

# Claiming ESCR At the United Nations



A manual on utilizing the OP-ICESCR  
in strategic litigation



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International Network for  
Economic Social Cultural Rights

## **Claiming ESCR at the United Nations**

A Manual on Utilizing the OP-ICESCR in Strategic Litigation

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# **Part One: Executive Summary and Introduction**

# 1



# Executive Summary

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol or OP-ICESCR) entered into force on 5 May 2013. With the Optional Protocol, the international community comes much closer to treating “human rights globally in a fair and equal manner, on the same footing, and with the same emphasis” as required by the Vienna Declaration on Human Rights. In particular, the OP-ICESCR creates a mechanism whereby rights holders can submit complaints of violations of any of their economic, social and cultural rights and hold States accountable to their obligations under the Covenant to respect, protect, and fulfill Covenant rights, including the human rights to adequate housing, food, water, sanitation, health care, education and social security. This procedure will also provide further clarity on the content of human rights in different contexts, resulting in greater guidance for governments that seek to implement the International Covenant on Economic, Social and Cultural Rights (Covenant or ICESCR) in good faith.

The Optional Protocol provides two key procedures by which individuals, groups and non-governmental organizations can seek to enforce economic, social and cultural rights enshrined in the ICESCR, namely a Complaint (or Communication) procedure and an Inquiry Procedure. With the OP-ICESCR, the Committee on Economic, Social and Cultural Rights, which until May 2013 had a mandate to periodically review State party compliance with the ICESCR, now adds both an adjudicative and an inquiry procedure to its mandate.

The Complaint procedure, officially known as Communication procedure, allows individuals or groups of individuals who have had their rights violated to directly litigate ICESCR rights before the Committee on Economic, Social and Cultural Rights by bringing claims against States parties to the Covenant that have also accepted the Optional Protocol. The Inquiry Procedure allows individuals, groups,

non-governmental organizations or others to bring information demonstrating grave or systemic violations of the Covenant to the Committee on Economic, Social and Cultural Rights thereby triggering an investigation by the Committee itself.

This Guide provides detailed information on how to effectively use those procedures, including examples of comparative legal arguments, strategies and jurisprudence from other international human rights enforcement mechanisms.

It offers advice on crafting Communications and on strategies to ensure that the cases brought forward under the Optional Protocol enhance the efficacy of the ICESCR and advance accountability, remedies and enforcement of economic, social and cultural rights.

Part Two of this Guide provides an examination of the substantive rights that can be litigated under the OP-ICESCR, including content from the Committee’s General Comments which provide authoritative interpretations of the content of these rights. It also provides links to the relevant General Comments which should be referred to by those engaged in the Communication or Inquiry procedures and discusses overarching legal principles that are applicable to all of the rights in the Covenant. Part Two also provides examples of the obligations to respect, protect and fulfill Covenant rights as well as the obligations

to prohibit discrimination and not to engage in deliberate retrogressive measures.

Part Three of this Guide provides information on the utility of the OP-ICESCR and a detailed examination of the Communication procedure. This section discusses case selection, use of evidence to support a case, admissibility requirements and strategies, and complementary advocacy that may lend support to a successful Complaint.

The information on admissibility provides a step by step examination of what is required of a Communication under

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the OP-IESCR as well as strategies and comparative jurisprudence from other international mechanisms.

Part Three also covers two important procedures that may be useful during the consideration of a Communication, namely the interim measures procedure and the protective

measures procedure. The interim measures procedure can be used to prevent threatened rights violations while a Complaint is under consideration by the Committee, while the protective measures can be used to provide protection to those engaged in the Communication process, including protection from retaliation or other abuse or harassment by the State party.

The important issue of remedies is also examined in Part Three, and offers advice on how those engaged with the OP-ICESCR processes can better ensure that remedies are crafted well by the Committee and implemented by the State party and its agents. The benefit of third party, including *amicus curiae*, interventions is also discussed.

Part Four summarizes the Inquiry Procedure including information on how to craft a successful intervention under the Inquiry Procedure as well as how the OP-ICESCR defines relevant terms and how to create an evidentiary record sufficient to trigger an investigation.

The appendix to the Guide offers information on non-governmental organizations that may be of assistance in utilizing the OP-ICESCR, including the ESCR-Net Working Group on Strategic Litigation.



# Introduction

**T**he objective of this Guide is to provide theoretical and practical information for lawyers and other advocates interested in utilizing the OP-ICESCR as a means to enforce economic, social and cultural rights.

Although the principle of indivisibility has been used successfully to further aspects of ESC rights, the ICESCR is like no other international or regional instrument in that it provides such a direct link to the full content of ESC rights, including the body of ESC rights commentary provided by the Committee on Economic, Social and Cultural Rights through its General Comments, Concluding Observations and other pronouncements.

Indeed, the OP-ICESCR provides a complaint procedure that directly addresses economic, social and cultural rights, and thus includes those principles of law that relate to those rights, such as the obligations to respect, to protect and to fulfill ESC rights, progressive realization of ESC rights, and

the prohibition on deliberate retrogressive measures. The OP-ICESCR also provides a platform for litigation aimed at broad structural and systemic change in the areas of ESC rights enjoyment. This Guide provides information on these relevant principles of law as well as how to find more detailed information useful for building a successful case under the OP-ICESCR, and discusses how best to achieve accountability and remedies that are truly transformative, for example by improving the enjoyment of ESC rights at the societal level.

In addition to the Communications procedure, the OP-ICESCR provides an Inter-State procedure and an Inquiry procedure. This Guide also offers advice on how to make use of the Inquiry procedure with the aim of furthering ESC rights enjoyment in real contexts.

Finally, an aim of this Guide also is to contribute to the growing network of advocates using strategic litigation to advance ESC rights protections, and hopefully will lead to further collaboration in that regard.

**Part Two:  
Rights violations  
that may be taken to the  
CESCR under the  
Optional Protocol**

**2**



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**T**his Section discusses substantive rights that can be litigated under the OP-ICESCR as well as overarching legal principles regarding ESCR.

### 2.1. What are the substantive rights under the ICESCR?

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights allows for the adjudication of violations of any of the economic, social and cultural rights set forth in the Covenant. These rights include:

- The right to self-determination (in the context of economic, social and cultural rights guaranteed by the Covenant)
- The right to work
- The right to just and favorable conditions of work
- The right to form and join trade unions
- The right to social security, including social insurance
- The right to protection of the family

- The right to adequate housing
- The right to adequate food and to be free from hunger
- The right to the highest attainable standard of physical and mental health
- The right to water
- The right to sanitation
- The right to education
- The right to enjoy the benefits of scientific progress
- The right of an author to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production

The Committee on Economic, Social and Cultural Rights (Committee), which is mandated to monitor compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR or Covenant) has adopted a number of General Comments, which are authoritative interpretive texts related to Covenant rights. The General Comments elaborate upon the content of the rights enshrined in

the ICESCR, including examples of a country's obligations and what constitutes a violation of those obligations. Since these General Comments provide interpretative guidance from the Committee itself, those seeking to bring a complaint under the Optional Protocol should rely on and cite the language from these General Comments in complaints where this is helpful in addressing the issues involved. However, it should also be remembered that the General Comments have been developed prior to any complaints procedure under the ICESCR, so claims need not be restricted by the content of General Comments.

Also, to contribute to the understanding of the content of economic, social and cultural rights and what constitutes a violation, experts have adopted the Limburg Principles on the Implementation of the ICESCR, the Maastricht Guidelines on Violations of ESC rights, the Montreal Principles of Economic, Social and Cultural Rights, and the Maastricht Principles on Extra-Territorial Obligations of States and ESC Rights, each of which provide interpretations and clarifications of the provisions of the ICESCR.<sup>1</sup>

Generally, elements of substantive rights include adequacy, accessibility, affordability, availability, and quality. Each of these terms is explained in greater detail in the related General Comment and should be used as a guide for drafting Complaints.

The following is a list of General Comments dealing with substantive rights in the Covenant along with a short summary of their content. Below each summary are links to the full text of the relevant General Comment.

### **Right to adequate housing:**

#### **General Comments No. 4 and No. 7**

The right to adequate housing includes both the prohibition on forced eviction as well as the requirement that housing should meet certain standards of adequacy including related to security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.

General Comment No. 4 is available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/469f4d91a9378221c12563ed0053547e?Opendocument>

General Comment No. 7 on the prohibition on forced eviction is available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/959f71e476284596802564c3005d8d50?Opendocument>

### **Economic, Cultural and Social Rights**

- **The right to self-determination (in the context of economic, social and cultural rights guaranteed by the Covenant)**
- **The right to work**
- **The right to just and favorable conditions of work**
- **The right to form and join trade unions**
- **The right to social security, including social insurance**
- **The right to protection of the family**
- **The right to adequate housing**
- **The right to adequate food and to be free from hunger**
- **The right to the highest attainable standard of physical and mental health**
- **The right to water**
- **The right to sanitation**
- **The right to education**
- **The right to enjoy the benefits of scientific progress**
- **The right of an author to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production**

### **Right to education:**

#### **General Comments No. 11 and No. 13**

The right to education involves both providing compulsory and free primary education and ensuring that functioning educational institutions and programs are available in sufficient quantity to everyone without discrimination.

General Comment No. 11 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/422/76/PDF/G9942276.pdf?OpenElement>

General Comment No. 13 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement>

#### **Right to adequate food and to be free from hunger and malnutrition: General Comment No. 12**

The Committee considers the core content of the right to adequate food as implying: (1) "The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;" and (2) "The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights." Adequate food also has to meet the dietary needs of the rights-holder, be safe including free of adverse substances, be culturally acceptable, be available to all rights-holders, and be both economically and physically accessible. Importantly, the right to be free from hunger and malnutrition is of immediate effect, and not subject to progressive realization.

General Comment No. 12 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?OpenElement>

#### **Right to highest attainable standard of health: General Comment No. 14**

The right to the highest attainable standard of health includes elements of availability, accessibility, acceptability, and quality. Furthermore, it is "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information including on sexual and reproductive health." Moreover, a "further important aspect is the

participation of the population in all health-related decision-making at the community, national and international levels."

General Comment No. 14 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement>

#### **Right to water: General Comment No. 15**

The right to water is implicit in Articles 11 and 12 of the Covenant. Similar to other Covenant rights, the normative content of the right to water includes elements related to availability, quality, physical and economic accessibility, and access to information.

General Comment No. 15 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>

#### **Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author: General Comment No. 17**

Similar to other Covenant rights, this right includes elements of availability and accessibility as well as quality of protection of the right. Availability includes "adequate legislation and regulations, as well as effective administrative, judicial or other appropriate remedies, for the protection of the moral and material interests of authors must be available within the jurisdiction of the State parties." Accessibility involves "administrative, judicial or other appropriate remedies for the protection of the moral and material interests resulting from scientific, literary or artistic productions must be accessible to all authors." This also includes physical and economic accessibility as well as access to information. The quality of protection element relates to protection of the moral and material interests of authors being administered competently and expeditiously by judges and other relevant authorities.

General Comment No. 17 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/400/60/PDF/G0640060.pdf?OpenElement>

#### **Right to social security: General Comment No. 19**

The right to social security includes elements related to availability, adequacy, and accessibility. Social security should be available for various social risks and contingencies including





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health care, sickness, old age, unemployment, employment injury, family and child support, maternity, and disability as well as for survivors and orphans of the beneficiary. Adequacy deals with the amount and duration of social security, while accessibility addresses issues related to coverage and eligibility requirements, affordability of contributions into social security plans, and physical access to contributions and to information and the right to participation in decisions related to social security.

General Comment No. 19 is available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement>

### 4.2. What are some of the overarching key legal principles related to all rights under the ICESCR?

Violations of Covenant rights may occur through either acts of commission, in other words by doing something that is prohibited, or acts of omission, in other words by not doing

something that is required. The Covenant incorporates the principle of progressive realization, meaning that full implementation of some aspects of rights may take time. While the notion of progressive realization is contained within the Covenant, certain obligations are of immediate effect. These immediate obligations include the obligations to respect and to protect Covenant rights, the obligation to take deliberate steps towards the fulfilment of Covenant rights, the prohibition of discrimination, and the urgency of implementing core obligations related to each Covenant right. These terms are explained below in greater detail.

Covenant rights have corresponding State party obligations to respect, protect and fulfil those rights and to do so without discrimination. As mentioned above, the General Comments are authoritative interpretive texts adopted by the Committee on Economic, Social and Cultural Rights and many provide detailed descriptions and examples of these obligations for a number of Covenant rights.

Generally, the obligation to respect require States not to interfere directly or indirectly with the enjoyment of

### General Comment No. 15 on obligations to respect

The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, *inter alia*, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>, Par. 21)

economic, social and cultural rights. This obligation is essentially negative in nature, meaning that the State must not take any action that diminishes the enjoyment of any given economic or social right, unless there are justifications for doing so. The obligation to respect is of immediate effect (for example, upon ratification of the ICESCR) and is not subject to progressive realization.

The obligation to protect requires States to prevent third parties (non-State) or other States, including inter-governmental organizations such as the World Bank, from violating the enjoyment of Covenant rights. Third parties or non-State actors include individuals, groups, landlords, corporations, other States or other entities as well as agents acting under their authority. The obligation includes adopting the necessary and effective legislative, regulatory and other measures to restrain third parties and non-State actors from interfering or violating Covenant rights; investigating, prosecuting or otherwise holding accountable those entities that have violated Covenant rights; and providing remedies to victims of violations. The obligation to protect is also of immediate effect (for example, upon ratification of the ICESCR) and not subject to progressive realization.

Under the obligation to fulfill, States are obliged to take

steps to progressively realize the rights contained in the ICESCR, to the maximum of their available resources. This obligation can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires States to take positive measures to assist individuals and communities to enjoy the right in question. The obligation to promote obliges State parties to take steps to ensure that there is appropriate education concerning the right in question. States parties are also obliged to fulfill (provide) the right in question when individuals or groups are unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. In deciding whether a State party has complied with the obligation to progressively realize Covenant rights under the Optional Protocol “the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”

Under the reasonableness standard of review, the Committee will examine the steps taken to implement Covenant rights, including assessing the circumstances and interests at stake for the rights claimants as well as the resource constraints and other concerns of respondent governments.

### General Comment No. 15 on obligations to protect

The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>, Par. 23)

According to the Committee, budgetary constraints never justify complete inaction. Furthermore, marginalized or vulnerable groups or communities must not be ignored. The Committee lists a number of possible factors to consider in assessing whether the steps taken had been reasonable. These include:

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

If a State party claims that it lacks the resources necessary to fulfill a Covenant right, the burden of proof falls on the State party to prove such lack of resources. The State also has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, minimum obligations associated with the right in question. The State party must also establish that it sought international assistance to ensure access to, and availability of, the content of the right in question.

Another overarching principle related to all substantive Covenant rights is the prohibition of discrimination, which the Committee describes in detail in its General Comment No. 20. Article 2(2) of the ICESCR prohibits discrimination on the explicit grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". "Other status" has been interpreted broadly. According to the Committee, "these additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable

and have suffered and continue to suffer marginalization" and include disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. The prohibition of discrimination is of immediate effect and thus is not subject to progressive realization or availability of resources, and includes within its scope laws, policies and practices that have either a discriminatory intent or effect. General Comment No. 20 provides further detail, and includes information on remedies and accountability.

(General Comment No. 20 is available at: <http://www1.umn.edu/humanrts/gencomm/escgencom20.html>)

States parties to the ICESCR have obligations related to both conduct and result. Obligations of conduct include the prohibition on discrimination and the adoption of reasonable plans of action aimed at realizing Covenant rights as expeditiously as possible.

According to the Committee's General Comment No. 3, the "principal obligation of result reflected in Article 2 (1) is to take steps 'with a view to achieving progressively the full realization of the rights recognized' in the Covenant." General Comment No. 3 makes clear that "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content" and that the Covenant "imposes an obligation to move as expeditiously

### General Comment No. 15 on obligations to fulfill

The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>, Par. 25).

and effectively as possible towards that goal.”

Another key principle is the prohibition of deliberate retrogressive measures. The Committee’s General Comment No. 3 requires that “any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

(General Comment No. 3 is available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/94bdbaf59b43a424c12563ed0052b664?Opendocument>)

### Notes

- <sup>1</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17.
- <sup>2</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.
- <sup>3</sup> Montreal Principles on Women’s Economic, Social and Cultural Rights, Human Rights Quarterly, 26 (2004) 760–780, at p. 763.
- <sup>4</sup> Maastricht Principles on Extra-Territorial Obligations and Economic, Social and Cultural Rights, adopted .
- <sup>5</sup> Committee on Economic, Social and Cultural Rights, An evaluation of the obligation to take steps to the ‘Maximum of available resources’ under an optional protocol to the Covenant.

