11 Inquiry procedure

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article

2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party

concerned together with any comments and recommendations.

6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in article 15 of the present Protocol.

8. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 12 Follow-up to the inquiry procedure

1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 11 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 11, paragraph 6, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 13 Protection measures

A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 14 International assistance and cooperation

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party's observations and suggestions, if any, on these views or recommendations.

2. The Committee may also bring to the attention of such

bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.

3. A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.

4. The provisions of the present article are without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.

Article 15 Annual report

The Committee shall include in its annual report a summary of its activities under the present Protocol.

Article 16 Dissemination and information

Each State Party undertakes to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

Article 17 Signature, ratification and accession

1. The present Protocol is open for signature by any State that has signed, ratified or acceded to the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 18 Entry into force

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.

Article 19 Amendments

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 20 Denunciation

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation

shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any

communication submitted under articles 2 and 10 or to any procedure initiated under article 11 before the effective date of denunciation.

Article 21 Notification by the Secretary-General

The Secretary-General of the United Nations shall notify all States referred to in article 26, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 19;
- (c) Any denunciation under article 20.

Article 22 Official languages

1. The present 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.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 26 of the Covenant.

Appendix 7.6

OP-ICESCR Rules of Procedure

15 January 2013

Original: English

Committee on Economic, Social and Cultural Rights

Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012)

Procedures for the consideration of individual communications received under the Optional Protocol

Transmission of communications to the Committee

Rule 1

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, communications that are, or appear to be, submitted for consideration by the Committee under article 2 of the Optional Protocol.

2. The Secretary-General may request clarification from the author/s of a communication as to whether she, he or they wish to have the communication submitted to the Committee for consideration under the Optional Protocol. Where there is doubt as to the wish of the author/s, the Secretary-General will bring the communication to the attention of the Committee.

3. No communication shall be received by the Committee if it:

- (a) Concerns a State that is not a party to the Optional Protocol;
- (b) Is not in writing;
- (c) Is anonymous.

Record and list of communications

Rule 2

1. The Secretary-General shall maintain a record of all communications submitted for consideration by the Committee under the Optional Protocol.

2. The Secretary-General shall prepare a list of the communications registered by the Committee, together with a brief

summary of their contents. The full text of any such communication may be made available in the language of submission, to any member of the Committee upon request by that member.

Request for clarification or additional information

Rule 3

1. The Secretary-General may request clarification or additional information from the author/s of a communication, including:

- (a) The name, address, date of birth and occupation of the author/s and verification of the author's identity;
- (b) The name of the State party against which the communication is directed;
- (c) The objective of the communication;
- (d) The facts of the claim;
- (e) Steps taken by the author/s to exhaust domestic remedies;
- (f) The extent to which the same matter is being or has been examined under another procedure of international investigation or settlement;
- (g) The provision or provisions of the Covenant alleged to have been violated.

2. When requesting clarification or additional information, the Secretary-General shall indicate to the author/s of the communication a time limit within which such information should be submitted.

3. The Committee may approve a questionnaire to facilitate requests for clarification or additional information from the author/s of a communication.

Authors of communications

Rule 4

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted

on behalf of individuals or groups of individuals, this shall be with their consent unless the author/s can justify acting on their behalf without such consent.

Non-participation of a member in the examination of a communication

Rule 5

1. A member of the Committee shall not take part in the examination of a communication if:

- (a) The member has a personal interest in the case;
- (b) The member has participated in the making and adoption of any decision on the case covered by the communication in any capacity other than under the procedures applicable to this Optional Protocol;
- (c) The member is a national of the State party concerned.

2. In deciding any question that may arise under paragraph 1 of the present rule, the member concerned shall not take part in the decision reached.

3. If a member considers that he or she should not take part or continue to take part in the examination of a communication, the member shall inform the Committee through the Chairperson of his or her decision to withdraw.

Establishment of Working Groups and designation of Rapporteurs

Rule 6

1. In any matter related to communications under the Optional Protocol, the Committee may establish a Working Group and/or may designate a Rapporteur to make recommendations thereon to the Committee and/or to assist it in any manner in which the Committee may decide.

2. The Working Group or Rapporteur established under this rule shall be bound by the present rules and the Committee's rules of procedure, where applicable.

Interim measures

Rule 7

1. The Committee may, in exceptional circumstances, after the receipt of a communication and before a determination on the merits has been reached transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid possible irreparable damage to the

victim/s of the alleged violations.

2. When the Committee requests interim measures under this rule, the request shall state that it does not imply a determination on the admissibility or the merits of the communication.

3. The State party may present arguments at any stage of the proceedings on why the request for interim measures should be lifted or is no longer justified.

4. The Committee may withdraw a request for interim measures on the basis of submissions received from the State party and the author/s of the communication.

Order of communications

Rule 8

1. Communications shall be dealt with in the order in which they are received by the Secretary-General, unless the Committee decides otherwise.

2. The Committee may decide to consider two or more communications jointly.

3. The Committee may divide a communication and consider its parts separately, if it addresses more than one issue or it refers to persons or alleged violations not interconnected in time and place.

Method of dealing with communications

Rule 9

1. The Committee shall, by a simple majority and in accordance with the present rules, decide whether the communication is admissible or inadmissible under the Optional Protocol.

2. The decision to consider a communication admissible or inadmissible may also be taken by the Working Group established under the present rules provided that all its members so decide. The decision is subject to confirmation by the Committee plenary which may do so without formal discussion, unless a Committee member requests for such a discussion.

Procedures with regard to communications received

Rule 10

1. As soon as possible after the receipt of a communication, and provided that the individual or group of individuals consent to the disclosure of their identity to the State

party concerned, the Committee, or the Committee through a Working Group or a Rapporteur, shall bring the communication confidentially to the attention of the State party and request that the State party submit a written reply.

2. Any request made in accordance with paragraph 1 of the present rule shall include a statement indicating that such a request does not imply that any decision has been reached on the question of admissibility or the merits of the communication.

3. Within six months after receipt of the Committee's request under the present rule, the State party shall submit to the Committee written explanations or statements that relate to the admissibility and the merits of the communication, as well as to any remedy that may have been provided in the matter.

