

**Justice NOW! Ratify to
Protect all Human Rights**

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



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

A Toolkit for Action | Booklet 3

Why Should States Ratify the
Optional Protocol to the International
Covenant on Economic, Social and
Cultural Rights?

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

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

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

This series has four booklets.

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

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

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

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

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

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BOOKLET 3:

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

Booklet 3 discusses some of the advantages that individuals, States and the international community gain from the ratification and effective implementation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol or OP-ICESCR). While this overview is not exhaustive, it describes some of the key incentives for States to ratify the OP-ICESCR.

This booklet also navigates through and challenges some of the most common myths behind the understanding of the justiciability (the capability of a right to be reviewed by a judicial or quasi-judicial body) of economic, social and cultural rights (ESCR). In doing so, it offers arguments and tools for individuals and organisations to advocate for States to ratify the OP-ICESCR and to advance domestic reforms to effectively implement this mechanism.

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1. Why Should a State Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?

A. THE OP-ICESCR PROVIDES FOR AN INTERNATIONAL MECHANISM TO REMEDY VIOLATIONS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A right that is internationally recognized but does not have a mechanism to protect it is an imperfect right, as there is no process to guarantee and enforce its fulfilment. Therefore, the OP-ICESCR provides individuals, societies and States with an international remedial mechanism for the infringement of the rights in the International Covenant on Economic, Social and Cultural Rights (Covenant or ICESCR).

As described in Booklet 2, the OP-ICESCR introduces three new mechanisms: an individual complaints procedure, an inquiry procedure and an inter-State complaints procedure.¹ Each mechanism provides the Committee on Economic, Social and Cultural Rights (Committee or CESCR) with a new mandate to enforce States Parties' obligations to realise ESCR.

By facilitating individual complaints,² the OP-ICESCR has the potential to increase the implementation of ESCR in countries around the world, particularly 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, to determine whether any of the rights under the ICESCR have been violated and, if so, to state its views as to the appropriate remedy. Some cases decided under Optional Protocols to other treaties led to a change in the laws, policies and programmes of governments around the world. For example, the case of *F. H. Zwaan-de Vries v. The Netherlands*, brought under the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR), led to the determination that the Netherlands was in breach of the ICCPR due to legislation that granted unemployment benefits to married men but not to married women. The Human Rights Committee established that the legislation was discriminatory on grounds of sex and marital status. The law was amended to eliminate the requirement that married women prove that they were the breadwinner or were permanently separated from their husband in order to obtain benefits.³

Where States have recognized the competence of the CESCR to undertake an inquiry procedure, the CESCR is empowered to initiate an investigation into particularly grave or systematic violations of the ICESCR. This mechanism reinforces the communication procedure by allowing grave and/or systematic violations to be investigated where individuals or groups are unable to utilise the individual communications mechanism for reasons such as fear of reprisals or where they lack the capacity to document the gravity or systemic nature of violations. The procedure enables a more timely response to grave and/or systematic violations. It will also enhance the CESCR's ability to review violations that affect large groups of people.

The inter-State complaints procedure allows a State Party to bring a complaint against another State Party to the CESCR, so as to ensure that the other State abides by its obligations under the ICESCR – where both States have ratified the OP-ICESCR and “opted in” to this procedure. Where this procedure exists in other treaties, it has been very rarely used.

The OP-ICESCR, like other UN complaints mechanisms, does not have a mechanism to enforce its decisions. However, decisions under this mechanism can lead to greater international visibility and scrutiny of specific violations. Failure to implement decisions under the OP-ICESCR could be raised in international peer review mechanisms (such as the Universal Periodic Review of the Human Rights Council). Decisions taken under the OP-ICESCR can strengthen advocacy by civil society for reforms necessary to end violations.

¹ For a more detailed description of the content and the three mechanisms introduced by the OP-ICESCR, please go to Booklet 2: *Overview: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.