**Part Three:**  
**Steps to Successful Strategic**  
**Litigation Before the CESC**

3





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### 3.1 Introduction

**T**he following section provides guidance to Claimants, officially known as “Authors”, on bringing a Complaint, officially known as a “Communication”, under the OP-ESCR. This section includes information on case selection, decisions related to when the ICESCR is the most appropriate instrument under which to bring a case, case preparation, the admissibility and merits phases of the case, as well as complementary advocacy and follow up strategies.

Since the purpose of this document is to address strategic litigation, the scope goes beyond a focus solely on achieving accountability and remedies for violations of economic, social and cultural rights. Its scope also encompasses the goals of broader impact such as structural or systemic change at the national level, the creation of beneficial jurisprudence at the international level, and creation of persuasive authority that can influence other national and international contexts.

Where relevant, case studies from other international mechanisms are provided, particularly where these examples provide guidance on ensuring that the OP-ICESCR guarantees a progressive and inclusive scope to its coverage. However, various aspects of the scope of the ICESCR go beyond any existing international mechanism, and thus examples may not be available for all of these aspects. Indeed, cases brought under the OP-ICESCR may address novel issues and therefore care should be taken to frame cases in such a way as to provide an expansive, inclusive and progressive interpretation of Covenant rights.

A key reference document is the provisional Rules of Procedure for the OP-ICESCR, which lay out specific guidance on how to bring a Complaint. The Rules of Procedure can be found at: <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.49.3.pdf>

### 3.2 Case selection

Especially at its early phases of implementation, case

selection is particularly important as early jurisprudence will affect the ultimate utility of the OP-ICESCR mechanism and the scope of Covenant protections.

For the purposes of strategic litigation, cases that involve a group of individuals or otherwise have the potential for broader structural and systemic impact and jurisprudential development may be preferable to cases that have a more limited scope.

If cases involve International Non-Governmental Organizations (INGOs), it is important to include local NGOs to ensure that expertise in national law, policy and practice is available, and to better ensure that the actual Claimants are fully involved in any decisions that affect their situation.

Finally, compelling facts supported by sound evidence will strengthen the case. Compelling facts often resonate more with treaty bodies, even helping get past the admissibility stage, and also lend themselves to complementary strategies such as media advocacy and garnering international solidarity.

### 3.3 Choice of forum and mechanism of protection

While economic, social and cultural rights have been successfully litigated before other UN treaty bodies as well as regional human rights mechanisms, most other mechanisms have generally focused on negative obligations or cases which have included an element of discrimination. Importantly, the OP-ICESCR offers a unique opportunity to litigate dimensions of economic, social and cultural rights that are often unavailable under other instruments or ignored by other mechanisms. In particular, these dimensions include issues related to the obligation to fulfill, progressive realization and the devotion of maximum available resources, retrogressive measures, broader structural and systemic social and economic issues and remedies, and the reasonableness of State action aimed at implementing and realizing economic, social and cultural rights. Consequently, while litigants may choose other mechanisms, particularly if jurisprudence exists that is highly relevant to their case, the OP-ICESCR may be desirable because of the broader scope of economic, social and cultural rights issues that can be litigated. Furthermore, jurisprudence from other mechanisms can be used as persuasive authority under the

#### Some Factors to Consider in Developing Test Cases under the OP-ICESCR

1. Individuals or, preferably, specified group of individuals with clear standing as victims and willingness to move forward to the UN System;
2. Identification of one or more local or national NGOs to work with the victims;
3. Where legal counsel is involved in representing the group, openness to working collaboratively with a project team, composed of victims, social movements, local and international NGOs, pro bono lawyers and researchers, with clear roles;
4. Exhaustion of domestic remedies or clear lack of effective domestic remedies or unreasonably prolonged remedies;
5. Solid evidentiary record, preferably with favorable findings by domestic courts on the evidentiary basis of the claim;
6. Compelling facts (including number of victims affected);
7. Quality of the framing of legal issues in the domestic litigation;
8. Focus on structural or systemic issues with a collective dimension that might have a regional or a national impact;
9. Helpful if issues addressed in the case have been included in the CESC recommendations for the particular country or have been the subject of recommendations by a UN Special Rapporteur, where the recommendations have been ignored; and
10. Cases raising unique obligations imposed by the ICESCR: reasonableness standard of review (supporting a shift of the burden of proof to the State once a prima facie violation has been established), progressive realization, and the obligation to fulfill, including with regard to private actors providing public services, ECHR, CEDAW, IASHR. Where compelling, such cases will be considered strong test cases for establishing jurisprudence and demonstrating the value of the OP.

Guidelines developed by the Steering Committee of the Working Group on Strategic Litigation.

OP-ICESCR, thereby making the OP-ICESCR a sound choice for cases dealing with both issues previously addressed in other mechanisms and more novel issues related to economic, social and cultural rights.

Another issue to take under consideration when choosing the most appropriate forum is that of timeliness. In its early phases, the OP-ICESCR mechanism will not suffer from the backlog of cases pending before other treaty bodies and regional mechanisms. Consequently, the OP-ICESCR will likely provide a more expeditious means to achieve accountability and remedies for violations of economic, social and cultural rights.

### 3.4 Preparation of the case

#### I. Evidence

It is crucial to have a sound and compelling evidentiary basis for a Complaint, and in particular, not to rely on an evidentiary record produced by the State respondent.

Strong evidentiary records are crucial when addressing

structural or systemic issues raised by Complaints. Litigants should seek expert witnesses as well as reports from reputable agencies and organizations that support the claims being brought forward. Similarly, proven methodologies should be used in developing

an evidentiary record such as the use of human rights indicators aimed at measuring the impact of law, policy and practice at the national level. One tool for creating an evidentiary record is provided by the Center for Economic and Social Rights in its OPERA Framework, which provides a framework by which to monitor the progressive realization of social rights, combining quantitative and qualitative evidence. The OPERA framework offers a blueprint for combining quantitative and qualitative evidence – including statistics and data, policy and budget analysis and personal stories – to visualize the scope and scale of chronic human rights deprivations and illustrate the links between such deprivations and the actions of the government.

The OPERA Framework is available at: [www.cesr.org/opera](http://www.cesr.org/opera).

#### II. Rights violations alleged

The OP-ESCR only allows claims for violations of rights found in the International Covenant on Economic, Social and Cultural Rights, as described in Part Two above. However, these human rights are indivisible and interrelated to other human rights, so jurisprudence from other human rights bodies may be relevant and be considered persuasive by the Committee on Economic, Social and Cultural Rights.

It will be useful to argue a rights violation through the language of a breach of an international legal obligation. This means arguing: (1) that there was or is a potential injury to an individual or group; (2) that injury was caused by the action or inaction of a State Party to the ICESCR and the OP-ICESCR; and (3) that the action or inaction of the State Party violated an obligation under the ICESCR.

Some of the General Comments provide examples of violations of Covenant rights, and these examples can

**One tool for creating an evidentiary record is the OPERA Framework, which provides a framework by which to monitor the progressive realization of social rights, combining quantitative and qualitative evidence.**

#### **Type of evidence for substantiating a claim on economic, social and cultural rights**

Because claims involving economic, social and cultural rights often involve policy decisions and sometimes complex decisions around allocation of resources, it can be important to help support the claims made in the communication by integrating the use of indicators, human rights budgeting and disaggregated data as sources of evidence. Also, previous reports by the State to any of the other international human rights bodies during periodic review sessions as well as findings by regional bodies, where related, can be critical sources of information.<sup>1</sup>

### General Comment No. 15 on violations and levels of obligations with regard to the right to water

While it is not possible to specify a complete list of violations in advance, a number of typical examples relating to the levels of obligations, emanating from the Committee's work, may be identified with relation to each right. The Committee establishes the following levels with regard to the right to water:

(a) Violations of the obligation to respect follow from the State party's interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health;

(b) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties. This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iii) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction; and

(c) Violations of the obligation to fulfill occur through the failure of States parties to take all necessary steps to ensure the realization of the right to water. Examples include, inter alia: (i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone; (ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized; (iii) the failure to monitor the realization of the right to water at the national level, for example by identifying right-to-water indicators and benchmarks; (iv) the failure to take measures to reduce the inequitable distribution of water facilities and services; (v) failure to adopt mechanisms for emergency relief; (vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone; (vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>, Par. 44)

generally be used to inform all Covenant rights.

### III. Relationship with the broader movement, affected groups, and assessment of needs

A key goal of strategic litigation must be to ensure that the litigation strategy is accountable to affected constituencies, that affected groups are full participants in all planning and decision making related to the litigation, and that they are supportive of the litigation strategy and willing to consider broader interests at stake in their case such as those that may lead to broader structural or systemic remedies.

It is therefore crucial to work closely with the affected groups that give rise to a Complaint and to ensure that they

are well informed about the process. Furthermore, it is important to ensure that they have reasonable expectations as to outcomes, that they are at the center of decision-making, and that organizations representing their interests are accountable to them.

Additionally, strategic litigation can be used to build the capacity of affected groups, mobilize them around core human rights principles, thereby resulting in greater democratization and participation of marginalized groups in all decisions affecting their rights under the Covenant. Strategic litigation may also engage interests of other groups not directly involved in the litigation, such that it is important to engage with broader alliances and ensure adequate consultation. For example, litigation involving refugee claimants



may impact on the rights of undocumented workers, or litigation on the right to sanitation may have distinctive impacts on women or people with disabilities. Strategic litigants should try to develop collaborative relationships with other stakeholders and ensure that, where helpful, those groups seek participatory rights such as by intervening as *amicus curiae*.

It is also important to ensure that strategic litigation complements broader advocacy movements. Experience demonstrates that litigation is most successful when it is anchored in social campaigns and that social campaigns may in turn be strengthened by integrating litigation strategies. Social movements are often essential in identifying the strategic goals for litigation, creating the political pressure necessary for powerful actors, including government agencies responsible for implementation of human rights and projects that impact human rights, to meaningfully engage in the compliant process, and they are also often essential in creating the political pressure necessary for implementation of any remedies resulting from litigation.

#### **IV. Building in enforcement strategies at the beginning of the case**

The early stages of developing a case should include building networks and coalitions with complementary actors that will be important as the case moves forward. These actors include those mentioned in the preceding section as well as civil society and public authorities that can contribute to implementation of remedies and other aspects of Covenant rights.

Litigation can leverage international pronouncements that include specific remedies, and these results can be used as goals towards the effective implementation of Covenant rights. Strategic litigation can be used to proactively engage with State parties in such a way so as to build relationships

that allow civil society actors to assist states in implementation of Covenant rights, including remedies resulting from litigation. The advocacy done through these relationships can be in the context of “friendly settlements” (see below), which lead to the change sought by the litigants and their supporters, and litigation can be the catalyst to ensure that these relationships are effective in achieving that change.

**“The story of the Treatment Action Campaign case is one of strategically chosen litigation, which, at the same time, is linked to a great deal of mobilization in the streets, politically in the Parliament, with the churches, trade unions, etc., and that makes the legal work quite different. It gives the legal work a significant impact that isn’t possible otherwise.”<sup>2</sup>**

—Geoff Budlender

#### **V. Seeking third party support**

It can be useful to create a broad coalition in support of strategic litigation. Support can be sought not only from UN Special Procedures (see below), but from INGOs and national NGOs that provide specific expertise in various advocacy methods that complement strategic litigation. These advocacy methods include media work, campaigning and social mobilization, capacity building, lobbying and negotiation at the national level, and garnering international solidarity and international pressure.

For instance, ESCR-Net’s Strategic Litigation Working Group may be available to provide assistance to advocates in developing litigation strategies, building support networks, identifying experts, crafting Complaints under the OP-ESCR and promoting enforcement of remedies. More information can be found here: <http://www.escr-net.org/docs/i/465879>

Others that could support strategic litigation, or follow up to strategic litigation, include the Office of the High Commissioner for Human Rights, inter-governmental organizations, and states such as those involved in bilateral international assistance.

### **3.5 The Communication procedure**

The Communication procedure enables an individual or a group of individuals to submit a complaint alleging violations of economic, social and cultural rights contained in the



Covenant before the CESCR. By allowing the possibility of bringing specific situations of violations to the attention of the CESCR, the OP-ICESCR has the potential to increase the implementation of economic, social and cultural rights for individuals who have been unable to access or achieve justice at the domestic level. The CESCR has the authority to study the case, determine whether any of the rights under the ICESCR have been violated, and require that the State concerned adopt specific measures to remedy the violations. Cases decided under other Optional Protocols have changed laws, policies and programs of governments around the world.<sup>3</sup>

In order to complete a successful Communication, Claimants generally need to fulfill several requirements that will be discussed in this section. Some requirements have to do with who can submit the Communication, and the rights violations that can be alleged. Others relate to the remedies that should be sought at the domestic level before presenting the complaint at the Committee. Finally, there are some formal requirements including that the submission should be in writing.

Articles 2 and 3 of the OP-ICESCR contain these several requirements.

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**Article 2, OP-ICESCR: Communications**  
Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

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### **Article 2 addresses three crucial issues for the Communications procedure:**

- Rights and obligations established in the ICESCR that could be the subject of Communications (subject matter jurisdiction);
- Who can submit Communications to the Committee (standing); and
- Territorial scope of the protection provided by the

### **Some examples of collective violations of economic, social and cultural rights**

Violations of economic, social and cultural rights, like other human rights, can be either individual or collective in nature. Examples of collective violations include the aggregation of individual violations produced by the same act or omission – such as a massive forced displacement, breaches of the rights of group right-holders such as indigenous communities or trade unions, or violations affecting goods that are collective or indivisible in nature, such as the environment, historical or cultural patrimony.

Communication procedure.

### **Which type of rights' violations can be claimed in the communications procedure?**

Article 2 of the OP-ICESCR has taken a comprehensive approach covering all of the economic, social and cultural rights included in the ICESCR. Thus, the full range of economic, social and cultural rights envisaged in the ICESCR can be invoked within the Communications procedure. The violation invoked can be of an individual or collective nature.

For more information on the precise content of rights and obligations that can be alleged, please refer to Part Two of this Guide.