4. The Committee, or the Committee through a Working Group or a Rapporteur, may request written explanations or statements that relate only to the admissibility of a communication but, in such cases, the State party may nonetheless submit written explanations or statements that relate to both the admissibility and the merits of a communication within six months of the Committee's request.

5. If the State party concerned disputes the contention of the author/s, in accordance with article 3, paragraph 1, of the Optional Protocol, that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims and said to be effective in the particular circumstances of the case.

6. The Committee, or the Committee through a Working Group or a Rapporteur, may request the State party or the author of the communication to submit, within fixed time limits, additional written explanations or statements relevant to the issues of the admissibility or merits of a communication.

7. The Committee, or the Committee through a Working Group or a Rapporteur, shall transmit to each party the submissions made by the other party pursuant to the present rule and shall afford each party an opportunity to comment on those submissions within fixed time limits.

State party's request for consideration of the admissibility separately from the merits

Rule 11

1. A State party that has received a request for a written

reply in accordance with paragraph 1 of rule 10 may submit a request in writing that the communication be rejected as inadmissible, setting out the grounds for such inadmissibility, provided that such a request is submitted to the Committee within two months of the request made under paragraph 1 of rule 10.

2. The Committee, or the Committee through a Working Group or a Rapporteur, may decide to consider the admissibility separately from the merits.

3. Submission by the State party of a request in accordance with paragraph 1 of the present rule shall not extend the period of six months given to the State party to submit its written explanations or statements, unless the Committee, or the Committee through a Working Group or a Rapporteur, decides to consider the admissibility separately from the merits.

Inadmissible communications

Rule 12

1. Where the Committee decides that a communication is inadmissible, it shall communicate its decision and the reasons for it, through the Secretary-General, to the author/s of the communication and to the State party concerned.

2. A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request submitted by or on behalf of the author/s indicating that the reasons for inadmissibility no longer apply.

Communications declared admissible prior to the submission of the State party's observations on merits

Rule 13

1. Decisions declaring a communication admissible prior to the submission of the State party's observations on merits shall be transmitted, through the Secretary-General, to the author/s of the communication and to the State party concerned.

2. The Committee may revoke its decision that a communication is admissible in the light of any explanation or statements submitted by the State party and the author/s.

Examination of communications on their merits

Rule 14

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee, or the Committee through a Working Group or a Rapporteur, may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems that may assist in the examination of the communication, provided that the Committee shall afford each party an opportunity to comment on such third party documentation or information within fixed time limits.

2. The Committee shall formulate its Views on the communication in the light of all information made available to it in accordance with article 8, paragraph 1, of the Optional Protocol, provided that this information has been duly transmitted to the parties concerned.

3. Consideration by the Committee of information submitted by third parties, pursuant to paragraph 1 of the present rule, does not in any way imply that these third parties become a party to the proceedings.

4. The Committee may refer any communication to a Working Group to make recommendations to the Committee on the merits of the communication.

5. The Committee shall not decide on the merits of the communication without having considered the applicability of all of the admissibility grounds referred to in articles 2 and 3 of the Optional Protocol.

6. The Secretary-General shall transmit the Views of the Committee, together with any recommendations, to the author/s of the communication and to the State party concerned.

Friendly settlement

Rule 15

1. At the request of any of the parties, at any time after receipt of a communication and before a determination on the merits has been reached, the Committee shall make available its good offices to the parties with a view to reaching a friendly settlement of the matter said to amount to a violation of the Covenant and submitted for consideration under the Optional Protocol, on the basis of respect for the obligations set forth in the Covenant.

2. The friendly settlement procedure shall be conducted on the basis of consent of the parties.

3. The Committee may designate one or more of its members to facilitate negotiations between the parties.

4. The friendly settlement procedure shall be confidential and without prejudice to the parties' submissions to the Committee. No written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be used against the other party in the communication proceedings before the Committee.

5. The Committee may terminate its facilitation of the friendly settlement procedure if it concludes that the matter is not susceptible to reaching a resolution or any of the parties does not consent to its application, decides to discontinue it, or does not display the requisite will to reach a friendly settlement based on respect for the obligations set forth in the Covenant.

6. Once both parties have expressly agreed to a friendly settlement, the Committee shall adopt a decision with a statement of the facts and of the solution reached. The decision will be transmitted to the parties concerned and published in the Committee's annual report. Prior to adopting that decision, the Committee shall ascertain whether the victim/s of the alleged violation have consented to the friendly settlement agreement. In all cases, the friendly settlement must be based on respect for the obligations set forth in the Covenant.

7. If no friendly settlement is reached, the Committee shall continue the examination of the communication in accordance with the present rules.

Individual opinions

Rule 16

Any member of the Committee who has participated in the decision may request that the text of his or her individual opinion be appended to the Committee's decision or Views. The Committee may fix time limits for the submission of such individual opinions.

Discontinuance of communications

Rule 17

The Committee may discontinue consideration of a

communication, when inter alia the reasons for its submission for consideration under the Optional Protocol have become moot.

Follow-up to Views of the Committee and Friendly Settlement Agreements

Rule 18

1. Within six months of the Committee's transmittal of its Views on a communication or decision that a friendly settlement has closed its consideration of a communication, the State party concerned shall submit to the Committee a written response, which shall include information on action taken, if any, in the light of the Views and recommendations of the Committee.

2. After the six-month period referred to in paragraph 1 of the present rule, the Committee may invite the State party concerned to submit further information about any measures the State party has taken in response to its Views or recommendations or in response to a friendly settlement agreement.

3. The Committee shall, through the Secretary-General, transmit the information received from the State party to the author/s of the communication.

4. The Committee may request the State party to include information on any action taken in response to its Views, recommendations or decisions closing the consideration of a communication following a friendly settlement agreement in its subsequent reports under article 16 and 17 of the Covenant.

5. The Committee shall designate for follow-up on Views adopted under article 9 of the Optional Protocol a Rapporteur or Working Group to ascertain the measures taken by States parties to give effect to the Committee's Views, recommendations or decisions closing its consideration following a friendly settlement agreement.

6. The Rapporteur or Working Group may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary.

7. In addition to written representations and meetings with duly accredited representatives of the State party, the Rapporteur or Working Group may seek information from the

author/s and victim/s of the communications and other relevant sources.

