Justice NOW! Ratify to Protect all Human Rights

CAMPAIGN FOR THE RATIFICATION AND IMPLEMENTATION OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

OP-ICESCR Coalition

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

A Toolkit for Action | Booklet 2

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

International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

These booklets were prepared by the International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (NGO Coalition). The NGO Coalition brings together individuals and organisations from around the world who share the common goal of promoting the ratification and implementation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol or OP-ICESCR).

The Optional Protocol grants the Committee on Economic, Social and Cultural Rights (Committee or CESCR) the competence to receive and consider complaints against States Parties, when they violate the economic, social and cultural rights (ESCR) contained in the International Covenant on Economic, Social and Cultural Rights (Covenant or ICESCR). We hope these booklets provide information and materials that will facilitate international and national advocacy work.

This series has four booklets.

Booklet 1: *Refreshing Your Knowledge About the International Covenant on Economic, Social and Cultural Rights* discusses the Covenant whose obligations the Optional Protocol seeks to enforce. It explains ESCR, States' obligations under the Covenant, the role of the Committee and the challenges related to implementing and enforcing ESCR.

Booklet 2: *Overview: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* describes the procedures and mechanisms introduced by the Optional Protocol, the adoption and ratification process and the competence of the Committee to receive and consider complaints against States Parties.

Booklet 3: *Why Should States Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?* outlines some of the key incentives for States to ratify and implement the Optional Protocol. It challenges the myths contesting the justiciability of ESCR and offers tools to advocate for ratification and domestic implementation of the Optional Protocol.

Booklet 4: *Tools to Lobby Your Country and Advocate for the Ratification and Implementation of the Optional Protocol* provides information, resources and templates to assist you in lobbying for the ratification and implementation of the Optional Protocol.

The NGO Coalition is led by a Steering Committee, currently comprised of representatives from the following organisations: Amnesty International (AI), Centre on Housing Rights and Evictions (COHRE), Community Law Centre, International Network for Economic, Social and Cultural Rights (ESCR-Net), FoodFirst Information and Action Network (FIAN), International Commission of Jurists (ICJ), International Federation for Human Rights (FIDH), International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific), Social Rights Advocacy Center (SRAC) and Inter-American Platform for Human Rights, Democracy and Development (PIDHDD). ESCR-Net coordinates the NGO Coalition's activity.

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BOOKLET 2:

OVERVIEW: THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

This booklet provides a broad overview of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol or OP-ICESCR). It describes the procedures and mechanisms introduced by the OP-ICESCR and the adoption and ratification process. In particular, it also explains the competence of the Committee on Economic, Social and Cultural Rights (Committee or CESCR) to receive and consider individual complaints against States Parties, when they violate the economic, social and cultural rights (ESCR) contained in the International Covenant on Economic, Social and Cultural Rights (Covenant or ICESCR).

CONTENTS

1. The Optional Protocol and its Supervising Body, the Committee on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights provides the main legal framework for the protection and promotion of economic, social and cultural rights.

The Committee on Economic, Social and Cultural Rights is responsible for monitoring State performance. Under the ICESCR, the CESCR's only means of monitoring State performance is through periodic assessments of a State's overall implementation of the ICESCR (normally every 5 years or more). These assessments are based on State reports and a dialogue between the CESCR, the State and civil society.

The OP-ICESCR adds to the CESCR's monitoring function by providing an accountability mechanism and access to a remedy (a procedure to seek justice and compensation) for violations of ESCR. It allows the Committee to assess **individual complaints**[1] of violations.[2]

The adoption of the OP-ICESCR by the United Nations General Assembly in 2008 was a major step towards redressing the historic imbalance of protection and recognition of ESCR. Forty-two years after a complaints mechanism was adopted for civil and political rights (through the Optional Protocol to the International Covenant on Civil and Political Rights), it finally became possible for those suffering from violations of their ESCR to obtain a remedy in the UN human rights system. This remedy is available when access to justice at the national level has been denied or does not exist. By providing the possibility of assessing how the ICESCR applies to very specific situations, the OP-ICESCR provides a legal mechanism by which the Committee, victims and those acting on their behalf, States and other actors can play a part in further defining and clarifying how ESCR apply in practice and what States are required to do. The decisions by the CESCR under the Optional Protocol can be used to support victims' claims and to interpret ESCR in national and regional human rights courts.

Therefore, the individual complaints procedure is important because it:

- Provides an opportunity for compensation in individual cases when a State violates ESCR;
- Provides the possibility to access a procedure to seek justice at the international level when access to justice at the national level has been denied;
- Provides the CESCR with an opportunity to advance new jurisprudence (legal interpretation about the content of State's obligations) on ESCR;
- Provides a legal mechanism within which contributions of claimants, States, third parties and the Committee itself can help to further define and clarify the nature and scope of the ESCR protected under the ICESCR.

In addition to the complaints procedure, where a State Party agrees to be bound by the **inquiry procedure**, the Committee will also be able to initiate and conduct investigations into grave and systematic violations of ESCR. This procedure adds to the complaints and periodic reporting procedures as it:

- Allows the Committee to respond in a timely fashion to serious violations taking place within a State Party instead of waiting until the State Party's next periodic report to the CESCR is submitted;
- Offers a means to adequately address systematic or widespread violations of ESCR in cases where individual complaints are not adequate to reflect the extent of the situation;
- Addresses situations where individuals or groups are unable to submit complaints due to practical constraints or fear of reprisals.

The OP-ICESCR also includes a second opt-in procedure: the **inter-State complaints procedure**. States that opt in to this procedure can make complaints against other States Parties and have complaints made against them.

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1 Note that in the UN human rights system and in the text of the OP-ICESCR, the word "communication" is used to refer to a "complaint" of a human rights violation.

2 To learn more about the CESCR, please refer to Booklet 1, Section 2(A): *The ICESCR and its Monitoring Body*. You can also visit the CESCR's official website at: http://www2.ohchr.org/english/bodies/cescr/index.htm.