### **Who can submit communications to the Committee?**

Article 2 of the OP-ICESCR allows communications to be submitted by the following individuals and groups:

- Individuals who claim to be victims of violations of the Covenant;
- Groups of individuals who claim to be victims of violations of the Covenant;
- Third parties acting on behalf of those individuals or groups of individuals with their consent;
- Other people acting on behalf of those individuals or groups of individuals, even without their consent, if an adequate justification can be provided for doing so.<sup>4</sup>

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

According to the OP-ICESCR, any individual or group of individuals, claiming their rights under the Covenant have been violated by a State party to that treaty, may bring a Communication before the Committee. The inclusion of both individuals and groups of individuals is not new under the international treaty body system. The International Convention on Elimination of Racial Discrimination and OP-CEDAW expressly provide standing for groups of individuals, as do the rules of procedure for the Human Rights Committee.<sup>5</sup>

### **Standing for third parties acting with consent of the victims**

Complaints may also be brought by third parties on behalf of individuals or a group of individuals. A representative may be designated by the victims to submit a Communication on their behalf. Representatives may include lawyers, family members, a national or international NGO or any other representative designated by the victim. It is common for NGOs with expertise on human rights and litigation to bring cases and communications before international bodies on behalf of individuals and groups.<sup>6</sup>

According to the general rule stipulated in the OP-ICESCR, individuals must give their written consent in order for a third party to have legitimacy in acting on their behalf. Evidence of consent can be offered in the form of an agreement to legal representation, power of attorney, or other documentation indicating that the victims have authorized the representative to act on their behalf.<sup>7</sup>

### **Standing for third parties acting without consent of the victim**

Article 2 also recognizes that a third party may bring a case without the consent of the victim in circumstances where this can be justified. The exception to the consent requirement aims to account for circumstances in which the consent of individual victims may be difficult or impossible to obtain, such as where victims face a danger of reprisal if they consent to the presentation of a claim on their behalf, victims who are deceased or imprisoned; victims whose whereabouts cannot be determined; or situations in which it

### **Violations of collective or indivisible rights: a case which calls for a flexible solution**

The submission of cases concerning harm to collective or indivisible goods requires a flexible solution since, by definition, no individual holds exclusive rights over these goods and it would be impracticable to require that the communication be submitted by the whole group jointly enjoying the collective good.<sup>8</sup> Some of the most important jurisprudence on economic, social and cultural rights developed by regional human rights systems concerns this type of situation.<sup>9</sup> For example, the case *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria* (Communication N° 155/96) was presented by two NGOs, SERAC and CESR, on behalf of members of the Ogoni people in which the African Commission considered that the rights to health, food, housing and the environment, among others, had been violated;<sup>10</sup> the *D.H. v. The Czech Republic* case<sup>11</sup> was presented by the European Roma Rights Centre, an NGO based in Budapest, on behalf of some specific victims but which involved the situation of other unidentified victims, in which the European Court decided that there was a discriminatory denial of the right to education. Within the Inter-American system of Human Rights, the *Sawhoyamaya Indigenous Community v. Paraguay* case<sup>12</sup> was originally presented by Tierraviva, an NGO, on behalf of an indigenous community and its members in which the Inter-American Court found that there had been violations of the right to a decent life, including lack of access to health services, education, water and sanitation and food, and the right to collective ownership of the community's ancestral land.<sup>13</sup>

would be impractical to acquire consent by all the victim(s) such as in some collective or systemic claims.<sup>14</sup>

### ***What to ask the Committee to consider in assessing the justification?***

Claimants seeking to act without the consent of the victim(s) should submit a written explanation of the justification for such action. Claimants should request that the Committee assess the justification *in the specific circumstances of the case*.<sup>15</sup> They might request that in making such determinations, the Committee consider the facts of the case, in light of such factors as:

- The nature of the alleged violation;
- The circumstances that make obtaining the consent of the alleged victims unworkable or impracticable;
- The capacity of the third party to represent the interests of the victims effectively, including attentiveness to the needs of victims; and
- The absence of any conflict between the interests of the victims and possible interests that third parties may themselves have in relation to the claim.<sup>16</sup>

The CEDAW Committee (Rules of Procedure, rule 68.3) may provide the CECSCR with a reasonable way to deal with the justification of absence of consent. The Human Rights Committee also allows representation in the absence of authorization where it can be proven that the alleged victim is unable to submit the communication in person due to compelling circumstances, such as (i) following an arrest the victim's location is unknown;<sup>17</sup> (ii) detained victims;<sup>18</sup> (iii) when the death of the victim was caused by an act or omission of the State concerned;<sup>19</sup> and (iv) proof that the alleged victim would approve of the representation.<sup>20</sup>

Violations of rights under the ICESCR will frequently have collective dimensions and affect groups or communities or have widespread effects on many individuals. In these cases it may be unworkable to obtain consent from large numbers of victims. In some cases a Communication submitted on behalf of a number of individual victims who have given consent may seek a remedy to violations affecting a larger group, but in other cases it may be important to

identify the entire group or class affected by the violation, and provide justification for acting without the consent of all of the victims.<sup>21</sup> The possibility of accepting third party complaints, therefore, is important in order to prevent impunity for violations which may affect a diffuse group of individuals.<sup>22</sup>

### **The requirement of concrete victims**

To be a victim, the individual or group of individuals must be actually and personally affected by a law or practice, which allegedly violated their rights. The Human Rights Committee has found that to satisfy the victim test, the alleged violation must relate to specific individuals at a specific time and may not be based on a hypothetical set of facts that may occur in the future.<sup>23</sup>

Under the OP-ICESCR, it is not possible to submit abstract legal claims (*actio popularis claims*) challenging policies or laws without identifying a specific victim(s).<sup>24</sup>

However, as said before, an individual or groups of individuals personally affected by a law or a policy can submit a complaint.<sup>25</sup>

### **To bear in mind:**

Claimants do not need to be a lawyer or have legal representative to submit a communication under OP-ICESCR.<sup>26</sup> However, having a lawyer or other trained advocate provide representation of assistance is often beneficial in helping to identify the relevant facts and present the most effective arguments based on existing principles of law and decisions in previous cases.

Unfortunately, the United Nations does not provide financial assistance for complainants to hire lawyers and does not specifically mandate that States parties provide legal aid.<sup>27</sup> This creates serious obstacles for vulnerable and marginalized groups to access the international system. In some countries legal aid is available for bringing complaints under international mechanisms. Human rights organizations may also be able to offer free assistance.<sup>28</sup>

### **What is the territorial scope of protection provided by the communication procedure?**

The OP includes a jurisdictional limitation absent in the

**An individual or groups of individuals personally affected by a law or a policy can submit a complaint.**

### Seeking participation of NGOs in complex cases

Article 2 allows non-governmental organizations to submit Communications on behalf of an alleged victim or groups of victims, with their consent or, where there is adequate justification, without their formal consent.). Thus, Communications can be submitted on behalf of alleged victims or groups of victims by both individual persons and legal entities, including non-governmental organizations. In many cases seeking participation of NGOs may be essential. In complex cases or where there is a large-scale harm, it is extremely difficult for a group of victims to act in a coordinated fashion. Non-governmental organizations may be better placed to ensure that the Communication is presented and processed in a way that addresses the circumstances of all those affected. Also, individual Claimants may be harassed or offered individual settlements in order to prevent the issue from being considered by the CESC and denying an opportunity to address the wider systemic issues. In some countries, this problem has been solved by having a number of individuals and NGOs submit the complaint together.<sup>29</sup>

### Immigration status does not restrict the right to present a claim

A person who claims to be a victim of a violation does not have to be a national of the State Party concerned. Immigrants, refugees and other migrants, whether legally documented or not, can submit a communication against the State where they are working or living and that is responsible for the violation of their rights.<sup>30</sup> Migratory status does not restrict an individual's right to claim a violation of the Covenant.

ICESCR itself. Article 2.1 of the ICESCR contains no reference to the territorial or jurisdictional limits of the Covenant's application. It also establishes international assistance and cooperation obligations that are absent from the equivalent provision of the ICCPR.

The OP states that "communications may be submitted by or on behalf of individuals or groups of individuals, *under the jurisdiction of a State Party*, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party" (article 2). Thus, victims are not required to have been within the State Party's territory at the time of the alleged violation to submit a complaint before the CESC, but they must have been under the "jurisdiction" of the State Party.

As the Optional Protocol is based on State *jurisdiction not territory*, it allows for extra-territorial claims where a state action or omission is attributable to the state's jurisdiction. While jurisdiction has traditionally been understood as physical or effective control, the definition is expanding in cases before regional and international courts towards a more purposive and contextual assessment. In this regard, the CESC has indicated that jurisdiction includes 'any territory over which a State party has geographical, functional or personal jurisdiction'.<sup>31</sup>

In this sense, international jurisprudence has repeatedly recognized the extra-territorial scope of human rights treaties and thus, this provision does not preclude the extraterritorial application of the international protection provided under the communications procedure.<sup>32</sup>

In addition to the established international jurisprudence that recognizes the extra-territorial scope of human rights treaties, a series of principles – the Maastricht Principles on Extra-Territorial Obligations of States in the area of Economic, Social and Cultural Rights<sup>33</sup> – have been identified by a group of experts in international law and human rights on September 2011. These principles reaffirm the responsibility of states for acts committed or that could have impact outside their national territory, and stress the relevance of this rule in the realm of economic, social, and cultural rights, particularly in times of economic globalisation.

Extra-territorial obligations may, for example, be engaged under the OP when states have failed to regulate activities of home state transnational corporations resulting in

## The right to water

According to the CESCR, States must respect the right to water by taking measures to prevent their own citizens or companies that come under their jurisdiction, from violating the right to water of individuals and communities in other countries and depending on their resources, they must facilitate the exercise of the right to water in other countries through international cooperation and assistance (CESCR, General Comment 15, par. 30 to 36).

violations of the Covenant outside of the territory of the state party. In addition, the OP recognizes the CESCR's mandate to make recommendations to international institutions such as the World Bank. The impact of UN and other agencies therefore can be included in litigation strategies.

### Extraterritorial Obligations: International assistance and cooperation <sup>34</sup>

Article 2.1 of the ICESCR requires States to take steps both individually and "through international assistance and co-operation, especially economic and technical" to realize the rights in the Covenant to the maximum of available resources. Unlike the ICCPR and the CRC, Article 2.1 does not contain express reference to jurisdictional limitations of the State party. <sup>35</sup> This may provide some flexibility in allowing for complaints alleging violations resulting from failures to meet obligations of international assistance and co-operation.

## 3.6 What are the admissibility requirements to present a complaint?

Article 3 of the OP sets forth the admissibility requirements to present a communication:

### Article 3, OP-ICESCR

1. The Committee shall not consider a Communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.

2. The Committee shall declare a Communication inadmissible when:

- a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;
- b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;
- c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- d) It is incompatible with the provisions of the Covenant;
- e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;
- f) It is an abuse of the right to submit a communication; or when
- g) It is anonymous or not in writing.

The following are the main admissibility conditions for presenting a complaint before the CESCR:

- The communication should generally be presented after exhausting domestic remedies – for example, attempting to challenge the violation and achieve a remedy by using domestic laws, courts and tribunals (although there are exceptions to this general rule as discussed below);
- The communication must have been submitted within one year following the exhaustion of domestic remedies;
- There must be no case pending or already examined concerning the same matter in the Committee itself or under another procedure of international investigation or settlement;
- Communications should be based on facts that occurred after the entry into force of the OP in the State Party concerned (although there are exceptions for ongoing or continuous violations as discussed below);



### Extra-territorial application of human rights treaties: international jurisprudence

The International Court of Justice has taken the view that the *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights* and *Convention on the Rights of the Child* are extraterritorially applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory (International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paragraphs 111, 112 and 113).

Along the same lines, the Human Rights Committee has recognized the extraterritorial application of the *International Covenant on Civil and Political Rights* in the case of acts that have taken place outside of the national territory, both in its general comments (General Comment N° 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 10, 2004) and Concluding Observations concerning countries (*Concluding Observations of the Human Rights Committee on: United States of America*, 1995, paragraphs 266-304, and 2006, paragraph 10) and Israel (2003, paragraph 11, and 1998, paragraph 10) and in the views it has taken on individual cases in the context of the communications procedure (Views of 29 July 1981, *López Burgos v Uruguay*, Communication No. 52/1979; Views of 29 July 1981, *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/79; Views of 31 March 1983, *Mabel Pereira Montero v Uruguay*, Communication No. 106/81). More recently, the Human Rights Committee, in its Concluding Observations of Germany in 2012, addressed the extra-territorial obligation to ensure human rights, stating that Germany should “set out clearly the expectation that all business enterprises domiciled in its territory

and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations” and that it “take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”.<sup>36</sup>

Similarly, the Committee on Economic, Social and Cultural Rights has applied the extra-territorial obligation to protect during its periodic review procedure. In 2011 it adopted its Concluding Observations on Germany in which it expressed its “concern that the State party’s policy-making process in, as well as its support for, investments by German companies abroad does not give due consideration to human rights” and called on Germany “to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries.”<sup>37</sup>

**The ICCPR, ICESCR and CRC are extraterritorially applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.**

The Committee against Torture (Conclusions and Recommendations: *United Kingdom of Great Britain and Northern Ireland - Crown Dependencies and Overseas Territories*, CAT/C/CR/33/3, 10 December 2004, paragraph 4 (b), and *General Comment N° 2: Implementation of Article 2* by States Parties, in UN Doc. CAT/C/GC/2 of 24 January 2008) and the Committee on Economic, Social and Cultural Rights have also reiterated the extraterritorial scope of their respective treaties (*Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, E/C.12/1/Add.90, 26 June 2003, paragraph 15, and E/C.12/1/Add.27, paragraph 11). This is also the case for the European Court of Human Rights (Judgment of 23 March 1995, *Loizidou v Turkey (Preliminary Objections)*, paragraph 60).



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- Communications should comply with the minimum substantive requirements (i.e. they should be compatible with the provisions of the ICESCR, not be manifestly ill-founded or not sufficiently substantiated); and
- Communications should also comply with some formal requirements (i.e. they cannot be anonymous and should be submitted in writing).

### I. Exhaustion of domestic remedies

Article 3(1) sets out the long established rule in international law, requiring the exhaustion of domestic remedies before a claim can be presented at the international level. Given the absence of jurisprudence by the ESCR Committee, claimants should consider both existing human rights jurisprudence pertaining to exhaustion of domestic remedies and factors particular to violations of economic, social

and cultural rights. The exhaustion rule is the subject of extensive jurisprudence under the UN and regional human rights treaties and the main criteria are well settled. Exceptions to the rule have been recognized in a wide range of circumstances.<sup>38</sup>

Article 3(1) has only included express reference to the exception of remedies that are unreasonably prolonged. It has failed to include an explicit exception to the exhaustion rule when domestic remedies are ineffective. Thus, advocates will need to remain aware of this restriction and take a proactive approach through argumentation to overcome it, considering well established jurisprudence on exceptions to the exhaustion rule.

Human rights bodies have emphasized that the exhaustion rule must be applied with a degree of flexibility and without excessive formalism, bearing in mind that it is being applied in the context of a system for the protection of

human rights and that the application of the rule requires an assessment of the particular circumstances of each individual case.<sup>39</sup>

As the Committee observed in its General Comment 9, on the domestic application of the Covenant: “A State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not ‘appropriate means’ within the terms of Article 2, paragraph 1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.”<sup>40</sup>

### To bear in mind:

The exhaustion of domestic remedies is among the most common grounds advanced by States as a basis for contesting admissibility under other human rights complaints procedures. One particular problem under the OP-ICESCR will be the application of the requirement that the Claimant submit a complaint within one year of the violation or exhaustion of domestic remedies. In countries without effective domestic remedies for ESC rights, that is, in those countries without effective remedies to deal with ESCR violations, claimants will not need to exhaust remedies and will have one year from the violation to present the petition.

In other situations, the harm caused by the rights violation may be ongoing. Other mechanisms have considered such

### The purpose of the exhaustion rule

“The underlying aim of the exhaustion rule is to provide the State with the opportunity to redress a violation using the domestic legal system before a claim is brought to an international body.”<sup>41</sup> This is an intrinsic aspect of the subsidiary character of the OP-ICESCR and international mechanisms in general.” “The exhaustion requirement in Article 3(1) is inextricably linked to the duty of the State to provide effective domestic remedies as a means of giving full effect to the rights recognized in the Covenant.”<sup>42</sup>

### Formal existence of remedies does not suffice

The availability, adequacy and effectiveness of a remedy must be sufficiently certain not merely in theory but also in practice. The merely formal existence of remedies in the domestic system does not impose a requirement to make use of them in a given case.<sup>43</sup>

circumstances to be ongoing or continuing violations for the purposes of timeliness. So even if the initial act or omission that triggered the violation lies outside the scope of time in which a complaint has to be filed, the fact that the violation continues to take place is sufficient for establishing that the case can be brought.

### >>To be exhausted, domestic remedies must be available, adequate and effective

Human rights jurisprudence has established that in order to fall within the scope of the exhaustion rule, a domestic remedy must meet three criteria:

- It must be *available* in practice;
- It must be *adequate* (or sufficient) to provide relief for the harm suffered and;
- It must be *effective* in the particular circumstances of the case.

“In the absence of effective domestic remedies, the exhaustion requirement in Article 3(1) does not apply.”<sup>44</sup>

### >>What constitutes a remedy being available?

The *availability* of a remedy “depends on its *de jure* and *de facto* accessibility to the victim in the specific circumstances of the case.”<sup>45</sup> As noted above, the *de jure* availability of remedies for violations of the rights protected by the Covenant remains limited in many domestic systems.<sup>46</sup> For disadvantaged sectors of society “the *de facto* availability of the remedies that do exist in the law is restricted by social and economic obstacles of a structural or systemic character. Domestic remedies may prove illusory due to economic barriers, such as lack of free legal aid, the location of courts or administrative tribunals, and procedural costs, or due to the broad-based effects of structural inequalities on

women, migrants, indigenous communities, marginalized racial and ethnic groups, and other sectors of society that face systemic discrimination.”<sup>47</sup>

### >>What constitutes a remedy being adequate?

The *adequacy* of a remedy “depends on the nature of the violation, the type of relief that may be obtained in the event of a successful outcome, and the objective sought by the victims in the particular circumstances of the case.”<sup>48</sup> Violations of the rights under the Covenant involving social policy measures that affect large groups of victims or breaches of collective rights generally cannot be adequately addressed through remedies designed for the settlement of individual claims.<sup>49</sup> Thus, Claimants should evaluate when exhausting remedies whether there are domestic remedies adequate to protect the interests of affected groups and communities, and in particular the collective dimensions of the affected rights.

