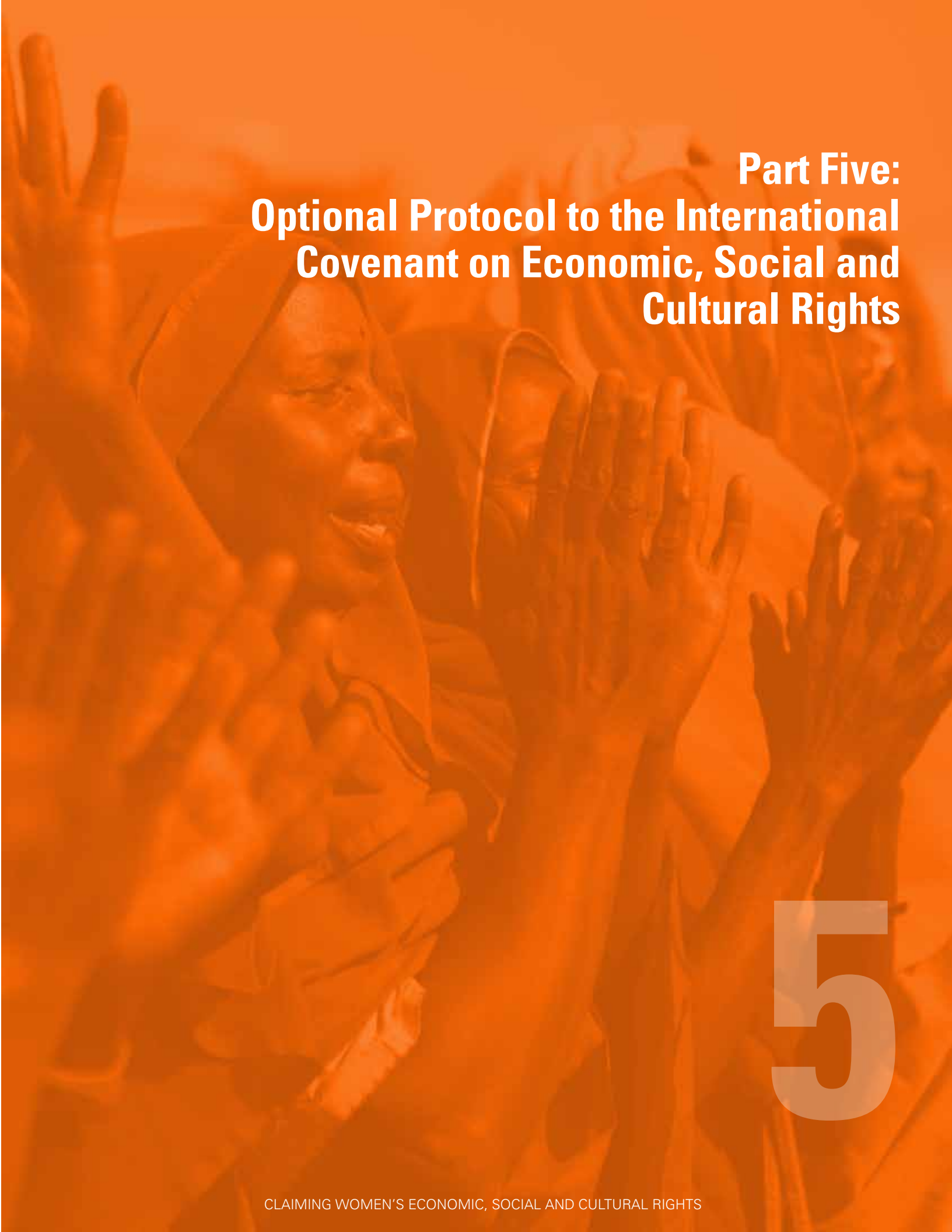

Part Five: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

5

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

5.1 Overview of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[1]

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

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

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

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

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

When a State ratifies a Covenant or its Optional Protocol, it voluntarily accepts a solemn responsibility to apply each of the obligations embodied therein and to ensure the compatibility of their national laws with their international duties, in a spirit of good faith.[2]

5.1.2 The mechanisms introduced by the OP-ICESCR

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

- Communications procedure
- Inquiry procedure
- Inter-State procedure

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

5.2. The Communication procedure

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

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

5.2.1 Admissibility criteria

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

a) Which violations can be claimed in the communication?

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

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

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

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

What is unique in the OP-ICESCR?