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For further information about the benefits of the OP-ICESCR, see Booklet 3, Section 1: *Why Should a State Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?*

It remains crucial for civil society to actively claim and mobilise around ESCR and ensure that States become Party to the Optional Protocol and utilise it when political action and national legal protections prove ineffective to ensure ESCR.

Optional Protocols

Generally, Optional Protocols are treaties that add new procedures or legal mechanisms related to the substantive rights included in an existing convention or treaty. For this reason, only States that have already agreed to be bound by the parent treaty may choose to be Parties to its Optional Protocols.

In the UN human rights treaty system, Optional Protocols do not amend the text of the original treaty, but rather they specify some obligations (*substantive* protocol) or create additional mechanisms to monitor compliance with the original instrument (*procedural* protocol). An example of a *substantive* protocol is the protocol abolishing the death penalty, which supplements the International Covenant on Civil and Political Rights (ICCPR).[3] An example of a *procedural* protocol is the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW) creating an individual complaints procedure and an inquiry procedure.[4]

2. What is Introduced by the OP-ICESCR?

The OP-ICESCR creates three new mechanisms under the competence of the CESCR: the individual complaints procedure, the inquiry procedure and the inter-State complaints procedure. The text of the OP-ICESCR is annexed to this booklet.

A. THE INDIVIDUAL COMPLAINTS PROCEDURE

The individual complaints procedure is a mechanism contained in several international treaties. It provides an opportunity for an individual or group of individuals to bring a case, alleging violations of certain treaty rights to the body of experts set up by the treaty. This body makes a legal review of the complaint and issues a resolution on it (quasi-judicial adjudication). Thus, the OP-ICESCR will enable individuals to bring violations of economic, social and cultural rights contained in the ICESCR to the attention of the CESCR, which will examine the complaint and make a decision as to whether a violation has occurred.

Articles 2 to 9 of the OP-ICESCR describe the requirements for an individual complaint:

Step 1: Submitting a Complaint

Articles 2 and 3 of the OP-ICESCR establish the basis for a complaint to be admissible – i.e., that the Committee is permitted to consider that complaint.

3 See the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty, adopted by the General Assembly (A/RES/44/128) on December 15, 1989 and entered into force on July 11, 1991 [http://www2.ohchr.org/english/law/ccpr-death.htm].

4 See the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW) adopted by the General Assembly (A/RES/54/4) on October 6, 1999 and entered into forced on December 22, 2000 [http://www2.ohchr.org/english/law/cedaw-one.htm].

Who can submit a complaint?

- Article 2 establishes that complaints may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction[5] of a State Party to the Optional Protocol, claiming to be victims of a violation of any of the rights set forth in the ICESCR by that State Party.

Where a complaint is submitted on behalf of individuals or groups of individuals, their consent is required, unless the author can justify acting on their behalf without such consent.

At what stage can a complaint be submitted?

- Article 3.1 establishes that a complaint can only be considered by the Committee after "all available domestic remedies have been exhausted." This means that complainants must have pursued all available legal processes in their country and failed to obtain an effective remedy for the violation. This rule does not apply when domestic remedies are unreasonably prolonged. In addition, where a domestic remedy is known to be ineffective, the CESCR is unlikely to demand that complainants utilize that remedy before presenting a case.[6]

When can a complaint be submitted?

- The complaint must be submitted within 1 year after the exhaustion of all available domestic remedies (Article 3.2.a). However, a person or group can still make a complaint if he or she can show that it was not possible to submit a complaint within the time limit.

Which violations can be addressed in the complaint?

- Violations of any right in the ICESCR may be submitted.
- The complaint must refer to facts that occurred after the entry into force of the Optional Protocol for the State Party concerned unless those facts continued after that date (Article 3.2.b).

Non duplication of procedures

- The CESCR or any other international complaint body must not have already examined the complaint (Article 3.2.c). For example, if an NGO complaining about a State shutting down shelters for the homeless has already made a complaint under the Revised European Social Charter, it will not be able to submit a complaint to the CESCR, even if its earlier complaint was unsuccessful.

Substance and format

- It must not be manifestly ill-founded or based only on reports by the media; it must be sufficiently substantiated (Article 3.2.e).
- It must be compatible with provisions of the ICESCR (Article 3.2.d).
- It must not be an abuse of the right to submit a complaint (Article 3.2.f).
- It must be in writing (Article 3.2.g).
- It cannot be anonymous (Article 3.2.g).

5 State "jurisdiction" commonly refers to a State's legal entitlement to exercise control over a person or territory.

6 International and regional human rights bodies have generally ruled that a complainant is not required to access a domestic remedy if it is known to be ineffective before seeking an international remedy. Inter-American Institute of Human Rights and International Commission of Jurists, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, IIDH and ICJ, 2010, p. 57-9 [http://www.icj.org/default.asp?nodeID=349&sessID=138345226@21214758164&langage=1&myPage=Legal_Documentation&id=23080].

To be addressed by the CESCR, a complaint must:	A complaint will not be considered by the CESCR if:
• Be submitted by or on behalf of an individual or group of individuals under the jurisdiction of a State that is Party to the Optional Protocol • Involve facts that ocurred after the entry into force of the Optional Protocol for the State Party concerned, unless those facts continued after that date • Be submitted after the complainant tried and was unable to obtain justice domestically or after domestic remedies were taking an unreasonably long time • Be sumitted no more than one year after the exhaustion of all available domestic remedies, unless it was not possible to respect this time limit • Be in writing	• It has already been examined by the CESCR or another international complaints body • It is an abuse of the right to submit a complaint • It clearly has no justification, does not provide enough proof or is based solely on media reports without any further evidence • It is anonymous or not in writing • It is incompatible with provisions of the ICESCR

Step 2: Consideration of the Substance of the Complaint

After the complaint is considered admissible,[7] the CESCR will transmit the petition to the State Party, who will have 6 months to submit written explanations or statements clarifying the matter and the remedy, if any, that it may have provided (Article 6).