### >>What constitutes a remedy being effective?

The *effectiveness* of a remedy depends on the nature of the violation, the nature of the remedy, and the relationship between the remedy and the facts of the case.<sup>50</sup> To be effective, “a remedy must be capable of producing the result for which it was designed and it must offer a reasonable prospect of success.”<sup>51</sup>

### Core elements of an effective remedy include:

- Enforceability;
- The independence of the decision-making body and its reliance on legal standards;
- The adequacy of due process protections afforded to the victim; and
- Timeliness (article 3.1. explicitly points to the situation where remedies are reasonably prolonged as an exception of the exhaustion of domestic remedies).

### >>Which types of remedies should be exhausted?

With regard to the types of remedies to which the rule applies, existing jurisprudence considers it to apply primarily to judicial remedies. However, the rule of exhaustion also applies to administrative remedies if they are *de facto* available, adequate and

## Some cases of inexistence of effective remedies: economic and financial obstacles to access to justice, situations of structural inequality, high procedural costs and location of tribunals<sup>52</sup>

According to the organs of the Inter-American System of Human Rights (ISHR), the first issue that affects the right of access to justice in the area of social rights is the existence of economic or financial obstacles in access to the courts and the extent of the positive obligation of the State to remove those obstacles in order to ensure an effective right to a hearing by a tribunal. In this respect, the IASHR has recognized the States’ obligation to remove any obstacles in access to justice that originate from the economic status of persons. Both the Inter-American Court and the Inter-American Commission of Human Rights have made it an obligation in certain circumstances to provide free legal services to persons without means in order to prevent infringement of their right to a fair trial and effective judicial protection.<sup>53</sup>

In turn, the IASHR has begun to identify situations of structural inequality that restrict access to justice for certain segments of society. In these cases, the IACHR has underscored the obligation of the State to provide free legal services and to strengthen community mechanisms for this purpose, in order to enable these groups that suffer disadvantage and inequality to access the judicial protective bodies and information about the rights they possess and the judicial resources available to protect them.<sup>54</sup>

By the same token, the IASHR has established that procedural costs, whether in judicial or administrative proceedings, and the location of tribunals are factors that may also render access to justice impossible and, therefore, result in a violation of the right to a fair trial. The organs of the IASHR have found that a proceeding in which the costs are prohibitive violates Article 8 of the American Convention. In this regard, the Commission has held that judicial remedies created to review administrative decisions must be not only prompt and effective, but also “inexpensive” or affordable.<sup>55</sup>



effective in the particular circumstances of the case. “To satisfy these criteria and fall within the scope of the rule, administrative remedies must be provided by a decision-making body that is impartial and independent, has the competence to issue enforceable decisions, and applies clearly defined legal standards. The proceedings must ensure due process of law, including the possibility of judicial review, and the remedies must be prompt.”<sup>56</sup>

**>> Situations where exceptions to the rule of exhaustion apply: inexistence of adequate and effective remedies in the domestic arena**

Many domestic systems lack adequate and effective

### Cases of inexistence of effective judicial proceedings for the protection of social rights

The Inter-American System of Human Rights has established concrete standards for the evaluation of the existence of effective judicial protection for the protection of social rights. Inter-American human rights mechanisms have stated that there exists an obligation for states to provide suitable and effective judicial remedies for the protection of social rights, in both their individual and their collective dimension. The traditional judicial remedies on the law books were conceived for the protection of conventional civil and political rights. Most countries in the hemisphere have created and enacted regulations on simple and prompt judicial remedies to protect rights in serious and urgent situations. However, often these remedies are not adequate for protecting social rights. Sometimes this is due to limits on the standing of groups or collectives of victims of violations, or to bureaucratic delays in judicial proceedings, which render them ineffective. In some cases there are problems in accessing these remedies because the protection does not extend to certain social rights owing to the fact that they are not considered fundamental rights, or because the procedural requirements for their admission are excessively onerous.<sup>57</sup>

remedies for violations of the rights protected by the Covenant, including judicial remedies or enforceable administrative remedies that guarantee due process of law. In these cases, *exceptions to the rule of exhaustion apply*. The standards that have already been developed either by universal or regional mechanisms are very important for building the case of the absence of available, adequate and effective remedies in the domestic arena.

As already mentioned, article 3(1) has expressly included only the exception for remedies that are unreasonably prolonged. It has not explicitly included an exception to the exhaustion rule when domestic remedies are inadequate or ineffective. Thus, advocates will need to remain aware of this restriction and take a proactive approach through argumentation to overcome it, considering well established jurisprudence on exceptions to the exhaustion rule for the cases of inexistence of adequate and effective remedies. For instance, in the case of *Centre on Housing Rights and Evictions (COHRE) v. Sudan* before the African Commission on Human and Peoples’ Rights, the Commission found the case admissible since Sudan failed to provide access to domestic remedies for victims of human rights violations in the Darfur region as well as on account of the scale of the violations and the vast number of victims.<sup>58</sup>

**>> Burden of proof regarding the exhaustion of domestic remedies and waiver of the requirement**

If a State contests admissibility on grounds of non-exhaustion, it should demonstrate that an unexhausted remedy would be available in practice, as well as adequate and effective in the particular circumstances of the case.<sup>59</sup> The regional human rights bodies and the Human Rights Committee apply the equivalent of a shifting burden of proof with regard to the exhaustion of domestic remedies.<sup>60</sup> “Once the Claimant presents a credible claim that domestic remedies have been exhausted or an exception to the requirement applies, if the State wishes to contest exhaustion it bears the burden of proving that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible.”<sup>61</sup> The State also bears the burden of proving that a domestic remedy exists and is capable of “providing redress in respect of the applicant’s complaints and offers reasonable prospects of success.”<sup>62</sup>

Evidence of the formal existence of remedies is not sufficient to discharge the State’s burden of proof. The State



should provide detailed information on the remedies that were available to the Claimant in the circumstances of the case, together with evidence that there would be a reasonable prospect that such remedies would be effective.<sup>63</sup> If the State advances such proof, the burden shifts back to the Claimant to show that the remedies identified by the State were exhausted or an exception to the rule applies. This allocation of the burden of proof reflects awareness that the State enjoys significant advantages over the Claimant in connection with access to evidence relevant to the exhaustion requirement.<sup>64</sup>

### To bear in mind:

When planning to submit a communication, the Complainant must either provide:

- a. Information indicating that domestic remedies have been exhausted, including the specific remedies utilized, the substance of the claim raised in domestic proceedings and whether a final decision has been issued in the proceedings;
- b. Alternatively, present information supporting arguments that no domestic remedies are available or, if they

### Obstacles for the enforcement of binding judgments as indicative of inexistence of effective judicial protection

The right to effective judicial protection requires that judicial procedures intended to protect social rights do not impose conditions or obstacles such as to render them ineffective for accomplishing the purposes for which they were designed. Thus, the IASHR has found that in certain cases there are major obstacles and restrictions to the enforcement of binding judgments against states, in particular with respect to judgments that recognize social security rights. The tendency to invoke emergency laws in this area limits the possibility of states to discharge financial obligations and tends to grant disproportionate privileges to the administration vis-à-vis the persons whose rights have already been recognized by the courts.<sup>65</sup>

### Arguments to advance for the consideration of the exhaustion rule in cases of ESCR

Arguments to advance by Claimants for the consideration of the exhaustion rule by the CESCR relates to factors that are particular to violations of rights under the Covenant. These include: the systemic or collective nature of many violations; the absence of judicial remedies in numerous domestic systems; and the need to clarify standards regarding the adequacy and effectiveness of non-judicial remedies for violations.<sup>66</sup>

are available, one or more of the recognized exceptions to the rule applies (not available in the law or in practice, not effective, or not adequate to provide relief).<sup>67</sup>

### II. The Complainant must generally submit the Communication within one year following the exhaustion of domestic remedies or the violation itself

Article 3(2), OP-ICESCR

The Committee shall declare a Communication inadmissible when:

- a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.

The OP-ICESCR presents a requirement not found in other treaties from the universal system: the need for Communications to be submitted within one year of the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to do so within that time limit.<sup>68</sup> This requirement is stipulated in regional human rights systems, such as the Inter-American system, the European system and the African system. The interest that justifies this admissibility requirement is ensuring that the situation to be examined is current and that the submission is serious.

### **Some examples of existence and inexistence of litispendence (matter examined by two or more international bodies)**

A communication that contains identical facts cannot be presented before the Inter-American Commission of Human Rights and the CDESCR under the communications procedure, because both bodies have the mandate to adjudicate the matter and produce an individual report stating if the facts alleged constitute a violation of economic, social and cultural rights and to issue remedial recommendations to the State party.

However, as United Nations treaty-monitoring bodies have extensively confirmed in practice, the requirement does not apply when a case is simultaneously submitted under an individual communications procedure established in a human rights treaty and under a special procedure of the United Nations Human Rights Council (procedures before Special Rapporteurs, for instance). This practice is widespread, the legal foundation of which stems from the fact that individual communications procedures relating to human rights treaties and the special procedures established by extra-conventional bodies, such as the United Nations Human Rights Council, are different in nature.<sup>69</sup> In this regard, the Human Rights Committee has held that: "Extra-conventional procedures or mechanisms established by the United Nations Commission on Human Rights and assumed by the United Nations Human Rights Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute a procedure of international investigation or settlement within the meaning of Article 5, paragraph 2 (a), of the Optional Protocol (to the to the ICCPR)."<sup>70</sup>

Indeed, regional systems have found exceptions to this general rule in some circumstances. For instance, in the case of *Plan de Sánchez Massacre v. Guatemala*<sup>71</sup> before the Inter-American Commission on Human Rights, the Commission found admissible a case which occurred sixteen years prior to the case being filed, even though the Commission has a rule requiring that cases generally are to be filed six months after exhaustion of domestic remedies. The Commission arrived at this admissibility decision on account of the ongoing violence in Guatemala at the time and the resulting inability of victims of that violence to access domestic justice and accountability mechanisms.

### **III. There must be no case pending or already examined concerning the same matter in the Committee itself or under another procedure of international investigation or settlement**<sup>72</sup>

Article 3(2), OP-ICESCR

The Committee shall declare a Communication inadmissible when:

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

A Communication may also be inadmissible if the matter is, or has been, presented before any other procedure of international investigation or settlement that has similar characteristics (quasi-judicial or judicial of a similar nature or scope) and can produce similar outcomes for the victim as the OP-ICESCR, that is, proceedings that can lead to the recognition of a State's international responsibility for violating a right protected by a treaty or for failing to comply with a treaty obligation.

### **IV. Communications should be based on facts that occurred after the entry into force of the Protocol for the State Party concerned**

Article 3(2), OP-ICESCR

The Committee shall declare a communication inadmissible when:

(b) The facts that are subject of the communication

occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

In principle, the facts that are subject to a communication need to have occurred prior to the entry into force of the OP-IESCR. In this regard, Article 3(2) set forth the principle of the non-retroactivity of treaty obligations and recognizes the well-established exception to the application of this principle for violations that are of a continuing nature.

### >>The exception of continuing violations

The exception for continuing violations has been defined by the Human Rights Committee and other human rights bodies as encompassing situations in which the acts or facts that form the basis of the claim continue, or have effects that are continuing and in themselves constitute a violation of protected rights.<sup>73</sup> In its General Comment 33 on the Obligations of States parties under the First Optional Protocol to the ICCPR, the Human Rights Committee states that “in responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the *ratione temporis* rule), the State party should invoke that circumstance explicitly, including any comment on the possible continuing effect of a past violation.”<sup>74</sup>

## V. Other admissibility requirements

The other subsections of paragraph 2 establish other admissibility requirements:

### • Communications should be in writing

The communication can be filed in any of the six official UN languages: English, French, Spanish, Chinese, Arabic and Russian. Oral, recorded or video-taped Communications are not allowed. However, Communications can be accompanied by documentation and information in various formats to support and/or to prove the alleged violation.

### • Communications cannot be anonymous

The OP states that Communications are not admissible if they are anonymous.

However, the author of the communication (the victim or legal representative acting on behalf of the victim/s) may request that information identifying victims be concealed

## Waiver of the requirement at the European and Inter-American Systems

The European Court of Human Rights, the Inter-American Commission and the Inter-American Court of Human Rights have held that the State may implicitly or expressly waive the exhaustion requirement, since the rule is designed for the benefit of the State and operates for it as a defense. If the State fails to assert non-exhaustion during the first stages of the proceedings, implicit waiver of the requirement by the State will be presumed.<sup>75</sup> Once issued, the waiver is irrevocable. This approach is supported by principles of fairness and judicial economy, bearing in mind that exhaustion is an admissibility requirement of procedural character, that is, it is a requirement created for the State's benefit. Considering this jurisprudence, Claimants might request the Committee to recognize that the exhaustion rule can be waived by the State and if it fails to raise non-exhaustion in the first available opportunity, it will be stopped from doing so at a later stage.<sup>76</sup>

## The burden of proof in the Inter-American System of Human Rights

In its Rules of Procedure, the Inter-American Commission on Human Rights has recognized that the State should bear the burden of proving non-exhaustion in circumstances where the Claimant lacks access to the evidence necessary to demonstrate exhaustion. The Rules stipulate that when the Claimant alleges that he or she is unable to prove exhaustion, the State must demonstrate that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

### The case of forced evictions as a continuing violation

It is noteworthy that many violations of economic, social and cultural rights have effects that are of a continuing nature and in themselves constitute violations of the Covenant, as in the case of forced evictions which may result in ongoing denials of the rights to housing, health, education, food, and water. Claimants should argue that the exception extends to the continuing effects of a past violation, in accordance with established human rights jurisprudence.

For example, the *Case of the Moiwana Community v. Suriname* before the Inter-American Court of Human Rights involved a forced eviction of an indigenous community a year prior to the entry into force of the American Convention of Human Rights. The Court found that it had jurisdiction over the continuous violations that resulted from the forced eviction since they continued subsequent to the American Convention entering into force in Suriname.<sup>77</sup>

during the consideration of the case and in the Committee's final decision. The Committee will likely agree, if requested, to replace the name of the author with initials in published documents. This is the practice of other UN human rights treaty bodies.<sup>78</sup>

The Committee may also agree not to reveal the author's name to the State in circumstances in which the individual or associated individuals might be at risk of retaliation.<sup>79</sup>

The safety of the victim is what justifies confidentiality. However, "complainants should be aware that so far, there are few examples under international human rights systems' practice that applies the anonymity of the victim in all stages of the procedure."<sup>80</sup> Disclosure of victim's name might be necessary, for example, in order for the State to implement the Committee's recommendations. However, personal information should never be disclosed if the author has requested confidentiality and no agreement reached about this information being disclosed.

- Communications should be reliable or sufficiently substantiated

The requirement that the alleged violation be sufficiently substantiated means that all submissions to international mechanisms should meet a minimum degree of reliability, especially when being made on behalf of (and not by) the alleged victims.<sup>81</sup>

In this regard, the communication must contain information of when, where and how the alleged violation occurred.<sup>82</sup> Specific data or information should be provided concerning the violations of the rights of the victim. It is not sufficient to rely exclusively on information about the general situation such as, for example, housing policies which do not meet the needs of vulnerable sectors in society or global statistics such as the rate of illiteracy among indigenous peoples, the percentage of lack of access to health care, etc. Information about the general situation will help to identify the systemic causes of individual violations but the author must also detail the actual experiences of the individual or group of individuals who allege that their rights have been violated.<sup>83</sup>

The CESCR, however, may request further information from the complainants where it is of the view that the complaint is not sufficiently substantiated, as detailed under Article 2 of the Rules of Procedure.<sup>84</sup>

- Communications cannot be based exclusively on reports disseminated by mass media

The purpose of the inclusion of this rule seems to be to ensure that communications submitted on behalf of victims or groups of victims comply with a minimum standard of proof, including direct evidence from the victims or reliable third party evidence. It is particularly relevant to complaints submitted by third parties, since it will be rare that a Communication submitted by victims would be based solely on media reports.