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

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

Strategies

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

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

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

b) Who can submit a communication?

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

- *Submission by an individual or group of individuals*

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

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

The system is intended to be as straightforward as

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

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

- *Standing for third parties*

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

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

According to the general rule set forth under OP-ICESCR, individuals must have given their written consent in order for a third party to have legitimacy in acting on her/his behalf. Evidence of consent can be offered in the form of an agreement to legal representation, power of attorney, or other documentation indicating that the victim(s) has authorized the representative to act on her or their behalf.

Key Issues on Standing

- *The (non) consent of the victim*

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

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

Under those circumstances the author must explain why

Who can bring a complaint under the OP-ICESCR?

a) a single individual whose rights under the ICESCR have been violated;

b) a group of named individuals whose rights have been violated by the same act (or failure to act);

c) a group of individuals who have all suffered the same violation(s) but who may not all be identified by name because their safety might be threatened or because the group is so large that it would be impractical to get the consent of all victims;

d) those that have suffered violations as a group (e.g. women's rights organizations that have been prohibited by the State from organizing activities to promote women's ESC rights under ICESCR)[15];

e) third parties (NGOs, legal representative) on behalf of an individual; and

f) third parties (NGOs, legal representative) on behalf of a group of individuals.

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

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

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

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

- *Who is the Victim?*

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

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

Abstract legal claims (*actio popularis* claims), challenging policy advanced by NGO's without identifying a specific victim are not allowed under the OP-ICESCR.[24] However, as noted above, identified groups of individuals can submit a complaint.

Jurisdiction and Extraterritorial Obligations

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

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

- *Jurisdiction vs. territory*

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

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

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

- *Extraterritorial Obligations*

Under certain circumstances, many human rights

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

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

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

- *Extraterritorial Obligations: International assistance and cooperation*[34]

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

c) Exhaustion of Domestic Remedies

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

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

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

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

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

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

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

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

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

Which remedies have to be exhausted?

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

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

- **Available in practice:** it is not sufficient that a remedy be available theoretically under the law but it must be capable of being applied in practice; and is applicable to the case. Thus, the availability of a remedy depends on its de jure and de facto accessibility to the victim in the specific circumstances of the case. In other words, "remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant."[41]

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

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

Therefore, if the actual situation of the complainant does not allow her to meet the substantive requirements for exhausting domestic remedies or she lacks legal standing, the remedy is in practice unavailable. For example, if the State Party does not provide court-appointed interpreters for women who are deaf or provide support for women who are illiterate to be able to file a petition, or fails to ensure a safe space to stay for a victim of domestic violence during the duration of the trial and afterwards, or does not provide transportation for a women in a rural area to go to the relevant tribunal, she will not be able to access to justice even if the remedy is recognized in the law.

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

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

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

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

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

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

Key Issues for Exhaustion of Domestic Remedies

- **Burden of proof:** Where a State contests admissibility on grounds of non-exhaustion, it bears the burden of demonstrating that a remedy was available in practice, that it was one which was capable of providing redress in respect of the applicant"s complaints, offered reasonable prospects of success and would have been effective in the particular circumstances of the case;[45] thus, the burden of proof shifts to the State. The information provided by the State as to effectiveness must be detailed and relate to the specific circumstances of the case[46] If the State advances such proof, the burden shifts back to the complainant to show that the remedies identified by the State were exhausted or an exception to the rule applies.

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

(1) Information indicating that domestic remedies have been exhausted, including the specific remedies utilized, the substance of the claim raised in domestic proceedings, and whether a final decision has been issued in the proceedings; or

(2) In the alternative, present information supporting arguments that no domestic remedies are available or, if they are available, one or more of the recognized exceptions to the requirement applies (not available in practices, not effective, or not adequate to provide relief.

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

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

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

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

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

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

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

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

The Inter-American Commission,[53] in analyzing the case of *Maria Eugenia Morales de Sierra,*[54] stated that "the legislation in question [the Civil Code of Guatemala in respect of the role of each partner within marriage] gives rise to restrictions on the rights of women on a daily, direct and continuing basis (...) Given the nature of the claims raised, which concern the ongoing effects of legislation which remains in force, the six-months rule creates no bar to the admissibility of this case under the circumstances analyzed above. Likewise, in the case of *Yean Bosico,* the Inter-American Court found that the denial of the right to nationality was a continuing violation for which the State could be held responsible.[55]

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

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

• Considerations by the same body

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

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

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

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

A communication will be considered "manifestly ill-founded" if:

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

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

• Cases pending or decided by another international body

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

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

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

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

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

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

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

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

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

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

Key Issues on Substantiating a Claim

• Evidence

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

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

g) Communication is in writing and not anonymous;

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

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

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

Confidentiality vs. Anonymity

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

The Committee will normally agree, if requested, to suppress the name of the alleged victim in published documents. This is the established practice of other UN human rights treaty bodies dealing with individual communications, including the Human Rights Committee, the Committee against Torture and the CEDAW Committee and regional human rights mechanisms. Initials or pseudonyms are substituted for the names of victims and/or authors.[63]

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

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

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

5.2.2. Communication is Inadmissible

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

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

5.2.3 Interim Measures

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

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

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

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

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

The use of interim measures in the Inter-American system has been significant in protecting the right to health of people living with HIV/AIDS seeking access to essential medicines[67] or to protect displaced women who have been victims of sexual violence.[68]

In the first case examined by the CEDAW Committee, *Ms. A.T. vs. Hungary*, the Committee granted interim measures. The Committee requested that the author be immediately offered a safe place for her and her children to live and that the State Party ensure that the author receive adequate financial assistance, if needed. Although the communication was later declared inadmissible, in *Ms N.S.F. vs. the United Kingdom of Great Britain and Northern Ireland,* the Committee requested the State Party not to deport the author and her two children as an interim measure while their case was pending.[69]

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

5.2.4 Clear Disadvantage

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

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

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

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

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

Standard of review "reasonableness of steps"

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

(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;

(b) whether the State Party exercised its discretion in a non-discriminatory and non-arbitrary manner;

(c) whether the State Party's decision (not) to allocate available resources is in accordance with international human rights standards;

(d) where several policy options are available, whether the State Party adopts the option that least restricts Covenant rights;

(e) the time frame in which the steps were taken;

(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.

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

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

5.2.5 Merits

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

The analysis of the admissibility and the merits of the communication can occur in one or two steps. Where the Committee, for reasons of efficiency and effectiveness, does not feel it necessary to separate the analysis of admissibility from that of merits, the steps may be merged. However, separation of the consideration of admissibility from merits is the best way to ensure that relevant information from third parties, UN agencies or international organizations, is obtained in appropriate cases. Given that the procedure remains confidential until the publication of the views of the Committee, without a prior decision on admissibility, these organizations may have no way of knowing, prior to the publication of the Committee"s views on the merits, that communications raising important public policy or systemic issues in which they have relevant expertise or views, were to be considered by the Committee.[71]

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

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

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

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

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

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

Reasonable steps

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

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

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

In considering a communication, the Committee will examine the measures that the State Party has taken or failed to take, legislative or otherwise, to realize women's ESC rights. Based on the facts and analysis submitted in the case, the Committee will evaluate whether the steps the State took were reasonable in light of its obligation to realize the right/s in question on a progressive basis using maximum available resources.

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

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

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

Factors in Determining Reasonableness

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

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

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

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

5.2.6 Remedies

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

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

When designing the strategy for a communication under the OP-ICESCR, complainants should have in mind what they expect to obtain from the litigation and what they want the CESCR to say and order the State to do. Individuals and women's groups are, in general, in a better position to analyze the context and circumstances that lead to the violation and the measures required to remedy the situation and prevent similar harms from occurring in the future. Educating the Committee (within the complaint) will be key in order to encourage the Committee to incorporate remedies with a public interest or structural component in its recommendations. These remedies could include:

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

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

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

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

5.2.7 Friendly Settlement

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

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

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

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

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

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

5.2.8 Follow Up

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

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

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

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

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

5.3 The Inquiry procedure

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

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

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

Contrasts between the individual communications and inquiry procedures:

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

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

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

5.3.1 Grave and systematic violation

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

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

5.3.2 Reliable information

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

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

5.3.3 Procedure for Requesting an Inquiry

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

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

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

- **Invitation to cooperate**

Individual Communication Procedure

1. The Committee receives an individual complaint and determines whether it is permitted to examine.

If the Committee decides that the complaint is not eligible for examination, it informs the complainant and the State. The process comes to an end. There is no appeal possible.

Reasons of inadmissibility:

- It has already been examined by the CESCR or under another international complaints body
- It is and abuse of the right to submit a complaint
- It clearly has no justification, does not provide enough proof or is based solely on media reports without any further evidence
- It is anonymous or not in writing
- It is incompatible with provisions of the Covenant

Prior to assessing the admissibility of a complaint, The Committee has the option to impose interim measures to prevent irreparable damage

2. If the Committee decides that the complaint is admissible,

- it sends the complaint to the State to request information.