8. The Rapporteur or Working Group shall report to the Committee on follow-up activities at each session of the Committee.

9. The Committee shall include information on follow-up activities in its annual report under article 21 of the Covenant and article 15 of the Optional Protocol.

Confidentiality of communications

Rule 19

1. Communications submitted under the Optional Protocol shall be examined by the Committee, a Working Group or Rapporteur in closed meetings.

2. All working documents prepared by the Secretary-General for the Committee, Working Group or Rapporteur shall be confidential unless the Committee decides otherwise.

3. The Secretary-General, the Committee, Working Group or Rapporteur shall not make public any communication or submissions relating to a communication prior to the date on which a decision of admissibility is issued. This is without prejudice of the Committee's prerogatives under article 8, paragraph 3, of the Optional Protocol.

4. The Committee may decide ex officio or upon request of the author/s or alleged victim/s, that the names of the author/s of a communication or the individuals who are alleged to be the victim/s of a violation of the rights set forth in the Covenant not be published in its decision of admissibility or Views or decision closing the consideration of a communication following a friendly settlement agreement.

5. The Committee, a Working Group or Rapporteur may request the author of a communication or the State party concerned to keep confidential the whole or part of any submission or information relating to the proceedings.

6. Subject to paragraphs 4 and 5 of the present rule, nothing in this rule shall affect the right of the author/s, alleged victim/s or the State party concerned to make public any submission or information bearing on the proceedings.

7. Subject to paragraphs 4 and 5 of the present rule, the Committee's final decisions on inadmissibility and Views shall be made public.

8. The Secretary-General shall be responsible for the

transmittal of the Committee's final decisions to the author/s and the State party concerned.

9. Unless the Committee decides otherwise, information related to follow-up to the Committee's Views and recommendations under article 9 of the Optional Protocol and in follow-up of a friendly settlement agreement under article 7 of the Optional Protocol shall not be confidential.

10. The Committee shall include in its annual report a summary of the communications examined and, where appropriate, a summary of the explanations and statements of the States parties concerned, and of its own suggestions and recommendations.

Protection measures

Rule 20

Where the Committee receives reliable information that a State party has not complied with its obligations under article 13 of the Optional Protocol to take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation, it may seek from the State party concerned written explanations or statements clarifying the matter and describing any action it is taking to ensure that its obligations under article 13 are fulfilled. Thereafter, the Committee may request the State party to adopt and take urgently all appropriate measures to stop the breach reported.

Proceedings under the Inquiry Procedure of the Optional Protocol

Applicability

Rule 21

Rules 21 to 35 of the present rules only apply to a State party that has made the declaration under article 11, paragraph 1, of the Optional Protocol.

Transmission of information to the Committee

Rule 22

In accordance with the present rules, the Secretary-General shall bring to the attention of the Committee reliable information that is received for the Committee's consideration indicating grave or systematic violations by a State party of any of the economic, social and cultural rights set forth in the Covenant.

Record of information

Rule 23

The Secretary-General shall maintain a permanent record of information brought to the attention of the Committee in accordance with rule 22 of the present rules and shall make the information available to any member of the Committee upon request.

Summary of information

Rule 24

The Secretary-General, as appropriate, shall prepare and circulate to members of the Committee a brief summary of the information received in accordance with rule 22 of the present rules.

Confidentiality

Rule 25

1. All documents and proceedings of the Committee relating to the conduct of the inquiry shall remain confidential, without prejudice to the provisions of article 11, paragraph 7 of the Optional Protocol.

2. Meetings of the Committee during which inquiries under article 11 of the Optional Protocol are considered shall be closed.

Preliminary consideration of information by the Committee

Rule 26

1. The Committee may, through the Secretary-General, ascertain the reliability of the information and/or the sources of the information brought to its attention under article 11 of the Optional Protocol. It may seek to obtain additional relevant information substantiating the facts of the situation.

2. The Committee shall determine whether the information received contains reliable information indicating grave or systematic violations of rights set forth in the Covenant by the State party concerned.

3. The Committee may designate one or more of its members to assist it in discharging its duties under the present rule.

Examination of information

Rule 27

1. If the Committee considers that the information received

and/or compiled on its own initiative is reliable and appears to indicate grave or systematic violations of rights set forth in the Covenant by the State party concerned, the Committee, through the Secretary-General, shall invite the State party to submit observations with regard to that information within fixed time limits.

2. The Committee shall take into account any observations submitted by the State party concerned, as well as any other relevant information.

3. The Committee may seek to obtain additional information, inter alia, from the following:

- (a) Representatives of the State party concerned;
- (b) Governmental organizations;
- (c) United Nations bodies, specialized agencies, funds, programmes and mechanisms;
- (d) International organizations, including from regional human rights systems;
- (e) National Human Rights Institutions;
- (f) Non-governmental organizations;

Establishment of an inquiry

Rule 28

1. Taking into account any observations that may have been submitted by the State party concerned, as well as other reliable information, the Committee may designate one or more of its members to conduct an inquiry and to make a report within an appropriate time limit.

2. An inquiry shall be conducted confidentially and in accordance with any modalities determined by the Committee.

3. The member or members designated by the Committee to conduct the inquiry shall determine their own methods of work, taking into account the Covenant, the Optional Protocol and the present rules.

4. During the period of the inquiry, the Committee may defer the consideration of any report that the State party concerned may have submitted pursuant to articles 16 and 17 of the Covenant.

Cooperation of the State party concerned

Rule 29

1. The Committee shall seek the cooperation of the State party concerned at all stages of an inquiry.

2. The Committee may request the State party concerned to nominate a representative to meet with the member or members designated by the Committee.

3. The Committee may request the State party concerned to provide the member or members designated by the Committee with any information that they or the State party may consider relevant to the inquiry.

Visits

Rule 30

1. Where the Committee deems it warranted, the inquiry may include a visit to the territory of the State party concerned.

2. Where the Committee decides, as a part of its inquiry, that there should be a visit to the State party concerned, it shall, through the Secretary-General, request the consent of the State party to such a visit.