### VI. Communications Not Revealing a Clear Disadvantage or Raising a Serious Issue of General Importance

#### Article 4, OP-ICESCR

The Committee may, if necessary, decline to consider a communication where it does not reveal that the

### Arguments for alleging that the clear disadvantage reference is not an admissibility criterion

In order for Article 4 not to represent an additional admissibility requirement with the potential of foreclosing examination of communications that are serious and merit attention, claimants can advance arguments based on the following interpretation of Article 4:

- It is an exceptional provision that should be applied only when “necessary” and not in the normal functioning of the communications procedure;
- The term “necessary” refers to the Committee’s assessment of restrictions on its capacity to consider communications and the best allocation of its resources in light of its existing caseload;
- Article 4 cannot be invoked or pleaded by the State Party as grounds for dismissal of a communication; and
- It is a discretionary consideration which the Committee is under no obligation to apply.<sup>85</sup>

author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance

Article 4 of the OP-ICESCR is unique within the UN treaty body system. It was proposed during the Open Ended Working Group as a way for the Committee to decline to deal with claims which did not raise issues of clear disadvantage if the caseload became too unwieldy, allowing the Committee to focus on more important claims. It is not an additional admissibility requirement but rather a discretionary provision which the Committee may invoke.

States may argue that communications should be required to show a ‘clear disadvantage’ or ‘issue of general importance’ at the initial admissibility phase but advocates and claimants should resist this approach.<sup>86</sup> Only if it is necessary due to caseload should the Committee request additional information from Claimants regarding the particular

disadvantage suffered or whether the communication involves a serious issue of general importance.<sup>87</sup> Thus, it is not for State parties to invoke Article 4 as grounds for the Committee to decline to consider a communication. Within a progressive interpretation, the Committee should clarify that in the normal functioning of the Communications procedure, Article 4 does not constitute an additional requirement to be satisfied by the authors of communications.<sup>88</sup>

In general, however, alleged violations of Covenant rights will cause victims to suffer clear disadvantage. It will be relatively easy to make submissions in the complaint showing that the author that suffered clear disadvantage and that the issue raised is a serious issue of general importance. Such submissions will generally strengthen other submissions with respect to standing and remedy.

### 3.7 Merits

For information useful to arguing the merits of a Complaint, please refer back to Part Two of this publication. Part Two provides explanations of procedural and substantive rights including strategies on how to construct effective arguments as well as references to more detailed information such as General Comments of the Committee and comparative jurisprudence from other international mechanisms.

### 3.8 Remedies

Claimants can play a key role in the process towards the determination of remedies.<sup>89</sup> Ideally, claimants might anticipate and envisage possible and feasible remedies from the initial submission, so as to impact on the Committee’s views and strategize for effective implementation of the remedies as early as possible in the process. In cases involving violations of the obligation to fulfill in particular, Claimants should consider remedies that entail transformative justice rather than merely restorative justice.<sup>90</sup> While the latter aims to place the Claimant in the position they were in prior to the violation at issue, transformative justice entails remedying the underlying violations, including structural and systemic violations as well as violations of the obligation to fulfill Covenant rights, and moving the claimant further towards the full enjoyment of the rights at issue.

The Protocol does not provide guidelines regarding the scope of the Committee’s remedial recommendations



### The right to a remedy and reparation in international law

The right to a remedy and reparations is at the core of international human rights law. All of the major international human rights instruments set forth the right to an “effective” remedy or recourse after a rights violation has occurred. Also, under international law, the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act (cf. Article 31 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001). Remedies in international law serve the purpose of repairing victims of human rights’ violations as fully as possible. When a State party violates a Covenant right, by action or omission, it is internationally responsible to remedy the situation by providing victims with “adequate, effective, prompt, and appropriate remedies, including reparation” (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights, art. 11). As international principles and jurisprudence have established, appropriate reparations for victims of human rights violations may include measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights (n. 3 above), Art. 2(c)).

when it identifies violations. Thus, the Committee is free to draw considerable guidance from the victims’ suggestions, public international law, human rights law and jurisprudence, as well as the Committee’s own experience in proposing remedies in the context of its Concluding Observations.<sup>91</sup> Consequently, claimants should be proactive in suggesting the adoption of specific remedies. In the context of collective complaints, affected communities, groups, or tribal or indigenous peoples, may also request that the Committee’s remedial recommendations also include elements of

transformative justice, ample participation of different categories of affected persons (e.g. women, children or persons with disabilities) as well as recognition of traditional authorities, in cases such as among indigenous communities.<sup>92</sup>

### Participation of States and other agencies and experts

The Protocol also provides for the participation of the State. This participation is needed in order to provide the Committee and the Claimant(s) with a full understanding regarding the challenges involving implementation and the specificities of the State’s responsibilities. In responding to Communications transmitted by the Committee, the Protocol provides in Article 6(2) that the “State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.” In Article 9, the Protocol further requires States to submit to the Committee within six months “information on any action taken in the light of the views and recommendations of the Committee,” and allows the Committee to invite the State to submit further information thereafter for inclusion in the Committee’s reports.

In addition, the process established to determine remedies would benefit from interaction with agencies or experts that could contribute to determining the underlying causes or consequences of the violation, and help to frame an adequate response to the situation at hand.<sup>93</sup> Articles 8.1 and 8.3, which are unique to the Protocol, would support this possibility as they allow information to be considered by the Committee beyond that which has been submitted by the parties. The submission of *amicus curiae* interventions could also play a significant role in presenting the Committee to different alternatives regarding remedies, drawing from accumulated experience from national and international NGOs in the litigation of economic, social and cultural rights.<sup>94</sup>

### Scope and content of remedies

Reparations have taken different forms depending on the organ that grants them, which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Additionally, as mentioned above, when appropriate, transformative justice should be sought rather than or complementary to restorative justice. The Basic Principles and

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles) have categorized these different modalities and provide examples, some of which are applicable, while others can be adjusted to violations of economic, social and cultural rights.

Under international law generally, States are obligated to provide restitution for their internationally wrongful acts, provided it is “not materially impossible” and “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.” (Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 35).

Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm” (IACtHR, *Case of Velásquez-Rodríguez v. Honduras* (Reparations and Costs), Judgment of 21 July 1989, Series C No. 7, paras. 25-26). While restitution is generally the preferred remedy, other measure such as compensation, satisfaction, rehabilitation or non-repetition are often appropriate remedies in cases involving irreparable harm from human rights violations or when the victim prefers remedies other than restitution. In some Communications brought under the Protocol, at least partial restitution may remain a feasible form of reparation, such as in cases involving forced evictions or unfair dismissals, where there is a possibility of effectively undoing part of the harm done to the individual or group.<sup>95</sup> However, in situations where ESC rights violations are attributable to a State’s failure to adopt a national plan or needed steps with adequate resources to realize Covenant rights, or involve multiple infringed rights and irreparable consequences for victims, restitution is not an option and remedies may require more than one form of reparation.<sup>98</sup>

### Different modalities of reparations

- *Restitution* should, whenever possible, restore the victim to the original situation before the violations of international human rights law occurred. Restitution could include return to one’s place of residence, restoration of employment and return of property, restoration of liberty, enjoyment of human rights, identity, family life and citizenship (cfr. Basic principles, rule 19).
- *Compensation* should be provided for any economically assessable damage and could include physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings; moral damages; costs required for legal or expert assistance, medicine and medical services and psychological and social services (cfr. Basic Principles, rule 20).
- *Rehabilitation* should include medical and psychological care as well as legal and social services (Basic Principles, cfr. rule 21).
- *Satisfaction* could include effective measures aimed at the cessation of continuing violations: an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; inclusion of an accurate account of the violations that occurred in international human rights law and training and in educational material at all levels (cfr. Basic Principles, rule 22).
- *Guarantees of non-repetition* so as to avoid repetition of similar human rights violations by the same State, could include creating domestic remedies to deal with economic and social rights’ violations, strengthening the independence and the adequate functioning of the judiciary; protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; providing, on a priority and continued basis, human rights education to all sectors of society; promoting mechanisms for preventing and monitoring social conflicts and their resolution; reviewing and reforming laws contributing to prevent violations of economic, social and cultural rights (cfr. Basic Principles, rule 23).

### **The practice of CEDAW Committee: individual and systemic measures**

In its “recommendations concerning the author of the communication”, the CEDAW Committee has usually recommended the broad remedies of “appropriate reparation” or “adequate compensation” (for “material” and/or “moral” damage), both “commensurate with the gravity of the violations.” However, it sometimes complements those recommendations with more specific remedies such as restitution (e.g. in a case of forced eviction, “housing commensurate in quality, location and size”), rehabilitation (“commensurate with [...] the condition of [the victim’s] health”), and – in the CEDAW Committee’s first and most famous case, on domestic violence – a range of particular remedies including immediate relief, a safe house, child support, legal assistance and other measures to restore and protect the victims’ physical and mental integrity.<sup>96</sup>

In its “general recommendations”, the CEDAW Committee has also tended to suggest to States quite specific measures to guarantee the non-repetition of violations, including: measures to amend, enact, implement, interpret or repeal certain laws or legal provisions; implementation and evaluation of a national strategy to guarantee non-repetition; measures to ensure the availability of State-funded shelters for victims, or adequate and affordable access to appropriate health care; specific negative and positive regulations of private health-care facilities and detention facilities; and specific trainings or oversight mechanisms for members of the judiciary, law enforcement, civil society and health providers (including to integrate CEDAW, its optional protocol and the CEDAW Committee’s General Comments into the domestic legal order).<sup>97</sup>

### **Individual and general remedies**

In order to redress victims’ injuries as fully as possible and prevent future violations, in many cases the adoption of both individual and general remedial measures will be necessary. Thus, the Committee’s disposition to recommend both types of measures encompassing different forms of reparation, as appropriate, will be key.

In communications submitted to the Committee, Claimants will likely recommend both immediate relief (potentially including restitution, or compensation for irreparable harm) as well as complex remedies with dialogic components, involving affected individuals or groups in the process of determining measures to achieve adequate and sustainable outcomes through longer-term reforms and to prevent future violations.

### **The Committee’s competence to recommend case specific and general remedies**

The Committee has clearly recognized its competence to recommend both specific and general measures necessary to remedy States’ failure to respect, protect or fulfill any Covenant right. In a 2007 statement on how it would evaluate States’ compliance with the Covenant through Communications submitted under the Protocol,<sup>99</sup> the Committee confirmed that it anticipated making both those lines of remedial recommendations in response to violations. In keeping with the practice of other treaty bodies, the Committee indicated its recommendations would comprise both victim-specific individual measures (such as restitution or compensation), as well as general measures aimed at tackling the root causes of violations, as appropriate on a case-by-case basis. When recommending general measures to affect systemic reforms, the Committee said it would suggest goals and parameters to assist the State party in identifying appropriate measures. Those parameters for appropriate measures would prioritize, in particular: resource allocation in conformity with Covenant obligations; provision for disadvantaged and marginalized individuals and groups; protection against grave threats to the enjoyment of ESC rights; and non-discrimination in the adoption and implementation of measures.

In the same statement, the Committee also anticipated recommending a follow-up mechanism to ensure ongoing accountability of the State party. In that sense,

### Systemic reparations in the Inter-American Human Rights System

In the *Yean and Bosico* case, the Inter-American Court ordered the State, as a non-repetition guarantee, to adopt measures to eliminate the historical discrimination caused by its birth record system and education system. In particular, the State was ordered to adopt simple, accessible and reasonable procedures for Dominican children of Haitian descent to obtain a birth certificate; and the Court requested the State to guarantee access to free elementary education for all children regardless of their background or origin.<sup>100</sup>

In the case of *Mamérita Mestanza v. Perú*, the Peruvian Government signed a friendly settlement agreement committing itself to provide education, psychological and medical attention, and housing to the family of a woman who was victimized by the State's practice of forced sterilization. But the State was also required to reform and pass legislation related to family planning as measures of non repetition (or systemic remedy). These measures were proposed by the national and international NGOs involved in the case in consultation with the victim's family and in light of the impact of forced sterilization on women in Peru and the social and economic factors that surrounded this violation.<sup>101</sup>

the Committee indicated it would continue to review the adequacy and reasonableness of measures adopted by States, even in their remedial responses to any violations identified in the initial review of Communications. By extension, the Committee would thus also continue to consider the time frame in which the steps were taken and whether remedial measures restored the minimum core content of the Covenant.

### 3.9 Oral hearings and alternative means of transmitting information

The text of the OP-ICESCR has accorded the Committee flexibility to determine the nature of submissions and

documentation to be presented to the Committee. While most international human rights communications procedures require proceedings on the basis of written submissions, the Rules of Procedure of the CERD and CAT Committees allow for oral submissions.

Claimants might take advantage of this flexibility by requesting oral hearings, or by providing the Committee with alternative means of documenting the case, in addition to the written submission. In many cases, oral presentations and the possibility of direct interaction among the parties of a case and the Committee may provide important insights, enabling the Committee to decide the case with a better picture of the situation. Providing alternative means of transmitting relevant information to the Committee may be the only way to ensure a full factual record. Information in alternative formats including video-links, video recordings, audio recordings, photographs, film or information in oral or electronic form may be key to providing a comprehensive and adequate account of a given violation. For example, forced evictions may be captured on video and photographs and videos may better illustrate the state of housing or health facilities, than written briefs. In some cases, written documentation of the realities faced by victims might be scarce, thus, alternative means will play a fundamental role in documenting the case. This flexibility might allow for an increased access for the victims to present an individual submission and also contribute to giving voice to the most marginalized communities.<sup>102</sup>

#### The importance of oral hearings in case of language, literacy and disability barriers

For victims facing language, literacy, or disability related barriers, written presentations may represent a significant obstacle to accessing the communications procedures. While State parties may generally have written material available to document their position, this will not always be the case for victims. In cases of visual impairment, for example, oral hearings may be an economical means to accommodate disability in order to ensure fairness and accessibility.<sup>103</sup>

#### Strategic use of oral hearings in complex issues of social policy

Oral hearings provide an opportunity for claimants to clarify a point at issue through direct interaction with the Committee,



rather than through the independent assessment of complex documentation. In cases dealing with relatively complex issues of social policy, Claimants might request oral hearings so the Committee can interact directly with representatives of the parties in order to clarify points, or better understand complex issues of policy or legislation.<sup>104</sup> Claimants can use various media, including video and photographic evidence, to support their arguments and to provide the Committee with a better understanding of the facts at issue.

The wording of Article 8(1) is unique in comparison to all other UN communications procedures in allowing for the consideration of information from a broad range of third party sources, in written or alternative formats. All other communication procedures restrict information to that which is made available by the individual petitioner or the State Party concerned.<sup>105</sup>

### Oral hearings in other Protocols and systems

The CAT rule relating to consideration on the merits provides a useful model for the Committee's consideration, at paragraph 111 (c) of its Rules of Procedure: "The Committee may invite the Claimant or his/her representative and representatives of the State party concerned to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits of the complaint. Whenever one party is so invited, the other party shall be informed and invited to attend and make appropriate submissions. The non-appearance of a party will not prejudice the consideration of the case. Other useful models exist at the regional level."

The African Commission on Human and Peoples' Rights and the Inter-American Commission and Court provide for oral hearings at the discretion of the Commission or Court and they are a very common and useful practice.

### What is the utility of third party submissions?

Information submitted by third parties such as non-governmental organizations or human rights institutions will help the Committee assess the situation at issue in a thorough manner. Such organizations may be in a position to advance legal arguments with an eye to future cases and to the coherence of jurisprudence, rather than simply focusing on success in an individual case. Their experience in domestic and regional systems may be of considerable assistance to the Committee in understanding the issues in specific cultural, legal, or political contexts, and in developing appropriate recommendations.<sup>106</sup>

### Which type of third party submissions might be useful?

Third party submissions may take the form of affidavits, expert opinions, *amicus curiae* interventions from human rights institutions or non-governmental organizations, opinions from UN agents, such as special procedures mandate holders, submissions from UN bodies, or submission from any other sources deemed to be reliable and to be providing relevant expertise or information.

## 3.10 Information Obtained from Other Sources

### Article 8: Examination of Communications

(...) 3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.

Article 8(3) is also unique in comparison to other UN human rights bodies' communication procedures. This Article was modeled on provisions adopted in the rules of procedure of the CERD, CAT and CEDAW Committees, establishing that Committees may obtain, through the Secretary-General, additional information from UN bodies or specialized agencies. Article 8(3) of the OP ICESCR, however, goes beyond the rules of the other Committees to identify a range of possible sources beyond those within the UN system,



### Information submitted by third parties

#### Article 8: Examination of Communications

The CAT rule relating to consideration on the merits provides a useful model for the Committee's consideration, at paragraph 111 (c) of its Rules of Procedure:

1. The Committee shall examine communications received under Article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.[...]