Admissibility criteria:

- Be submitted by or on behalf of an individual or group of individuals under the jurisdiction of a state that is party to the Protocol
- It involves facts that occurred after the entry into force of the Protocol for the State Party concerned, unless those facts continued after that date
- Be submitted after the complainant tried and was unable to obtain justices domestically, or if domestic remedies were taking an unreasonably long time
- Be submitted no more than one year after the exhaustion of available domestic remedies, unless it was not possible to respect this time limit
- Be in writing

Sources of information:

- NGO reports
- Other UN agencies and bodies reports
- Documentary evidence, testimonies, videos, etc.

3. The Committee examines the merits of the complaint in light of available information

If both parties are willing, the CESCR can facilitate a friendly settlement between them, which then ends the process.

4. Once the Committee has made it decision regarding whether a rights violation occurred, it transmits its decision to both parties.

The CESCR may, with the agreement of the State, inform UN and other bodies of any need by the State for technical advice or assistance, along with the State's suggestions. The CESCR can also inform these bodies, again with the State's agreement, of international measures likely to assist States implement the ICESCR.

5. The State must respond within 6 months stating what action it has taken.

The Committee can ask the State to provide further information.

The OP-ICESCR does not provide for a separate follow-up procedure based on whether a violation was found. The State is always required to give a report after 6 months.

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

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

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

5.3.4 Country Visits

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

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

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

5.3.5 Remedies

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

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

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

While under the communication procedure complainants are able to strategize around the remedies that they would like the CESCR to endorse, the inquiry mechanism leaves a narrower space for women and NGO's to request specific remedies. However, individuals and NGOs can take advantage of CESCR country visits to provide information to the Committee, denounce the situation through other UN bodies (to which the CESCR may reach out according to Article 14) or though the submission of shadow reports under the periodic review.

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

5.3.6 Extraterritorial obligations

As discussed on page 64, the OP-ICESCR offers a platform to discuss States' extraterritorial obligations. The restrictions in doing so through an individual communication were analyzed above; however, the inquiry procedure –as well as Inter-State[103] complaint procedure—could be seen as more likely possibilities for the articulation of complaints of violations of extraterritorial obligations before the CESCR.[104] This is because the text of the OP-ICESCR with regards to individual communications introduces a limitation on the submission of communications to individuals or groups of individuals "under the jurisdiction" of the State Party indicated in the communication. The text on initiation of the inquiry procedure, however, does not include this language.

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

5.3.7 Follow-up

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

Inter-State Procedure under the OP-ICESCR

Before submitting the matter to the CESCR

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

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

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

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

Proceure Before The CESCR

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

Admissibility criteria:

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

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

During the procedure, the CESCR will

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

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

a) Six months after the State has been notified of the findings of the inquiry and the Committee's comments and recommendations, the Committee may ask the State to inform it of any measures it has taken in response to the inquiry (Article 12.2). The CESCR may also ask the State Party to keep it informed about further measures.

b) It can request the State Party concerned to include details of any measures it takes to comply with the recommendations in its next periodic report (Article 12.1).

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

Technical Assistance

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

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

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

5.4. The Inter-State procedure

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

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

Notes

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

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

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

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

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

Committee"s workload.

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

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

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

[9] CESCR, General Comment 19, supra n. 25 above.

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

[11] *Maasstricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997.

[12] Montreal Principles, supra n. 13 above.

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

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

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

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

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

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

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

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

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

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

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

[24] Collective complaints were provided for in Article 3 of the Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina Albuquerque, 23 April 2007, A/HRC/6/WG.4/2 (containing the Explanatory Memorandum). Even though the collective complaints were removed from the final version of the Optional Protocol, this would not prevent the CESCR to consider complaints that involve the violation of a group.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[39] Following the interpretation of the CESCR, "[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate (...) In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary"; see also, CESCR, *General Comment No. 9: The domestic application of the Covenant*, U.N. Doc. E/C.12/1998/24, adopted 3 December 1998, para. 3.