3. The Committee shall inform the State party concerned of its wishes regarding the timing of the visit and the facilities required to allow the member or members designated by the Committee to conduct the inquiry to carry out their task.

Hearings

Rule 31

1. Visits may include hearings to enable the designated member or members of the Committee to determine facts or issues relevant to the inquiry.

2. The conditions and guarantees concerning any hearings held in accordance with paragraph 1 of the present rule shall be established by the designated member or members of the Committee visiting the State party in connection with an inquiry.

3. Any person appearing before the designated member or members of the Committee for the purpose of giving testimony shall make a solemn declaration as to the veracity of her or his testimony and the confidentiality of the procedure.

4. The Committee shall request that the State party take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to reprisals as a consequence of providing information or participating in any hearings or meetings in connection with an inquiry.

Assistance during an inquiry

Rule 32

1. In addition to the staff and facilities that shall be provided by the Secretary-General in connection with an inquiry, including during a visit to the State party concerned, the designated member or members of the Committee may, through the Secretary-General, invite interpreters and/or such persons with special competence in the fields covered by the Covenant, as are deemed necessary by the Committee to provide assistance at all stages of the inquiry.

2. Where such interpreters or other persons of special competence are not bound by the oath of allegiance to the United Nations, they shall be required to declare solemnly that they will perform their duties honestly, faithfully and impartially, and that they will respect the confidentiality of the proceedings.

Transmission of findings, comments or suggestions

Rule 33

1. After examining the findings of the designated member or members submitted in accordance with rule 28 of the present rules, the Committee shall transmit the findings, through the Secretary-General, to the State party concerned, together with any comments and recommendations.

2. Such transmission of findings, comments and recommendations is without prejudice to article 11, paragraph 7, of the Optional Protocol.

3. The State party concerned shall submit its observations on the findings, comments and recommendations to the Committee, through the Secretary-General, within six months of their receipt.

Follow-up action by the State party

Rule 34

1. The Committee may, after the end of the period of six months referred to in paragraph 2 of rule 33 above, invite the State party concerned, to provide it with additional information on measures taken in response to an inquiry.

2. The Committee may request a State party that has been the subject of an inquiry to include, in its report under article 16 and 17 of the Covenant, details of any measures taken in response to the Committee's findings, comments and recommendations.

Protection measures

Rule 35

Where the Committee receives reliable information that a State party has not complied with its obligations under article 13 of the Optional Protocol to take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation, it may seek from the State party concerned written explanations or statements clarifying the matter and describing any action it is taking to ensure that its obligations under article 13 are fulfilled. Thereafter, the Committee may request the State party to adopt and take urgently all appropriate measures to stop the breach reported.

Proceedings under the Inter-State Communications Procedure of the Optional Protocol

Declarations by States parties

Rule 36

1. Rules 36 to 46 of the present rules only apply to a State party that has made a declaration under article 10, paragraph 1, of the Optional Protocol.

2. The withdrawal of a declaration made under article 10 of the Optional Protocol shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under that article; no further communication by any State party shall be received under that article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party has made a new declaration.

Notification by the States parties concerned

Rule 37

1. A communication under article 10 of the Optional Protocol may be referred to the Committee by either State party concerned by notice given in accordance with paragraph 1 (b) of that article.

2. The notice referred to in paragraph 1 of this rule shall contain or be accompanied by information regarding:

(a) Steps taken to seek adjustment of the matter in accordance with article 10, paragraphs 1 (a) and (b), of the Optional Protocol, including the text of the initial communication and of any subsequent written explanations or statements by the States parties concerned which are pertinent to the matter;

(b) Steps taken to exhaust domestic remedies;

(c) Any other procedure of international investigation or

settlement resorted to by the States parties concerned.

Record of communications

Rule 38

The Secretary-General shall maintain a record of all communications received by the Committee pursuant to article 10 of the Optional Protocol.

Information to the members of the Committee

Rule 39

The Secretary-General shall inform the members of the Committee without delay of any notice given under rule 37 of these rules and shall transmit to them as soon as possible copies of the notice and relevant information.

Meetings

Rule 40

The Committee shall examine communications under article 10 of the Optional Protocol in closed meetings.

Issue of communiqués concerning closed meetings

Rule 41

The Committee may, after consultation with the States parties concerned, issue communiqués, through the Secretary-General, for the use of the media and the general public regarding the activities of the Committee under article 10 of the Optional Protocol.

Requirements for the consideration of communications

Rule 42

A communication shall not be considered by the Committee unless:

- (a) Both States parties concerned have made declarations under article 10, paragraph 1, of the Optional Protocol;
- (b) The time limit prescribed in 10, paragraph 1, of the Optional Protocol has expired;
- (c) The Committee has ascertained that all available and effective domestic remedies have been invoked and exhausted in the matter, or that the application of such remedies has been unreasonably prolonged.

Good offices

Rule 43

1. Subject to the provisions of rule 42 of these rules, the Committee shall proceed to make its good offices available to the States parties concerned with a view to reaching a friendly solution of the matter on the basis of respect for the

obligations provided for in the Covenant.

2. For the purpose indicated in paragraph 1 of this rule, the Committee may, as appropriate, establish an ad hoc conciliation commission.

Request for information

Rule 44

The Committee may, through the Secretary-General, request the States parties concerned or either of them to submit additional information or observations orally or in writing. The Committee shall set a time limit for the submission of such written information or observations.

Attendance by the States parties concerned

Rule 45

1. The States parties concerned shall be entitled to representation when the matter is considered by the Committee and to make submissions orally and/or in writing.

2. The Committee shall, through the Secretary-General, notify the States parties concerned as early as possible of the opening date, duration and place of the session at which the matter will be examined.

3. The procedure for making oral and/or written submissions shall be decided by the Committee, after consultation with the States parties concerned.

Report of the Committee

Rule 46

1. The Committee shall adopt a report in accordance with article 10, paragraph 1 (h), of the Optional Protocol with due expediency after the date of receipt of a notice under article 10, paragraph 1 b) of the Optional Protocol,

2. The provisions of paragraph 1 of rule 45 of these rules shall not apply to the deliberations of the Committee concerning the adoption of the report.