3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.

including international organizations and regional human rights systems.<sup>107</sup>

### 3.11 Interim measures (Article 5)

Importantly, the OP-ICESCR provides for Interim Measures, which is a way for the Committee to intervene and ask the State party to refrain from doing something, or to do something, prior to the case being decided on the merits. Interim Measures can be sought in exceptional circumstances to avoid possible irreparable harm to the authors of a Complaint.<sup>108</sup> Interim Measures can be sought any time after the submission of a Complaint, as long it is before a final determination on the merits. Consequently, Interim Measures can be sought even before a decision on admissibility.

The Human Rights Committee has provided some guidance on the meaning of "irreparable harm." The Human Rights Committee has stated that:

The Committee observed that what may constitute 'irreparable damage' to the victim within the meaning of rule 86

### Third party submissions in other systems and areas

All regional systems currently provide for third party submissions at the discretion of the adjudicating body. The Inter-American Court has a procedure for and has made extensive use of amicus submissions. The Protocol on the Statute of the African Court of Justice and Human Rights provides for third parties to be invited to present written observations or take part in hearings. The European Court of Human Rights has similar authority and had made increasing use of the power to consider third party submissions where it deems these relevant. In the adjudication of issues of public policy in trade and investment disputes and arbitration, the importance of amicus submissions has become increasingly recognized. For instance, in the *Case of the Ituango Massacres v. Colombia*, the Inter-American Commission and later the Inter-American Court relied on an *amicus curiae* intervention that brought comparative law on forced evictions into the arguments. The Court relied on this information to hold that forced eviction may rise to violations of Article 11 (protection from arbitrary or abusive interference with the home) and Article 21 (right to property) of the American Convention.<sup>109</sup>

In domestic law, it is widely accepted that courts and tribunals may benefit from interventions by non-governmental organizations, human rights institutions and other actors in the consideration of human rights cases, particularly those with broader systemic impact or raising new areas of law.

cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request [for interim measures] under rule 86

### **Case Study: *Liliana Assenova Naidenova et al. v. Bulgaria*, Communication No. 2073/2011**

This case involved a Roma community in Sofia that has existed for over seventy years and faced imminent forced eviction in July 2011 to make way for so-called urban development by created improved access to more recently built middle-income housing. The impoverished community was not consulted and was not offered alternative housing. In 2011, the Human Rights Committee issued the first ever Interim Measures under the ICCPR to prevent a forced eviction.<sup>110</sup> It later issued a order to reestablish water supply and in 2012 it issued a permanent injunction against the threatened eviction.

This case was built on a foundation of Concluding Observations created through strategic use of the Parallel Reporting procedure over the previous six years, beginning with a Parallel Report on Kenya in 2005 that resulted for the first time in forced evictions being considered a violation of the ICCPR and a Parallel Report on Israel in 2010 that reaffirmed and strengthened those Concluding Observations while also addressing access to water under the ICCPR.

[http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-106-D-2073-2011\\_en.doc](http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-106-D-2073-2011_en.doc)

where it believes that compensation would be an adequate remedy.<sup>111</sup>

With respect to the binding nature of Interim Measures, General Comment No. 33 of the Human Rights Committee provides further guidance, stating that:

Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith

the procedure of Communication established under the Optional Protocol.<sup>112</sup>

Given the substantive rights under the ICESCR, Interim Measures can include both injunctive relief (ordering a State party to refrain from specified actions) and mandamus relief (ordering a State party to take specified positive action).<sup>113</sup> The case of *Liliana Assenova Naidenova et al. v. Bulgaria*<sup>114</sup> under the OP-ICCPR provides an example of both. There, the Human Rights Committee issued Interim Measures ordering that a threatened forced eviction of a Roma community not be carried out. It also subsequently ordered the reestablishment of access to water after that access was cut off by local authorities, demonstrating that Interim Measures can be used to enforce both negative and positive obligations. In its deliberations, the Human Rights Committee found that irreparable damage, including to Article 17 prohibitions on arbitrary or unlawful interference with the home, would occur if the community was evicted, and also found that irreparable damage to Article 17 as well as Article 6 right to life would occur if access to water remained cut off.

Requests for Interim Measures can be made at any time after the Committee has received a complaint and before a decision on the merits has been transmitted to the State.<sup>115</sup> The Committee will make clear that the request for Interim Measures does not prejudice the merits of the case, and Interim Measures can be lifted at any time on account of the Committee being satisfied that the State has adequately addressed the concerns at issue.<sup>116</sup> Both the authors of the complaint and the responding State may make written submissions addressing whether or not it is appropriate to lift the Interim Measures.

### **3.12 Protective measures (ARTICLE 13)**

The OP-ICESCR also provides protection for those bringing a complaint. The State party against which a complaint is brought is prohibited from retaliating against those bringing the complaint, including that authors of complaints not be subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee.<sup>117</sup>

If such retaliation does occur, Claimants should immediately notify the Committee. Additionally, Complainants should request urgent action from Special Procedures of



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the Human Rights Council, including where relevant:

- Special Rapporteur on the situation of human rights defenders
- Special Rapporteur on the independence of judges and lawyers
- Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence
- Working Group on arbitrary detention
- Working Group on enforced or involuntary disappearances

### 3.13 Friendly settlements

Article 7 establishes a friendly settlement procedure by stating that “[t]he Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect

for the obligations set forth in the Covenant. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.”

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

According to Rule 15 of the Rules of Procedure, a request for friendly settlement can be made by any of the parties after receipt of the communication by the Committee and before a determination on the merits and requires the consent of all the parties. Information provided by the parties in the context of seeking a friendly settlement can not be used if the communication goes to consideration of the merits, and the entire friendly settlement process is confidential.

The success of a friendly settlement mechanism depends

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

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

Monitoring by the Committee on implementation of a friendly settlement is essential, especially in ensuring that the friendly settlement is consistent with the object and purpose of the Covenant and that the mechanism is not used

to delay a case indefinitely. The terms of a friendly settlement should be subject to review and approval by the Committee, and must also be subject to follow-up procedures in order to monitor its implementation. Further, if a State party fails to comply with the terms of the friendly settlement, the complainant should have the ability to revive the Communication from the last point of consideration by the CESC, without having to resubmit.<sup>120</sup> Further, advocates also need to ensure that use of the friendly settlement procedure will not expose the complainant to undue pressure or intimidation by the State.<sup>121</sup>

### 3.14 Follow Up

Article 9 of the OP-ICESCR establishes the Committee's competence to issue its views and recommendations on a Communication and creates the basic framework for follow-up procedures with the State. After examining a communication, if the Committee finds that the State party has committed the violation(s) alleged in the Communication, it will transmit its views together with its recommendations to the parties concerned.

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

The Committee can ask the State Party to submit further information about any measures the State party has taken in response to its views or recommendations in the State party's subsequent periodic reports under Articles 16 and 17 of the Covenant.<sup>122</sup>

OP-ICESCR is the first treaty Optional Protocol in which a follow-up procedure has been expressly included in the text, building on the existing practice of other treaty bodies.<sup>123</sup>

### 3.15 Advocacy parallel to litigation

It is often useful to build a foundation for a complaint by engaging other international mechanisms. In particular, if the opportunity presents itself, it can be helpful to use the Parallel Reporting procedure under the ICESCR, or other treaty bodies, to produce Concluding Observations that lay the foundation for a Communication. In this way, you can not only create international pronouncements addressing

#### Friendly settlements in regional and domestic systems

The Inter-American system, as well as domestic systems such as South Africa provide useful models for using friendly settlement as a means of securing remedies in a more timely fashion, and often achieving resolutions that may go beyond those that would be secured through a formal decision.<sup>118</sup> A third model that could possibly be looked at is the practice of the European Court of Human Rights in issuing "pilot" judgments as a response to breaches revealing structural deficiencies, without specifying the type of measures the State should take, nor suspending the handling of similar cases while waiting for the adoption of such measures.<sup>119</sup>



the issues to be addressed via litigation, including by the Committee on Economic, Social and Cultural Rights itself, but you can gauge the reaction to those issues by the Committee and adjust arguments accordingly.

Advocates can also seek pronouncements from Special Procedures of the Human Rights Council, including relevant Special Rapporteurs and Independent Experts, which support the claims or otherwise address the issues of a Communication. Jurisprudence under the OP-ICCPR may be useful to cite for the proposition that extra-conventional procedures or mechanisms established by the United Nations Commission on Human Rights and assumed by the United Nations Human Rights Council do not constitute a procedure of international investigation or settlement within the meaning of Article 5, paragraph 2 (a), of the OP-ICCPR, and thus do not detrimentally effect a decision on admissibility (Article 3(2)(c) of the OP-ICESCR uses similar language). This is because the mandates of both the UN Commission and the Council Special Procedures focus on examining and publicly reporting on human rights situations more generally and not on providing a final settlement in individual cases of violations.

The Universal Periodic Review (UPR) is another international mechanism under the Human Rights Council that can be used to support strategic litigation, including as a means to leverage international condemnation of the violations at issue in a Complaint. It also may be useful for calls for accountability and implementation of remedies during the follow up phase.

As the Treatment Action Campaign case mentioned above demonstrates, other useful advocacy that can be undertaken to support litigation includes public awareness raising and mobilization in support of the issues raised in litigation, including media and social mobilization strategies aimed at drawing attention to the issues being litigated and applying political pressure on governments to

ensure that they cooperate with the OP-ICESCR mechanisms including by implementing any remedies ordered by the Committee.

### 3.16 Enforcement strategies

#### I. Favorable decisions

Under the OP-ICESCR, State parties found to be in violation of the ICESCR are obliged to submit, within six months of a decision on the merits, a written response detailing actions taken in light of the Committee's decision. The Committee may invite further information, including within the content of the State party's periodic reporting under the Covenant, so it may be advantageous for claimants to request such follow up by the Committee.

The Committee may also appoint a Special Rapporteur to follow up on implementation of decisions. This follow up should include the drafting of a detailed plan of action for implementation of remedies, and it will be important for advocates, and in particular the Claimants, to engage in this follow up process. Claimants can request that the Committee appoint such a Rapporteur and subsequently provide information to the Special Rapporteur regarding implementation of the Committee's decisions.

Rates of implementation of favorable decisions, however, demonstrate that such decisions alone all too often fail to result in the remedies sought, or impact desired. Consequently, litigation strategies should be augmented with other advocacy methods, including those resulting in political pressure aimed at the State party in question.

**“Luckily, quite a lot of our lawyers have previous experience in using the law against apartheid, and one of the things we discuss is what they term ‘the art of a losing case’, where you lose in court, but you get a whole number of other benefits. You get the issue out into the public domain.”<sup>124</sup>**

**- Mark Heywood,  
National Secretary of the  
Treatment Action Campaign**

#### II. Unfavorable decisions

Even unfavorable decisions can be used for positive impact. For instance, you can use the litigation for broader public



awareness and education about the issues on which the litigation focuses. Advocates can also use unfavorable decisions to expose the lack of effective remedies and to highlight which incremental goals should be the focus of future strategic litigation efforts in order to end the impunity resulting from the failure of human rights mechanisms to take a broad view of rights enforcement.

## Notes

- <sup>1</sup> International Network for Economic, Social and Cultural Rights & International Women's Rights Action Watch – Asia Pacific, *Claiming Women's Economic, Social and Cultural Rights*, 2013 at p. 70.
- <sup>2</sup> Interview in Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, Geneva: COHRE 2003, discussing Constitutional Court of South Africa, *Minister of Health vs. TAC*, Case CCT 8/02, Constitutional Court of South Africa, 5 July 2002. The Treatment Action Campaign case dealt with the provision of medicines to prevent transmission of the HIV virus from mothers to babies during pregnancy. Strategic litigation was used to bring awareness of the issue to the broader public and to garner support for provision of the medicine to pregnant women.
- <sup>3</sup> See, for example, OP-CEDAW, cases *Şahide Goekce (deceased) v. Austria (domestic violence)*, CEDAW/C/39/D/5/2005, 6 August 2007; and *Fatma Yildirim (deceased) v. Austria (domestic violence)* CEDAW/C/39/D/6/2005, 1 October 2007; OP-ICCPR, case *Brough v Australia*, CCPR/C/86/D/1184/2003, 27 April 2006; *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 60.
- <sup>4</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 35.
- <sup>5</sup> *Ibid* at p. 62.
- <sup>6</sup> *Ibid* at p. 63.
- <sup>7</sup> *Ibid* at p. 63.
- <sup>8</sup> Cf. Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008, Available at <http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf>
- <sup>9</sup> Cf. Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008, Available at <http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf>
- <sup>10</sup> African Commission of Human Rights, decision of 13-27 October 2001.
- <sup>11</sup> European Court of Human Rights, *D.H. v. The Czech Republic*, judgment of 13 November 2007.
- <sup>12</sup> Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006.
- <sup>13</sup> Cf. Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008, Available at <http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf>
- <sup>14</sup> *Ibid* at p. 63.
- <sup>15</sup> International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Considerations in relation to the OP-ICESCR and its Rules of Procedure, p. 4.
- <sup>16</sup> International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Considerations in relation to the OP-ICESCR and its Rules of Procedure, p. 4 and 5.
- <sup>17</sup> HRC, *Lanza v Uruguay*, Communication No. 8/1997, UN Doc CCPR/C/9/D/8/1997.
- <sup>18</sup> HRC, *Weinberger v Uruguay*, Communication No. 28/1978, UN Doc CCPR/C/11/D/28/1978
- <sup>19</sup> HRC, *Miango v Democratic Republic of Congo*, Communication No. 194/1985, UN Doc CCPR/C/31/D/194/1995.
- <sup>20</sup> HRC, *Sahid v New Zealand*, Communication No. 893/1999, UN Doc CCPR/C/77/D/893/1999; *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 64.
- <sup>21</sup> International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations of the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure*, (2009).
- <sup>22</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 64.
- <sup>23</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 64.
- <sup>24</sup> Collective complaints were provided for in Article 3 of the Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina Albuquerque, 23 April 2007, A/HRC/6/WG.4/2 (containing the Explanatory Memorandum). Even though the collective complaints were removed from the final version of the Optional Protocol, this would not prevent the CESCR to consider complaints that involve the violation of a group.
- <sup>25</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 64.
- <sup>26</sup> *Ibid* at p 63.
- <sup>27</sup> *Ibid*.
- <sup>28</sup> *Ibid*.
- <sup>29</sup> *Ibid*.
- <sup>30</sup> Migrant workers are especially vulnerable to racism, xenophobia and discrimination. Migrants themselves are criminalized, most dramatically through widespread characterization of irregular migrants as 'illegal', implicitly placing them outside the scope and protection of the rule of law (see Committee on Migrant Workers - Frequently Asked Questions (FAQs) at <http://www2.ohchr.org/english/bodies/cmwf/faq.htm> In addition to submitting a communication to the CESCR, The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provide for inter-state and individual communications; *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 64.
- <sup>31</sup> CESCR, *Concluding Observations on the Netherlands* U.N. Doc. E/1999/22 para. 194.
- <sup>32</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 65.
- <sup>33</sup> The Maastricht Principles have been adopted on 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists. The experts who adopted the principles came from universities and organizations located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations

Human Rights Council. The Maastricht Principles complement and build on the 1986 Limburg Principles for the implementation of the International Covenant on Economic, Social and Cultural Rights and on the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. The text of the Maastricht Principles is available at: [www.maastrichtuniversity/humanrights](http://www.maastrichtuniversity/humanrights) and [www.icj.org](http://www.icj.org).

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

<sup>35</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 65; Several human rights instruments refer to a State's jurisdiction in defining the scope of application for treaty obligations. For example, the ICCPR states 'all individuals within [a State's] territory and subject to its jurisdiction.' The CRC indicates 'each child within [a State's] jurisdiction.' The American Convention requires member States to 'respect the rights and freedoms recognized herein and [to] ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.' However, the ICESCR contains no jurisdictional clause.

<sup>36</sup> Human Rights Committee, Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO/6 (12 November 2012).

<sup>37</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations: Germany, UN Doc. E/C.12/DEU/CO/5 (12 July 2011).

<sup>38</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 5.

<sup>39</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 7.

<sup>40</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 6. For example, the subsidiary role of human rights system in the protection of human rights is referenced expressly in the American Convention, which refers to international efforts as necessarily 'reinforcing or complementing the protection provided by the domestic law of the American states.' American Convention, Preamble, para. 2. It is ensured through the rule of prior exhaustion of domestic remedies, allowing states to resolve problems under their internal law before being confronted with an international proceeding, and the 'fourth instance formula', which prevents an international body from examining internal issues unless a violation of a provision of international law is alleged. See, e.g., *Velásquez Rodríguez*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paras. 60-61; *Juan Carlos Abella v. Argentina*, Case 11.137, OEA/Ser.L/V/II.98, doc. 6 rev. (1998), paras. 141-42. Similarly, in spite of the fact that the ECHR does not expressly mention the principle the Court held that the protection of the ECHR is subsidiary to that of national law. It stated that '... the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26). ECHR, *Issa and Others v. Turkey*, Application No:31821/96 par. 48; The court reached the same conclusion in the *Belgian Linguistic Case*, Application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (23 July 1968), para. 10 stating '...In so doing it cannot assume the role of the competent national authorities,

for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.' (emphasis added), Strasbourg reaffirmed this notion in its case *Akdivar v. Turkey*, 99/1995/605/693, European Court of Human Rights, (30 August 1996), '...[I]t is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.'

<sup>41</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 65; See, e.g., *Human Rights Committee, Celal v. Greece*, Communication No. 1235/2003 (2004), para. 6.3; CEDAW, *Fatma Yildirim (deceased) v. Austria*, Communication No. 6/2005 (2007) para. 7.2; African Commission on Human and Peoples' Rights, *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, Communication No. 71/92, 10th Annual Activity Report (1996), para. 10; Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Merits, Judgment of 29 July 1988, Series C, No. 4, para. 61; European Court of Human Rights, *Akdivar and Others v. Turkey*, Judgment of 16 Sept. 1996, Reports, 1996-IV, para. 65.

<sup>42</sup> Committee on Economic, Social and Cultural Rights, *The domestic application of the Covenant: 12/03/1998.E/C.12/1998/24, CESCR General comment 9*, (General Comments), para. 3.

<sup>43</sup> *Ibid* at p. 66; Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 6.

<sup>44</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 67.

<sup>45</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 66.

<sup>46</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 6.

<sup>47</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 6.

<sup>48</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 67.

<sup>49</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 6.

<sup>50</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 67.

<sup>51</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 7.

<sup>52</sup> Inter-American Commission of Human Rights, Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights.

<sup>53</sup> Available at <http://www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodesci-ii.eng.htm>

<sup>54</sup> Inter-American Commission of Human Rights, Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights, cit, para. 9

<sup>55</sup> Inter-American Commission of Human Rights, Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by

the Inter-American System of Human Rights, cit, para. 8.

<sup>56</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 7

<sup>57</sup> Inter-American Commission of Human Rights, Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights, cit, para. 27.

<sup>58</sup> African Commission on Human and Peoples' Rights, *Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication 296/05 (decision on the merits 27 May 2009).

<sup>59</sup> *Claiming Women's Economic, Social and Cultural Rights*, supra note 6 at 67.

<sup>60</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 7 and 8.

<sup>61</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 7 and 8.

<sup>62</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 7 and 8.

<sup>63</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 8.

<sup>64</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 8.

<sup>65</sup> Inter-American Commission of Human Rights, Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by the Inter-American System of Human Rights, cit, para. 27.

<sup>66</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 5.

<sup>67</sup> *Claiming Women's Economic, Social and Cultural Rights*, supra note 6 at 67.

<sup>68</sup> *Ibid* at 66.

<sup>69</sup> Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008, p. 62. Available at <http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf>

<sup>70</sup> Human Rights Committee, *Liliana Assenova Naidenova et. al v. Bulgaria*, Communication No. 2073/2011, UN Doc. CCPR/C/106/D/2073/2011 (2012), at para. 13.3

<sup>71</sup> See Inter-American Commission on Human Rights, *Plan de Sánchez Massacre case v. Guatemala*, ruling on admissibility, Report No. 31/99, Case 11.763 (11 March 1999); Inter-American Court of Human Rights, *Plan de Sánchez massacre case v. Guatemala*, Report No. 31/99, Case 11.763 (29 April 2004).

<sup>72</sup> *Claiming Women's Economic, Social and Cultural Rights*, supra note 6 at 69.

<sup>73</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 10.

<sup>74</sup> *Claiming Women's Economic, Social and Cultural Rights*, supra note 6 at 68; HRC, *Sandra Lovelace v. Canada*, 11 HRC, Comm. No. 24/1977 (30

July 1981), U.N. Doc. CCPR/C/OP/1 (1984), para 83. See also, Tom Zwart, *The Admissibility of Human Rights Petitions: the Case Law of the European Commission of Human Rights and the Human Rights Committee*, 1st Ed. (Springer: 1994).

<sup>75</sup> See for example, Inter-American Court of Human Rights, Case of *Acevedo-Jaramillo et al. v. Peru*, Judgment of February 7, 2006, (*Preliminary Objections, Merits, Reparations and Costs*). The Court "reaffirms the criteria regarding the filing of the objection for failure to exhaust the domestic remedies, criteria which is to be considered in the instant case. First, the Court has pointed out that the matter of the failure to exhaust remedies is one of pure admissibility and that the State which alleges it must express which domestic remedies should be exhausted, as well as prove the effectiveness thereof. Second, for the objection of failure to exhaust the domestic remedies to be held timely, it should be filed at the admissibility stage of the proceeding before the Commission, that is, before any consideration of the merits of the case; otherwise, the State is assumed to have waived constructively its right to resort to it. Third, the respondent State may waive, either expressly or implicitly, the right to raise an objection for failure to exhaust the domestic remedies" (par. 24). Other cases where the Court held the same criteria are: Case of *Ximenes-Lopes v. Brazil*. Preliminary Objections, para. 5; *Case of the Moiwana Community v. Suriname*, para. 49; and *Case of the Serrano-Cruz Sisters v. El Salvador*. Preliminary Comments, para. 135.

<sup>76</sup> In the cited case of *Acevedo-Jaramillo et al. v. Peru*, the Inter-American Court applied this rule: "the Court has noted that during the proceeding before the Commission the State did not invoke the failure to exhaust the domestic remedies (...) Therefore, as a consequence of having failed to file a procedurally timely objection for failure to exhaust the domestic remedies, the Court concludes that Peru has implicitly waived its right to invoke it, whereby it dismisses the preliminary objection filed by the State" (para. 125 y 126). See also, ECHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 Nov. 1971, Series A No. 12, para. 55; *Artico v. Italy*, Judgment of 13 May 1980, Series A, No. 37, para. 27; IA Court of Human Rights, *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 July 2004, Series C, No. 107, par. 81; *Velásquez Rodríguez v. El Salvador*, Preliminary Objections; IACHR, *Abu-Ali Rahman v. United States*, Report No. 39/03, Petition 136/2002, 6 June 2003, para. 27. The UN Human Rights Committee has also recognized that in certain circumstances a State may waive the exhaustion requirement. Annual Report of the Human Rights Committee, UN Doc. A/54/40 (1999), para. 417. Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 11.

<sup>77</sup> Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname*, (Judgment of 15 June 2005).

<sup>78</sup> *Claiming Women's Economic, Social and Cultural Rights*, supra note 6 at p. 70; See, e.g. CEDAW, Ms. B.J. vs. Germany, A/59/38 Annex III Communication No.: 1/2003, available at [http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/BJ%20v.%20Germany\\_E\\_.pdf](http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/BJ%20v.%20Germany_E_.pdf); Ms. A.T. vs. Hungary; supra n. 143 above, among others. See also IACHR 'PM 43-10 - 'Amelia', Nicaragua'. On February 26, 2010, the IACHR granted precautionary measures for a person who the IACHR will identify as Amelia, in Nicaragua. The request seeking precautionary measures alleges that Amelia, mother of a 10-year-old girl, is not receiving the necessary medical attention to treat the cancer she had, because of her pregnancy. The request alleges that the doctors had recommended to urgently initiate chemotherapy or radiotherapy treatment, but the hospital informed Amelia's mother and representatives that the treatment would not be given, due to the high risk that it could provoke an abortion. The Inter-American Commission asked the State of Nicaragua to adopt the measures necessary to ensure that the beneficiary has access to the medical treatment she needs to treat her metastatic cancer; to adopt the measures in agreement with

the beneficiary and her representatives; and to keep her identity and that of her family under seal. Within the deadline set to receive an answer, the State of Nicaragua informed the IACHR that the requested treatment has been initiated; ECHR, *K.H. and Others v. Slovakia*, (Application no. 32881/04); ACHPR, *B. v. Kenya*, Communication 283/2003, Seventeenth Activity Report.

<sup>79</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 70; See, Catarina de Albuquerque, 'Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights. Analytical paper by the Chairperson-Rapporteur, E/CN.4/2006/WG.23/2, 30 November 2005.

<sup>80</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 70.

<sup>81</sup> Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *cit.*, p. 64.

<sup>82</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 69.

<sup>83</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 69; Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *cit.*, p. 64.

<sup>84</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at 69. Inter-American Institute of Human Rights/International Commission of Jurists, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *cit.*, p. 64.

<sup>85</sup> See International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 12.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 74.

<sup>90</sup> Human Rights Council. Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (A/HRC/14/22), 23 April 2010, par. 31, 32 and 78.

<sup>91</sup> Krsticevic Viviana, "Remedies" at p. 5.

<sup>92</sup> *Ibid* at p. 5.

<sup>93</sup> *Ibid* at p. 6.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid* at p. 8.

<sup>96</sup> Krsticevic, Viviana, *supra* note 99 at p. 8, note 9.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* at p. 8.

<sup>99</sup> CESCR Statement, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant', 10 May 2007, UN Doc. E/C.12/2007/1.

<sup>100</sup> IA Court H.R., *Case of the Girls Jean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgement of September 8, 2005, Series C No. 130. Petition related to the rights to

nationality and education of girls of Haitian descent born in Dominican Republic.

<sup>101</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 75.

<sup>102</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 28.

<sup>103</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 28.

<sup>104</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), p. 28.

<sup>105</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), 26.

<sup>106</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), 26.

<sup>107</sup> Cfr. International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations in relation to the OP-ICESCR and its Rules of Procedure*, (2009), 27.

<sup>108</sup> Krsticevic Viviana. "Precautionary Measures" at p. 1.

<sup>109</sup> Inter-American Court of Human Rights, *Case of the Ituango Massacres v. Colombia*, (Judgment of 2 July 2006).

<sup>110</sup> Human Rights Committee, *Liliana Assenova Naidenova et. al v. Bulgaria*, Communication No. 2073/2011, UN Doc. CCPR/C/106/D/2073/2011 (2012).

<sup>111</sup> Human Rights Committee, *Stewart v. Canada*, Communication No. 538/1993, UN Doc. CCPR/C/50/D/538/1993 (1994), para. 7.7

<sup>112</sup> Human Rights Committee, General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/33 (5 November 2008), para. 19.

<sup>113</sup> Krsticevic, Viviana, "Precautionary Measures" *supra* note 117 at p. 9.

<sup>114</sup> Human Rights Committee, *Liliana Assenova Naidenova et. al v. Bulgaria*, Communication No. 2073/2011, UN Doc. CCPR/C/106/D/2073/2011 (2012). Available at: [http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-106-D-2073-2011\\_en.doc](http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-106-D-2073-2011_en.doc)

<sup>115</sup> Krsticevic, Viviana, "Precautionary Measures" *supra* note 117 at p. 8.

<sup>116</sup> *Ibid* at p. 9.

<sup>117</sup> *Ibid* at p. 3.

<sup>118</sup> ESCR-Net, Supporting Strategic Litigation under the Optional Protocol to ICESCR, Draft Background Note, 2010, p. 12.

<sup>119</sup> For further information on this procedure see, The Council of Bars and Law Societies of Europe, CCBE Comments on the Pilot-Judgment Procedure of the European Court of Human Rights, (June 24, 2010), available at <http://>



[www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Commentaires\\_CCBE1\\_1277718645.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Commentaires_CCBE1_1277718645.pdf). (last visited 5 December 2013).

<sup>120</sup> NGO Coalition Commentary, although this will be subject to the Rules of Procedure to be adopted by the CESCR.

<sup>121</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 76.

<sup>122</sup> This is the traditional mechanism under the ICESCR, according to which all State Parties are obliged to submit regular reports to the Committee on how the rights are being implemented every five years.

<sup>123</sup> *Claiming Women's Economic, Social and Cultural Rights*, *supra* note 6 at p. 76. While all treaty bodies have developed a practice of following up on decisions taken with regard to a specific communication, the OP-ICESCR expressly introduce a follow up mechanism. Follow-up procedures 'constitute an incentive for States promptly to adopt measures aimed at giving effect to Committee's views, a way for States to report publicly on those measures,

a source of best practices by States on their implementation of Committee's views and therefore a crucial element in making the communications system more effective. *Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque*, Commission on Human Rights, Sixty-second session Open-ended working group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Third session, Geneva, 6-17 February 2006 E/CN.4/2006/WG.23/2, 30 November 2005 (also available at <http://www.opicESC-rights-coalition.org/Elements%20Paper-e.pdf>).

<sup>124</sup> Interview in Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, Geneva: COHRE 2003, discussing Constitutional Court of South Africa, Minister of Health vs. TAC, Case CCT 8/02, Constitutional Court of South Africa, 5 July 2002. For more details on the Treatment Action Campaign case see box above in section 6.d.iii.



# **Part Four: Inquiry Procedure**

4

# Inquiry Procedure

**A**rticle 11 of the Optional Protocol establishes an Inquiry Procedure, whereby the Committee can initiate an inquiry, or investigation, of alleged “grave or systematic” violations of ESC rights when it receives “reliable” information that indicates the existence of such violations.<sup>1</sup> To be bound by the procedure, however, a State party to the Optional Protocol must “opt-in” by making an express declaration accepting the competence of the Committee under Article 11. Therefore, before considering possibilities for encouraging an inquiry in a particular case, Claimants must ensure the relevant State has accepted this provision. For a list of countries that have opted in, please go to: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en) link.

The inquiry procedure allows the CESCR to address structural causes of violations that would be difficult under the

Complaints mechanism by allowing the Committee to investigate widespread and systemic violations of economic and social rights. It also provides an alternative to the Communications Procedure in situations where individuals or groups are unable to submit communications due to practical constraints, fear of reprisals, lack of resources or other reasons.

The inquiry procedure does not require a formal complaint or a victim for the Committee to initiate the procedure; individuals, civil society, local, national or international human rights organizations, may submit reliable information about a situation of a grave or systematic violation and such information will trigger a formal investigation by the Committee. One important drawback, however, is that the Inquiry procedure is confidential, which precludes media or other advocacy strategies that often can augment using international human rights mechanisms such as the Communications procedure.

**The inquiry procedure is often a more effective mechanism than the communications procedure for responding to grave and systematic violations because it:**

- responds for the need for a more urgent response to violations than is possible under communications procedures;
- dispenses with admissibility requirements;
- assigns the CESCR an investigative role, expanding possible sources to verify what is happening on the ground;
- accommodates a broader fact base for the CESCR’s review of the situation; and
- allows for more timely consideration of the situation.<sup>2</sup>

Since the inquiry procedure does not require a specific victims or victims, there is no requirement of exhausting domestic remedies and Interim measures are not available. The inquiry procedure, however, is limited to “grave or systemic violations” of Covenant rights. Grave violations include those that are serious or severe whether or not they are of a systemic nature, while systemic violations refers to large or wide-scale violations, often with many victims, regardless of the gravity of the violations. The case law under the OP-CEDAW and the CAT inquiry procedures may

## The main stages of an inquiry are:

- the preliminary consideration of information submitted to, and obtained by, the Committee;
- the Committee’s invitation to the State party to cooperate;
- the Committee’s examination of the information received from the State party and other sources;
- the Committee’s decision regarding whether to establish an inquiry;
- the Committee’s activities pursuant to the inquiry if one is initiated, including an on-site visit to the territory of the State party concerned if the latter consents;
- the Committee’s evaluation of information obtained in the course of the inquiry;
- the Committee’s adoption of findings, comments and recommendations;
- publication of the report of the inquiry; and
- follow-up.

provide some guidance. These procedures address “consistent patterns” of violations, which is arguably analogous to “systemic violations”. Consistent or persistent patterns of violations have been found where violations occur repeatedly or continuously on a large scale and are authorized or tolerated by the State party through its actions or inactions. With respect to the ICESCR, systemic violations may also arise due to structural issues such as legislation, policies or practices that fail to meet Covenant obligations without discrimination or which do not prioritize marginalized or vulnerable groups or communities.

The other key element is that anyone using the inquiry procedure must present the Committee with “reliable information”. Reliable information is information that the Committee finds plausible and credible, and should be based on a presentation of evidence similar to that under the Communications procedure.

In assessing the standard of reliability, factors that may count are: its specificity; its internal coherence and the similarities between reports of events from different sources; the existence of corroborating evidence; the credibility of the source in terms of their recognized ability to investigate and report on the facts; and, in the case of sources related to the media, the extent to which they are independent and non-partisan.<sup>3</sup>

One drawback to the Inquiry procedure is that it is confidential, and therefore may preclude other advocacy methods such as media campaigns and social mobilization. However, one can publicize that an Inquiry has been launched dealing with a specific issue, and that alone may be useful in complementary campaigns and even in getting governments or other actors to mitigate or end laws, policies or practices that violate Covenant rights.

The final outcome of an inquiry takes the form of the Committee’s findings regarding the facts, its conclusions regarding possible breaches of the Covenant, its comments related to the findings, and its recommendations to the State party. The Committee’s recommendations can include a broad range of preventative and remedial measures to be taken at the systemic level and an indication of the types of remedies that should be made available to identified groups of victims. Inquiry proceedings are confidential but the outcome is expected to be made public.<sup>4</sup>

### Article 11 Inquiry procedure

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article.
2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in article 15 of the present Protocol.
8. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

## The inquiry procedure under CEDAW: the case of Ciudad Juárez<sup>5</sup>

In this case, the Committee analysed the murders and disappearances of a large number of women that occurred in a northern city of Mexico, Ciudad Juárez, over the course of a decade. The Committee concluded that grave and systematic violations of the Convention had taken place on the basis of information obtained during a visit to Mexico and information provided by NGOs and other sources. The Committee approached the murders and disappearance considering not only the circumstances of the individual cases and the pattern of impunity in relation to those cases, but also the economic, social and cultural inequality of the victims and women in Mexican society as a whole. Its analysis and recommendations “addressed the systemic and structural aspects of the violations and their root causes, including widespread sex discrimination, gender-based violence and gender stereotyping, as well as the deficiencies in the State’s response to individual cases.”<sup>6</sup>

The Committee’s recommendations includes a broad range of measures, including the implementation of Mexico’s obligations under the CEDAW Convention as a whole and coordination and accountability of all levels of government; investigation of the crimes and punishment of the perpetrators; and the prevention of violence against women in the immediate, medium and long term. Among its recommendations was the establishment of an agreement with the United States regarding cooperation in the investigation of the murders and disappearances, in light of the fact that the persons responsible for the crimes or belonging to international criminal networks active in the area could be located on both sides of the border.<sup>7</sup>

The Mexico inquiry “was viewed by women’s human rights groups, including the Mexican women’s groups most closely involved in advocacy related to the violations, as a valuable tool for increasing pressure on the Government to implement the necessary legal, policy and administrative reforms.”<sup>8</sup>

Article 11(7) provides for the publication of a summary account of the inquiry in the Committee’s annual report and practice under other UN inquiry procedures indicates that the Committee can also issue a lengthier full report that details the Committee’s activities and its findings, comments and recommendations, in addition to the summary account.

Finally, Article 12 authorized the Committee to follow up on any results of an inquiry procedure. Specifically, the Committee can use its annual report to publically provide “details of any measures taken in response to an inquiry.” The Committee may also, after the end of the six month deadline for the submission of the State party’s observations on the Committee’s findings and recommendations as per Article 11(6), request that State party inform the Committee of “the measures taken in response” to the inquiry.

Civil society can play an important role in continuing to provide information the Committee on implementation of recommendations resulting from the Inquiry procedure, and the details provided in the public periodic report of the Committee may be used for complementary advocacy such as media, public awareness and mobilization, and lobbying government.

## Notes

- <sup>1</sup> *Claiming Women’s Economic, Social and Cultural Rights*, *supra* note 6 at p. 76.
- <sup>2</sup> Donna Sullivan, *The Inquiry Procedure*, Commentary on the OP- ICESCR (ESCR-Net forthcoming).
- <sup>3</sup> See, Inter-American Institute of Human Rights, *Convención CEDAW y Protocolo Facultativo. Convención sobre la eliminación de todas las formas de discriminación contra la mujer*, IIDH-UNIFEM, 2nd. Ed., San José, 2004, pp. 73-74. [Unofficial translation] cited in Inter-American Institute of Human Rights/International Commission of Jurists, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 2008.
- <sup>4</sup> Donna Sullivan, *The Inquiry Procedure*, Commentary on the OP-ICESCR (ESCR-Net forthcoming).
- <sup>5</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico (Thirty-second session, 2005). CEDAW/C/2005/OP.8/MEXICO (2005)
- <sup>6</sup> Cf. Donna Sullivan, *The Inquiry Procedure*, Commentary on the OP-ICESCR (ESCR-Net forthcoming).
- <sup>7</sup> *Ibid.* paras. 283, 284.
- <sup>8</sup> Donna Sullivan, *The Inquiry Procedure*, Commentary on the OP-ICESCR (ESCR-Net forthcoming).



# Part Five: Conclusion

5

# Conclusion

The OP-ICESCR provides a unique opportunity to enforce rights enshrined in the International Covenant on Economic, Social and Cultural Rights. This Guide provides a useful resource so that advocates can not only utilize the OP by leveraging international law and mechanisms for local impact, but can also shape international norms by shaping the jurisprudence that is developed under the OP-ICESCR. In its early stages it's crucial that litigants craft their arguments in such a way that the emerging jurisprudence broadly encompasses a comprehensive and holistic view of all aspects of economic, social and cultural rights, including all three general obligations to respect, to protect and to fulfill Covenant rights and to do so without discrimination.

The detailed explanations in this Guide of the processes by which to bring a claim under the OP-ICESCR are intended to ensure that the developing jurisprudence under the OP-ICESCR provides broad beneficial impact and that any potential for counter-productive jurisprudence is mitigated. The Guide is built on tactics and strategies successfully used in legally enforcing economic, social and cultural rights before other fora, both international and national, as well as upon the foundation created by strong civil society participation in the drafting of the OP-ICESCR itself. The tactics and strategies discussed in the Guide should therefore provide a sound basis for effective and productive legal advocacy before the Committee on Economic, Social and Cultural Rights in the years to come.

Beyond the content on bringing claims under the OP-ICESCR, another important element of this Guide is its aim to

bring advocates together with those that have experience in litigating economic, social and cultural rights and those that helped develop the OP-ICESCR over the years. In doing so, advocates can tap into a wealth of knowledge, experience and advice that will improve their chances of successfully litigating under the OP-ICESCR and creating jurisprudence

that has lasting beneficial impact beyond any one case. In particular, advocates considering using the OP-ICESCR procedure may benefit from close interaction with ESCR-Net and the NGOs within the network with relevant experience, and in particular with ESCR-Net's Working Group on Strategic Litigation. These groups are made up of leading experts in the field of economic, social and cultural rights advocacy and can bring a wealth of information that would benefit cases brought under the OP-ICESCR procedure.

Finally, it's crucial that the Guide, and the advice it provides, be shared with claimants so that they are fully informed of the broader issues that may be related to their cases. While achieving accountability and remedies is of foremost importance, claimants need to be aware that their cases may have broader implications and consent to any tactics or strategies that contribute to broader systemic and structural outcomes, including the cre-

ation of jurisprudence that would impact the OP-ICESCR in future cases. By being fully informed of all of these implications, claimants can play a central role in legal advocacy under the OP-ICESCR, including often informing the jurisprudence from the perspective of marginalized or vulnerable groups and communities.

**The Guide is built on tactics and strategies successfully used in legally enforcing economic, social and cultural rights before other fora, both international and national, as well as upon the foundation created by strong civil society participation in the drafting of the OP-ICESCR itself.**

# Part Six: Appendix

6

### Appendix 6.1

# How to submit a communication to the CESCR

Communications can be brought to the Committee on Economic, Social and Cultural Rights by individuals, groups or organizations alleging violations of any of the rights in the International Covenant on Economic, Social and Cultural Rights.

Claimants should first attempt available domestic remedies unless such remedies are not accessible in practice, not adequate or sufficient to provide the remedy sought, or not effective in the given situation. If using domestic remedies, argue Covenant rights directly to ensure that they are specifically addressed at the domestic level.

If success is not achieved at the domestic level, Claimants should submit their written Communication, based on reliable and substantiated information, to the Committee within one year of any final judgment.

#### **Communications should be submitted to:**

Petitions Team  
Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
1211 Geneva 10 (Switzerland)  
Fax: + 41 22 917 9022 (particularly for urgent matters)  
E-mail: [petitions@ohchr.org](mailto:petitions@ohchr.org)

### Appendix 6.2

# UN contacts

#### **For Communications:**

Petitions Team  
Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
1211 Geneva 10 (Switzerland)  
Fax: + 41 22 917 9022 (particularly for urgent matters)  
E-mail: [petitions@ohchr.org](mailto:petitions@ohchr.org)

#### **For CESCR – Secretariat:**

Committee on Economic, Social and Cultural Rights (CESCR)  
Human Rights Treaties Division (HRTD)  
Office of the United Nations High Commissioner for Human Rights (OHCHR)  
Palais Wilson - 52, rue des Pâquis  
CH-1201 Geneva (Switzerland)  
Mailing address:  
UNOG-OHCHR  
CH-1211 Geneva 10 (Switzerland)  
Fax: +41 22 917 90 08  
E-mail: [cescr@ohchr.org](mailto:cescr@ohchr.org)



## Appendix 6.3

# ESCR-Net Working Group on Strategic Litigation

## International organizations litigating ESCR or facilitating litigation domestically and internationally

### Our Vision

The Working Group on Strategic Litigation works to ensure accountability for violations of economic, social and cultural rights (ESCR) by strengthening the access to competent adjudication and effective remedies to ESCR.

### Aims Of Our Work

ESCR-Net's work on Adjudication of Economic, Social and Cultural Rights (ESCR) seeks to provide a space for organizations, individual advocates, and academics to share resources and information, discuss key issues, and explore possibilities for collective efforts to support the effective litigation and enforcement of economic, social, and cultural rights. The main objectives of the Working Group on Strategic Litigation are the following:

- Creating space for the emergence of joint strategies and projects related to strategic litigation of ESCR.
- Strategically supporting cases before the Committee on ESCR under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).
- Developing resources and capacity to more effectively demand the legal enforcement of ESCR decisions within domestic, regional and international systems.
- Making key ESCR cases, including supporting documentation, readily available and searchable for litigators and advocates.

### How We Work

The Working Group on Strategic Litigation understands that strategic litigation at the domestic and international levels is an effective tool to ensure accountability for violations of ESCR. Collaboration and mutual support are critical in this rapidly emerging field of human rights practice. Developments in one jurisdiction or region have impacts in many

others, and rights claimants face similar obstacles in diverse settings. In order to respond to the priorities of local activists and lawyers, ESCR-Net provides a forum for exchange, learning and relationship-building. The Working Group has organized peer learning workshops in Latin America and Africa, developed a case law database in two languages, published books on strategic litigation and enforcement with participation of actors from different regions, and conducted studies of trends in diverse jurisdictions to facilitate more effective litigation and enforcement strategies. ESCR-Net also maintains an active listserv of those involved in legal advocacy and adjudication of ESCR, providing regular updates on developments and emerging jurisprudence and providing members an opportunity to seek assistance or guidance from a range of knowledgeable experts and practitioners.

### What We Have Achieved Together

***Strong decisions on ESCR.*** The Working Group on Strategic Litigation has built on the expertise of its members and partners to produce joint *amici curiae*, based on international and comparative law, in cases such as the Garissa case, which yielded a positive decision issued by the Kenyan High Court, applying the ESCR provisions of the new Constitution and recognizing the impact of forced evictions on the right to health care services, information, fair administrative decisions, food and clean and safe water.

***New transnational partnerships and projects for the promotion of ESCR.*** Workshops were organized in Bogota (Colombia) to identify new strategies for enforcement (2010), in Mexico City (Mexico) to create space for national joint action on strategic litigation (2011), and in Johannesburg (South Africa) to discuss concrete ESCR cases in fourteen African countries and promote peer learning. New projects emerged from these workshops, such as an ongoing study on enforcement trends in Nepal and South Africa, commentaries on the enforcement of key ESCR decisions

issued by courts around the world, and partnerships for new projects in Kenya and, potentially, in Zimbabwe.

**Bilingual access to key ESCR cases.** The Working Group has developed a Caselaw Database (See Appendix 6.4 below) of over 100 ESCR decision, which receives over 500 unique visitors every month, who examine roughly 2,500 pages. Case summaries include updates regarding enforcement; analysis of each case's significance—often written by lawyers working on the case; and original case documents and secondary sources.

**New and effective legal mechanisms of protection.** Having partnered with the NGO Coalition for the OP-ICESCR in a campaign that led to the adoption of the Optional Protocol in 2008, the Group is current working with NGOs and lawyers in countries that have ratified the OP-ICESCR, in order to identify and support cases able to set strong precedents before the Committee on Economic, Social and Cultural Rights.

**Ongoing informal collaboration and support.** Through the listserve, meetings and other networking, members of the Working Group have both received and provided invaluable assistance and support in strategic cases in a wide range of jurisdictions. Many informal partnerships and support networks have been created, encouraging creative approaches to ESCR litigation and better use of jurisprudence and experiences from a range of jurisdictions.

### Who Is Involved

To effectively guide and facilitate different areas of collective work, the Working Group on Strategic Litigation has developed two steering committees to support its strategic

litigation and Caselaw Database, as well as a group of legal experts to support wider requests for legal support. The Working Group is coordinated by the following organizations and individuals:

Malcolm Langford, University of Oslo (Co-Coordinator)

Daniela Ikawa, ESCR-Net (Co-Coordinator)

Aoife Nolan, Nottingham University (U.K.)

Bret Thiele, Global Initiative for Economic, Social and Cultural Rights (U.S.)

Bruce Porter, The Social Rights Advocacy Center (Canada)

César Rodríguez Garavito, DeJusticia (Colombia)

Colin Gonsalves, Human Rights Law Network (India)

Diego Morales, CELS (Argentina)

Gabriela Kletzel, CELS (Argentina)

Iain Byrne, Amnesty International (U.K.)

Jackie Dugard, The Socio-Economic Rights Institute (South Africa)

Odindo Opiata, Hakijamii (Kenia)

Urantsooj Gombosuren, Center for Human Rights and Development (Mongolia)

Different members of the Working Group on Strategic Litigation participate in particular projects.

To Contact the Working Group on Strategic Litigation, write to:

Daniela Ikawa <dikawa@escr-net.org>

## Appendix 6.4

# ESCR-Net Caselaw Database

The ESCR-Net Caselaw Database contains a wealth of information related to the legal enforcement of economic, social and cultural rights. The ESCR-Net Caselaw Database is a collaborative project developed under the leadership of the Steering Committee Members, academic partners, and many groups and individuals working to advance economic, social and cultural rights (ESCR) throughout the world. The Caselaw database makes ESCR-related pleadings, commentary and decisions available to a wide audience of ESCR activists and defenders from a range of countries, legal traditions and languages (Spanish and English). In doing so, it serves to facilitate the exchange of information and strategies, disseminate tools for a rights-based approach to social

injustice, encourage discussion of crucial challenges for ESCR advocacy, and inspire joint projects.

The ESCR-Net Caselaw Database can be accessed at: <http://www.escr-net.org/caselaw>

Please contact us at [dikawa@escr-net.org](mailto:dikawa@escr-net.org) or write to the justiciability group if you are interested in getting involved in this project. The database is a work in progress and we hope to develop it further with the involvement of interested ESCR advocates and organizations.

ESCR-Net expresses its thanks and appreciation to all the advocates, researchers and rights claimants who contributed to the creation of this database.



The ESCR-Net Caselaw Database can be accessed at:  
<http://www.escr-net.org/caselaw>



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Social and Cultural Rights (ESCR-Net)  
+1(212) 681-1236  
Email: [info@escr-net.org](mailto:info@escr-net.org)  
Website: [www.escr-net.org](http://www.escr-net.org)