The Committee will then examine the substance of the complaint (referred to in the OP-ICESCR as "the merits") in closed meetings. It will analyse the facts and the arguments in the complaint and the State's submissions. It may also consider documentation from other sources such as UN bodies and other international organisations, including from regional human rights systems (Article 8). Article 8.1 states that the CESCR shall examine complaints "in light of all the documentation submitted to it," which appears to establish an opportunity for interested third parties to also submit information to the CESCR. This is in line with the practice of other human rights bodies.[8] It does not specify that such documentation is in written form, and therefore audio-visual and other material could be considered.

Article 8.4 of the OP-ICESCR requires the Committee to consider the reasonableness of the steps taken by the State Party in view of its obligations set out in Articles 2-5 of the ICESCR. These particular articles address the obligation to progressively realise the full range of ESCR to the maximum of available resources and to refrain from discrimination. The Committee is also required to bear in mind that the State can adopt a range of possible policy measures to implement ESCR. This means that the CESCR is not supposed to evaluate whether or not the State has adopted what it feels is the correct approach to realise ESCR. Rather, its role is to determine whether the State has taken measures that are clearly inconsistent with its obligations under the ICESCR.

7 However, for reasons of efficiency and effectiveness, it might be possible for the Committee to consider the substance of the complaint at the same time as it considers whether the case is admissible. This is likely to be addressed when the Committee develops its Rules of Procedure.

8 The Latin term "*amicus curiae*" literally means friend of the court and refers to someone who is not a party to the case but has an interest in it and offers information in the form of *amicus* submissions to assist in deciding a matter. The issue of third-party submissions from NGOs and human rights institutions (where they are not the author of the complaint) was specifically considered when the Optional Protocol was being drafted, initially in relation to standing for non-governmental organisations and institutions in Article 2. While there was considerable support for the concept of third-party submissions, there was little support for granting NGOs independent standing to submit collective complaints without requiring the victims' consent as provided for in the European Social Charter. As a result, references to standing for non-governmental organisations and institutions were removed from Article 2, and the question of whether or how procedures might be developed for *amicus* submissions was left to the Committee to consider in its Rules of Procedure.

All complaint procedures previously established under UN human rights complaint mechanisms restrict information to that which is provided by the individual petitioner or the State Party concerned, although in practice some of the Committees do receive *amicus* submissions.[9] The OP-ICESCR takes a progressive approach in providing the CESCR with a mandate to receive information from a broad range of third-party sources (Article 8.1 and 8.3) and in mandating the CESCR to consider whether reasonable steps have been taken by the State Party (Article 8.4). In addition, the mandate accorded to the Committee under Article 8.4 requires it to consider the State's overall policy measures that are challenged by the complaint and how these affect the complainants as well as the needs of groups that are not direct parties to the complaint. This makes it particularly important to ensure that the Committee has access to a full factual record, relevant sources of expertise and an analysis of issues that may often extend beyond the facts related to individual complaints.[10]

Step 3: What Happens Next

Article 9 establishes that after examining a complaint, if the Committee finds that the State Party has committed the violation(s) alleged in the complaint, it will send its views and any recommendations it may have to the parties concerned.

The State Party must consider the Committee's views. Within six months after the Committee releases its recommendations, the State Party must submit to the Committee a written response including information on any action taken in light of the views and recommendations by the Committee. The Committee can ask the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations in the State Party's subsequent periodic reports under Articles 16 and 17 of the Covenant on how it has implemented its obligations under the ICESCR.

This is the first time that a follow-up procedure has been expressly included in the text of an Optional Protocol. It builds on the existing practice of other UN human rights treaty bodies.[11]

Article 14 on international assistance and cooperation indicates that the CESCR may, with the agreement of the State Party concerned, inform UN and other bodies of its findings on the complaint, indicating a need for technical advise or assistance where needed. It is also required to send them any suggestions and observations by the State Party.

The CESCR can also inform UN and other bodies, again with the agreement of the State Party concerned, of international measures likely to assist States in implementing the ICESCR where this information arises out of the complaint. Article 14 establishes a trust fund for expert and technical advise. However, it also clarifies that Article 14 does not reduce State obligations under the ICESCR.

Interim Measures (Article 5)

After a complaint is received, the CESCR can request that the State takes interim measures to avoid harm if it considers that there is a risk of irreparable damage to the victim of an alleged violation, even before deciding whether the complaint is "admissible" (i.e., whether the CESCR is permitted to examine the complaint).[12]

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9 The Committee noted that the traditional formulation of other complaint procedures seems unduly restrictive and counterproductive and recommended that the Optional Protocol authorise the Committee to consider information from additional sources on the condition that any such information would also be provided to the parties concerned for comment. See United Nations Economic and Social Council Commission on Human Rights, N*ote by the Secretary General Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Right*s, E/CN.4/1997/105, December 18, 1996, para. 42 [http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1997.105.En?Opendocument]. See also the paper by the International NGO Coalition for the OP-ICESCR, edited by Bruce Porter and Donna Sullivan, *Considerations of the International NGO Coalition for an OP-ICESCR in relation to the OP-ICESCR and its Rules of Procedure*, 2010 [http://www.escr-net.org/usr_doc/NGO_Coalition_submission_to_the_CESCR_on_OP-ICESCR.pdf].

10 For further discussion about mandate under Article 8.4, see the paper by the International NGO Coalition for the OP-ICESCR, edited by Bruce Porter and Donna Sullivan, *Considerations of the International NGO Coalition for an OP-ICESCR in relation to the OP-ICESCR and its Rules of Procedure*, 2010 [http://www.escr-net.org/usr_doc/NGO_Coalition_submission_to_the_CESCR_on_OP-ICESCR.pdf].

11 Follow-up procedures "constitute an incentive for States promptly to adopt measures aimed at giving effect to Committee's views, a way for States to report publicly on those measures, a source of best practices by States on their implementation of Committee's views and therefore a crucial element in making the complaints system more effective." *Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Third Session, E/CN.4/2006/WG.23/2, November 30, 2005 [http://www.opicescr-coalition.org/Elements%20Paper-e.pdf].

12 For further information, see the paper by the International NGO Coalition for the OP-ICESCR, edited by Bruce Porter and Donna Sullivan, *Considerations of the International NGO Coalition for an OP-ICESCR in relation to the OP-ICESCR and its Rules of Procedure*, 2010 [http://www.escr-net.org/usr_

This provision is essential to the effectiveness of the OP-ICESCR since the objectives of the complaints procedure would be defeated if irreparable damage to the victims of an alleged violation were to occur while a complaint is pending.

Article 5 is valid for all rights recognised in the ICESCR.

Interim measures of protection are incorporated in other human rights treaties. It should be noted that the CESCR does not need to determine whether a complainant has been able to obtain an effective local remedy in his or her own country before requesting an interim measure. This has been the established practice of other UN human rights treaty bodies and regional human rights mechanisms.[13]

Photo: Liz Ligon

Friendly Settlements

Friendly settlements are a procedure through which both parties agree to resolve the complaint by reaching an agreement.

Although friendly settlements exist under other regional human rights systems,[14] this is the first time it is explicitly included in an individual complaints procedure within the UN system.

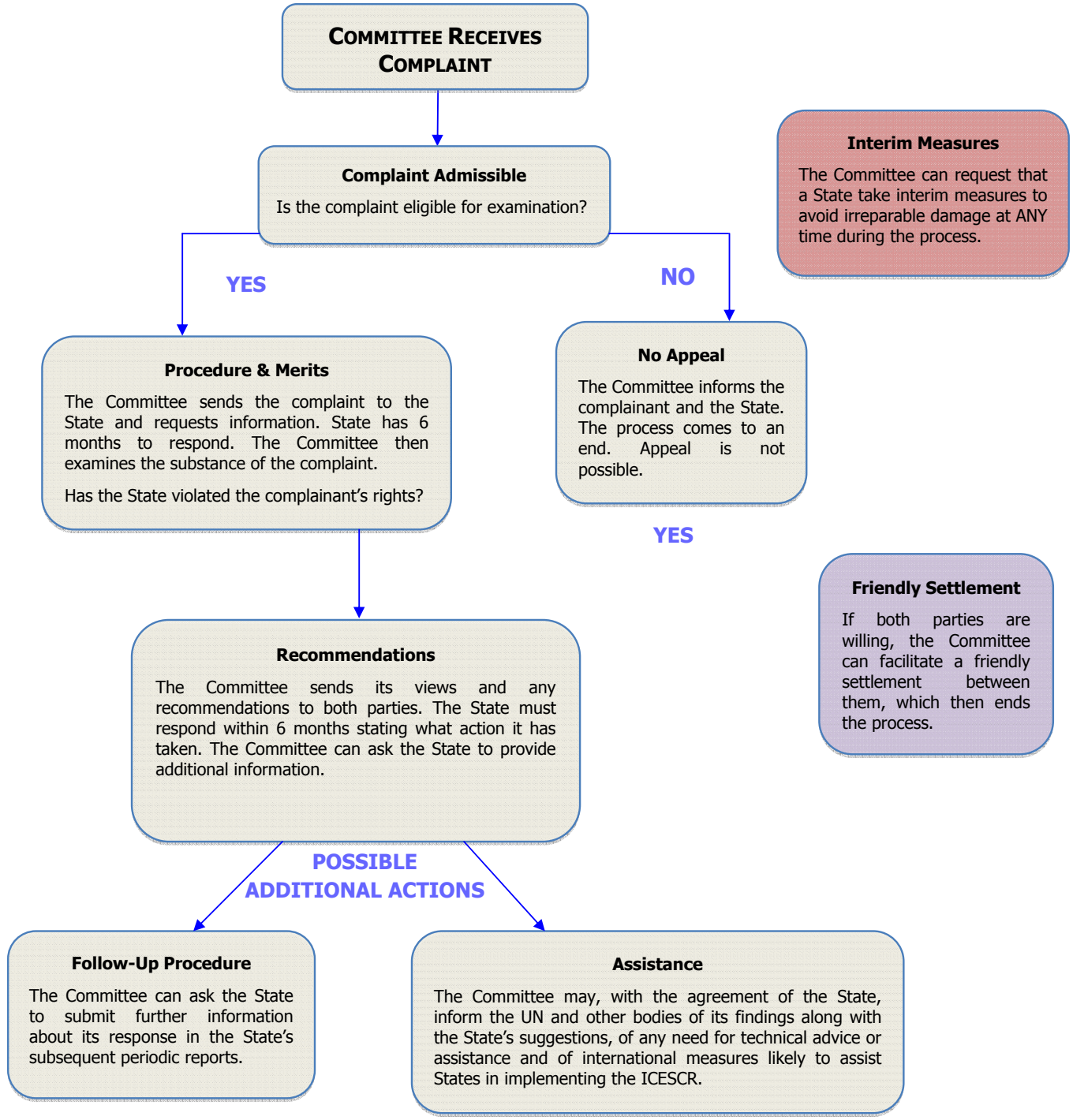
Article 7 establishes that the Committee shall be available to facilitate a friendly settlement between the author(s) of a complaint and the State Party concerned. The guiding principle of Article 7 is that friendly settlements can be reached only on the basis of respect for the obligations set forth in the ICESCR. Thus, the CESCR can facilitate the achievement of an agreement between the parties only if this agreement is consistent with the State's obligations under the ICESCR. There is no procedure for cases where a State does not implement the agreement. In such a situation, a complainant would have to make a new complaint about the unresolved violation.

doc/NGO_Coalition_submission_to_the_CESCR_on_OP-ICESCR.pdf].

13 Regional human rights bodies include the European System on Human Rights, Inter-American Commission on Human Rights and African Commission on Human and People's Rights.

14 For instance, under the Inter-American System on Human Rights (Art. 49 of the American Convention on Human Rights) and the European System on Human Rights (Art. 30).

BOX 1: THE INDIVIDUAL COMPLAINTS PROCEDURE



B. THE INQUIRY MECHANISM

The Optional Protocol provides the CESCR with the ability to conduct inquiries when it has received reliable information on grave or systematic violations by a State Party of rights in the ICESCR.

The main difference between an inquiry procedure and a complaints procedure is that the inquiry mechanism does not require a complaint for the Committee to initiate the procedure.

The CESCR can only undertake this mechanism if the relevant State has expressly accepted that the CESCR can carry out an inquiry procedure in reference to that State.[15]

The steps followed under the inquiry procedure are:

Step 1: Receipt and Consideration of Information

The CESCR receives information concerning a grave or systematic violation of one or more of the rights set forth in the ICESCR. After reviewing the information, the CESCR considers whether the information is reliable.

The information can be received from any source, i.e., individuals, civil society, local, national or international human rights organisations. An anonymous source can also provide the information. The Committee can request further information from the same source or from a different source.

The inquiry process is confidential and the CESCR shall seek the cooperation of the State Party concerned at all stages of the process.

Step 2: Request to the State to Respond

If the CESCR determines that the information is reliable, it must invite the State Party to cooperate by submitting its views on the information showing grave or systemic violations.

Step 3: Decision to Investigate and Report to the State

On the basis of this information, the Committee decides whether to conduct an inquiry. The inquiry is then conducted by one or more members of the Committee, who are required to submit a report urgently to the Committee. The inquiry procedure, with the consent of the State Party, can include a visit to the territory.

As in the individual complaints procedure, the OP-ICESCR does not include an explicit provision for the Committee to request and receive additional information and documentation from other sources. However, obtaining such information is not prohibited. The whole Committee then considers the report and sends it, together with any comments and recommendations to the State concerned.

Step 4: State Response

Within six months, the State must inform the Committee of its views on the Committee's findings.

Step 5: Follow-Up

The CESCR may ask the State to inform it about any measures taken in response to its inquiry or to include this information in the State's next periodic report on its implementation of the ICESCR. The Committee may also include a summary of the proceedings in its annual report, but the State has to be consulted.

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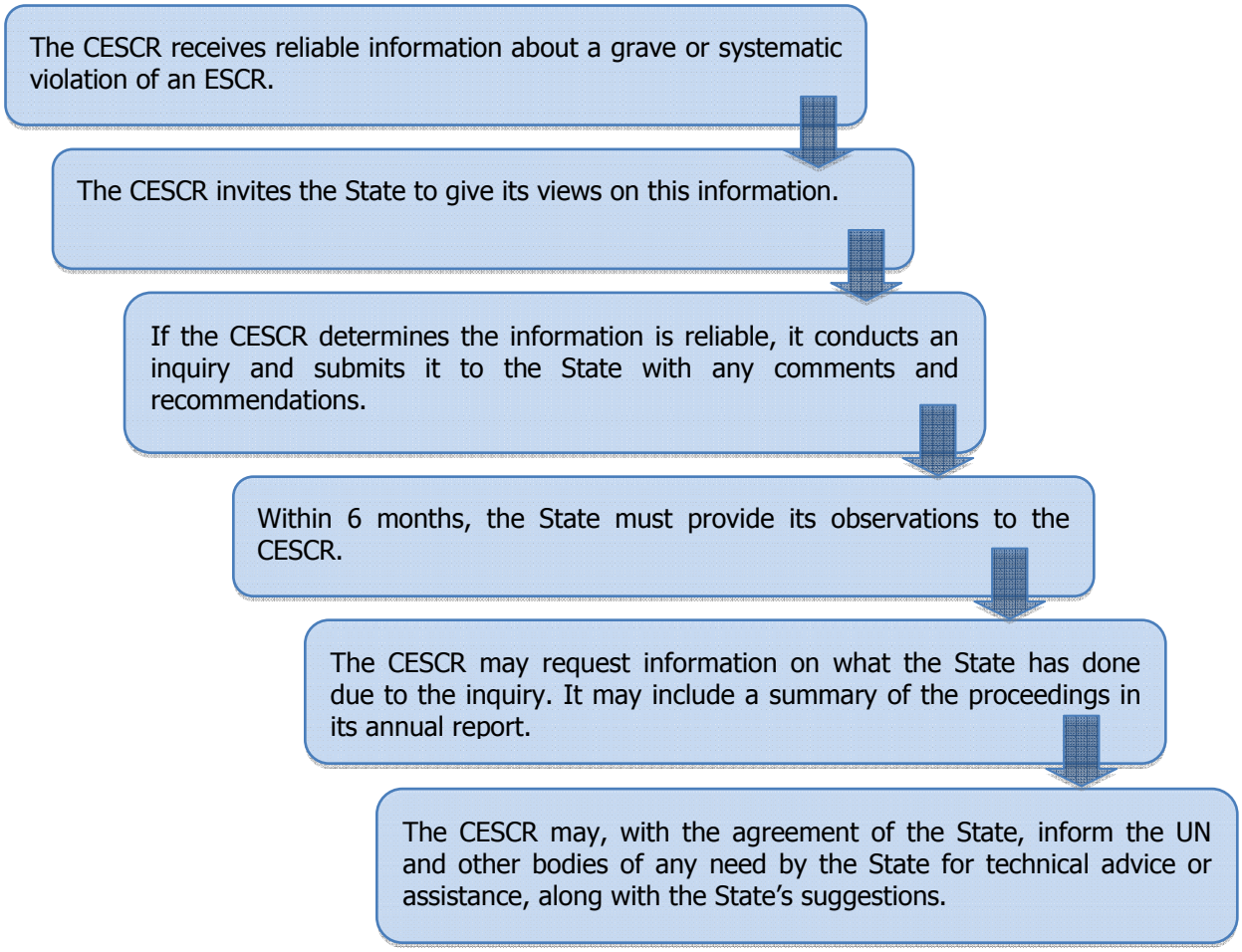
15 The "opt-in" formula constitutes a move back from other instruments where States are automatically subject to this procedure unless they take the explicit step of refusing to be subject to this procedure. For example, under the OP-CEDAW, States may "opt-out" of the inquiry procedure at the time of signature, accession or ratification (Art. 10). Under the Convention Against Torture (CAT) [http://www2.ohchr.org/english/law/cat.htm], a State may enter a reservation declaring that it does not recognise the competence of the Committee to initiate inquiry procedures (Art. 20).

Article 14 on international assistance and cooperation indicates that the CESCR may, with the agreement of the State Party concerned, inform the UN and other bodies of its findings on the inquiry, indicating a need for technical advice or assistance where needed. It is also required to send any suggestions and observations by the State Party. Article 14 establishes a trust fund for expert and technical advice. However, it also clarifies that Article 14 does not reduce State obligations under the ICESCR.

BOX 2: INQUIRY MECHANISM



C. THE INTER-STATE COMPLAINT MECHANISM

If a State Party to the OP-ICESCR considers that another State Party is not fulfilling its obligations under the ICESCR, it may bring the matter to the attention of that State Party. It may also inform the Committee of the matter.

As with the inquiry procedure, this procedure must be explicitly accepted by a State Party. Under this particular procedure, a complaint may only be submitted if both the claimant and the defendant States have recognised the competence of the CESCR to receive this type of complaint.

Most other UN human rights treaties include an inter-State complaints mechanism. However, it is very rare for States to make complaints through such procedures.

For more information about the Optional Protocol, see:

Inter-American Institute of Human Rights and the International Commission of Jurists, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. This is available in English, French and Spanish at: http://icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23080.

For further information, see the paper by the NGO Coalition, edited by Bruce Porter and Donna Sullivan, *Considerations of the International NGO Coalition for an OP-ICESCR in relation to the OP-ICESCR and its Rules of Procedure*, 2010 available at: http://www.escr-net.org/usr_doc/NGO_Coalition_submission_to_the_CESCR_on_OP-ICESCR.pdf.

The CESCR is in the process of adopting Rules of Procedure for the OP-ICESCR and is expected to complete this work in 2011. The Rules will supplement the Optional Protocol and will be influential for its effectiveness. The NGO Coalition will circulate these to all of its members once they are available.

3. The OP-ICESCR Adoption and Ratification Process

A. BRIEF HISTORIC DESCRIPTION OF THE ADOPTION PROCESS

In the early 1990s, the CESCR started discussing the possibility of drafting an Optional Protocol to the ICESCR. In preparation for the 1993 World Conference on Human Rights in Vienna, civil society also began advocating for the adoption of such an instrument. As a result, the World Conference made a specific request to the United Nations Commission on Human Rights (the body that was replaced by the Human Rights Council in 2006), in cooperation with the Committee on Economic, Social and Cultural Rights, to examine the development of an Optional Protocol.

In 2001, the UN Commission on Human Rights decided to nominate an Independent Expert on the question of a draft Optional Protocol to the ICESCR[16] who, after a series of reports, recommended the adoption of an Optional Protocol to the ICESCR. In 2002, the Commission on Human Rights established a process whereby all States were able to discuss the possibility of an Optional Protocol to the ICESCR, known as an open-ended working group.[17]

Civil society actively lobbied States and made statements in these discussions. In 2006, the open-ended working group began negotiations on the text of the Optional Protocol. In 2008, the States in the working group sent an agreed text to the Human Rights Council for consideration and approval.[18] The Human Rights Council adjusted Article 2 of the text to include

16 UN, Commission of Human Rights, Resolution 2001/30, April 20, 2001 [http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.30.En?Opendocument].

17 UN, Commission on Human Rights, Resolution 2002/24, 45th Meeting, April 22, 2002 [http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2002.24.En?Opendocument].

18 UN, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/HRC/8/7, May 6, 2008 [www2.ohchr.org/english/issues/escr/docs/A-HRC-8-7.doc].

all rights in the ICESCR. It then approved the OP-ICESCR by consensus.[19]

Finally, on December 10, 2008, the 60th Anniversary of the Universal Declaration of Human Rights, the Optional Protocol was adopted by the United Nations General Assembly.

The Optional Protocol was opened for signature and ratification or accession on September 24, 2009 during the annual UN Treaty Event days. At this annual event, State representatives are encouraged by the UN to sign, ratify or accede to treaties at the UN headquarters in New York.

The OP-ICESCR will enter into force once ten States have ratified or acceded to it.

If you want to find out whether or not your country has signed and/or ratified the OP-ICESCR, you can check this information at the website of the Office of the High Commissioner for Human Rights at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

B. INFORMATION ON THE RATIFICATION PROCESS

Article 17 of the OP-ICESCR indicates that the Optional Protocol can be **signed** (first step towards ratification) by any State that has signed, ratified or acceded to the ICESCR.

Any State that has ratified or acceded to the ICESCR may **ratify or accede** to the OP-ICESCR.

What happens when a government signs the OP-ICESCR?

In most cases, the Head of the State, Head of Government, or Minister of Foreign Affairs – according to the rules of the country – is empowered to sign treaties on behalf of the State. By signing the OP-ICESCR, governments express their intention to move in the direction of consenting to be legally bound by the treaty. However, signatories of the OP-ICESCR are not yet States Parties to the treaty.

What is the significance of signing the OP-ICESCR?

The signature is significant because it is evidence of the intention of a government to take steps towards ratification of the treaty.

According to Article 18 of the Vienna Convention on the Law of Treaties, signature creates the obligation to refrain in good faith from acts that would defeat the object and purpose of the Optional Protocol to the ICESCR in the period between signature and ratification.[20] Between signature and ratification, governments are effectively being given time to seek ratification from the competent national authorities and/or to make changes to laws and policies, which may be necessary to implement the treaty.

What happens when a government ratifies the OP-ICESCR?

Ratification of the OP-ICESCR at the national level

The process of ratification varies from country to country according to the provisions in its domestic legal system (generally in the national constitution). Usually different branches of the government – executive and legislature – participate in the ratification of a treaty.

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19 UN, Human Rights Council, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Resolution 8/2, 28th Meeting, June 18, 2008 [http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf].

20 UN, Vienna Convention on the Law of Treaties, adopted on May 23, 1969 and entered into force on January 27, 1980. "*Article 18: Obligation not to defeat the object and purpose of a treaty prior to its entry into force* - A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

In general, a government will have to go through the following stages to become a State Party:

1) The Executive – Head of State, Head of Government or the Minister for Foreign Affairs – signs the international instrument and sends it to the legislative body for its approval;

2) Members of the Legislature have a key role to play in the ratification process as in most countries the ultimate decision on ratification rests with the Legislature, which must express the acceptance of the State to be bound by the OP-ICESCR and approve ratification;

3) After Parliament passes the bill or motion accepting the OP-ICESCR, the Executive authorises the instrument of ratification to be deposited with the UN Secretary-General;

4) Three months after depositing the instrument of ratification with the UN Secretary-General, the State becomes a Party to the OP-ICESCR.

It should be noted that for those countries that follow a *dualist* legal system, international law does not automatically form part of a State's national law. International law in these countries is not treated as part of the country's national law unless it is included within national legislation. Therefore, after the ratification process, the legislative body must pass legislation incorporating the Optional Protocol into its national law. In countries that have a *monist* tradition, the act of ratifying or acceding to an international treaty immediately incorporates it into national law.

What is the significance of ratifying the OP-ICESCR?

Once a government has ratified a treaty at the international level, it is obligated by international law to ensure that its national laws and policies comply with the treaty.

What happens when a government accedes to the OP-ICESCR?

A State may also express its consent to be bound by the OP-ICESCR through accession. Although accession has the same legal effect as ratification, the procedure differs. In the case of ratification, the State first signs and then ratifies the treaty. The procedure for accession has only one step – it is not preceded by an act of signature.

States must deposit an instrument of accession with the Secretary-General of the United Nations.

Accession is generally used by States wishing to be bound by a treaty when the deadline for signature has passed. However, the OP-ICESCR does not have a deadline for signature.

Entry into force of the OP-ICESCR

The entry into force of a treaty is the moment in time when a treaty becomes legally binding on the Parties to the treaty. The provisions of the treaty determine the moment of its entry into force. According to the OP-ICESCR, it enters into force three months after the tenth State becoming Party to the Optional Protocol has deposited its instrument of ratification or accession with the Secretary-General of the United Nations. Individuals within States Parties to the Optional Protocol can make complaints about violations that occurred or continued to occur after the entry into force of the Optional Protocol. When additional States become Party to the Optional Protocol, it will enter into force for them three months after they deposit their instrument of ratification or accession.

Reservations

A reservation is a unilateral statement made by a State when signing, ratifying or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.[21]

However, unlike the ICESCR, the OP-ICESCR is silent about reservations.

Declarations

A State may make a declaration about its understanding of a certain matter or the interpretation of a particular provision contained in a treaty. Interpretative declarations of this kind, unlike reservations, do not seek to exclude or modify the application of a treaty to the State. The purpose of an interpretative declaration is to clarify how the State interprets the meaning of certain provisions or of the entire treaty.

Treaties may also provide for States to make optional and/or mandatory declarations affecting the manner in which the treaty applies to them.[22] These declarations are legally binding on the States making the declaration. The OP-ICESCR has two provisions allowing States Parties to make declarations where they "opt in" to the inter-State complaints and inquiry procedures. These declarations can be made during or at any time after signature, ratification or accession. They can also be withdrawn at any time.

Denunciation

Denunciation is an act whereby a State Party expresses its will to put an end to its obligations regarding a particular treaty. The OP-ICESCR, like the Optional Protocol to the International Covenant on Civil and Political Rights, permits States Parties to denounce the treaty. Article 20 permits a State Party to notify the Secretary-General that it denounces the Optional Protocol, which takes effect within 6 months after the notification. However, any communications or inquiries begun before the denunciation takes effect will continue.

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21 There are strict limitations for a State to introduce a reservation. The UN Vienna Convention on the Law of Treaties requires that reservations cannot be contrary to the object and purpose of the treaty, which means that a State may, when signing, ratifying or acceding to a treaty, make a reservation unless: a) the reservation is prohibited by the treaty; or b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made.

22 Where a treaty requires States to make a mandatory declaration, the Secretary-General, as depositary, seeks to ensure that they make such declarations. Some human rights treaties provide for mandatory declarations. For example, Art. 3(2) of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 2000 [http://www2.ohchr.org/english/law/crc-conflict.htm] provides: "Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced."

Justice NOW! Ratify to Protect all Human Rights

CAMPAIGN FOR THE RATIFICATION AND IMPLEMENTATION OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

OP-ICESCR Coalition

About the International NGO Coalition for the OP-ICESCR

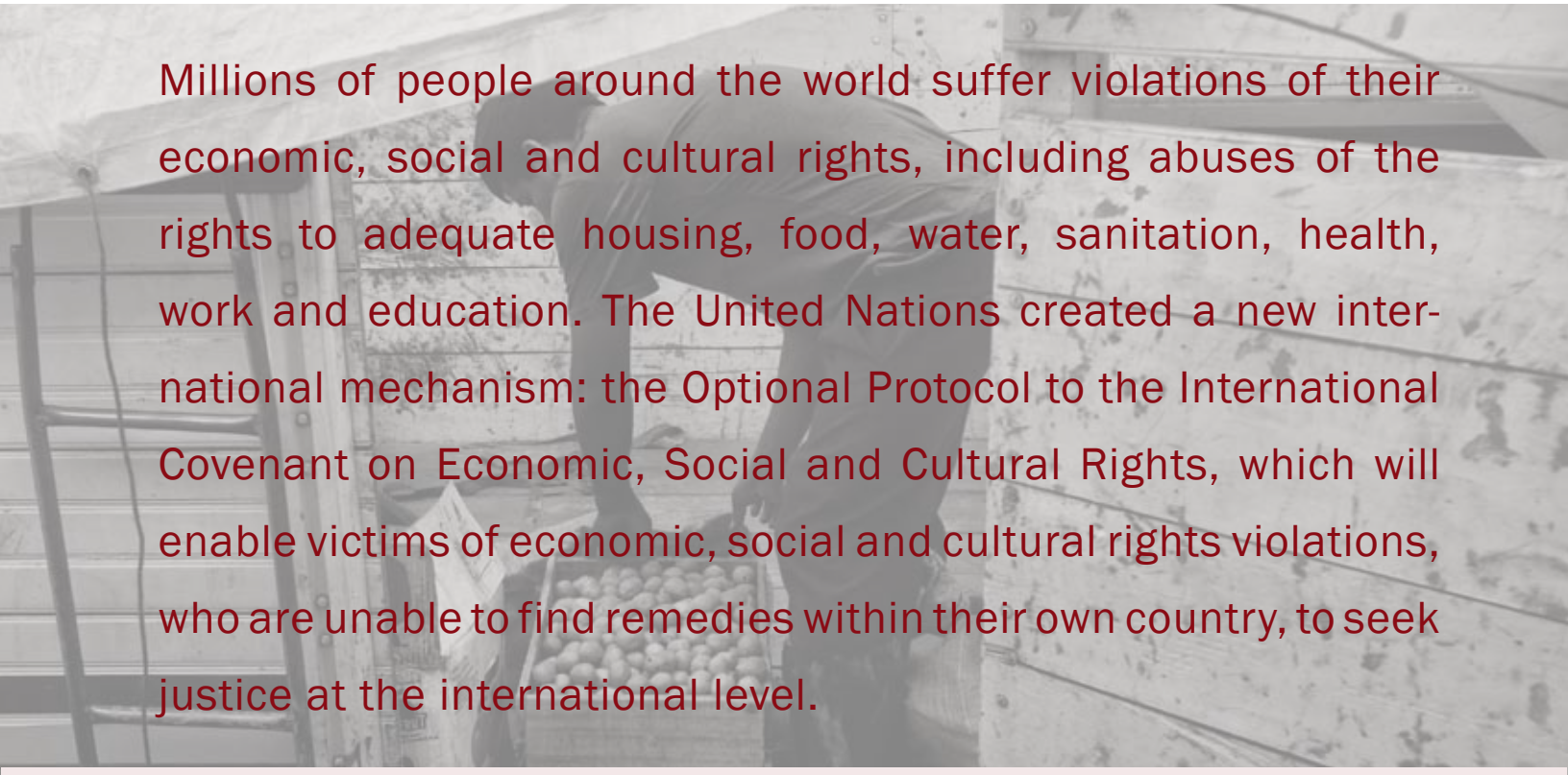
The International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (NGO Coalition) brings together hundreds of individuals and organisations from around the world who share the common goal of promoting the ratification and implementation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The NGO Coalition led civil society efforts towards the adoption of the Optional Protocol and now focuses on the ratification and implementation of this Treaty

Through the Campaign for the ratification and implementation of the OP-ICESCR, Justice NOW! Ratify to Protect all Human Rights, the NGO Coalition seeks to:

1. Secure the immediate entry into force of the OP-ICESCR with a large and regionally diverse number of ratifications/accessions;
2. Ensure the effective functioning of the OP-ICESCR moving forward by: advocating for the adoption of effective rules of procedure, encouraging the election of Committee members with a strong ESCR background, supporting harmonization of national-level systems with the OP-ICESCR and working with the Committee and national-level authorities to build awareness and ensure progressive implementation of the Treaty;
3. Provide litigation support to ensure appropriate cases reach the Committee to set positive precedent;
4. Increase awareness on the OP-ICESCR and strengthen the capacity of organizations to use this instrument as an important tool to advance ESCR work at the national level;
5. Expand and strengthen the network of organizations working on the Optional Protocol, the ICESCR and ESCR-related issues more broadly;
6. Facilitate the involvement of national-level organizations on the presentation of strategic cases before the CESCR and the implementation of decisions and ensure that appropriate cases reach the Committee.

Get Involved!

Join the NGO Coalition and support accountability for ESCR violations. If you want to be a part of the NGO Coalition and receive further information about the Campaign, fill out the membership form available at: **http://www.escr-net.org** or contact us at: **op-coalition@escr-net.org**



Millions of people around the world suffer violations of their economic, social and cultural rights, including abuses of the rights to adequate housing, food, water, sanitation, health, work and education. The United Nations created a new international mechanism: the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which will enable victims of economic, social and cultural rights violations, who are unable to find remedies within their own country, to seek justice at the international level.

FOR MORE INFORMATION, PLEASE VISIT: www.escr-net.org

A TOOLKIT FOR ACTION:

Booklet 1: REFRESHING YOUR KNOWLEDGE ABOUT THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Booklet 2: OVERVIEW: THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Booklet 3: WHY SHOULD STATES RATIFY THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

Booklet 4: TOOLS TO LOBBY YOUR COUNTRY AND ADVOCATE FOR THE RATIFICATION AND IMPLEMENTATION OF THE OPTIONAL PROTOCOL

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