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

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

[42] IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68, 20 Jan. 2007, Chapter II A.4-6; IACHR, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007, Chapter II, available at available at http://www.cidh.org/countryrep/AccesoDESC07eng/Accesodesciv.eng.htm

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

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

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

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

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

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

[48] See, e.g., ECHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 Nov. 1971, Series A No. 12, para. 55; *Artico v. Italy*, Judgment of 13 May 1980, Series A, No. 37, para. 27; IA Court of Human Rights, *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 July 2004, Series C, No. 107, par. 81; *Velásquez Rodríguez v. El Salvador*, Preliminary Objections; IACHR, *Abu-Ali Rahman v. United States*, Report No. 39/03, Petition 136/2002, 6 June 2003, para. 27. The UN Human Rights Committee has also recognized that in certain circumstances a State may waive the exhaustion requirement. Annual Report of the Human Rights Committee, UN Doc. A/54/40 (1999), para. 417.

[49] HRC, *Sandra Lovelace v. Canada*, 11 HRC, Comm. No. 24/1977 (30 July 1981), U.N. Doc. CCPR/C/OP/1 (1984), para 83. See also, Tom Zwart, *The Admissibility of Human Rights Petitions: the Case Law of the European Commission of Human Rights and the Human Rights Committee*, 1st Ed. (Springer: 1994).

[50] HRC, *Könye and Könye v. Hungary,* Communication No. 520/1992, U.N. Doc. CCPR/C/50/D/520/1992 (1994).

[51] HRC, General Comment No 31, supra n. 114 above, para. 9.

[52] Article 46.1.b of the American Convention establishes that a case must be filed in a timely manner, *within six months* of the date the interested party received notification of the final judgment within the domestic system. As the Commission has previously stated, this rule exists to allow for juridical certainty while still providing sufficient time for a potential petitioner to consider her position. "While an issue of timeliness would have arisen had the petitioners specifically challenged the decision of the Court of Constitutionality or had they complained about specific past occurrences, they are in fact complaining about what they allege to be a continuing violation." See generally, IACtHR, *Blake Case*, Preliminary Exceptions, Judgment of July 2, 1996, pars. 29-40.

[53] IACHR, *Maria Eugenia Morales de Sierra v Guatemala*, CASE 11.625, Admissibility Report, March 6, 1998.

[54] The petition challenges continues violation of the petitioner rights to equality, and to equal protection of and before the law, under Articles 2, 17 and 24 of the American Convention, by reason of her gender. The challenged legislation provides that her husband has the exclusive competence to administer family property, and the goods of their minor child, and that, notwithstanding that the law requires women to bear primary responsibility for child care and the home, it excuses them from exercising certain forms of guardianship by virtue of their sex. Accordingly, the victim maintains that the legislation in question constitutes an attack on her human dignity, and contravenes her right to a life free of discrimination based on gender.

[55] See *Yean Bosico case*, supra n. 8 above. See also IACtHR, *Case of the Moiwana Community v. Suriname,* Judgment of June 15, 2005. Series C Nº. 124, par. 164. In the case the Court found the state liable for a violation of the right to property of a maroon tribe, based on a massacre and forced displacement which occurred a year before the critical date. Because their survival depends upon their right to their lands, this right may be said to arise directly from their status as an indigenous or tribal people. Such status is without temporal limitation; it can be neither created nor destroyed by the state." In *Loizidou v Turkey,* the European Court recalled "…that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs; see, also, the *Papamichalopoulos and Others v. Greece* judgment of 24 June 1993, Series A no. 260-B, pp. 20-21, s 46, and the *Agrotexim and Others v. Greece* Judgment of 24 October 1995, Series A, no. 330, p. 22, s 58)." Corte Europea de Derechos Humanos, *Loizidou c. Turkey*, Fondo, 18 de diciembre de 1996, Serie A, p. 41. See also Kerem Alt Parmak, *The Application of the Concept of Continuing Violation to the Duty to Investigate, Prosecute and Punish under International Human Rights Law*', Turkish Yearbook of Human Rights, Ankara, vols. 21-25, 1999-2004, pp. 6-12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926281.

[56] See, *Bakweri Land Claims Committee v. Cameroon*, (2004) AHRLR 54 (ACHPR 2004). In this respect Frans Viljoen observes, "[T]he rule *ne bis in idem* applies. This is clearly sound, because a State should not be found in violation twice for one violating action or conduct, and a complaint that has been finalized on the merits should not be reopened. This principle is similar to those of *autrefois acquit* and *autrefois convict*, which entail that an accused in a criminal trial may not be tried again for an offence similar to one for which he or she has already been either acquitted or convicted." Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility*, in Malcolm Evans & Rachel Murray, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2006 126 (2nd Ed. 2008).

