

IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES

NO. 2

**EQUALITY IN INTERNATIONAL
HUMAN RIGHTS TREATIES:**

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

International Women's Rights Action Watch Asia Pacific



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ABBREVIATIONS

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	Committee Against Torture
CEDAW Convention	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of Racial Discrimination
CESCR Committee	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CMW Committee	Committee on Migrant Workers
CPMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OP-CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

I. Introduction

Women are 70 percent of the world's poor and they own 1 percent of the world's wealth. In every country in the world, women are poorer than men, and their poverty and economic inequality affects every aspect of their lives – their basic survival and the survival of their children, their access to food and housing, their physical security, their ability to escape from violence, their sexual autonomy, their health, their access to education and literacy, their access to justice, their ability to participate in public life, their ability to influence and participate in decisions that affect them. Women's economic inequality is integrally connected to their sexual exploitation and to their lack of political power. As long as women as a group do not have an equal share of the world's economic resources, they will not have an equal say in shaping the world's future.¹

In 1948 the General Assembly of the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR)² and one indivisible and interdependent set of rights were identified as inalienable: civil, political, economic, social, and cultural rights.

The UDHR was then translated into two binding agreements, which split that original set of rights into two groups. These two treaties that entered into force in 1976 were the International Covenant on Civil and Political Rights (ICCPR),³ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁴ Despite the early bifurcated approach to the codification of these rights, in subsequent treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention),⁵ the Convention on the Rights of the Child (CRC),⁶ the Convention on the Elimination of All Forms of

¹ Shelagh Day on behalf of Women's Economic Equality Project presenting to the United Nations (UN) Committee on Economic, Social and Cultural Rights. 23 April 2001.

² UN G.A. Res. 217A(III). 10 December 1948.

³ UN G.A. Res. 2200 (XXI). 19 December 1966. Entered into force 23 March 1976 (ICCPR).

⁴ UN G.A. Res. 2200A (XXI). 16 December 1966. Entered into force 3 January 1976 (ICESCR).

⁵ UN G.A. Res. 34/80. 18 December 1979. Entered into force 3 September 1981 (CEDAW).

⁶ UN G.A. Res. 44/25. 20 November 1989. Entered into force 2 September 1990 (CRC).

Racial Discrimination (CERD),⁷ and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPMW),⁸ the two sets of rights have appeared as unified under one convention.⁹

Thus, economic, social and cultural rights should be of equal status in international human rights law to civil and political rights. Yet the former has historically received less attention, and mechanisms to promote their enforcement have largely been neglected. A symptom of this neglect is reflected in the ICESCR's mechanism, which unlike the ICCPR, does not provide for a formal complaints procedure or a forum for individual victims to bring forward their claims at the international level.¹⁰

This paper argues for the adoption of such an individual complaints procedure to the ICESCR as an important tool in giving voice to women's concerns in international law. After an overview of the initial steps towards an optional protocol to the ICESCR, it discusses how the ICESCR strengthens economic, social and cultural rights. Here it also debunks the misconception that economic, social and cultural rights are not justiciable. Following this is a section that looks at the framework of a potential optional protocol to the ICESCR including its scope, standing and remedies. Part four then examines the treatment of women's issues by the Committee on Economic, Social and Cultural Rights (CESCR Committee) in its Concluding Observations to reports of States parties, before a conclusion is presented.

⁷ UN G.A. Res. 2106 (XX). 21 December 1965. Entered into force 4 January 1969 (CERD).

⁸ UN G.A. Res. 45/158. 18 December 1990. Entered into force 1 July 2003 (ICPMW).

⁹ In total there are seven main treaties in the UN system. They are the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture (CAT), the Convention on the Rights of the Child (CRC), and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPMW).

¹⁰ An optional protocol allowing for individual complaints under the ICCPR has been in force since 1976 and has demonstrated a number of benefits. The first optional protocol to the ICCPR currently has 99 signatories. Thanks to the individual complaints procedure, several countries have changed their laws, in a number of cases prisoners have been released and compensation paid to the victims.

Preliminary steps towards an optional protocol to the ICESCR

Although progress has been slow, there have been some steps taken to further the implementation of an individual complaints procedure to the ICESCR. As a result of the UN World Conference on Human Rights held in Vienna in 1993, the UN Commission on Human Rights was mandated to cooperate with the CESCR Committee to examine the possibility of such a procedure.¹¹ The CESCR Committee then presented a draft proposal in 1996.¹² From 2001 to 2002 an Independent Expert on the Question of a draft optional protocol to the ICESCR prepared reports that were discussed by the CHR. Subsequently, the CHR established a Working Group, which has been mandated to consider options for an individual complaints procedure under the ICESCR, and first met in 2004.¹³

Such a complaints procedure would have to come in the form of an optional protocol to the ICESCR, allowing for individuals or groups whose rights have been violated to bring forward complaints against States parties to be heard by the CESCR Committee.¹⁴ The Optional Protocol to the ICESCR (OP-ICESCR) would be a separate treaty that is only open to ratification by States that are already parties to the ICESCR.¹⁵ By ratifying the optional protocol, governments would commit to further implementation of the ICESCR. Although it will be a separate treaty, the OP-ICESCR will not create any new rights, rather it will open up the possibility of accessing and implementing the rights already set forth in the ICESCR.

A women's rights perspective

Meanwhile, several other UN treaties have gained optional individual complaints mechanisms. The latest and most comprehensive is the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (OP-CEDAW). The OP-CEDAW took only three years to complete and includes

¹¹ Vienna Declaration and Programme of Action. A/Conf. 57/1993. 12 July 1993.

¹² "Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights." E/CN.4/1997/104 (1996).

¹³ Commission on Human Rights. Resolution 2002/24 paragraph 9(f). The mandate of the Working Group was renewed in April 2004 (See E/CN.4/2004/L.38).

¹⁴ *Supra* note 12.

¹⁵ *Supra* note 12.

an inquiry procedure, by which groups of victims subject to grave and systematic violations of their rights may institute a complaint in front of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee).¹⁶ Serious work on the instrument began in 1996, negotiations started in 1997 and by December 1999, the text was adopted and opened for signature to States parties to CEDAW. As of 5 November 2004, of the 179 States parties to CEDAW, 76 have signed the OP-CEDAW and of those, 68 have ratified it.¹⁷

The passage of the OP-CEDAW represents a significant step forward in the recognition of women's rights.¹⁸ However, critics of international human rights law have charged that women's issues have been marginalised both through the creation of a separate "women's ghetto" of UN organs that are given less resources and receive less attention than other human rights mechanisms,¹⁹ and through the masculine approach of the major UN human rights treaties that privilege issues of traditional concern to men and label them as general human concerns.²⁰ The OP-CEDAW seems, at least, in part to be a step towards rectifying the first of these concerns. Although the OP-CEDAW casts rights in individual terms and its main purpose is individual remedy and not societal change, it nonetheless allows women to voice concerns unique to them and hold their home states accountable in an international legal forum.²¹

¹⁶ Optional protocols allowing for an individual complaints procedure have also been added to CERD, CAT and ICCPR.

¹⁷ The latest list of States parties to the OP-CEDAW can be found at <<http://www.un.org/womenwatch/daw/cedaw/sigop.htm>>.

¹⁸ See Hilary Charlesworth, Christine Chinkin and Shelley Wright. "Feminist Approaches to International Law." 85 *American Journal of International Law* 613, 645 (1991). The authors argued before the passage of OP-CEDAW that "an international mechanism to hear complaints of individuals or groups... could give women's voices a direct audience in the international community."

¹⁹ See for example, Laura Reanda. "The Commission on the Status of Women". In P. Alston, *The United Nations and Human Rights: A Critical Appraisal*. (Oxford, Clarendon Press, 1992). p267.

²⁰ *Supra* note 18 pp621-627. See also Catherine McKinnon. *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) p244. "The next step is to recognize that male forms of power over women are affirmatively embodied as individual rights in law."

²¹ See *supra* note 18 in which the authors address whether acquisition of legal rights advances women's equality, and in the process point out that the dominant discourse of human rights law has revolved around civil and political rights, which are of less concern to women than economic, social and cultural rights.

The second critique, that general human rights instruments largely ignore women's concerns is evident in the disparate treatment that the ICCPR and the ICESCR have received. Because most of women's concerns have to do with economic, social or cultural rights, women have largely been deprived of a voice in an international legal system that privileges civil and political rights.²² By adding an individual complaints procedure to the ICESCR, women would gain a much overdue recognition that the forms of oppression of most concern to them are justiciable and do have a concrete remedy just as much as civil and political rights. CEDAW is, in fact, premised on the existence of an implementation of the ICESCR,²³ and not meant to be read in isolation as the only human rights treaty applicable to women, suggesting even more strongly that an OP-ICESCR is long overdue and probably should have preceded the one to CEDAW.

II. How the ICESCR strengthens economic, social and cultural rights

Justiciability of rights under the ICESCR

“A right is said to be justiciable when a judge can apply it in a specific case, and when this application can result in the further determination of this right’s meaning.”²⁴

In the traditional approach to human rights, the “classical” civil and political rights were seen as requiring the state to refrain from infringing conduct, and therefore easily justiciable, whereas economic, social and cultural rights were seen as requiring the state to take positive steps toward guaranteeing the enjoyment of a right.²⁵ This approach suggested that economic, social and

²² See Radhika Coomaraswamy. Special Rapporteur on Violence Against Women. Report on Economic and Social Policy and Its Impact on Women. 24 February 2000. See also, <<http://unstats.un.org/unsd/demographic/ww2000/table.htm>> for statistics on women’s social, economic and cultural status including unemployment rates, wages, physical abuse, women as managers, maternity leave benefits, basic education and literacy.

²³ The Preamble to the CEDAW Convention recognises the “International Covenants on Human Rights,” which guarantee economic, social, cultural, civil and political rights.

²⁴ Kitty Arambulo. *Strengthening the Supervision of the International Covenant: Theoretical and Procedural Aspects*. (Antwerp, Intersentia Publishers, 1999) p55.

²⁵ See Brigit Toebes. “Towards an Improved Understanding of the International Human Right to Health”. 21 *Human Rights Quarterly* 661 (1999).

cultural rights were too vague and “insufficiently detailed to form the subject of measurement or supervision.”²⁶ The US Mission to the UN in Geneva, for example, has openly and repeatedly proclaimed that realisation of civil and political rights deserve primacy and economic, social rights are secondary and will come with time.

Legally, however, the two conventions, often dubbed to be “twin treaties”, were meant to be complementary and contain one interdependent set of rights. In a symbolic effort to promote the unity of the rights, the two conventions were drafted with virtually identical preambles, identical articles 1, 2, 3 and 5, and announced on the same day and in a single General Assembly resolution.²⁷ Practically, however, the political realities of the Cold War and post-Cold War US dominance have left the ICESCR lagging far behind the ICCPR.

The progressive realisation of rights under the ICESCR

The rights contained in the ICESCR are in fact justiciable and in fulfilling their obligations under the ICESCR, States parties are expected to take steps aimed towards the progressive achievement of the full realisation of the rights recognised.²⁸ Unlike CEDAW, which “recognizes discrimination against women as a legal issue” but hopes for progress through “good will, education and changing attitudes,”²⁹ the ICESCR offers a more concrete structural, social and economic change for women through the theory of progressive

²⁶ 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). p75.

²⁷ See “Status of International Covenants on Human Rights: Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights”. Commission on Human Rights. Fifty-ninth session. E/CN.4/2003/54.

²⁸ See *supra* note 4, ICESCR Article 2(1) requiring States parties “to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the particularly the adoption of legislative measures.”

²⁹ See *supra* note 18.

implementation. One of the limitations of the text of CEDAW is that it seems to take men's place in society as the benchmark for rights attainable by women,³⁰ while the ICESCR offers substantive and absolute rights with minimum core obligations that must be met by all States parties.

The concept of progressive realisation is recognition that full realisation of all economic, social and cultural rights embodied in the ICESCR cannot generally be achieved immediately or in a short period of time. The CESCR Committee has noted, however, that the progressive realisation of rights should not be interpreted as depriving the obligation of all meaningful content.³¹ Rather, every right has immediate and programmatic components.

Specifically, it noted that a number of provisions of the ICESCR, *inter alia*, the equal right of men and women to the enjoyment of all economic, social and cultural rights, fair wages and equal remuneration for work and the right to collective bargaining are self-executing, that is, subject to immediate implementation at the domestic level. In total, parts or all of eight of the fifteen articles referring to substantive rights in the ICESCR are subject to immediate implementation.³² For example, forced evictions would violate Article 11 guaranteeing the right of everyone to an adequate standard of living, and the testing of "trial" medicine without information or consent would violate Article 12 recognising the right of everyone to the highest attainable standard of health.³³

³⁰ For example, an exception to this is Article 6 which requires States parties to take "all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." *Supra* note 5.

³¹ The Nature of States Parties Obligations. General Comment No. 3. CESCR Fifth Session. Supp. No. 3 at 104 qt. 3. UN Doc. E/1991/23-E/C.12/1990/8 (1991).

³² These include Article 3, the right of equality of men and women; Article 7(a)(i), the right of equal remuneration; Article 8, rights associated with joining and forming trade unions; Article 10(3) the right of children to be protected from economic and social exploitation without discrimination; Article 13(2)(a) the right to primary educations; Article 13(3) the right of parents to choose schools other than those provided by the authorities; Article 13(4) the right to establish schools; Article 15(3) respect freedom for scientific research and creative activity. See also *supra* note 31 at para. 5.

³³ See *supra* note 32.

The obligation to respect, protect and fulfil

In order to promote progressive realisation of the rights in the ICESCR, the CESCR Committee has broken down States parties' obligations into three distinct categories; the obligation to respect, protect and fulfil.³⁴ The obligation to respect requires states to refrain from interfering with the enjoyment of economic, social and cultural rights.³⁵ This includes the state's responsibility to ensure that private entities or individuals over which they exercise jurisdiction do not interfere with individuals' economic, social and cultural rights.³⁶ The obligation to protect requires states to prevent and punish violations of the rights contained in the ICESCR.³⁷ The obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of convention rights.³⁸

Monitoring the implementation of rights under the ICESCR

A common misconception surrounding the justiciability of rights contained in the ICESCR concerns the monitoring ability of the CESCR Committee. Because the treaty imposes only 'programmatic' obligations upon governments, some states maintain that it is difficult if not impossible to determine when those obligations have been met. The US, for example, maintains that, "a claim that these 'rights' are justiciable is a false promise because it cannot be fulfilled".³⁹

³⁴ See *supra* note 31.

³⁵ An example of the obligation to respect might be a state permitting women's rights groups to distribute pamphlets about reproductive and sexual health.

³⁶ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. para. 18. "Acts by non-state entities."

³⁷ An example of the obligation to protect might involve a state taking action to protect women from verbal and physical harassment at male-dominated institutes of higher education.

³⁸ *Supra* note 27. An example of the obligation to fulfil would be a state passing legislation to guarantee equal wages for men and women.

³⁹ Statement of the United States of America, 59th Session of the Commission on Human Rights delivered by Richard Wall and available at <www.us-mission.ch/humanrights/statements>. The US suggests that fulfilment of economic, social and cultural rights leads naturally from according civil and political rights. But if this is true it is difficult to see why the US has thus far refused to ratify the ICESCR and agree to open itself up to international scrutiny to see exactly how beneficial rights under the ICCPR that it accords to its citizens have been in the realisation of their economic, social and cultural rights.

However, the reality is that the ICESCR contains very real and substantive rights, which are subject to violation by a State party in the same way that the rights in the ICCPR may be violated. As with the Optional Protocol to the ICCPR, the OP-ICESCR should address the state's obligation to act in a positive manner towards the realisation of the covenant's rights, and the obligation to refrain from acting in a way that inhibits realisation of these rights.⁴⁰ In practice the obligation to act positively may mean taking steps to promote the rights under the ICESCR, while the obligation to refrain from inhibiting realisation of rights might mean removing impediments or barriers to enjoyment of a right.

In addition, the CESCR Committee requires the implementation of a minimum set of core obligations. The minimum levels, intended to give concrete meaning to the substantive rights of the ICESCR essentially call for fulfilment of a minimum essential level of each of the rights by the States parties. According to the CESCR Committee, a state in which a significant number of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the ICESCR.

To stress the importance of enforceable minimum levels, the CESCR Committee has remarked 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*."⁴¹ Each category contains elements of obligation of conduct and obligation of result: the obligation of conduct requires action by the States parties reasonably calculated to ensure the realisation of a particular right while obligation of result focuses states' efforts on achieving specific targets.⁴²

⁴⁰ See *supra* note 27. The independent expert's report, rejecting concerns of several states that the ICCPR lends itself naturally to an individual complaints procedure because it "sets out... obligations of result, obligations which are measurable by their very nature, and hence not subject to shades of meaning," while the ICESCR does not.

⁴¹ *Supra* note 31.

⁴² The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 7. "Obligations of Conduct and Result." The Maastricht Guidelines give the following examples to clarify the dual nature of the obligations. With regard to health care reforms, an obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality rates, while an obligation of result would involve the reduction of maternal mortality rates to those agreed on at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

Together these guidelines offer a precise map to States parties on proceeding down the road of compliance with the ICESCR and offer an answer to critics who have marginalised women's concerns by contending that economic, social and cultural rights do not point to precise obligations on the part of states.

Justiciability of rights under the ICESCR at the domestic level

Practical evidence that these rights are justiciable can also be found in domestic case law. The right to work, the right to social security, the right to an adequate standard of living and the right to education are just some of the rights under the ICESCR that have been adjudicated in national courts.⁴³ At the regional level, in June 2003, the European Court of Human Rights agreed to hear a case concerning the respect for private and family life arising from inhumane conditions faced by Roma families after their houses were burned down by a mob of villagers.⁴⁴ The European Committee of Social Rights, the African Commission on Human and People's Rights and the Inter-American System under the Pacto de San Salvador have also heard a wide array of cases concerning economic, social and cultural rights.⁴⁵

At the international level, in its 50 years of existence, the Committee on Freedom of Association of the Governing Body of the International Labour Office has heard nearly 2,000 cases concerning worker's rights with respect to collective bargaining and freedom of association, building up a comprehensive body of case law around the topic.⁴⁶ Among others, the United Nations Educational Scientific and Cultural Organisation (UNESCO) and the Human Rights Committee have also considered violations of economic, social and cultural rights.

⁴³ See *Daily Rated Casual Labour Employed under P & T Department through Bharatiya Dak Tar Mazdoor Manch v. Union of India and others* (All India Reporter. 1987. Supreme Court of India 2342) (finding that hostile discrimination in the workplace amounted to exploitation of workers and thus denial of their human rights). See also *Government of the Republic of South Africa and Others v. Grootboom* ((1) SA 46 (CC)) (finding that a government programme set up for the progressive realisation of the right to adequate housing was not reasonable as it did not consider the needs of people in extremely precarious situations). See also *Campaign for Fiscal Equity et al. v. the State of New York et al.* (719 NYS 2d 475 2001) (finding that the state must take steps to ensure that at least adequate resources were provided for pupils in New York's public schools).

⁴⁴ European Roma Rights Center. 4 July 2003 Press Release at <http://www.errc.org/publications/letters/2003/romania_jul_4_2003.shtml>; See also *López Ostra v. Spain*, 303 European Court of Human Rights (ser. A) at 41, 47 (1995) (concerning disruption to right to family life caused by health nuisance from waste-disposal plant).

⁴⁵ *Supra* note 27.

⁴⁶ *Supra* note 27.

In addition, several of the UN treaties, including CEDAW and CERD, which contain economic, social and cultural rights components, have been successfully litigated in national courts without being subject to abuse or accusations of vagueness. This is one of the reasons why although the issue of justiciability was also a concern during the drafting of the OP-CEDAW, it was eventually resolved by viewing it from the perspective of a sliding scale, given the particularities of a case rather than of particular rights.⁴⁷

III. Technical aspects of an OP-ICESCR

The technical aspects of the OP-ICESCR include its scope within the context of the substantive rights in the ICESCR, and who has standing to make a complaint, as well as possible remedial measures.

Scope and standing

To be an effective and comprehensive complaints mechanism, the OP-ICESCR must bind states to all of the substantive rights listed in Articles 1 to 15 of the ICESCR unless they have been reserved by states at the time of ratification of the Covenant. Countries should not be able to pick and choose which rights will be eligible for complaints as all the rights enshrined in the ICESCR are interdependent and selective enforcement would lead to confusion and inconsistency. In recognition of the advantages of “facilitat[ing] a progressive acceptance of a wider range of rights over time,” in the current draft of the OP-ICESCR, the majority of the CESCR Committee members advocate a “comprehensive approach” restricting the rights of states to “opt-out” of certain rights or “opt-into” others.⁴⁸

Therefore, according to these experts, this optional protocol should be responsive to all of the rights in the ICESCR, and not just those strategically selected by the States parties. Just as under the OP-CEDAW and the draft proposed by the CESCR Committee for the OP-ICESCR,⁴⁹ those who have standing before the Committee

⁴⁷ 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). p76.

⁴⁸ “Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”. E/CN.4/1997/105. para. 26. 18 December 1996.

⁴⁹ *Id.* at para. 21 proposed text: “A State party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and examine communications from any individuals or groups subject to its jurisdiction in accordance with the provisions of this Protocol.”

should include at least: individuals and groups (groups of individuals) who have been victims of violations of their Covenant rights; representatives of individuals or groups of individuals who may bring a complaint on behalf of individuals; and/or collective victims with their consent or without if justified.⁵⁰

Two possible avenues for pursuing a complaint should parallel the ones found under the OP-CEDAW and include a communications procedure and an inquiry procedure.

Under the communications procedure, the CESCR Committee would review complaints submitted by individual or groups alleging to be victims of violations of rights under the ICESCR, and decide on an appropriate remedy for the victims. Under an inquiry procedure, the CESCR Committee would 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. According to the OP-CEDAW definitions, “grave” refers to the severity of the violation and may be a single act. While, “systematic” refers to the scale or prevalence of the violations or to the existence of a scheme or policy directing the violations. Therefore 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.⁵¹

States parties have expressed concern that an individual communications procedure would expose them to frivolous complaints or arbitrary appeals against simple oversights or shortcomings in their policies.⁵² In the draft OP-ICESCR, however, the CESCR Committee has proposed that individual complaints be declared admissible only if a clear detriment has been suffered.⁵³ In line with

⁵⁰ See Article 2 of the OP-CEDAW. Here the draft OP-ICESCR’s language is “acting with the knowledge and agreement of the alleged victim(s).” There is no reference to consent or to justified reasons a victim may not give his/her consent.

⁵¹ 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).

⁵² *Supra* note 39. Richard Wall representing the US warned other states that, “by agreeing with this approach, you – as governments – agree to provide housing for the millions who claim their present housing is not ‘adequate’. You agree to provide food for each and every one of your citizens. And, even where not possible, you agree to provide the best available medical care for each and every citizen. If you fail to provide these ‘rights’, you agree to provide monetary compensation. This is what it means for rights to be justiciable.”

⁵³ Audrey Chapman. “A ‘Violations’ Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights.” *Human Rights Quarterly* Vol. 18 No. 1 (1996).

this, the CESCR Committee has suggested that the OP-ICESCR refers to the “violation of the rights set forth in the Covenant” rather than “failure by [a] State party to give effect to its obligations” or “failure to ensure satisfactory application of a provision or to adopt a formulation”.⁵⁴

Under this formulation it can be assumed that the complainant will have to show a clear cause by the state that produced the violation and a detrimental effect on him/her personally for the complaint to be considered admissible. The independent expert appointed by the Human Rights Committee confirmed this strategy for the drafting of the optional protocol language suggesting that the procedure be restricted to “situations revealing a species of gross, unmistakable violations of or failures to uphold any of the rights set forth in the Covenant”.⁵⁵

In recognition of the fact that violations of economic, social and cultural rights are pervasive and widespread, the OP-ICESCR should also include an inquiry procedure. Such a procedure would empower the CESCR Committee to initiate investigation into particularly grave or systematic abuses of economic, social and cultural rights. It would also complement this optional protocol's complaints procedure as it would allow the CESCR Committee to address a broader range of issues, including structural causes of violations, than would be possible under the individual complaints mechanism.

Of the UN treaty mechanisms, the Convention Against Torture and the CEDAW Convention have inquiry procedures with the latter's provisions calling for short and long-term follow-up to the inquiry.⁵⁶ An inquiry procedure mitigates concerns of critics of an individual complaints procedure that its utility does not stretch beyond addressing individual women's concerns to produce societal change.⁵⁷ Given the nature of economic, social and cultural rights and the theory of “progressive realisation”, including a procedure for long-term follow-up in the optional protocol would be in line with the spirit of the ICESCR.⁵⁸

⁵⁴ “Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”. E/CN.4/1997/105. para. 18. 18 December 1996.

⁵⁵ *Supra* note 27.

⁵⁶ 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).

⁵⁷ *Supra* note 21 and accompanying text.

⁵⁸ Article 9 of CEDAW authorises the CEDAW Committee to request that the State party provide information on how it has addressed violations in its next periodic report or alternatively, authorises the Committee to request that the State party inform it of the steps taken to correct the violations six months after the transmission of the findings and recommendations. See *supra* note 5.

What outcome: Remedies/interim measures

According to General Comment No. 3 of the CESCR Committee, the ICESCR imposes an obligation to move as “expeditiously” and “effectively” as possible towards the realisation of the rights set forth in this Covenant.⁵⁹ Under any remedy offered, the CESCR Committee will therefore have to consider whether the State party is moving as expeditiously and as effectively as possible towards the goal of fulfilling obligations under this treaty.

Remedies for violations of the ICESCR can be broadly split into two categories; communications or inquiry. For the communications procedure, remedies for individual victims of violations may include compensation, restitution or reparation, while remedies for submissions under the inquiry procedure are more likely to be administrative or legislative to facilitate broad-based reforms.

Remedies for victims using the communications procedure should be tailored to provide immediate redress for the individual victim and may also include suggestions by the CESCR Committee for long-term reforms tailored towards policies or practices forming the root cause of the violation. Compensatory remedies have occasionally been recommended by the Human Rights Committee and the International Labour Organisation Freedom of Association Committee, and could be recommended by the CEDAW Committee once it issues final views and recommendations on individual complaints to be considered.⁶⁰

Remedial action for individual victims of violations utilising the communications procedure may also come in the form of interim measures. Interim measures are used in potentially serious cases involving the possibility of irreparable harm and are in line with the current practice of similar international procedures.⁶¹ The current OP-ICESCR draft allows the CESCR Committee to request interim measures in cases where a preliminary study has indicated that allegations, if substantiated, could lead to irreparable harm.⁶²

⁵⁹ The Nature of States Parties Obligations. General Comment No. 3. Article 2(1). CESCR Fifth Session. para. 9.

⁶⁰ “The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Remedies for Covenant Violations.” International Commission of Jurists. Source: <http://www.icj.org/news.php3?id_article=2753&lang=en>.

⁶¹ See for example, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. UN G.A. Res. 54/4 of October 6, 1999. Article 5.

⁶² “Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”. E/CN.4/1997/105. para. 37. 18 December 1996.

An example of such a case may be a woman who is threatened by her village with rape if she sends her daughter away to private school. In such an instance the woman's safety and well-being and her daughter's educational opportunities will be compromised by the length of the decision-making process and immediate action by the state should be required.

The OP-CEDAW contains a similar measure as well as a safeguard to maintain the impartiality of the procedure, making it explicit that a request by the CESCR Committee for interim measures would not imply a determination on the merits of the case or its admissibility.⁶³ A similar safeguard, so that victims of violations are not permanently affected by delays in decision-making but the impartiality of the procedure is maintained would be appropriate for the OP-ICESCR.

Remedies that are targeted towards changing state practices or facilitating the realisation of the rights in the Covenant might take several forms. A remedy that takes progressive realisation into account, for example, may not be subject to immediate implementation but may be more programmatic in nature.⁶⁴ Such an evaluation might be restricted to assessing whether the state had taken reasonable steps within a range of options. In a quasi-judicial process such as this, the remedy proposed ought to take into consideration the States parties' efforts at improvement to conclude whether it had complied with its treaty obligations. The CEDAW Committee, for example, does not simply look at the violation itself but evaluates trends in progress towards a goal, the existence of legislation, administrative remedies or other means of implementation.⁶⁵

Similarly, the CESCR Committee has noted that the right to an effective remedy need not be interpreted as always requiring a judicial remedy. It suggested that administrative remedies will, in many cases be adequate as long as the State

⁶³ *Supra* note 61, Article 5(2).

⁶⁴ Note that something like discrimination, banned by Article 2(2) and Article 3 of the ICESCR is a violation subject to immediate remedy and the obligation of a state not to discriminate is not progressive in nature but subject to immediate implementation in private and public sectors. However, providing everyone with the highest attainable standard of health under Article 13 is a right that is subject to progressive realisation and is more programmatic in nature calling for example, for administrative programmes providing health care access to a higher percentage of the population and raising the level of health care available.

⁶⁵ 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). p75. para. 48.

party respects its good faith obligation to carry out such remedies within its jurisdiction. Any such administrative remedies should be accessible, affordable, timely and effective.⁶⁶

In the same vein, the CESCR Committee noted in its draft optional protocol that friendly settlement is an especially appropriate remedy for violations of economic, social and cultural rights and that under an effective optional protocol, the CESCR Committee ought to be prepared to facilitate such a settlement, provided it was in line with the rights under the ICESCR.⁶⁷

Finally, with respect to remedies it is important to note that the limitation under the optional protocol system is that the State party concerned retains the final decision as to the steps it will take in response to any recommendation, for instance, as issued by the CESCR Committee.⁶⁸ Nevertheless, the OP-CEDAW, for example, contains a provision requesting the State party to inform the CEDAW Committee of measures it has taken in response to an inquiry procedure.⁶⁹ Both CAT and ICCPR also contain follow-up procedures in their optional protocols, which contribute to and facilitate state accountability.⁷⁰

IV. The Committee on Economic, Social and Cultural Rights and its approach to women's rights

Having examined issues of justiciability under the ICESCR and technicalities of an OP-ICESCR, this section will examine how the CESCR Committee has thus far addressed the concerns of women in its Concluding Observations, and how an individual complaints mechanism would complement the current procedure.

One of the primary tasks of the implementing body of the ICESCR, the CESCR Committee, is examining periodic State party reports on the implementation of the Covenant's rights.⁷¹ An indication of how an individual complaints procedure

⁶⁶ "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights". General Comment No. 9. UN Doc. E/C.12.1998/24 (1998).

⁶⁷ "Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights." E/CN.4/1997/105. para. 38. 18 December 1996.

⁶⁸ *Id.* at para. 12(d).

⁶⁹ *Supra* note 61, Article 9.

⁷⁰ See for example, Reply from the Government of Argentina. CAT A/54/44.

⁷¹ Higgins, Rosalyn. *Problems and Process: International Law and How We Use It.* (New York: Oxford University Press, 1994) p108.

might be utilised for the benefit of women under the ICESCR can be deduced by examining the Concluding Observations to these States parties' reports. Without an individual complaints procedure this is the primary system with which to hold states accountable to their treaty obligations. Especially crucial to women is Article 3 of the ICESCR providing for the "equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".⁷² The drafters of the ICESCR recognised that discrimination based on sex can intersect with other forms of discrimination and thus create particular constraints and vulnerabilities for certain groups of women in the enjoyment of their economic, social and cultural rights.

Additional barriers are faced by many women due to such factors as race, language, ethnicity, culture, religion, disability, or socio-economic class, or because they are indigenous women, migrants, displaced women or refugees.⁷³ In this regard, allowing women to bring their cases before the CESCR Committee will provide them with access to a judicial remedy that might not be available to them in domestic courts, and highlights the unique difficulties faced by women in many countries around the world. The CESCR Committee is currently drafting a General Comment to Article 3,⁷⁴ which will provide valuable insights into the enforcement of the gender equality provision, but has already given clues to its position on gender equality in its Concluding Observations to States parties' reports.

The CESCR Committee has been especially attentive to employment conditions of women. Regarding inequalities between the wages of men and women, it expressed concern that in Sweden, women earn only 83 percent of men's salaries,⁷⁵ in Colombia women earn 25 percent less than men,⁷⁶ and in the Czech Republic women similarly earn 25 percent less than men.⁷⁷ The CESCR Committee has also expressed concern over high unemployment rates among

⁷² *Supra* note 4, Article 3.

⁷³ "Report to the Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic Social and Cultural Rights: Submission by Non-Governmental Organisations, pursuant to Article 9(d) of Resolution 2002/24 of the Commission on Human Rights." August 2002.

⁷⁴ In addition to reading and commenting on States parties' reports, treaty bodies contribute to the general understanding of the treaties and developing human rights standards by writing General Comments or General Recommendations.

⁷⁵ Sweden. ICESCR. E/2002/22. (2002). 106 at para. 726.

⁷⁶ Colombia. ICESCR. E/2002/22. (2001). 110 at para. 765.

⁷⁷ Czech Republic. ICESCR. E/2003/22 (2002). 25 at para. 83. See also Slovakia. ICESCR. E/2003/22 (2002). 50 at para. 315.

women,⁷⁸ the absence of laws to prevent sexual harassment in the workplace,⁷⁹ and discrepancies between law and practice, with respect to employment practices that discriminate against women.⁸⁰

In the social sphere, the CESCR Committee has expressed concern over the Family Code of Algeria, including provisions on polygamy, unilateral repudiation by the husband, requirement of a guardian's consent for marriage and the obligation of the wife to obey her husband.⁸¹ Although the CESCR Committee urged Algeria to undertake a radical reform of the Family Code, under an individual complaints procedure it would have had the power to order remedial measures, which would have provided another level of inducement to the State party to effect change. The individual complaints procedure is tailored to individuals and offers a specific remedy, rather than a vague or general suggestion of reform. With a specific remedy it is often more transparent whether a State party has obeyed the CESCR Committee's order and increases State party accountability.

An individual complaints procedure might also be instrumental in addressing violence against women, which the CESCR Committee has thus far largely overlooked in its Concluding Observations. While the CESCR Committee has voiced its concern in connection with the lack of laws addressing sex tourism, sexual exploitation and prostitution of women⁸² it has not been as vocal about domestic violence.⁸³ An individual complaints mechanism could bring to light specific cases of violence against women and perhaps add a human element to an otherwise very technical procedure. It would also be a valuable international forum for women to tell of their personal struggles with violence and provide details of the gruesome reality of their everyday lives, which are often lost in the statistics and empirical analysis of States parties' reports and Concluding Observations.

⁷⁸ *Supra* note 76 at para. 764. Jamaica. ICESCR E/2002/22 (2001). 130 at para. 932.

⁷⁹ Croatia. ICESCR. E/2002/22 (2001). 125 at para. 896.

⁸⁰ Poland. ICESCR. E/2003/22 (2002). 54 at para. 358.

⁸¹ Algeria. ICESCR. E/2002/22 (2001). 116 at para. 817.

⁸² See for example, Jamaica. ICESCR. E/2002/22 (2001). 130 at para. 936; Slovakia. ICESCR. E/2003/22 (2002). 50 at para. 321; Czech Republic. ICESCR. E/2003/22 (2002). 25 at para. 85.

⁸³ See for instance, *supra* note 82, Jamaica at 937. The CESCR Committee expressed concern over domestic and sexual violence but did not suggest remedial measures, as it did for laws to curb sexual violence.

V. Conclusion

The UDHR guarantees “equal and inalienable rights to all members of the human family”,⁸⁴ yet nearly 60 years after its passing women’s rights have failed to be adequately addressed within the UN treaty system. Evidence of this inequality is mirrored in statistics that affirm what many women already experience in their everyday lives, that they comprise a staggering 70 percent of the world’s poor. For most of those women, their right to a fair trial⁸⁵ and freedom to manifest their religion or beliefs⁸⁶ are secondary to their desire for potable drinking water, adequate nutrition,⁸⁷ sanitary work conditions,⁸⁸ primary education for themselves or their daughters,⁸⁹ and adequate housing.⁹⁰

Although most of these rights are guaranteed under CEDAW, the primary human rights convention addressing economic, social and cultural rights in the UN treaty system is the ICESCR. If the original treaties under the UDHR had been constructed and enforced with gender equality in mind, perhaps there would not have been a need for a separate women’s convention like CEDAW. However, even with CEDAW in place, women are still not on an equal footing with men in international human rights law.

The two treaties – CEDAW and ICESCR – are meant to be complementary and an OP-ICESCR is just as crucial as an OP-CEDAW is to hold states responsible to the international community for women’s concerns, and finally bring women’s issues into the human rights treaties on equal footing with those of men. An optional protocol to the ICESCR would also provide the momentum to a much needed paradigm shift that places economic, social and cultural rights – and with it the concerns of women – on centre stage with civil and political rights. Maybe when these rights are on equal footing can we finally begin to speak of human rights as a set of international norms that include women’s rights and are implemented as truly indivisible.

⁸⁴ *Supra* note 2. “Preamble”. Note that although human rights are to be guaranteed equally, as early as the third paragraph of the “Preamble” the masculine form is used to represent “everyone”.

⁸⁵ *Supra* note 3, ICCPR Article 14.

⁸⁶ *Supra* note 3, ICCPR Article 18(3).

⁸⁷ *Supra* note 4, ICESCR Article 12.

⁸⁸ *Supra* note 4, ICESCR Article 7.

⁸⁹ *Supra* note 4, ICESCR Article 13.

⁹⁰ *Supra* note 4, ICESCR Article 11.