3. The Committee's report shall be communicated, through the Secretary-General, to the States parties concerned.

Communiqués on the Committee's activities under the Optional Protocol

Rule 47

The Committee may issue press communiqués on its activities under the Optional Protocol for the use of the media and the general public.

Appendix 7.7

Participating in ICESCR and CEDAW Reporting Processes

Guidelines for Writing on Women's Economic, Social and Cultural Rights in Shadow/Alternative Reports (NGO)

Co-authored by ESCR-Net and IWRAW Asia Pacific

This document is a practical guide for NGOs reporting on women's economic social and cultural rights within the reporting processes for the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The main motivation of this guide is to encourage the participation of NGOs in the treaty body reporting process and use it as another tool to advance women's human rights and in particular, women's economic, social and cultural rights, at the national level. It also aims to bring about the greater recognition, protection and promotion of women's economic, social and cultural rights through the treaty body system at the international level.

The treaty reporting process is about holding states accountable to their obligations under a treaty and NGOs have a role to play in participating and monitoring a treaty and NGOs have a role to play in participating in and monitoring that process. NGO shadow reporting within the CEDAW and the ICESCR country review processes can be strategically utilized to increase awareness and integration of all women's human rights and improve state accountability.

Different treaties have developed in recognition of the need for a specific focus on particular human rights issues or the rights of particular groups of people. Having distinct treaties and reporting processes for economic, social and cultural rights and women's rights has enabled States and treaty bodies to focus on these specific areas of human rights. However, it has also meant that the issues can sometimes be looked at in isolation from each other.

Women from around the world are increasingly recognizing

how essential economic, social and cultural rights are to achieving gender equality and the full realization of women's human rights. Throughout the world, women make significant contributions to the economy and labour market through their paid and unpaid work in the public and private spheres. However, globally, women represent approximately 70% of the global poor and 60% of the working poor, and disproportionately suffer when economic, social and cultural rights are not fulfilled. The feminization of poverty has reinforced women's political, economic and social inequality in all regions. In today's economy, gender inequality remains a significant issue as evidenced by the increasing poverty and economic exploitation of women and their concentration in the informal labor sector. Trends towards the implementation of neo liberal economic policies (including privatization and deregulation) as well as the current global economic crisis has made the need for strategies to address the roots of women's poverty even more critical. As States recede from providing for social needs, the burden falls on women because of socialized gender roles to ensure adequate food, education and healthcare for their families.

As a result of this situation, there is a pressing need to improve understanding, recognition and implementation of women's economic, social and cultural rights as integral to and indivisible from civil and political rights. Furthermore, it is crucial that women are able to access justice and bring international visibility to these issues as a means to enforce women's human rights both domestically and internationally.

NGO shadow reporting within the CEDAW and the ICESCR country review processes can be strategically utilized to increase awareness on the rights and obligations contained in the treaties, promote integration of all women's human rights and improve state accountability for fulfilling its

obligations under the treaties.

Both the CEDAW and ESCR Committees have recognized the need for a greater integration of women's rights and economic social and cultural rights in their processes. Equally, the shadow reporting for CEDAW and ICESCR to date have contained limited analysis of the integration of women's rights with economic, social and cultural rights.

The aim of this guide is to provide assistance for individuals and organisations who are working within the shadow reporting processes of CEDAW and ICESCR to incorporate information on women's rights related dimensions of economic, social and cultural rights in the shadow reports for both processes. The guide provides clarity on how NGOs should package information to ensure a more effective impact on the review process and in a way that is useful for the CEDAW and ESCR Committee. It also contained information about how to most effectively use the review process and the outcomes of the review (the recommendations contained in the Concluding Observations) to effect change nationally.

These guidelines for reporting on women's economic, social and cultural rights to the CEDAW and ESCR Committees are organized into five parts:

1. State Party reporting processes for CEDAW and ICESCR.
2. Processes for preparing and submitting a shadow or alternative report to the CEDAW and ESCR Committees
3. Guidelines for writing a shadow or alternative report for CEDAW and ICESCR.
4. NGO Interventions during and after the CEDAW and ESCR Committee sessions: how and when to lobby
5. Resources

Supplementary to these guidelines, information on reporting on women's economic, social and cultural rights through the CEDAW and ESCR Committee processes are also contained in:

- IWRAW-Asia Pacific and ESCR-Net, Claiming Women's Economic, Social and Cultural Rights: A Guide to Advocacy and Litigation Using the Optional Protocol and Convention on the Elimination of All Forms of

Discrimination Against Women and the Optional Protocol and International Covenant on Economic, Social and Cultural Rights

- IWRAW Asia Pacific Participation in the CEDAW reporting process: Process and guidelines for writing a shadow/alternative report
- IWRAW Asia Pacific NGO Interventions during and after the CEDAW Session: How and when to lobby

For the full guide, go to: http://www.escr-net.org/user_doc/CEDAW_CESCR_reporting_guidelines_FINAL_Oct_6_2010.pdf

Appendix 7.8

Model Communications Form

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women entered into force on 22 December 2000. It entitles the Committee on the Elimination of Discrimination against Women, a body of 23 independent experts, to receive and consider communications (complaint) from, or on behalf of, individuals or a group of individuals who claim to be victims of violations of the rights protected by the Convention.

To be considered by the Committee, a communication:

- shall be in writing;
- shall not be anonymous;
- must refer to a State which is a party to both the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol;
- must be submitted by, or on behalf of, an individual or a group of individuals under the jurisdiction of a State which is a party to the Convention and the Optional Protocol. In cases where a communication is submitted on behalf of an individual or a group of individuals, their consent is necessary unless the person submitting the communication can justify acting on their behalf without such consent.

A communication will not normally be considered by the Committee:

- unless all available domestic remedies have been exhausted;
- where the same matter is being or has already been examined by the Committee or another international procedure;
- if it concerns an alleged violation occurring before the entry into force of the Optional Protocol for the State.

In order for a communication to be considered the victim or victims must agree to disclose her/their identity to the State against which the violation is alleged. The communication, if admissible, will be brought confidentially to the attention of the State party concerned.

If you wish to submit a communication, please follow the guidelines below as closely as possible. Also, please submit

any relevant information which becomes available after you have submitted this form.

Guidelines for submission

The following provides a guideline for those who wish to submit a communication for consideration by the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Please provide as much information as available in response to the items listed below.

Send your communication to:

Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
E-Mail : petitions@ohchr.org

1. Information concerning the author(s) of the communication

- Family name
- First name
- Date and place of birth
- Nationality/citizenship
- Passport/identity card number (if available)
- Sex
- Marital status/children
- Profession
- If relevant, ethnic background, religious affiliation, social group
- Present address
- Mailing address for confidential correspondence (if other than present address)
- Telephone/e-mail
- Indicate whether you are submitting the communication as:

- Alleged victim(s). If there is a group of individuals alleged to be victims, provide basic information about each individual.
- On behalf of the alleged victim(s). Provide evidence showing the consent of the victim(s), or reasons that justify submitting the communication without such consent.

2. Information concerning the alleged victim(s) (if other than the author)

- Family name
- First name
- Date and place of birth
- Nationality/citizenship
- Passport/identity card number (if available)
- Sex
- Marital status/children
- Profession
- Ethnic background, religious affiliation, social group (if relevant)
- Present address
- Mailing address for confidential correspondence (if other than present address)
- Telephone/e-mail

3. Information on the State party concerned

- Name of the State party (country)

4. Facts of the complaint and nature of the alleged violation(s)

Please detail, in chronological order, the facts and circumstances of the alleged violations,, including:

- Description of alleged violation(s) and alleged perpetrator(s)
- Date(s)
- Place(s)
- Provisions of the Convention on the Elimination of All Forms of Discrimination against Women that were allegedly violated. If the communication refers to more than one provision, describe each issue separately.

5. Steps taken to exhaust domestic remedies

Describe the action taken to exhaust domestic remedies; for example, attempts to obtain legal, administrative, legislative, policy or programme remedies, including:

- Type(s) of remedy sought
- Date(s)
- Place(s)
- Who initiated the action
- Which authority or body was addressed
- Name of court hearing the case (if any)
- If you have not exhausted domestic remedies on the ground that their application would be unduly prolonged, that they would not be effective, that they are not available to you, or for any other reason, please explain your reasons in detail.

Please note: Enclose copies of all relevant documentation.

6. Other international procedures

Has the same matter already been examined or is it being examined under another procedure of international investigation or settlement? If yes, explain:

- Type of procedure(s)
- Date(s)
- Place(s)
- Results (if any)

Please note: Enclose copies of all relevant documentation.

7. Disclosure of your name (s)

Do you consent to the disclosure of your name(s) to the State party should your communication be registered by the Committee in accordance with article 6, paragraph 1 of the Optional Protocol and rule 69, paragraph 1 of the Committee's rules of procedure?

8. Date and signature

- Date/place
- Signature of author(s) and/or victim(s)

9. List of documents attached

(Do not send originals, only copies).

Appendix 7.9

General Recommendations to CEDAW¹

RIGHTS RECOGNISED UNDER THE CONVENTION		GENERAL RECOMMENDATIONS BY THE COMMITTEE ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED IN THE CONVENTION	
PREAMBLE	Discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity;		
PART – I			
ART 1	Definition of Discrimination against Women		
PART – II			
ART 2	Nature and scope of State Obligation under the Convention	GR 28 (2010)	Nature and Scope of State Obligation under Art 2
ART 3	State obligation to undertake special and appropriate measures to ensure that women are guaranteed exercise and enjoyment of rights – civil, political, economic, social and cultural, on the basis of equality with men.	GR 3 (1987) GR 6 (1988) GR 7 (1988) GR 9 (1989) GR 18 (1991) GR 27 (2010)	Education and public information programmes Effective national machinery and publicity State Parties to make resources available for implementation of the Convention State Parties obligation to gather and compile statistical data Disabled Women Older Women

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RIGHTS RECOGNISED UNDER THE CONVENTION		GENERAL RECOMMENDATIONS BY THE COMMITTEE ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED IN THE CONVENTION	
ART 4	Temporary Special Measures to aimed accelerating de facto equality between men and women	GR 5 (1988) GR 25 (2004)	Temporary Special Measures Art 4 para 1 Temporary Special Measures
ART 5	State Obligation to undertake appropriate measures to address discrimination faced by women because of gender stereotyping, based on culture, religion and traditions.	GR 12 (1989) GR 19 (1992) GR 14 (1990) GR 17 (1991)	Violence against women Female circumcision Measurement and quantification of the unremunerated domestic activities of women and their recognition in the GNP
PART – III			
ART 6	State's Obligation to suppress all forms of traffic in women and exploitation of prostitution of women.	GR 26 (2008)	Women migrant workers
ART 7	Discrimination against women in the political and public life	GR 23 (1997)	Women in political and public life
ART 8	Measures to promote participation of women at international level	GR 8 (1988)	Women's participation at international level
ART 9	Discrimination against women in context of nationality and citizenship rights		
ART 10	Discrimination against women in the field of education		
ART 11	Discrimination against women in the field of employment; Maternity benefits; Equal pay for equal work; Safe working conditions at work and of employment; Right of protection to health and safety conditions;	GR 13 (1989) GR 16 (1991)	Equal remuneration for work of equal value Unpaid women workers in rural and urban family enterprises
ART 12	Discrimination against women in the field of health; Access to health services including family planning; Sexual and Reproductive health rights;	GR 15 (1990) GR 24 (1999)	Women and AIDS Women and Health

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RIGHTS RECOGNISED UNDER THE CONVENTION		GENERAL RECOMMENDATIONS BY THE COMMITTEE ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED IN THE CONVENTION	
ART 13	Discrimination against women in the field of economic and social life; Family benefits such as pension, etc; access to credit including bank loans and subsidies; right to participate in leisure and entertainment activities;		
ART 14	Discrimination against Rural Women in relation to exercise and enjoyment of rights recognized in the Convention;		
ART 15	Equality before and in law; Property rights; Freedom to choose domicile and residence, including freedom to movement;		
ART 16	Discrimination against women in matters of marriage and family relations	GR 21 (1994)	Equality in marriage and family relations
PART – IV			
ART 17-22		GR 1 (1986) GR 2 (1987) GR 10 (1989) GR 11 (1989) GR 22 (1995)	Reporting guidelines Reporting guidelines Tenth anniversary of the adoption of CEDAW Technical advisory services for reporting Article 20 of the Convention
PART – V			
ART 23-30		GR 4 (1987) GR 20 (1992)	Reservations Reservations

Currently the CEDAW Committee is considering following General Recommendations:

1. General Recommendation on Economic Consequences of Divorce
2. General Recommendation on Human Rights of Women in Situations of Conflict and Post-conflict (Committee held general day of discussion on 18 July 2011, and currently organizing regional consultation to bring in regional specificities to elaborate the scope and provisions of the GR)
3. General Recommendation on Access to Justice
4. General Recommendation on Rural Women
5. General Recommendation on Stateless, Refugees and Natural Disasters

Notes

¹ The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) came in force on 3 September 1981. As of 13 December 2011 it has been ratified by 187 UN member States. In 2000 an Optional Protocol to the CEDAW came into force and as of 13 December 2011, 103 State Parties have ratified the Protocol allowing communications and requests for inquiries to be submitted to the CEDAW by women or groups of women or NGOs on behalf of the victims whose rights under the Convention have been violated.

Appendix 7.10

General Comments Under ICESCR

RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
PREAMBLE	Recognition to universal, inherent and inalienable nature of human rights and fundamental freedoms; Obligation of State Parties to respect economic, social and cultural rights as well as civil and political rights; and Acknowledgement to the duty of individuals to others and to the community towards respect and observance of human rights.		
PART –I			
ART 1	<p>Right of self-determination</p> <ul style="list-style-type: none"> • to determine political status • o freely pursue their economic, social and cultural development • to freely dispose of one’s natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law, and which does not deprived people of its own means of subsistence. 		

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RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
PART – II			
ART 2	<p>Obligation of State Parties to undertake:</p> <ul style="list-style-type: none"> • guarantee all exercise of the economic, social and cultural rights without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. • to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of economic, social and cultural rights by all appropriate means, including particularly the adoption of legislative measures. <p>In specific reference to the Developing Countries the obligation under Art 2 allows these countries to determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals, with due regard to human rights and their national economy.</p>	<p>GC 3 (1990)</p> <p>GC 9 (1998)</p> <p>GC8 (1997)</p> <p>GC 10 (1998)</p> <p>GC 20 (2009)</p>	<p>The nature of State Parties Obligations (Art 2, para 1)</p> <p>The domestic application of the Covenant</p> <p>The relationship between economic sanctions and respect for economic, social and cultural rights</p> <p>The role of national human rights institutions in protection of economic, social and cultural rights</p> <p>Non-discrimination in economic, social and cultural rights (Art 2 clause 2)</p>
ART 3	<p>Equal right of men and women to the enjoyment of all economic, social and cultural rights</p>	<p>GC 16 (2005)</p> <p>GC 20 (2009)</p>	<p>The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3)</p> <p>Non-discrimination in economic, social and cultural rights (Art. 2 para 2)</p>
ART 4	<p>Any restrictions or limitations on the enjoyment of the economic, social and cultural rights can only be determined by law, and which is compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.</p>		

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RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 5	<p>Any State, group or person have no right to interpret the Covenant giving justification to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.</p> <p>No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent</p>		
PART – III		GC9 (1998)	The domestic application of the Covenant
ART 6	<p>Right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.</p> <p>State Obligation to take measures to achieve full realisation of everyone's right to work.</p>	<p>GC 5 (1994)</p> <p>GC 16 (2005)</p>	<p>Persons with Disabilities</p> <p>The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3)</p>

RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 7	<p>Right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:</p> <p>(a) Remuneration which provides all workers, as a minimum, with:</p> <p style="padding-left: 20px;">(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;</p> <p style="padding-left: 20px;">(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;</p> <p>(b) Safe and healthy working conditions;</p> <p>(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;</p> <p>(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays</p>	<p>GC 5 (1994)</p> <p>GC 16 (2005)</p>	<p>Persons with Disabilities</p> <p>The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3)</p>

RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 8	<p>Right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.</p> <p>This right includes the right of national trade union federations or confederations join international trade-union organizations; to function and manage their affairs freely subject to necessary limitations; and Right to strike provided that it is exercised in conformity with the laws of the particular country.</p> <p>Exception: Imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.</p> <p>No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;</p> <p>State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize are prevention to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.</p>	<p>GC 5 (1994)</p> <p>GC 16 (2005)</p>	<p>Persons with Disabilities</p> <p>The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3)</p>
ART 9	<p>Right of everyone to social security, including social insurance</p>	<p>GC 19 (2008)</p> <p>GC 6 (1995)</p>	<p>The right to social security</p> <p>The economic, social and cultural rights of older persons*</p>

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RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 10	<p>Protection guaranteed to family as a natural and fundamental group unit of society, in its establishment and responsibility for care and education of dependent children, including free consent for marriages entered into, special protection to mothers during a reasonable period before and after childbirth, maternity leave for working mothers with adequate social security benefits, protection and assistance to children and young persons without any discrimination for reasons of parentage or other conditions, including child labour to be prohibited by law.</p>	GC 16 (2005)	<p>The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3)</p>
ART 11	<p>Right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.</p> <p>Right of everyone to be free from hunger- mandating State to take individually and through international co-operation, the measures, including specific programmes, which are needed:</p> <p>Right to food security</p>	<p>GC 12 (1999) GC 15 (2002) GC 4 (1991) GC 7 (1997)</p>	<p>The right to adequate food (Art 11) The right to water (Arts 11 & 12) The right to adequate housing The right to adequate housing: forced evictions (Art 11-1)</p>

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RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 12	<p>Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and it covers State's obligation to ensure</p> <p>(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;</p> <p>(b) The improvement of all aspects of environmental and industrial hygiene;</p> <p>(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;</p> <p>(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.</p>	GC 14 (2000)	The right to the highest attainable standard of mental and physical health (Art 12)

RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 13	<p>Right of everyone to education that is directed to the full development of the human personality and the sense of its dignity, and which emphasizes that</p> <ul style="list-style-type: none"> (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. <p>Right to education must be realized respecting liberty of parents and their & children's own convictions in imparting moral and religious education, in particular but at the same time ensuring minimum educational standards</p> <p>This right includes the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and regulations as determined by law and/or policy laid down by the State.</p>	GC 13 (1999)	Right to education (Art. 13)

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RIGHTS RECOGNISED UNDER THE COVENANT		GENERAL COMMENTS BY THE COMMITTEE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS TO EXPAND MEANING, NATURE AND SCOPE OF THE RIGHTS RECOGNISED	
ART 14	State's obligation to ensure free and compulsory education by adopting a national action plan within 2 years	GC11 (1999)	Plans of actions for primary education (Art 14)
ART 15	Right of everyone to take part in cultural life; to enjoy the benefits of scientific progress and its applications; to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.	GC 21 (2009)	Right to everyone to take part in cultural life
PART – IV			
ART 16-25	Reporting obligation of the State Parties	GC 1 (1989)	Reporting by State Parties
PART – V			
ART 26-31		GC 2 (1989)	International technical assistance

Notes

¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) was signed and adopted by the UN General Assembly on 16 December 1966 and came in force on 3 January 1976. As of 22 Dec 2011 it has been ratified by 160 UN member States. In 2008 an Optional Protocol to the ICESCR was adopted and as of 5 State Parties have ratified the Protocol allowing communication to be filed to the Committee on the Economic, Social and Cultural Rights by individuals or group of individuals whose economic, social and/or cultural rights are violated by the State or bodies acting as agents of the State.

Appendix 7.11

Special Procedures of Human Rights Council related to Economic, Social and Cultural Rights

The above list of Special Procedures established under the Human Rights Council with the exception of the WG on the issue of discrimination against women in law and practice address issues, gaps and challenges faced in full enjoyment of economic, social and cultural rights. However, this doesn't limit activists and groups advancing women's ESC rights to approach other existing special procedures whose mandate is more focused on promotion and protection of civil and political rights.

Title /Mandate	Name and country of origin of the Mandate Holder/s	Contact Information
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context	Ms. Raquel ROLNIK (Brazil)	srhousing@ohchr.org
Independent Expert in the field of cultural rights	Ms. Farida SHAHEED (Pakistan)	ieulturalrights@ohchr.org
Special Rapporteur on the right to education	Mr. Kishore SINGH (India)	sreducation@ohchr.org
Special Rapporteur on extreme poverty and human rights	Ms. Maria Magdalena SEPÚLVEDA CARMONA (Chile)	srextremepoverty@ohchr.org
Special Rapporteur on the right to food	Mr. Olivier de SCHUTTER (Belgium)	srfood@ohchr.org
Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights	Mr. Cephas LUMINA (Zambia)	ieforeigndebt@ohchr.org
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	Mr. Anand GROVER (India)	srhealth@ohchr.org
Special Rapporteur on the rights of indigenous peoples	Mr. James ANAYA (United States of America)	indigenous@ohchr.org
Special Rapporteur on the human rights of internally displaced persons	Mr. Chaloka BEYANI (Zambia)	idp@ohchr.org

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Title /Mandate	Name and country of origin of the Mandate Holder/s	Contact Information
Special Rapporteur on the human rights of migrants	Mr. François CREPEAU (Canada)	migrant@ohchr.org
Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste	Mr. Calin GEORGESCU (Romania)	srtoxicwaste@ohchr.org
Working Group on the issue of human rights and transnational corporations and other business enterprises	Ms. Margaret JUNGK (USA) Chair-Rapporteur Mr. Michael K. ADDO (Ghana) Ms. Alexandra GUAQUETA (Colombia/USA) Mr. Puvan J. SELVANATHAN (Malaysia) Mr. Pavel SULTYANDZIGA (Russian Federation)	wg-business@ohchr.org
Special Rapporteur on the human right to safe drinking water and sanitation	Ms. Catarina de ALBUQUERQUE (Portugal)	srwatsan@ohchr.org
Working Group on the issue of discrimination against women in law and in practice	Ms. Kamala CHANDRAKIRANA (Indonesia) Chair-Rapporteur Ms. Emna AOUIJ (Tunisia) Ms. Mercedes BARQUET (Mexico) Ms. Frances RADAY (Israel/United Kingdom) Ms. Eleonora ZIELINSKA (Poland)	wgdiscriminationwomen@ohchr.org
Special Rapporteur on Human Rights Defenders	Margaret SEKAGGYA (Uganda)	urgent-action@ohchr.org
Special Rapporteur on Violence Against Women	Rashida MANJOO (South Africa)	vaw@ohchr.org

For more information on how to submit information to these special procedures, please visit the webpage on the Official website of OHCHR at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

Appendix 7.12

Resources

Resources on OP-CEDAW

International Women’s Rights Action Watch Asia Pacific, The OP-CEDAW as a mechanism for Implementing Women’s Human Rights: An analysis of the first five cases under the communications procedure of the OP-CEDAW (2008).

International Women’s Rights Action Watch Asia Pacific, The OP-CEDAW as a mechanism for Implementing Women’s Human Rights: An analysis of cases 6-10 under the Communications Procedure of the OP-CEDAW (2009).

Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies Under the OP-CEDAW, International Women’s Rights Action Watch Asia-Pacific (2009).

Simone Cusack, Mechanisms for advancing women’s human rights: A guide to using the Optional Protocol to CEDAW and other international complaint mechanisms, Australian Human Rights Commission (2011).

Resources on OP-ICESCR

ESCR-Net, Toolkit for Action for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, NGO Coalition for the OP-ICESCR (2011), available in English, Spanish, Portuguese Arabic, and French.

Inter-American Institute of human Rights, International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2010).

Other Relevant Resources for Litigation and Advocacy on Women’s ESCR

Rebecca Cook and Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (2010).

Simone Cusack, Optional Protocol to CEDAW Blog.

International Commission of Jurists, ‘Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability’, Human Rights and Rule of Law Series No.2 (2008)

Open Society Justice Initiative, From Judgment to Justice: Implementing International and Regional Human Rights Decisions (2010).

Principles and Guidelines on the Interpretation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2010).

Inter-American Commission on Human Rights (IACHR), The Labor, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights, (2011).