[57] IACHR, *Jose Bernardo Diaz et al v. Colombia*, Report No. 5/97, Case 11.227, March 12, 1997, par. 69.

[58] CEDAW, *Ms. A.T. vs. Hungary*, Communication No. 2/2003, (26 January 2005).

[59] HRC, *Fanali vs. Italy* (Communication No. 075/1980). See also, CEDAW, *Rahime Kayhan vs. Turkey* CEDAW/C/34/D/8/2005, Communication No. 8/2005, in which the Committee did not agree with the State party in that the communication was inadmissible under Article 4, paragraph 2 (a) of the OP because the European Court of Human Rights had examined a case that was similar, because the identity of the author was one of the elements that it considered when deciding whether a communication was the same matter that was being examined under another procedure of international investigation or settlement. http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8_2005.pdf.

[60] For a detailed understanding of the rules and standards under Regional Human Rights Systems, see Andres Pizarro Sotomayor, "The Rule Against Duplication of Procedures in the Regional Systems of Human Rights Protection" University of Notre Dame, *Center for Civil and Human Rights, Working Paper No. 2,* Spring 2009.

[61] See, ICCPR, Concluding observations, Peru, November 15th, 2000, CCPR/CO/70/PER, in which the Committee stated that it "is concerned about recent reports of forced sterilizations, particularly of indigenous women in rural areas and women from the most vulnerable social sectors. The State party must take the necessary measures to ensure that persons who undergo surgical contraception procedures are fully informed and give their consent freely. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.70.PER.En?Opendocument 6/6/2007.

[62] In the case of *V.Ø. v. Norway*, a father complained of the denial of a fair hearing in a custody case, which allegedly violated his right to a fair trial, his right to respect for family life and his right not to be discriminated against. The European Commission had declared the complaint inadmissible as manifestly ill-founded. (HRC Comm. No. 168/1984, *V.Ø. v. Norway*, inadmissibility decision of 17 July 1985, A/40/40, Annex XIX, par. 4.4).

[63] See, e.g. CEDAW, *Ms. B.J. vs. Germany,* A/59/38 Annex III Communication No.: 1/2003, available at http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/BJ%20v.%20Germany_E_.pdf; *Ms. A.T. vs. Hungary*, supra n. 143 above, among others. See also IACHR "*PM 43-10—'Amelia', Nicaragua*." On February 26, 2010, the IACHR granted precautionary measures for a person who the IACHR will identify as Amelia, in Nicaragua. The request seeking precautionary measures alleges that Amelia, mother of a 10-year-old girl, is not receiving the necessary medical attention to treat the cancer she had, because of her pregnancy. The request alleges that the doctors had recommended to urgently initiate chemotherapy or radiotherapy treatment, but the hospital

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

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

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

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

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

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

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

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

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

[72] The issue of third party amicus submissions from NGOs and human rights institutions was specifically considered by the Open-Ended Working Group, initially in relation to standing for non-governmental organizations and institutions in Article 2.31. While there was considerable support for the concept of amicus submissions, there was little support for granting NGO"s independent standing to submit collective communications in the model of the European Social Charter. As a result, references to standing for non-governmental organizations and institutions were removed from Article 2 and the question of whether or how procedures might be developed for amicus submissions was left to the Committee to consider in its Rules.

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

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

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

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

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

[78] Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[102] The reliance of inter-state communications may pose some obstacles as an effective remedy to redress the violations of the ESCR of victims affected by the extra-territorial activity of a State party since individuals and groups of individuals cannot file a communication, which is left to the discretion of the State.

[103] See Courtis, Sepulveda, *Are extra-territorial obligations reviewable under the Optional Protocol to the ICESCR?*, in Nordic Journal of Human Rights, supra.

[104] Report of the Special Rapporteur on violence against women, its causes and consequences; *The Due Diligence Standard as a Tool for the Elimination of Violence against Women,* Commission on Human Rights, Sixty-second session, E/CN.4/2006/61, January 20, 2006, para. 34.

[105] Accordingly, Article 9 of CEDAW authorizes the CEDAW Committee to request that the State party provide information on how it has addressed violations in its next periodic report or alternatively, authorizes the Committee to request that the State party informs it of the steps taken to correct the violations six months after the transmission of the findings and recommendations.

[106] *See UN website, Human Rights Bodies—Complaints Procedures: Complaining about human rights violations, at http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate*