

ESCR PROTOCOL NOW!

**Campaign for international justice for
economic, social and cultural rights**



ADVOCACY KIT

**Compiled by
The NGO Coalition for
an Optional Protocol to the
International Covenant on
Economic, Social and Cultural Rights**
www.escrprotocolnow.org

For activities targeting the
Open-Ended Working Group
to consider options for an OP-ICESCR
(February 2006) and the
Commission on Human Rights 2006

Introduction

This is an Advocacy Kit compiled by the NGO Coalition for an OP-ICESCR for groups interested in supporting the campaign for an international complaints mechanism for victims of economic, social and cultural rights.

It provides information on the process, as well as tools for national campaigning and lobbying. This document is organised in the following different sections so you can pick and choose the parts that are most useful to you:

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Your comments on this Advocacy Kit are very welcome – we’d love to hear from you about how you use it, which parts are most helpful, and any ideas for other aspects that could be addressed. Please email advocacy@escrprotocolnow.org with your comments.

Lobby Guide

What

We are campaigning to provide victims of violations of economic, social and cultural rights with access to international justice.

Currently, if you have been tortured or if your right to freedom of expression is violated, you can complain to the United Nations. But if you have been forcibly evicted, or if you are unable to access healthcare services, you don't have the same opportunity. It should not be that way!

The way forward is the development of what is called an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). This Optional Protocol will establish a complaints mechanism allowing you to present your case to the United Nations.

How

The members of the United Nations have come together, in the form of a working-group, to discuss the possibility of elaborating this Optional Protocol. Victims of economic, social and cultural rights violations have been waiting for this opportunity for a long time.

We are now at a crucial stage and governments will decide in March 2006 whether or not we will have this Optional Protocol. The voice of civil society is vital in convincing all governments to support this process.

When

Time is short and work has already commenced. But we urgently need more voices and your active support. It is important to be lobbying your government now and in the coming months in the lead up to two major events.

First, the UN Working-Group will be meeting from 6 to 17 February 2006 in Geneva. This meeting is the last opportunity for governments to express their support for the Optional Protocol. Later in 2006, during the session of the UN Human Rights Commission in Geneva, governments will decide whether or not to draft this Optional Protocol.

If there is not enough support for this at the Working Group and the Commission on Human Rights 2006, there will be no Optional Protocol in the foreseeable future and voices of victims of economic, social and cultural rights violations will be silenced.

Who

The campaign for the adoption of this Optional Protocol is coordinated by the NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

The Coalition brings together national, regional and international NGOs, individuals, social movements and community based organisations all committed to make the Optional Protocol a reality. Because we need to join forces on this issue, the Coalition makes sure that we develop a common strategy and position and provides information about the process.

Because you can make a difference in the way your government thinks about this Optional Protocol, we invite you to join the Coalition and share with us your successes, feedback from your lobbying with governments and any information that could be useful to others campaigning in other countries.

To join the Coalition, go to our website: www.escrprotocolnow.org.

Why

An OP-ICESCR is important because it will provide victims of economic, social and cultural rights violations who can't be heard before their national courts an avenue to get redress. As such, it will redress the current imbalance in the protection of different human rights, which marginalises economic, social and cultural rights.

Having an international complaint mechanism will also help develop the content of ESC rights and related States' obligations, as well as give guidance to national courts.

In order to achieve these objectives, the mechanism adopted must be useful and the Coalition has established minimum criteria (further information about these can be found in sections of this Advocacy Kit).

In our view, anything short of a comprehensive OP-ICESCR would have huge impacts on groups' ability to use those rights to seek better social justice.

Feedback On Your Lobbying

Please complete this form and return to the NGO Coalition, either via email to advocacy@escrprotocolnow.org, or you can complete online at www.escrprotocolnow.org.

Name	
Organisation	
Contact Details	
What is your Government's position on the OP-ICESCR	
Will your Government participate in the Open-Ended Working Group in February?	
If so, please provide information about your Government's Delegation (who, how long are they staying, any particular background information on individuals we should be aware of)	
Who you contacted – Name, Position and Department	
Any other relevant information?	

What Is The NGO Coalition And Who Is Involved In The Campaign?

The NGO Coalition for an OP-ICESCR coordinates the campaign for the adoption of an OP-ICESCR.

The NGO Coalition for an OP-ICESCR brings together individuals and organisations from around the world who support the development of an OP-ICESCR. Our members including international NGOs, regional networks, grassroots activists, community based organizations, and individuals, all of whom have a common goal to promote an OP-ICESCR. Together we join forces to convince governments that the time has come to provide victims of violations of economic, social and cultural rights with access to international justice.

Aims And Activities

The main motivation behind the creation of the Coalition was the need to speak with one voice and to show that there is broad civil society support for the OP-ICESCR.

The primary objective of the Coalition is therefore to advocate for the adoption of an effective OP-ICESCR and to mobilise forces around this issue at the national, regional and international levels.

As such, the Coalition undertakes the following activities:

- Developing and providing information and materials which will facilitate the advocacy of individuals and organisations working for the adoption of an OP-ICESCR
- Mobilising national, regional and international organisations and individuals to engage in public education and advocacy for an OP-ICESCR
- Facilitating communication between interested parties
- Engaging in public education and direct advocacy as appropriate
- Consulting with relevant individuals and organizations about critical issues in the development of an effective OP
- Developing strategies and seeking funding as appropriate to secure the development and adoption of an effective OP to the ICESCR
- Intervening in relevant for a to promote the adoption of an OP-ICESCR

Principles Guiding The Work Of The Coalition

The Coalition has identified five key elements for an effective OP. Each is a minimum requirement for the Optional Protocol that should be promoted by all NGOs wishing to contribute to the process of making the OP to the ICESCR a meaningful human rights instrument. These minimums are described on page 6 of this Advocacy Kit.

Commitments From Members

Members of the Coalition commit to:

- Sharing information about the OP-ICESCR campaign & their activities
- Sharing resources which support the principles of the Coalition
- Sharing strategies for lobbying

Governance Of The Coalition

The Coalition is directed by a volunteer Steering Committee comprised of regional and international organisations, as well as individuals. The Steering Committee is an operational group of individuals and organisations which coordinates the work of the coalition.

The current Steering Committee comprises of representatives from the following organisations:

- Centre on Housing Rights and Evictions (COHRE), Geneva
- FoodFirst Information and Action Network (FIAN), Germany
- International Commission of Jurists (ICJ), Geneva
- International Women's Rights Action Watch Asia-Pacific (IWRAP Asia Pacific), Malaysia
- Inter-American Platform of Human Rights, Democracy and Development (PIDHDD), Colombia

Bruce Porter and Magdalena Sepulveda are also members of the Steering Committee in an individual capacity.

Membership of the Steering Committee will be reviewed after the 2006 Working Group.

How To Join The Coalition?

Organisations and individuals can become members of the Coalition. To join the Coalition, you will have to agree upon a set of membership principles and return the membership form to the following address: membership@escrprotocolnow.org.

The membership form and principles are available on the Coalition website: www.escrprotocolnow.org.

Communication

The members of the Coalition communicate through an e-mail list, where information, strategies, papers, etc. are shared. To join the Coalition email list please visit <http://www.nwjc.org.au/avcw/lists/info/op-icescr.html>.

What Are We Campaigning For? *(short version)*

Members of the Coalition have identified five key elements for an effective OP. Each is a minimum requirement for the Optional Protocol that should be promoted by all NGOs wishing to contribute to the process of making the OP to the ICESCR a meaningful human rights instrument.

ELEMENT ONE: The OP should contain at least two procedures: (1) a Communication Procedure and (2) an Inquiry Procedure. The NGO Coalition also supports the inclusion of other important procedural elements, such as an early warning/emergency procedures mechanism, interim measures in cases of immediate or irreparable harm to complainants, and effective remedies and follow-up measures. An inquiries procedure, including fact-finding missions to the State Party concerned, would enable the CESCR Committee to launch, at its own initiative, investigations into grave and/or systematic violations of the rights contained in the Covenant.

ELEMENT TWO: The Procedures established under the OP to the ICESCR should be available to victims of violations of ANY substantive right enshrined in the Covenant. The procedures under the OP to the ICESCR should extend to ALL the rights set forth in the Covenant. The OP to the ICESCR must be comprehensive in its coverage and should include all the rights contained in the ICESCR, including the right to self-determination.

ELEMENT THREE: The violations to be reviewed under the Procedures established under the OP to the ICESCR should be linked to all levels of state obligations. This should include the obligations to respect, protect, and fulfil economic, social and cultural rights. It should also include all components of a right, and not simply the “core” rights or “minimum rights”.

ELEMENT FOUR: Standing should extend to individuals, groups and organisations. The capacity to submit complaints under an OP should extend to individuals, groups of individuals, and organisations (including NGOs and trade unions). The OP should enable complaints to be submitted by or on behalf of individuals, groups of individuals and organisations.

ELEMENT FIVE: No reservations should be allowed under the Optional Protocol to the ICESCR.

In addition to these five core elements, the Coalition also believes that other issues are important and should continue to be discussed during the process of advocating for an OP, including the capacity to address and acknowledge the role of international cooperation in the realisation of ESCR and the responsibilities of non-state actors, in particular transnational corporations. Once discussions around an OP progress to the drafting of the mechanism, the NGO Coalition will advocate for progressive approaches towards other more procedural elements such as the exhaustion of local remedies rule and the protection of complainants against reprisals.

What Are We Campaigning For? *(longer version)*

Members of the Coalition have identified five key elements for an effective OP. Each is a minimum requirement for the Optional Protocol that should be promoted by all NGOs wishing to contribute to the process of making the OP to the ICESCR a meaningful human rights instrument.

ELEMENT ONE: Communication & Inquiry Procedures

The OP should contain at least two procedures: (1) a Communication Procedure and (2) an Inquiry Procedure.

Why a communications procedure?

The communications procedure would enable individuals and groups of individuals to file complaints before the Committee. The individual communications would refer to specific violations of the rights guaranteed in the International Covenant on Economic, Social and Cultural Rights. It would also allow them to seek redress for violations of ESCR that generally go unnoticed at the national level.

Why an Inquiry Procedure?

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

***Grave violations** would constitute severe abuse. For example violations of economic, social and cultural rights that would have negative impact on of the right to life, physical and mental integrity, and security of a person. E.g.: forced evictions by military forces that have caused injuries and deaths of various members of an indigenous community

* **Systematic** would refer to the scale or prevalence of violations, or to existence of scheme or policy directing violations. Violations not amounting to the level of severity implied by “grave” may still be focus of inquiry if there is pattern of violations or abuses are committed pursuant to scheme or policy. E.g. forced sterilization of Roma women in public hospitals.

An inquiry procedure would reinforce an Optional Protocol's complaints procedure as it would: (i) Open an avenue to address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of *Covenant* provisions; (ii) Allow grave and/or systematic *Covenant* violations to be investigated where individuals or groups were unable to utilise the complaint's mechanism for reasons including fear of reprisals; and (iii) Enable a more-timely response to grave and/or systematic violations of the provisions of the *Covenant*, and to continuing violations in particular.^[1]

Why a Follow-up Procedure

This procedure would enable the Committee to follow-up on the implementation of its decisions. Under a follow-up procedure, the Committee would be empowered to intervene with the State Party, beyond the regular reporting process, to discuss problems that could arise regarding the implementation of a particular decision.

A follow-up procedure would reinforce an Optional Protocol's complaints procedure as it would: (i) Open an avenue to address problems States might face in implementing a particular decision; (ii) Provide guidance and support to those States in order to give full effect to a Committee's decision; (iii) Guarantee that the Committee's decisions are actually implemented.

Other Elements

The NGO Coalition also supports the inclusion of other important procedural elements, such an early warning/emergency procedures mechanism, interim measures in cases of immediate or irreparable harm to complainants, and effective remedies and follow-up measures.

Interim Measures

Many allegations of violations of Covenant rights involve measures which may irreparably set back the enjoyment of Covenant rights or do irreparable harm to groups or individuals. The NGO Coalition believes that if the alleged violation is of extreme gravity and urgency or would constitute a serious retrogressive measure that would be difficult to remedy, such that immediate action is required in order to avoid irreparable harm to victims and potential victims or to the enjoyment of Covenant rights, it should be possible to order interim measures. Therefore, the OP should include, as it is the case in the OP-CEDAW, a specific provision allowing for interim measures which will enable the CESCER to require a State party to take measures “to avoid irreparable damage to the victim of the alleged violation”.

ELEMENT TWO: Comprehensive Scope

The Procedures established under the OP to the ICESCR should be available to victims of violations of ANY substantive right enshrined in the Covenant. The procedures under the OP to the ICESCR should extend to ALL the rights set forth in the Covenant.

The OP to the ICESCR must be comprehensive in its coverage and should include all the rights contained in the ICESCR, including the right to self-determination.

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

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

ELEMENT THREE: All Levels of Obligations

The violations to be reviewed under the procedures established under the OP-ICESCR should be linked to all levels of state obligations.

This should include the obligations to respect, protect, and fulfil economic, social and cultural rights. It should also include all components of a right, and not simply the “core” rights or “minimum rights”.

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

* **The obligation to *respect*** requires States parties to refrain from interfering with the enjoyment of *Covenant* enshrined economic, social and cultural rights. That is, States parties must not act in a way which violates an economic, social or cultural right, nor infringes on an individual’s freedom to access these rights. Within this context, states must “respect the freedom of the individuals to take the necessary actions and use the necessary resources – alone or in association with others.”^[2]

* **The obligation to *protect*** requires States parties to prevent the violation of ICESCR rights by third parties. States parties must take “the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the infringement of his material resources.”^[3]

* **The obligation to *fulfill*** encompasses the state obligations to *facilitate* the access to and/or to *provide* for the full realisation of economic, social and cultural rights. The obligation to *facilitate* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and means to ensure the realisation of *Covenant* rights. The obligation *provide* requires States to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal.^[4]

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

ELEMENT FOUR: Standing For Individuals, Groups and Organisations.

The capacity to submit complaints under an OP should extend to individuals, groups of individuals, and organisations (including NGOs and trade unions).

The OP should also enable complaints to be submitted by or on behalf of individuals, groups of individuals and organisations.

The NGO Coalition believes that due to the nature of violations of economic, social and cultural rights, and the scope of impact that these violations can have, the capacity to submit communications under an OP should remain as broad as possible.

At a minimum, the following should have standing:

1. Individuals and groups of individuals^[5] who have been victims of violations of *Covenant* rights by State parties;
2. Representatives of individuals or groups of individuals empowered to initiate complaints *on behalf of* individual and collective victims.

Why the need for groups of individuals?

Limiting standing, and thus the ability to initiate complaints under an Optional Protocol, to individuals would be to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this mechanism. Both the *Covenant on the Elimination of Racial Discrimination* and the *Covenant on the Elimination of All Forms of Discrimination Against Women* contain the ability for communications to be brought by both individuals and groups of individuals. Victims of ESCR violations are often extremely poor and would thus often not be in a position to make use of the international procedure.

The role of NGOs in the Communications procedure

NGOs should be able to lodge communications **on behalf of** individuals and groups of individuals.

The importance of expressly acknowledging the competence of representatives, particularly non-governmental organisations and national human rights institutions, to launch complaints on behalf of individual and groups victims of *ICESCR* violations cannot be underestimated. Under existing instruments, complaints *on behalf of* individual and group victims have either been specifically included^[6] or such representative standing has been provided through adjudicative interpretation.^[7]

Providing standing to individuals and organisations to initiate communications *on behalf of* individual and group victims of rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women*, Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 77 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, and the practice of the United Nations Human Rights Committee.

The significance of allocating standing to such representatives is rooted in the fact that these types of communications play an essential role in initiating international complaint's procedures, particularly where victims face the risk of ill-treatment or other retaliation for directly engaging in the process.^[8]

What would be the role of NGOs in the Inquiry Procedure?

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

ELEMENT FIVE: No Reservations

No reservations should be allowed under the OP-ICESCR.

Precluding reservations to the Optional Protocol^[9] to the ICESCR would represent a significant commitment by States parties which ratify the Protocol, to uphold the integrity of internationally recognised economic, social and cultural rights. Excluding the use of reservations would be appropriate as:

- (i) The *raison d'être* of an Optional Protocol would be to provide to people an international procedure to obtain protection for the enjoyment of their economic, social and cultural rights as enshrined in the ICESCR. As a tool to both complement and strengthen the *Covenant*, to allow State party reservations to an Optional Protocol would be to undermine its potential as a tool for the full realisation of economic, social and cultural rights;
- (ii) An Optional Protocol would by its very nature be optional and as such, reservations that curtailed its applicability would be unnecessary;
- (iii) An Optional Protocol would be a procedural instrument as it would neither introduce new nor expand present economic, social and cultural rights obligations that States parties accepted through their ratification of the *Covenant*. An Optional Protocol would thus merely serve as a means through which States parties would be encouraged to realise existing *ICESCR* obligations.
- (iv) An effective Optional Protocol must recognise the indivisible and interdependent relationship amongst all *Covenant* rights. To allow States parties to individually select the *ICESCR* rights subject to an Optional Protocol strike at the core this relationship and the instruments ability to protect and promote *Covenant* rights. Such a selective approach would open the door to arguments as to the hierarchy of and inequality between economic, social and cultural rights, thereby encroaching upon the universality, interdependence, indivisibility and interrelatedness of all human rights.^[10] Further, permitting the selection of economic, social and cultural rights subject to the Optional Protocol mechanisms would risk that some States parties would enhance their international prestige, through ratification, while restricting the instrument's substantive application.

It is important to bear in mind the comments made by the Human Rights Committee on the issue of reservations made upon ratification or accession to the *ICCPR* or its Optional Protocols, in its General Comment Number 24^[11], where it addressed the issue of whether reservations are permissible under the first Optional Protocol to the *ICCPR*, and if so, whether such reservations are contrary to the object and purpose of the *Covenant* or of the first Optional Protocol itself.

In this regard, the Committee stated:

"It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does

not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

Further, the Committee stated that “reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose”.

Accepting reservations to the Optional Protocol to the *ICESCR* would depart from existing practice where neither the OP to *CEDAW* nor the OP to *ICCPR* accept reservations.

Further Elements

In addition to these five core elements, the Coalition also believes that other issues are important and should continue to be discussed during the process of advocating for an OP, including the capacity to address and acknowledge the role of international cooperation in the realisation of ESCR and the responsibilities of non-state actors, in particular transnational corporations.

Once discussions around an OP progress to the drafting of the mechanism, the NGO Coalition will advocate for progressive approaches towards other more procedural elements, such as the exhaustion of local remedies rule, and the protection of complainants against reprisals.

Political Support For The OP-ICESCR

Over the last three years, political support for the OP-ICESCR has gained momentum and an increasing number of countries are supporting the elaboration of this instrument. However, strong opponents to the whole process remain, while many countries, perhaps because they still have a certain number of concerns, have not developed a final position on this issue.

Opposition to the OP-ICESCR comes from various regions. The United States, Saudi Arabia and Australia have been very vocal in opposing the development of this instrument and in trying to stop any further discussion on this issue at the United Nations. Canada, while not openly opposing continued discussions at the international level on this issue, is also seriously questioning the need to develop an OP-ICESCR. Another big concern of the Coalition is that, as of today, not a single Asian country has appeared in favour of an OP-ICESCR. In particular, India, Pakistan, China and Japan have been very outspoken in their opposition to an individual complaint mechanism for economic, social and cultural rights at the international level.

The good news is that Latin American countries have come together, as a regional group, to support an OP-ICESCR. The main advocates for the Optional Protocol in the region are Argentina, Mexico, Chile, Brazil and Costa Rica. Other countries in the region, although supporting the development of an OP-ICESCR, might still have some reservations or concerns.

African countries, as a regional group, are also supporting the development of an OP-ICESCR which would include all the Covenant rights and all levels of States obligations. The support of African countries is conditional on the inclusion of international cooperation in the OP-ICESCR. South Africa, Burkina Faso and Ghana have been the main proponents of this instrument in Africa.

The European Union (EU) comes divided in relation to the OP-ICESCR. Countries like Portugal and Finland are key supporters of an OP-ICESCR that is comprehensive and corresponds to the Coalition set of minimum criteria. Other EU countries, like France, Germany or Spain do support the development of an OP-ICESCR, but have not finalised their position regarding its scope and procedural aspects. Countries like Poland, Sweden or the United Kingdom have expressed serious reservations regarding the development of an OP-ICESCR, while other EU countries are following the debates but are not expressing a specific position.

At the European level, the Russian Federation and Croatia have expressed their support for the development of an OP-ICESCR, while Switzerland has expressed serious reservations regarding the elaboration of an OP-ICESCR including all rights and all levels of States' obligations.

If you are interested in getting more details about a specific country position on the OP-ICESCR, you can contact us at: info@escrprotocolnow.org.

Ideas For Getting Involved – What Can You Do?

What you can do to influence the position of your country in the right direction? You can:

- Co-ordinate efforts and come together at the national and/or regional levels to organise and share work (i.e. build a national coalition/platform for the OP-ICESCR)
- Write a letter to your government with your demands for the OP (you can use the minimum elements of the international NGO Coalition which you can find on page 6 of this Advocacy Kit or in the Membership Principles – this document is available on our website at www.escrprotocolnow.org)
- Try to get this letter signed by as many national civil society actors as possible (including trade unions and social movements)
- If possible, follow-up on the letter by organising a meeting with people in charge of the issue in the relevant ministries. (an inter-ministerial approach may be required – for example it may be the Ministry of Foreign Affairs, Ministry of Justice, Ministry for Culture, Ministry of Social Services, and/or the Ministry of Interior, or each of these equivalents or others in your country that will be responsible for this issue.)
- Parallel to that, and whenever possible, national public opinion should be mobilised and the issue brought to the media attention. For example, you can stimulate changes in public opinion through activities such as public seminars, training workshops, etc. and engaging media (for example, writing letters to editors, issuing media releases on upcoming events, writing opinion editorial pieces in the local media drawing on local examples).

We can help you preparing your advocacy efforts and answer your strategic questions. We can inform you on regional initiatives and on international events. In return, if we want all the national efforts to fill in the global campaign for the OP, we will need your input and feedback on your national activities and achievements.

This will enable us to attend the next big decisive negotiations rounds as a representative and broad coalition of civil society organizations. And this is what the OP needs the most: that states see that their citizens care about the future of economic, social and cultural rights.

Preparing For The Working Group

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

Why Is The February 2006 Working Group So Important?

From 6-17 February 2006 governments, civil society representatives and experts will be meeting in Geneva to discuss future work on the development of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

The meeting of the "Open Ended Working Group" will report to the Commission on Human Rights in 2006, and its report will reflect the discussions regarding future actions on the development of the Optional Protocol to the ICESCR. **It is hoped that the Report of this Working Group will show that States feel strongly that it is time to start drafting an Optional Protocol.**

The meeting is a vital point in the campaign for the Optional Protocol to the ICESCR. **If the meeting fails to attract significant support for the continuation of the Working Group and the prompt development of a legal text, the mandate of the Working Group will not be renewed and the momentum that has been developing over the past few years will be lost.**

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

1. ensure that the Coalition knows the position of as many governments as possible
2. encourage supportive governments to participate in the Open-Ended Working Group
3. lobby governments at the national level to guarantee support for the Optional Protocol to the ICESCR.

What Is Your Government Saying And What Can You Do?

While developments at the United Nations level might seem very far away and abstract, you have a crucial role to play, in your respective countries, to change the way your governments think about economic, social and cultural rights and about an Optional Protocol to the ICESCR.

Your actions at the national level, with your respective governments, are crucial to guarantee support for the OP-ICESCR. Pressure put on your government through letter writing, campaigning or official meetings, remain fundamental elements to bring about changes in your governments' position on an Optional Protocol to the ICESCR.

To facilitate the Coalition learning more about government attitudes to the Optional Protocol to the ICESCR - including whether or not they intend to participate in the meeting of the Open-Ended Working Group - we are asking national groups, organisations and networks to meet with representatives of government, write letters and set up a campaign for the Optional Protocol at the national level.

For the most part, participation in negotiations of this nature is the responsibility of Ministries/Departments of Foreign Affairs. However, in many countries, other ministries are also key, for example the Ministry of Labour, Ministry of Interior Affairs, etc.

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

We would also like to know whether your governments intend to participate in the meeting of the Open-Ended Working Group. If your government is supportive *and* is going to send a delegation, you/your organization might also consider lobbying the government to be included as a NGO

representative on the delegation. If your government is not supportive but you have a constructive working relationship with another government, you might also consider approaching them to be accredited as a NGO representative on the delegation. Be aware that governments do not often support the cost of NGO representatives on their delegations.

Telling Us What You Have Learnt

When you learn of the government position, please feed the information back to the coalition distribution list at op-icescr@lists.nwjc.org.au. To subscribe to this list, please go to the following address: <http://www.nwjc.org.au/avcwl/lists/info/op-icescr.html>.

Alternatively, you could send your feedback to Coalition Steering Committee members at advocacy@escrprotocolnow.org.

To ensure we are as effective as possible during the meeting of the Open-Ended Working Group and in our work leading up to this event, please send this information as soon as possible.

Information For Those Able To Attend The Working Group In Geneva

NGOs can participate in the meeting of the Open-Ended Working Group as observers if their organization has ECOSOC consultative status. They may also be accredited to government delegations.

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

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

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

- a pre-meeting strategy session
- regular briefings with Coalition members
- regular meetings with “friendly” governments
- regular email briefings to Coalition members unable to attend the Geneva meeting
- lunch-time seminars during the course of the Geneva meeting

Accreditation For The Open-Ended Working Group

To participate as an observer of the Open-Ended Working Group you need to be accredited. Information about accreditation is posted on the website of the Office of the High Commissioner for Human Rights. You can check this website at: <http://www.ohchr.org/english/issues/escr/group.htm>.

Before You Leave

Before you leave, it is important that you have prepared!

In preparation for the Working Group, please refer to other sections of this Advocacy Kit, including: “Ideas For Getting Involved - What Can You Do?”, “Preparing For The Working Group” and “How to Lobby Your Government”.

Also, please tell the other NGO Coalition members that you are coming, so that we can be sure to include you in all of our activities. Email us at advocacy@escrprotocolnow.org.

Information For Those Working From Home

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

For the duration of the meeting of the Open-Ended Working Group we will send regular updates on the state of negotiations. If required we may also ask individual partner organizations to undertake specific activities to bring about a change in position, or to encourage governments to remain firm if they are taking a positive position.

In preparation for the Working Group, please refer to other sections of this Advocacy Kit, including: "Ideas For Getting Involved - What Can You Do?", "Preparing For The Working Group" and "How to Lobby Your Government".

How To Lobby Your Government

It is essential that governments know that there is support for an OP-ICESCR, and also that they understand fully the benefits and know how to refute challenges. This Advocacy Kit has been designed to help you make this happen. It may be useful for you to print out the different sections of the Advocacy Kit and include them in briefing kits or lobbying letters.

Mobilising Support to Influence Your Government

If your government is not supportive of the OP-ICESCR, we ask that you mobilise as much support as possible to influence them to change their minds. Activities you might consider include:

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

If your government is supportive of the OP-ICESCR, but does not intend to participate in the Working Group, we ask that you mobilise as much support as possible to influence them to change their minds and to attend and speak out in favour of an OP-ICESCR. Activities you might consider include:

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

Pro-Forma Letter to Send to Your Government

To facilitate your own work with your national government we have also produced a pro-forma letter to send to Members of Parliament, Bureaucrats, and Mission Staff.

Dear

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

As you may be aware, an Open-Ended Working Group to consider the development of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) is meeting for the third time in February 2006 in Geneva. We are writing to ascertain your position on the drafting of the Optional Protocol to the ICESCR, and to strongly urge you to support further negotiations on the issue.

Work towards an Optional Protocol to the ICESCR provides an opportunity for the international human rights treaty system to codify the increasing domestic jurisprudence on economic, social and cultural rights. Moreover, work on the Optional Protocol to the ICESCR enables governments to honour the commitments made during the Vienna Conference on Human Rights, which affirmed the indivisibility, interdependence and interrelatedness of all human rights and recommended that the Committee on Economic, Social, and Cultural Rights work with the Commission on Human Rights to examine a draft Optional Protocol to the ICESCR. In 1997 the Commission on Human Rights received a draft Optional Protocol from the Committee on Economic, Social, and Cultural Rights, and yet since then the international community has been slow to act on progressing this matter.

In keeping with the Vienna Declaration, we are sure that you will agree that it is imperative that economic, social, and cultural rights be accorded full and equal recognition within the United Nations human rights mechanisms. Four of the six international human rights treaties currently have Optional Protocols. An Optional Protocol to the ICESCR, similar to the one that has been in place for 25 years under the ICCPR, is critical to ensuring that full recognition is accorded to economic, social, and cultural rights. We would also emphasize that what is being considered is an “optional” protocol. In other words, States can decide, at a later date, whether to ratify the protocol once it exists.

We hope that the Government will adopt a favourable position on this important issue. We will follow up shortly to discuss the matter with you.

Media And Other Activities

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

Activities could include:

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

Besides the letter writing and media strategy, you might also want to carry out other activities to gather as much support as possible to influence your government to improve its position on the Optional Protocol to the *ICESCR*. These might include:

- direct meetings with the responsible minister
- visits to influential parliamentarians (for example, if there are sub-committees on treaties, the chair of the committee might be useful to visit; the Attorney-General might also be an appropriate person to visit)
- a seminar on the development of the OP-ICESCR, to which you invite influential parliamentarians, bureaucrats, supportive members of the judiciary and legal profession, academics, and NGOs.

Background on the *ICESCR*

Historical Background

At the end of the 1940s, the Cold War broke out and split the former allies into two blocks - the "socialist east" and the "capitalist west". This new international system functioned at the expense of human rights, which were turned into an ideological battlefield until the end of the 1980s. The western block claimed civil and political rights to be the only "real rights" and the only ones to bring freedom and well-being to the individual. The eastern block retaliated, saying that economic and social rights were a prerequisite for a true democracy in which civil and political rights make sense at all. This led to a split in the envisaged Human Rights Covenant into two covenants.

Following the *Universal Declaration of Human Rights (UDHR)* – which enshrines all human rights – by the General Assembly of the United Nations, in a resolution adopted in 1950, the Commission on Human Rights was encouraged to prepare a single Covenant to include all the rights of the *UDHR* in a legally binding document. In the light of the totally different views of the states, and especially the opposition of the Western states, the idea of a single Covenant had to be abandoned. Instead an *International Covenant on Civil and Political Rights (ICCPR)*, and another *International Covenant on Economic, Social and Cultural Rights (ICESCR)* were developed. Both Covenants were adopted in 1966 and entered into force in 1976. From the very beginning, civil and political rights were granted greater attention and better monitoring and protection mechanisms. Economic, social and cultural rights were considered as mere political aspirations and were denied further protective mechanisms.

The end of the Cold War allowed for greater attention to be devoted to economic, social and cultural rights and important developments have taken place since the 1990s. The universality, indivisibility, interdependence and interrelatedness of all human rights is now recognised by the international community and the United Nations Commission on Human Rights now has various special procedures dealing specifically with economic, social and cultural rights. However, in practice, economic, social and cultural rights are often not placed on an equal footing with civil and political rights.

A practical example in the international human rights system is that the UN permits individual complaints against violations of the *ICCPR*, but not against violations of the *ICESCR*: The UN adopted an Optional Protocol to the *ICCPR* to this effect immediately in 1966 (as a "package", together with the *ICCPR* itself). There was no such Optional Protocol for the *ICESCR*.

***ICESCR* Overview**

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

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

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

One strength of the *ICESCR* is that it is a legally binding human rights treaty. States can choose to "sign-up" to the treaty (to "ratify" it). Once they have ratified it, they have a binding obligation to work towards the realisation of the full range of human rights covered in the *ICESCR*. For activists this means that we can hold the State accountable for the actions they do, or don't take, to ensure a range of rights, including the right to health or the right to housing. Human rights treaties provide guarantees,

so the Convention can become a useful tool for advocates, a roadmap for claiming and mobilizing around our rights.

What Is In The *ICESCR*?

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

The rights outlined in the *ICESCR* include:

- the right to work and to just and favourable conditions of work, and to form trade unions;
- the right to social security;
- protection of the family;
- the right to an adequate standard of living, including food, housing and clothing;
- the right to health;
- the right to education (including compulsory primary education); and
- the rights to culture and science.

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

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

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

... a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.^[12]

The General Comment further notes that where the minimum core standards are not realised, resource constraints should be considered within the context of the State Party having allocated "all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."^[13] Moreover, the CESCR noted that a lack of resources does not remove the obligation to strive for implementation of ESCR or to monitor the actual extent of implementation.^[14] This interpretation was codified by a meeting of civil society experts in 1997, when a document entitled the *Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights* (Maastricht Guidelines) was developed. The Maastricht Guidelines also discuss the concept of a margin of discretion, the argument that "as in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations."^[15] Through domestic adjudication of ESCR, and through the adoption of Concluding Observations and General Comments, the CESCR and domestic jurisdictions have developed a clearer understanding of the ways in which the minimum core standards are realised in different contexts, while simultaneously asserting the universality of ESCR.

You can find a full version of the *ICESCR* at www.ohchr.org.

Challenges Of ESCR

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

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

What Is The Role Of The Committee On Economic, Social And Cultural Rights?

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

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

What is an "Optional Protocol"?

Optional Protocols are additions to existing conventions or treaties. They do not amend the text of the original treaty, but rather add some obligations or create some additional mechanisms to monitor compliance with the original instrument. They are 'optional' because governments can choose whether they want to ratify these.

Protocols may address any topic relevant to the original treaty. The *International Covenant on Civil and Political Rights* has two protocols, one on the abolition of capital punishment and the other on individual complaint mechanism.

An Optional Protocol introducing a complaint (or rather, a communication) mechanism is of a procedural nature and enables individuals to seek justice internationally, if they have been denied access to justice domestically. It is attached to the "parent" treaty, in this case the *International Covenant on Economic, Social and Cultural Rights*. It is a separate legal text which establishes a mechanism for accountability.

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

If you want to find out whether or not your country is a State Party to the ICESCR, you can check this information at the website of the Office of the High Commissioner for Human Rights website (www.ohchr.org).

How Other Communications & Inquiries Procedures Work

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

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

To lodge a "case" with one of the Committees, an individual needs to have experienced a breach of the human rights contained in a particular treaty. They also need to have tried to achieve justice for that violation through domestic processes. If that has been unsuccessful, or there were no avenues for redress, then they can lodge a communication with the appropriate Committee. One of the challenges

is to pick which treaty is most applicable. Once the Committee has received the communication, they consider whether or not it is admissible, that is whether or not it really fits the rights in “their” treaty. If they decide that the case is admissible, they then consider the “merits” of the case to determine whether a breach occurred. If they find that a breach occurred they can make a series of recommendations to the government, “views” on “remedies”. The views focus on providing relief for the individual, but also identify the violations and cause of the violations, and as such, can be used in domestic advocacy campaigns to change those laws, policies or programs. Governments are then required to consider the recommendations, take appropriate actions, and report back to the Committee within a specified time-frame. The Committees also have the power in the early stages to require States Parties to take “interim measures” to avoid possible irreparable damage to the victim or victims of the alleged violation.

Further Information On The Optional Protocol To The *ICCPR*

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

Further Information On The Optional Protocol To *CEDAW*

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

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

Until now, only a very limited number of communications have been fully reviewed by the *CEDAW* Committee (and no inquiries). However, contributions to the development of ESCR jurisprudence are likely to be made.

Benefits Of An OP-ICESCR *(short version)*

Why An OP To The *ICESCR*?

One of the strengths of an Optional Protocol to the *ICESCR* is the potential role it could play in securing the implementation of economic, social and cultural rights in countries around the world. In particular cases, individuals who have been unable to access justice at the domestic level would be able to take their complaint to the CDESCR. It would then have the authority to review 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.

Another benefit of an Optional Protocol is the contribution it will make to better understanding the scope of the rights contained in the *ICESCR*. This combined with the work of the CDESCR in reviewing country reports, and adopting general comments, will lead to a stronger base for the implementation of economic, social and cultural rights in our own communities.

It also contributes to the universality and indivisibility of human rights. At present, some governments continue to challenge the validity of economic, social and cultural rights, claiming that they are not “justiciable”, that is that there is no legal right which attaches to them. Adoption of an Optional Protocol to *ICESCR* would change this perception, and would finally provide equality between civil and political and economic, social and cultural rights.

How Could An Optional Protocol To the *ICESCR* Contribute To Local Economic, Social And Cultural Rights Work?

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

Benefits Of An OP-ICESCR *(longer version)*

The Coalition for the Optional Protocol to the *ICESCR* strongly believes the Optional Protocol will benefit individuals, States Parties and the international community through:

BENEFIT ONE: Providing an International Remedial Mechanism for the Infringement of ICESCR Rights

The OP-ICESCR will provide individuals and groups with access to international remedies where Covenant rights have been violated. A right internationally recognized but without an international individual procedure of protection is an imperfect right. Ideally comprising of a communication's mechanism and an inquiry procedure, the Optional Protocol to the ICESCR would possess the potential to significantly contribute towards the realisation of economic, social and cultural rights as enshrined in the Covenant.

Whereas the Optional Protocol communication's mechanism would provide individuals and groups with access to an international adjudicative procedure and remedies concerning specific Covenant violations, the inquiry procedure would empower the CESCR to initiate an investigation into particularly grave ICESCR abuses. The inquiry procedure would strengthen and compliment the proposed Optional Protocol communication's procedure as it would:

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

BENEFIT TWO: Identifying and Clarifying State Party ICESCR Obligations

As demonstrated through the first Optional Protocol to the ICCPR, an OP-ICESCR would contribute, through the development of international jurisprudence, to the further understanding of the rights contained in the ICESCR, to the identification of what constitutes a violation of these rights and to the definition of corresponding State party obligations.

Further, the Optional Protocol would assist in transforming general ICESCR provisions into concrete, tangible and achievable norms. In focussing, through the communications procedure, on specific violations of the rights of the individual, the Committee would provide States parties with guidance as to their Covenant obligations in actual situations. These recommendations in turn could constitute guidelines for the effective domestic implementation and promotion of economic, social and cultural rights as contained in the Covenant.

BENEFIT THREE: Assisting States Parties in Protecting and Promoting Covenant Enshrined Rights

The elaboration of an OP-ICESCR will encourage States parties to take steps towards the full implementation of all rights enshrined in the Covenant. This would mark an important step in strengthening the principle that, through ratification, States parties have committed themselves to progressively realise Covenant rights. Through the promotion of the Optional Protocol's

communication mechanism and inquiry procedure, States parties would be provided with further opportunities to develop the concept of economic, social and cultural rights at the national level, to increase understanding and awareness of these rights and to remedy any existing inequalities in their laws, policies or procedures. The Optional Protocol will encourage the implementation of all the rights enshrined in the Covenant through progressive changes in national law and policy. Such changes will, in turn, trigger an increased recognition of economic, social and cultural rights at all levels of society and assist all, including the most marginalized, to seek and access justice.

BENEFIT FOUR: Encouraging the Development of Domestic Jurisprudence Concerning Economic, Social and Cultural Rights

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

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

The OP-ICESCR will serve to strengthen the relationship between States parties and the Committee by creating an impetus, at the national level, for nations to promote the effective national implementation of ICESCR rights. Through this instrument, States parties will be furnished with incentives to provide detailed information to the Optional Protocol adjudicative body that would serve to strengthen the institutional knowledge of the ICESCR reporting mechanism. Scholars and non-governmental organisations have long noted that one of the major constraints faced by the Committee, in the development of its working practices, has derived from the absence of a provision that requires State party co-operation beyond the submission of periodic reports. The Optional Protocol would thus lead to a new and more involved relationship between the Committee and States parties. Given that the Covenant and its Optional Protocol would comprise the sole specific international communications mechanism dedicated to economic, social and cultural rights, this is of the utmost importance, both for the legal development of the rights at the international level, and for the progressive interpretation and enactment of law at the national level.

BENEFIT SIX: Reinforcing the Universality, Indivisibility, Interrelatedness and Interdependence of All Human Rights

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. The Vienna Declaration mentioned that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." Given the existence of an international communication's procedure concerning the adjudication of ICCPR rights infractions, the creation of an OP-ICESCR would provide States Parties an excellent opportunity to reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights.

BENEFIT SEVEN: Increase Public Awareness of Economic, Social and Cultural Rights

The OP-ICESCR would place a renewed emphasis on economic, social and cultural rights nationally and internationally. The publication of communications, inquiries and views of the CESCR would serve to promote public awareness, nationally and internationally, of the human rights standards enshrined in the *ICESCR*. This has been the case with communications submitted under existing complaints procedures and in particular, communications under the first Optional Protocol to the *ICCPR*.

Key Issues Regarding The OP-ICESCR

ISSUE ONE: ESC rights are not capable of being applied by judicial bodies. They are not justiciable.

One of the major arguments used against an OP to the ICESCR is that ESC rights are not justiciable and, as a result, cannot be the object of an individual complaint procedure. Developments at the domestic and regional levels show, on the contrary, that ESC rights can be subjected to the scrutiny of a court of law or another judicial or quasi-judicial entity.

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

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

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

ISSUE TWO: ESC rights are too vague to be applicable to a case-based complaint procedure

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

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

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

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

ISSUE THREE: ESC rights involve questions of resources allocation and public policy that should not be dealt with by courts

Suggestions that matters involving the allocation of resources and public policy questions should be left to the political authorities rather than the courts relate to the concern that the judiciary should not intervene in such fields, which are said to be the exclusive domain of governments.

First, it is important to remember that, as it is the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. In this respect, when national courts have intervened to order that specific programme or policy be implemented, the orders have, in most cases, given a wide degree of discretion to the government to devise the appropriate response. For instance, the Bangladesh High Court noted in 1999 that in order to fulfil the basic rights of equality, life and livelihood, the government had to complement its project to demolish slum-dwellings in Dhaka with a plan to rehabilitate the dwellers and that the project needed to be carried out in stages with reasonable notice given to evict.^[16] With regard to the progressive realisation of ESC rights, courts have shown the capacity to set boundaries for their intervention. For instance, the Swiss Federal Court has said it lacked the “competence to set priorities in allocating resources” but would intervene if the legislative framework failed to ensure constitutional entitlements.^[17]

Secondly, while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters with important resource implications. The adjudication of civil and political rights, as well as many other legal rules such as trade law, regularly impinges upon the political options of governments, notably with regard to the allocation of resources. Indeed, while judges should respect the division of competences between the various branches of government, it is important to recognise that their decisions frequently have budgetary consequences.^[18] For instance, the right to a fair trial necessitates significant financial investments in court systems, and frequently legal aid.^[19] Similarly, the protection against torture and other forms of cruel, inhuman or degrading treatments also requires financial prioritization in terms of police training, construction of prison facilities, protection of the victims, etc. While it is obvious that the realisation of civil and political rights involve allocation of resources, the related costs are often not considered because the institutions are already in place.

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

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

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

While ESC rights may often involve significant issues of resource allocation, over-emphasizing this aspect of ESC rights may sometimes serve to obscure the serious issues of injustice which leave large segments of society without access to work, education or adequate food, clothing and housing. It is often only from the standpoint of dominant groups that ESC rights claims appear as demands that governments “provide” for particular needs rather than as demands that government decision-making conform with the recognition of the equal dignity and worth of all members of society.

For example, a demand by people with disabilities that resources are allocated for the provision of wheelchair ramps in public buildings is only necessary when buildings have been designed as if people with disabilities did not exist. Any attempt in the OP to weaken remedies or exclude rights that involve resource allocation is likely to exclude the most disadvantaged groups and the most critical aspects of injustice from effective review. Often these issues are precisely the ones which require the consideration of individual complaints in order to understand the link between government decision-making and individual dignity and security.

Because of their important implications for human rights, resource allocation decisions have never been excluded from human rights review, either domestically or internationally. To the extent that decisions affect the enjoyment of human rights they must be subject to review for compliance with human rights standards. No category of decision-making can be exempt from review. When the rights and survival of so many are at stake in these decisions, however, it is important that they not be considered exempt from serious review for compliance with human rights norms.

There are considerations in human rights review of resource allocation to which courts and other adjudicative bodies must be, and have been sensitive. These relate primarily to polycentricity and competing rights. If, for example, in the consideration of complaints under the OP, the Committee were to rush to find a violation of the right to education and recommend that significant resources be allocated to fulfilling that right, without considering competing needs for resources to fulfil the right to adequate food, clothing, housing and medical care, the decisions of the Committee would have little credibility.

This is no different from the need for the consideration of competing rights and needs in the adjudication of other human rights, for example, balancing the rights of accused with the rights of victims and of other members of society, or the rights of those vulnerable to hate speech with the right to freedom of expression. Human rights adjudication is, by its very nature, complicated by these types of competing concerns. It is by developing and demonstrating competence in adjudicating these types of disputes, and exercising appropriate institutional restraint, that courts and other human rights institutions are able to win the respect of both rights claimants and governments.

With increasing numbers of jurisdictions making ESC rights justiciable at the domestic level, courts have shown that they are capable of developing meaningful standards by which to review resource allocation decisions against the requirements of ESC rights, without usurping the role of legislatures or ignoring the importance of the many competing demands on resources that are faced by governments.

If the OP were to suggest that resource allocation decisions are inherently 'political' and on this account exempted this category of decision-making from complaints of violations of rights, the restriction would represent an unprecedented attack on the supremacy of human rights and the rule of law, and would discriminate against groups that are most in need of access to the complaints procedure the protection of the ICESCR.

ISSUE FOUR: Judicial remedies are not effective in realising ESC rights

It is sometimes argued that judicial or quasi-judicial remedies alone cannot bring about systemic changes necessary for the complete realisation of ESC rights.

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

As judicial or quasi-judicial entities look at specific cases of human rights violations, judicial or quasi-judicial remedies will always be limited in term of their ability to address or change a whole country situation. In this regard, such limitation applies irrespectively to civil and political rights, as well as to economic, social and cultural rights. For instance, it is unlikely that a decision of the Human Rights Committee on a torture case in a given country will be effective in putting a stop to an institutionalised

practice that is taking place throughout the country in question. Indeed, it is more the conjunction of different actions and factors that can trigger change in a given situation and can prove effective in realising economic, social and cultural rights as well as civil and political rights. Judicial or quasi-judicial remedies play, in this respect, a crucial role.

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

ISSUE FIVE: A complaint procedure for ESC rights would imply a huge financial burden for States

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

However, in many instances, the realisation of ESC rights does require restraint by governments, i.e. refraining from certain behaviour or regulating the actions of third parties. As mentioned in General Comment No. 12 of the CESCR, the *International Covenant on Economic, Social and Cultural Rights* impose three different types of obligations on States: the obligations to respect, protect and fulfil.^[20] Under the obligations to respect and protect States have to refrain from interfering with the enjoyment of ESC rights and to prevent violations of these rights by states agents or abuses by third parties.^[21] In both cases, the realisation of ESC rights does not impose huge financial burden upon States, as it does not imply the adoption and implementation of expensive programme or measures. Furthermore, the Optional Protocol providing for a complaint mechanism will be per se a procedural instrument and does not introduce new obligations others than the ones that states have already accepted by the ratification of the ICESCR.

More generally, state obligations under the ICESCR are subject to available resources. In that context, domestic courts and regional bodies have demonstrated that they are able to assess requirements in relation to the financial burden imposed and to assess these obligations without imposing unmanageable financial burdens on states lacking necessary resources.

ISSUE SIX: A complaint procedure for ESC rights would create new ESC rights and corresponding new obligations for States

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

First of all, as indicated by its name, the OP to the ICESCR will remain an option for States. In other words, States will not be obliged to ratify such instrument.

Secondly, the OP-ICESCR will not create new ESC rights and corresponding obligations for States but a new complaint procedure for rights and corresponding obligations that already exist under the *ICESCR*. In this regard, the procedure created by an OP to the *ICESCR* will not be different that the ones existing under the First Optional Protocol to the *International Covenant on Civil and Political Rights (ICCPR)*, the *Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Elimination of Racial Discrimination* or the Optional Protocol to the *Convention on the Elimination of Discrimination against Women*.

ISSUE SEVEN: A complaint procedure for ESC rights would compete or conflict with other complaint procedures

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

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

In examining the issue of complementarity between the proposed Optional Protocol and other international and regional complaint's mechanisms adjudicating over economic, social and cultural rights infractions, it is acknowledged that some degree of overlap exists between the proposed instrument and existing regional and international complaint's procedures. That said, existing international and regional economic, social and cultural rights complaint's mechanisms are fairly limited in terms of the subject matter that they are competent to adjudicate over and/or the complainants provided with standing, (the capacity to submit a communication). Here, for example, an International Labour Organisation complaint's mechanism primarily confines itself to communications from governments, workers' and employers' organizations concerning allegations that member States are not respecting basic freedom of association principles while a UNESCO complaint's procedure entertains only a narrowly defined class of complainants and the process is confidential. Given the structural constraints of existing economic, social and cultural rights complaint's mechanisms, access to these procedures is limited, either in terms of the economic, social and cultural rights covered and/or in terms of the individuals/groups competent to lodge a complaint.

Overlap between the rights covered by different individual complaint mechanisms is common in the realm of civil and political rights and does not seem to create problems or to raise concerns in that field. For instance, the Committee Against Torture is authorised, under Article 22 of the *Convention against Torture* (CAT), to receive complaints from individuals who claim to be victims of a violation of the provisions of this Convention by a State party that has made a declaration under this Article. This provision does not prevent the Human Rights Committee from receiving individual complaints regarding alleged violations of Article 7 of the ICCPR, under the Optional Protocol to this Covenant. Neither does it prevent the Inter-American Commission, the Inter-American Court, or the European Court on Human Rights to look at individual complaints related to torture and other cruel, inhuman or degrading treatment. Moreover, the right to freedom of association, covered by the Optional Protocol to the ICCPR, has not been excluded from the individual complaint procedure on the grounds of overlap with the ILO Committee on Freedom of Association. Similar examples could be given with respect to other individual complaints mechanisms, including the *Convention on the Elimination of Discrimination against Women* (CEDAW) and the *Convention on the Elimination of all Forms of Racial Discrimination* (CERD).

The OP mechanism will be complementary to other procedures, it would not compete or conflict with other procedures. For example, the OP to CEDAW only covers sex discrimination; the OP to ICCPR mainly addresses civil and political rights; regional mechanisms do not cover Asia and the Pacific; the Inter-American system only provides for individual communications in relation to education and forming and joining trade unions; and in Europe the *à la carte* system does not cover all ESCR and does not provide for individual communications. Additionally, if an OP were to be adopted, it will complement the existing procedures within specialised agencies. Indeed it would deepen the existing cooperation between the CDESCR and UNESCO and ILO.

Further, potential duplication of work between these different mechanisms has not created problems or raised potential concerns because all these procedures contain clauses preventing the examination

of a case that would be, at the same time, under consideration by another procedure of international or regional settlement or investigation.

The interdependence, indivisibility and interrelatedness of all human rights, reiterated in the Vienna Declaration and Programme of Action adopted by the Second World Conference on Human Rights in 1993, requires that the same standards be applied equally to economic, social and cultural rights and civil and political rights.^[22] In this respect, the Draft OP to the *ICESCR* follows the same approach as its civil and political rights predecessors concerning the 'examination clause', stipulating that an individual complaint cannot be examined concurrently by more than one mechanism. The interdependence, indivisibility and interrelatedness of all human rights also highlights the need that a complaint procedure for ESC rights be able to look at the full range of economic, social and cultural rights.

Questions And Answers

Why Is An '*à la carte*' Approach Problematic?

During the debates at both sessions of the Open-Ended Working Group and at other inter-sessional forums, there appears to have been little or no agreement as to the meaning of the so-called "*à la carte*" approach. Rather, it appears that there are many different variations of "*à la carte*" approaches to an Optional Protocol that have been suggested.

The NGO Coalition considers that any *à la carte* formula would undermine the indivisibility of human rights and would be extremely detrimental to the realisation of ESC rights. Any of the proposed *à la carte* approaches would represent serious assaults on the integrity and inter-dependence of Covenant rights, and on the principle that the OP should enhance the implementation of the Covenant and promote access to effective remedies rather than restricting the scope or application of any aspects of the Covenant.

Many of the rights contained in the Covenant are already justiciable at the domestic level. A failure to protect their justiciability at the international level would be a step backwards, which could have disastrous consequences domestically. Likewise, in many jurisdictions all components and levels of obligations of the rights have been recognized as justiciable. Any exclusion of components or levels of obligations of Covenant rights from the OP would thus be a step backwards. Any options being considered under the rubric of an *à la carte* approach would result in difficulties in the domestic implementation of the OP-ICESCR as it would suggest that certain aspects of Covenant rights need not be subject to effective remedies. This negative message that would result would undermine efforts to improve and enhance domestic implementation of the Covenant and would result in inconsistent and inadequate domestic remedies for violations of rights in the ICESCR.

For example, state signatories to the Covenant currently hold obligations to respect, protect and fulfil all rights contained in the Covenant. In some countries, these obligations can be upheld and tested in national courts, and in other countries international obligations such as these are used as important measures for guiding domestic jurisprudence. If an Optional Protocol was adopted whereby violations of some rights are subject to review and others not, it would undermine the perceived justiciability of those rights excluded from such a procedure, significantly impacting the ability to enforce these rights at a national level.

An *à la carte* approach would also seriously undermine the integrity and effectiveness of the jurisprudence developed under the OP itself, as it would be unclear to what extent decisions and reasoning was affected by the particular constellation of rights chosen by the state party, and the Committee would be forced to treat rights in compartmentalized fashion, rather than as interdependent and integrated into the Covenant as a whole.

Any attempt to divide economic, social and cultural rights into 'justiciable' and 'non-justiciable' components would undermine the integrity and inter-dependence of all human rights, thwart positive developments at the domestic and regional levels recognizing the justiciability of economic, social and cultural rights, and create unworkable distinctions as to the admissibility of communications based on the exact and distinguishable violation in question. Further, it would prevent victims of certain types of rights violations from receiving restitution, compensation and other remedies, and limit the ability of victims to seek remedies for the full range of violations they may suffer. It would create a discriminatory exclusion of some categories of victims from the complaints procedure that would be contrary to the principle in Article 2 requiring the equal enjoyment of Covenant rights without discrimination.

The difficulty and confusion of an *à la carte* approach is evident in the way in which there is little or no agreement as to what such an approach would even entail at the outset. A so-called "*à la carte* approach" might take different forms. For example:

(A) One approach could require States parties to indicate which provisions of the Covenant *would not* be covered by the procedure they have accepted by becoming a party to the Optional Protocol. Each

State would thus have to “opt out” in relation to specified provisions if it wishes to avoid the application of the Optional Protocol in relation to all of the rights recognized in the Covenant.

(B) A second approach could require States to “opt in” to the procedure in relation to provisions of the Covenant which they would specify upon becoming a party to the Protocol. This selective approach might also take two forms (i) States may be able to select the *rights* included in the Covenant in relation to which a communication would be accepted &/or (ii) States may be able to identify the *elements* of the rights in relation to which it would accept the communications procedure. For example, in regard to Article 11 the State could accept the procedure only in relation to the right to an adequate food.

(C) A third approach could be one whereby the Optional Protocol itself indicates the rights or the elements of the rights for which it would be possible to submit communications.

(D) A fourth approach could restrict the Optional Protocol to complaints alleging “grave and systematic violations”.

(E) A fifth approach could involve the Committee assessing violations of only the “minimum core obligations”

(F) A sixth approach could frame an Optional Protocol that only addressed violations of economic, social and cultural rights through a discrimination framework (i.e. only violations of ESCR on the basis of discrimination would be subject to review).

(G) An seventh approach could involve an Optional Protocol being established to address only some levels of obligations (for instance only the respect level, and not the protect or fulfil levels).

No doubt more approaches could be added to this list, but what remains clear is that the so-called “à la carte approach” is not one option, but many. The NGO Coalition considers that all of these options are unacceptable.

None of these options is either workable or acceptable. Determinations as to what constitutes ‘grave or systemic violations’ or ‘minimum core obligations’, if made into determinations of admissibility of complaints, are not only fraught with difficulty and imprecision. Such restrictions would almost certainly have discriminatory consequences, and create arbitrary exclusions from the complaints process. Grave or systemic violations or core content violations, for example, would likely be applied more frequently to developing countries lacking available resources. Complaints alleging violations found in more affluent countries would be less likely to meet admissibility standards. Many of the situations in which remedies may be more readily achievable through available resources would be excluded, seriously undermining the effectiveness of the procedure.

The practical unworkability of such approaches is clear. For example, to address a communication on the basis of whether a ‘core minimum obligation’ has been violated or not requires an even greater level of analysis on the part of the Committee than a simple determination of whether the right has been violated. Likewise, to adopt an approach that would consider only violations of some levels of obligations, for example the obligation to protect, makes no practical sense from the perspective of victims. While the typology of respect, protect and fulfil is useful for interpretation, it has little relevance to real victims of violations of ESC rights.

Any use of the “respect, protect, fulfil” typology of obligations developed by the CESCR to clarify general dimensions of obligations to deny access to the OP complaints procedure would be a perverse and discriminatory application of the typology. The different dimensions of obligation are by no means exclusive, and it would be virtually impossible to make determinations of admissibility on this basis without creating appearances of arbitrariness. A consideration of the complex claims that have been adjudicated at the domestic level, for example, dealing with access to HIV-AIDS medication or housing programs that do not attend adequately to the needs of the homeless, demonstrates that most ESC rights claims often span all three dimensions of obligations. Thus, the result may be that most complaints would be admissible, but the consideration of the complaint and of appropriate remedies would be distorted by restrictions in the scope of the OP.

Restricting the OP to allegations of discrimination or to severe deprivations that threaten the right to life would simply duplicate procedures already available under the ICCPR and other Covenants.

Jurisprudence emerging from such restrictive admissibility requirements would provide little or no guidance to states parties about how to provide effective remedies to other aspects of Covenant rights.

The only acceptable option is to adopt an Optional Protocol that is comprehensive in scope in terms of the rights and levels of obligations that are subject to it. Restricting the scope and application of the OP would indirectly give validity to attempts by states parties to limit their accountability to certain rights or components of the Covenant. It would permit the continued exclusion of the most disadvantaged victims of human rights violations from any complaints procedure and institutionalise a second class status for economic, social and cultural rights. The NGO Coalition emphasizes that any of the range of options that have been discussed under the heading of the so-called *à la carte* approach would compromise basic principles of human rights and undermine the equal status of economic, social and cultural rights in the UN system.

What About Self-Determination – Should This Be Included In The OP-ICESCR?

The NGO Coalition considers that it is neither necessary nor desirable to exclude the right to self determination from consideration under an OP-ICESCR. The right to self-determination is recognized in exactly the same terms in Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) and is subject to communications under the first Optional Protocol to that Covenant. However, the Human Rights Committee has, in its practice, adopted a completely restrictive approach to its application in relation to the communications procedure. The OP-ICESCR should not be drafted to exclude self determination, but rather the possibility of hearing communications related to violations of this right should be left open to the CESCR to determine in accordance with the Covenant and the procedural rules of the Optional Protocol.

As the NGO Coalition supports an OP-ICESCR which gives standing to groups of individuals, it is hoped that a less restrictive approach to the admissibility of communications including issues of self determination will be taken by the CESCR than is currently taken by the HRC. The right to self-determination is of critical importance to indigenous people in particular, who frequently ask that other Covenant rights be interpreted and applied inter-dependently with the right to self-determination and the right of access to land and resources through which to fulfil Covenant rights. Excluding Article 1 from the Optional Protocol would seriously damage the value and integrity of the communications procedure for these and other groups.

What About Friendly Settlement or Mediation – Should This Be Included In The OP-ICESCR?

The NGO Coalition does not preclude the possibility that the OP may include provision for the parties to reach an amicable solution on the issue, based on the respect of human rights and the requirements of the *ICESCR*. Attempts to achieve settlement between the parties, however, should not be permitted to thwart the broader purposes of the Covenant. In addition, attempts to promote amicable settlement must not be allowed to prejudice the subsequent consideration of a communication/complaint should mediation fail.

In light of these concerns, mediation and settlement procedures should comply with the following minimum requirements. They must:

- (a) be optional;
- (b) be limited in time;
- (c) be without prejudice;
- (d) be disclosed only to designated staff or members of the Committee, and not placed before the same members of the Committee who may later review the communication if the mediation should fail; and
- (e) the terms of settlement should be subject to review and approval by the Committee, and must also be subject to follow-up procedures. This is essential to ensure that the settlement reached is in accordance with the Covenant and properly implemented.

Should a mediation or amicable settlement provision be included within the Optional Protocol, it is vital that this be included only as part of a broader communication procedure, and not viewed as an alternative to a complaint/communication mechanism which takes the more traditional form such as those provided for in relation to the other human rights treaties. An amicable settlement mechanism on its own, without allowing for the possibility of resorting to a "full communication" should the mediation fail, establishes a system whereby there is little or no incentive for states to enter into such negotiations in good faith or with the intention of providing appropriate redress for the violation in question.

How Should International Cooperation & Assistance Be Addressed?

The NGO Coalition considers that the issue of international cooperation and assistance could be addressed either under an inter-State complaint mechanism or a communications and inquiry mechanism.

Under a communications mechanism the Committee would need to assess if, in a concrete case, the alleged victim(s) has suffered a violation of his/her Covenant rights due to an action or omission which can be attributed to a State party to the Covenant. There must be a causal link between the State action and the violation of the victim's rights.

The communications procedure would enable individuals and groups of individuals to file complaints before the Committee. The individual communications would refer to specific violations of the rights guaranteed in the ICESCR. It would also allow them to seek redress for violations of ESC rights that generally go unnoticed at the national level.

An inquiry procedure would allow the Committee to investigate, on the basis of reliable information received or on its own initiative, situations that appear to constitute a consistent pattern of gross and systematic violation of human rights.

What Impact Will The UN Reform Process Have Upon the OP-ICESCR?

For all of 2005 the UN has been preoccupied with the issue of reform. For our purposes, the proposed reform of the Commission on Human Rights has some impact. Governments have agreed that the Commission on Human Rights will be replaced by a new Human Rights Council, however the details about how the new Human Rights Council will operate (what its mandate will be, when it will meet, who will be members, etc) are as yet still undecided. The Chair of the General Assembly (where these decisions will ultimately be made) is hoping that governments will be able to negotiate a decision on some or all of these questions by the end of 2005. Until then, everything is still very much up in the air!

In many ways, many of these procedural details regarding the operation and functioning of the new Human Rights Council will have little impact upon the work of the OP-ICESCR Working Group – it just means that in future, decisions about the OP-ICESCR will be made by the Council rather than the Commission, and it will be Council members we need to engage with in particular rather than Commission members, etc.

However, where this is particularly relevant for the OP-ICESCR process in the short term is in relation to moving the Working Group forward towards drafting an OP-ICESCR. In light of the much-hoped support that will be shown in the next Working Group for work to begin on drafting an OP, we as NGOs have, to date, been working on the expectation that a vote will be taken at the next Commission regarding a proposal to extend and expand the mandate of the Working Group. As the mandate of the Working Group expires after this next session, something needs to be done to continue its work, or else the discussions at the UN regarding an OP-ICESCR will cease. In the negotiations around the Commission reform issue and the move to the new Human Rights Council, many countries have been focused on ensuring that at the very least the Council takes over responsibility for *all* of the current

mandates of the Commission (i.e. working groups and other special procedures such as the Special Rapporteurs and Independent Experts). This would ensure that the issue remains active at the UN. However, the way in which they are seeking to protect these mandates is to support the idea that there should be one final Commission which would be purely procedural in nature, which would meet for a short period of time (less than the regular 6 weeks), with the primary purpose of renewing all mandates and transferring the work of the Commission (and all its mandates) to the new Human Rights Council. Then, when the Council meets for the first time (the question as to when is still undecided), it would be up to the Council to take over decisions regarding the duration and scope of mandates, such as that of the OP-ICESCR Working Group,

In essence, the idea of a purely procedural Commission, one which would transfer the mandates to the Council (and thereby protect their continuation), is not hugely problematic, and indeed, many NGOs support this. Where this becomes somewhat problematic for our purposes is that it potentially may not allow for the mandate of the Working Group on the OP-ICESCR to be changed in order to allow the Working Group to begin drafting an OP. This would mean that we may end up having an extension of the current mandate (this is positive in terms of continuing the work of the Working Group, but to continue discussions around the current mandate and not progress to drafting would instead be a step backwards as we lose the momentum and interest that has been generated thus far).

The NGO Coalition is approaching this potential problem in two ways:

- (a) First, we have always maintained that the current mandate of the Working Group (which requests the Working Group to meet with "*a view to considering options regarding the elaboration of an OP-ICESCR*") does not, per se, preclude the ability to draft an OP-ICESCR. However, there are a number of key states who made it clear in the original negotiations for this mandate that, in their view, this mandate would not allow the Working Group to begin drafting an OP. Thus while we will continue to hold the view that the current mandate is and should be sufficient to let the work of drafting begin, we recognise that this is not the easiest or preferred approach to adopt, and that a clear mandate for drafting is preferable.
- (b) The main approach we are adopting is that we are working with supportive states to ensure that in the negotiations for the transfer of mandates to the Council that the important issue of the work of this Working Group (and its need to progress to drafting an OP) is not forgotten. We are hoping that the Resolution of the General Assembly that is eventually agreed upon will still allow for some mandates (i.e. in particular this one), to be amended before being simply renewed and transferred, and that therefore there will be a need for the Commission on Human Rights to address some elements of substance regarding mandates such as this. Thus we are asking for this mandate to be dealt with slightly differently to others, allowing for the mandate to be changed and for the work to continue in a progressive manner, rather than simply a procedural renewal of the same mandate. At this stage we believe we have the support of some key states on this.

The negotiations and discussions surrounding the reform issue, and in particular the issue of the procedures that will be adopted for transferring mandates to the Council, are still ongoing, and so no clear decision has been made yet. Thus the potential impact upon the work of our Working Group is unknown. Whether there will be another Commission on Human Rights, and if so when it will be held, for how long it will meet, or what decisions it will make, are all still unanswerable questions. When further information is available about the impact this will have upon the work of the NGO Coalition & the future of drafting an OP-ICESCR, the NGO Coalition Steering Committee will communicate this to the Coalition email list.

What Impact Will The Treaty Body Reform Process Have Upon the OP-ICESCR?

Another process which has been undergoing consideration by the United Nations members for some time now is Treaty Body reform. Various proposals, including from the High Commissioner for Human Rights, have been raised, notably suggesting reforming of the existing 7 human rights treaty bodies and their functions into one unified Treaty Body. No doubt many members of our NGO Coalition hold

differing opinions about the advantages and disadvantages of such a proposed change, as well as the procedural aspects regarding the operationalisation of this idea.

For the purposes of our focus on promoting the equal protection and promotion of civil, cultural, economic, political and social rights, the NGO Coalition continues to advocate for the adoption of an OP-ICESCR as a prerequisite to any Treaty Body reform resulting in a unified Treaty Body. We believe that in relation to the role the Treaty Bodies play in receiving and adjudicating communications, it is vital that any unified Treaty Body be able to hear complaints regarding *all* human rights. In this regard, the lack of an existing communications procedure could jeopardise the future scope for protection of ESC rights if only the currently existing mechanisms are reformed into a unified body. While there are many advantages that could be gained from one body dealing with all human rights in a way that reinforces the indivisibility and interrelatedness of all human rights, these advantages will not be enjoyed unless the unified body has the competence to hear complaints about economic, social and cultural rights violations as well as civil and political rights violations.

Thus the drafting and adoption of an OP-ICESCR will be a necessary step before Treaty Body reform is possible – without the adoption of an OP-ICESCR any unification of the existing mechanisms will further entrench the hierarchy between the two “generations” of rights. Treaty Body reform has the potential to aid in reinforcing our goal of better protecting and promoting economic, social and cultural rights, but only if the reformed Treaty Bodies (or a unified Treaty Body) can deal with economic, social and cultural rights as thoroughly as it can deal with civil and political rights.

Toolkit On ESCR Justiciability

Can courts enforce economic, social and cultural (ESC) rights? Should UN treaty committees be able to give an opinion that a State has violated such rights and recommend appropriate action to remedy the violation? These questions are frequently raised during discussions on establishing a complaints mechanism through an Optional Protocol to *the International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

A number of common myths reflect misunderstandings of both the nature of economic, social and cultural rights and of the role of courts and other bodies in adjudicating them.

Myth

Adjudicating ESC rights is not an appropriate or legitimate role for courts or other bodies since it involves making policy decisions that are properly the function of democratically elected parliaments.

Reality

Adjudicating ESC rights claims does not require courts to take over policy making from governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases, courts and other bodies adjudicating ESC rights review government decision-making, to ensure consistency with fundamental human rights. Holding governments accountable to human rights enhances democracy. It does not undermine it. In reality, a great number of States have legislation, even at constitutional level that protects ESC rights and establishes procedures for its protection before the courts of justice or other state bodies. It has not affected the competency of the other public powers, although it can have an influence in the design, implementation and correction of laws and policies that are not in conformity with the international obligations of the State.

Myth

ESC rights require governments to 'give everyone houses' to comply with the right to housing or 'buy everyone expensive medicines' to comply with the right to health. Making these rights justiciable will bankrupt governments.

Reality

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

Myth

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

Reality

In a great number of countries, National Courts regularly order remedies for unjustified interference with or the denying of ESC rights (for example, dismissal from employment, forced evictions, discrimination in the rights to education) and have increasingly demonstrated their capacity to contribute to a best understanding about the reach, nature and extension of these rights, through their

jurisprudence and decisions, and to contribute to the progressive realization of ESC rights. They play a critical role, especially in protecting the rights of vulnerable groups or persons who may be overlooked or treated unfairly in ways which deny them equal enjoyment of economic, social and cultural rights.

“To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.”^[23]

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

Further Reading

Committee on Economic, Social and Cultural Rights, General Comment Number 9: The Domestic Implementation of the ICESCR.

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

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

Toolkit On Government Obligations

The Obligation To Ensure Non-Discrimination & Equality

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

Example 1: *Brown v. Board of Education (USA)*

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

Example 2: *Eldridge v. BC (Canada)*

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

The Obligation To Respect

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

Example 3: *ASK v Bangladesh*

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

The Obligation To Protect

Private actors, individuals or corporations, often impede or deny access to ESC rights. Regional human rights bodies have regularly assessed whether States have complied with their duty to protect individuals from such violations: see Examples 4 and 5.

Example 4: *ICJ v. Portugal*

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

Example 5: *SERAC v. Nigeria*

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

The Obligation To Fulfil

Lastly, courts can play an active role in monitoring States' progress in fully realising the rights by hearing complaints about the failure to make reasonable plans, allocate the necessary and available

resources, and implement and monitor appropriate policies and programs. They may also require States to define and achieve progressive benchmarks for the fulfilment of ESC rights.

Example 6: *Grootboom v South Africa*

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

Further Reading

Committee on Economic, Social and Cultural Rights, General Comment Number 9: The Domestic Implementation of the ICESCR.

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

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

Main Developments In Relation To The OP-ICESCR

The Work Of The Committee On Economic, Social And Cultural Rights

In 1990 the Committee on Economic, Social, and Cultural Rights started discussing the possibility of drafting an Optional Protocol to the ICESCR.

Later, in 1993, the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action. The Declaration reaffirmed that “all human rights are universal, indivisible and interdependent and interrelated” and went on to declare that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”. Moreover, the document encouraged “the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights”.

By 1996 the Committee on ESCR had finalized a draft Optional Protocol that was presented for consideration to the Commission on Human Rights in 1997. In its decision 1997/104 of 3 April 1997 the Commission on Human Rights requested the Secretary-General to transmit the text of the draft optional to Governments and intergovernmental and non-governmental organizations for their comments for submission to the Commission on Human Rights. Only a handful of Governments submitted their comments.

The Work Of The Independent Expert

In 2001 the Commission on Human Rights decided to nominate an Independent Expert on the question of a draft Optional Protocol to the ICESCR. Mr. Kostrane, the Independent Expert, submitted his first report in 2002, declaring himself in favor of the adoption of an Optional Protocol to the ICESCR. The Commission on Human Rights renewed his mandate to allow him to study in greater depth the nature and the scope of States parties obligations under the ICESCR, the question of the justiciability of ESCR, and finally the question of the benefits and practicability of a complaint mechanism under the ICESCR and the issue of complementarity between different mechanisms. The Commission also decided that a working group “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights” would be established in 2003.

In 2003 Mr. Kostrane, submitted his second report recommending that the Commission adopt a resolution establishing an open-ended working group “with a view to considering options regarding the elaboration of an optional protocol to the ICESCR”. In his report, Mr. Kostrane highlighted that there is no longer any doubt regarding the justiciable nature of ESC rights and that States’ obligations under the ICESCR include each State’s duty to respect, protect and actively realize ESC rights.

The Commission on Human Rights decided to establish a working group “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights”

The First Meeting Of The Open-Ended Working Group 23 February – 5 March 2004

In 2003, the United Nations Human Rights Commission established an Open-Ended Working Group with a view to “*considering options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*” (the ICESCR).

This Working Group, chaired by Portugal, met in Geneva from 23 February to 5 March 2004. States, NGOs, international organisations and ESC rights experts participated in the Working Group discussions.

The discussions focused on issues such as the nature and scope of States Parties' obligations under the ICESCR, the justiciability of ESC rights, as well as the benefits of an Optional Protocol to the ICESCR and its complementarity with other existing mechanisms. Reference was also made to the international dimension of ESC rights, as well as to the principle of international cooperation and technical assistance.

Although some delegations were strongly in favour of establishing an Optional Protocol to the ICESCR,^[24] others expressed concern, notably with regard to the justiciability of ESC rights (both at the national and international levels), the question of resources, the meaning of "*maximum available resources*", and issues related to the cost of implementing ESC rights. Another issue raised was that a complaints procedure related to ESC rights might unduly interfere in the democratic process and national policy-making with regard to political, economic and budgetary priorities. Some delegations also questioned whether the Committee on Economic, Social and Cultural Rights (CESCR) would be competent to receive complaints under an Optional Protocol without amending the ICESCR.

Those delegations in favour of an Optional Protocol stressed that a complaints mechanism would ensure more effective local remedies, promote the development of international jurisprudence, strengthen international accountability, and empower vulnerable and marginal groups. Discussion also focused on the question of which rights should be covered by an Optional Protocol and whether a comprehensive or an *à la carte* approach should be adopted.

NGOs forming part of the International Coalition for an Optional Protocol to the ICESCR stressed the need to move towards the adoption of an Optional Protocol, considered as a valuable tool to redress injustice and provide compensation to potential victims of ESC rights violations. They also stressed that adjudicating ESC rights claims does not require courts to take over policy making from governments, that courts regularly order remedies for the unjustified interference with ESC rights, and that they have increasingly demonstrated their capacity to monitor the progressive realization of the rights through the implementation of appropriate programs and policies.

After two weeks of deliberations, the Working Group adopted a report highlighting the discussions.^[25] Unfortunately, the United States blocked consensus on the Chair's recommendation and conclusions, which included a request for a two-year renewal of the working group's mandate to consider options regarding the elaboration of an Optional Protocol.

At its 60th session, the UN Human Rights Commission decided to renew, for a two years period, the working group's mandate to "*considering options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*" (the ICESCR).

The Second Meeting Of The Open-Ended Working Group 10 – 21 January 2005

In January 2005, the Working Group met again in Geneva where States, NGOs, international organisations and ESC rights experts participated in the working group discussions.

The discussions focused on issues similar to those outlined above in the description of the first session. Overall, the mood in the second Working Group was more positive, with clearly expressed support for an Optional Protocol from two regional groups – the Group of Latin American and Caribbean States (GRULAC) and the African Group. The Working Group's Report was adopted by consensus. It included a request to the Chair to prepare an "elements paper" for the next session, which would address a wide range of issues to be considered regarding elements of an Optional Protocol (and including the option of no OP at all).^[26]

At its 61st session, the UN Human Rights Commission welcomed the adoption of this report, and requested the Working Group to report again at the 62nd session.

Historical Milestones

- 1990 The Committee on Economic, Social, and Cultural Rights started discussing the possibility of drafting an Optional Protocol to the ICESCR.
- 1993 The World Conference on Human Rights adopted the Vienna Declaration and Programme of Action (UN document [A/Conf.157/23](#)). The Declaration reaffirmed that “all human rights are universal, indivisible and interdependent and interrelated” and went on to declare that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.

Moreover, the document encouraged “the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights”.

- 1996 The Committee on ESCR finalized a draft Optional Protocol that was presented for consideration to the Commission on Human Rights in 1997 (UN document [E/CN.4/1997/105](#)). In its decision 1997/104 of 3 April 1997 the Commission on Human Rights requested the Secretary-General to transmit the text of the draft optional to Governments and intergovernmental and non-governmental organizations for their comments for submission to the Commission on Human Rights. Only a handful of Governments submitted their comments.
- 2001 The UN High Commissioner for Human Rights organizes, in cooperation with the International Commission of Jurists, a two-day workshop on the justiciability of ESCR with particular reference to an Optional Protocol to the ICESCR (the report on the workshop is contained in UN document [E/CN.4/2001/62/Add.2](#)). The same year the Commission on Human Rights decided to nominate an Independent Expert on the question of a draft Optional Protocol to the ICESCR (Commission on Human Rights [resolution 2001/30](#)).
- 2002 Mr. Kotrane, the Independent Expert, submitted his first report declaring himself in favor of the adoption of an Optional Protocol to the ICESCR (UN document [E/CN.4/2002/57](#)). The Commission on Human Rights renewed his mandate to allow him to study in greater depth the nature and the scope of States parties obligations under the ICESCR, the question of the justiciability of ESCR, and finally the question of the benefits and practicability of a complaint mechanism under the ICESCR and the issue of complementarity between different mechanisms (Commission on Human Rights [resolution 2002/24](#)). The Commission also decided that a working group “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights” would be established in 2003.
- 2003 Mr. Kotrane, the Independent Expert, submitted his second report recommending that the Commission adopts a resolution establishing an open-ended working group “with a view to considering options regarding the elaboration of an optional protocol to the ICESCR”. In his report, Mr. Kotrane highlighted that there is no longer any doubt regarding the justiciable nature of ESC rights and that States’ obligations under the ICESCR include each State’s duty to respect, protect and actively realize ESC rights.

The Commission on Human Rights decided to establish a working group “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights”

- 2004 The Working Group established by the Commission on Human Rights in 2004 met during 2 weeks in Geneva - from 23 February to 5 March 2004- with the mandate to consider options regarding the elaboration of an Optional Protocol to the ICESCR. The Working-Group was chaired by Portugal and was attended by States, NGOs, international organisations and ESC rights experts.

The discussions focused on issues such as the nature and scope of States Parties’ obligations under the ICESCR, the justiciability of ESC rights, as well as the benefits of an Optional

Protocol to the ICESCR and its complementarity with other existing mechanisms. Reference was also made to the international dimension of ESC rights, as well as to the principle of international cooperation and technical assistance.

After two weeks of deliberations, the working group adopted a report highlighting the discussions. Unfortunately, the United States blocked consensus on the Chair's recommendation and conclusions, which included a request for a two-year renewal of the working group's mandate to consider options regarding the elaboration of an Optional Protocol.

At its 60th session, the UN Human Rights Commission decided to renew, for a two years period, the working group's mandate to "*considering options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*" (the ICESCR).

2005 The Working Group established by the Commission on Human Rights in 2004 met for a second time during 2 weeks in Geneva - from 10-21 January 2005 - with the same mandate to consider options regarding the elaboration of an Optional Protocol to the ICESCR.

At its 61st session, the UN Human Rights Commission welcomed the report of the second session of the Working Group, and mandated it to report again at the 62nd session of the Commission.

Reference Documents

All of these documents are available by clicking on the relevant hyperlinks:

Document	English *	French *	Spanish *
<i>International Covenant on Economic, Social and Cultural Rights</i> (1966)	click here	click here	click here
Independent Expert's first study on an Optional Protocol (2002)	click here	click here	click here
Independent Expert's second study on an Optional Protocol (2003) [E/CN.4/2003/53]	click here	click here	click here
Independent Expert's second study on an Optional Protocol – corrigendum (2003) [E/CN.4/2003/53/Corr. 1]	click here	click here	click here
Report of the Committee on Economic, Social and Cultural Rights on a Draft Optional Protocol (1996) [E/CN.4/1997/105]	click here	click here	click here
Report from the First Session of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR (2004) [E/CN.4/2004/44]	click here	click here	click here
Report from the Second Session of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR (2005) [E/CN.4/2005/52]	click here	click here	click here
Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the UN system	click here	click here	click here

- Report of the Secretary-General (2005) [E/CN.4/2005/WG.23/2]			
Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the Charter of the UN (1997) [E/CN.6/1997/4]	click here	click here	click here
Selection of case law on economic, social and cultural rights – Note by the Office of the High Commissioner for Human Rights (2005)	click here	click here	click here
Selection of case law on economic, social and cultural rights – Note by the Office of the High Commissioner for Human Rights (2004)	Not online – provided upon request (email info@escrprotocolnow.org)	Not online – provided upon request (email info@escrprotocolnow.org)	Not online – provided upon request (email info@escrprotocolnow.org)
Commission on Human Rights resolution on the question of economic, social and cultural rights (2003)	click here	click here	click here
Commission on Human Rights resolution on the question of economic, social and cultural rights (2004)	click here	click here	click here
Commission on Human Rights resolution on the question of economic, social and cultural rights (2005)	click here	click here	click here
Sub-Commission Resolution on an Optional Protocol to the ICESCR (2003)	click here	click here	click here
Committee on Economic, Social and Cultural Rights General Comment 3 on The nature of States parties'	click here	click here	click here

obligations (art.2 (1))			
Statement by the High Commissioner for Human Rights to the Open-Ended Working Group (2005)	click here	N/A	N/A
Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986)	click here	click here	click here
Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)	click here	click here	click here
Report of the European Roundtable on Economic, Social and Cultural Rights, Hosted by the Government of Portugal and the International Commission of Jurists (2004)	click here	N/A	N/A
Report of the International Conference on Economic, Social and Cultural Rights, Hosted by the Republic of Croatia and the International Commission of Jurists (2003)	click here	N/A	N/A
Report of the Expert's Roundtable Concerning Issues Central to the Proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, hosted by the International Commission of Jurists (2002)	click here	N/A	N/A
Report of the Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,	click here	N/A	N/A

hosted by the International Commission of Jurists (2001)			
Written Submission to the Open Ended Working Group by NGO Coalition for an OP-ICESCR (2004)	click here	click here	click here
Written Submission to Open Ended Working Group by NGO Coalition for an OP-ICESCR (2005)	click here	N/A	N/A
Facts Sheets on Economic Social and Cultural Rights produced by the International Commission of Jurists (2005)	click here	N/A	N/A
50 Leading Cases on Economic, Social and Cultural Rights produced by the Centre on Housing Rights and Evictions (2004)	click here	N/A	N/A
Fact Sheet No.16 (Rev.1) on The Committee on Economic, Social and Cultural Rights, produced by the Office of the High Commissioner for Human Rights	click here	N/A	N/A

** direct links to some documents on the Official Documents System of the United Nations may not work for all users, however all documents can be obtained via email by request from info@escrprotocolnow.org. Alternatively you can search www.documents.un.org using the UN document number provided.*

Links To Organisations Involved in the Campaign

Many NGOs and Community Based Organisations are already actively campaigning for the OP both at the national and international level. It would not be possible to give references to all of them. You will find below some few links to international NGOs who have been involved and following the process since many years.

- Amnesty International: www.amnesty.org
- Centre on Housing Rights and Evictions (COHRE): www.cohre.org
- ESCR-Net: www.escr-net.org
- Foodfirst Information and Action Network (FIAN International): www.fian.org
- Habitat Internacional Coalition (HIC): www.hic-mena.org
- Inter-American Platform of Human Rights, Democracy and Development (PIDHDD): www.pidhdd.org
- International Commission of Jurists (ICJ): www.icj.org
- International Federation for Human Rights (FIDH): www.fidh.org
- International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific): www.iwraw-ap.org
- World Organisation Against Torture (OMCT): www.omct.org

If you wish to get in touch with organisations and movements in your country or region, do not hesitate to contact the Coalition at advocacy@escrprotocolnow.org.

^[1] Inter-American Institute of Human Rights, *Optional Protocol, Convention on the Elimination of all Forms of Discrimination against Women*, Costa Rica: 2000 at 71-72. An Optional Protocol to the ICESCR inquiry procedure could be modelled after either Article 20 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Article 8 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women*, both of which authorise inquiry procedures in prescribed situations.

^[2] Asbjørn Eide, "Realisation of Social and Economic Rights. The Minimum Threshold Approach", *International Commission of Jurists The Review* 1989, Issue 43, 40, 1989, p. 43. See also Maastricht Guidelines on Violations of Economic Social and Cultural Rights, January 1997, Para. 6.

^[3] Eide, op.cit. note, p. 42.

^[4] *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6. See also Committee on Economic, Social and Cultural Rights, General Comment 12, United Nations document reference, E/C.12/1999/5, para. 15.

^[5] Nowak, M., "The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" in *International Commission of Jurists, The Review: Economic, Social and Cultural Rights and the Role of Lawyers*, France: 1995 at 160. Limiting standing/ability to initiate complaints under an Optional Protocol to the ICESCR to individuals would be to prevent to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

^[6] Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims of State party ICESCR rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* which states "Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent", Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 77 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

^[7] *Supra* (Arambulo), note 1 at 223, 233-4. Through the practice of the United Nations Human Rights Committee, communications submitted *on behalf of* victims of State party ICCPR violations have been accepted.

[8] *Supra* note 3 at 43. See also *supra* note 4 at 161.

[9] Article 17 of the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women* explicitly states “No reservations to this Protocol may be permitted”.

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

[11] CCPR/C/21/Rev.1/Add.6

[12] United Nations. Committee on Economic, Social and Cultural Rights. 1990. *General Comment Three*.

[13] *Ibid*, para. 10.

[14] *Ibid*, para. 11.

[15] Maastricht Guidelines, para. 8.

[16] *Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors*

[17] Judgment of the Second Public-Law Division of 27 October 1995 *in re V. v Resident Municipality X. and Bern Canton Government Council (Constitutional Complaint)*.

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

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

[20] See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 6.

[21] *Ibid*.

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

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

[24] Those in favour included Finland, Croatia, the Russian Federation, and Latin American countries including Brazil, Argentina, Mexico, Venezuela, Peru and Chile.

[25] UN Doc. E/CN.4/2004/WG.23/CRP.8/Rev1, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2004/44&Lang=E>

[26] UN Document E/CN.4/2005/52, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2005/52&Lang=E>