² Note that in the UN human rights system and in the text of the OP-ICESCR, the word “communication” is used to refer to a “complaint” of a human rights violation.

³ *F. H. Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, April 9, 1987, UN Doc. Supp. No. 40 (A/42/40) at 160. Another example is the case of *Sandra Lovelace v. Canada*, brought under the OP-ICCPR. This case led to the determination that Canada was in breach of the ICCPR by requiring indigenous women who married non-indigenous men to relinquish their status under the Indian Act and, consequently, to lose the right to live on a reserve for indigenous peoples. Canada amended the Indian Act as a result of this decision. See J. Harrington, “How Canadian Lawyers Can Contribute to the Effectiveness of the UN Human Rights Committee” in Canadian Council on International Law, *The Measure of International Law* (Kluwer Law, 2004) at 134. See also *A.S. v. Hungary*, Communication No. 4/2004, CEDAW/C/36/D/4/2004, August 14, 2006. As a result of that case and the recommendations issued by the CEDAW Committee, Hungary amended the Public Health Act to ensure that women received proper information regarding sterilization procedures. For more information on these or other ESCR related cases, visit <http://www.escr-net.org/caselaw>.

Therefore, the OP-ICESCR provides victims with an international accountability mechanism to seek remedies for violations of ESCR.

B. THE OP-ICESCR WILL HELP CLARIFY THE OBLIGATIONS OF STATES PARTIES TO THE ICESCR

Through the development of international case law, the OP-ICESCR will contribute to further understanding of the meaning and scope of the rights contained in the ICESCR, to the identification of what constitutes a violation of these rights and to the definition of corresponding State Party obligations.

Of the eight committees established by international human rights treaties, seven contain a complaints procedure mechanism: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, the Committee on Migrant Workers and the Committee on Economic, Social and Cultural Rights.⁴ Some of these committees have developed a rich body of case law, and through these cases, they have been able to clarify the scope of the rights they are monitoring and motivate States Parties to better respect their commitments. In addition, there are also regional treaty bodies with complaints procedure mechanisms.⁵

In effect, the transition from abstract principles into concrete cases will help to give content to ESCR. By applying the content of the ICESCR and the OP-ICESCR, for example the criterion of “maximum available resources” or “reasonableness”, to concrete factual situations, the OP-ICESCR would assist in transforming general ICESCR provisions into concrete, tangible and achievable norms.

Furthermore, by focusing on specific violations of ESCR, the CESCER will be able to analyse concrete cases and provide States Parties with guidance as to their obligations under the ICESCR in actual situations.

Through the OP-ICESCR, States Parties will be furnished with incentives to provide detailed information to the CESCER that would serve to strengthen the institutional knowledge of the ICESCR reporting mechanism. Scholars and non-governmental organisations have long noted that one of the major constraints faced by the CESCER, in the development of its working practices, has derived from the absence of a provision that requires State Party cooperation beyond the submission of periodic reports. The OP-ICESCR thus leads to a new and more involved relationship between the CESCER and States Parties.

C. THE OP-ICESCR WILL ASSIST STATES PARTIES IN IMPLEMENTING THE RIGHTS IN THE ICESCR

The clarification of States’ obligations developed through the decisions adopted under the OP-ICESCR will aid States Parties in better implementation of ESCR by assisting and encouraging them to take steps towards the full realisation of all the economic, social and cultural rights in the ICESCR.

Through the communications and inquiry procedures, States Parties will be provided with further opportunities to develop the concept of ESCR at the national level, to increase understanding and awareness of these rights, to remedy any existing inequalities in their laws and to advance new policies toward the fulfilment of all ESCR. The OP-ICESCR will encourage the effective implementation of all the ESCR enshrined in the ICESCR through progressive changes in national law and policy. Such changes, in turn, trigger an increased recognition of ESCR at all levels of society and assist all, including the most marginalized, to access justice.

D. THE OP-ICESCR PROVIDES AN INCENTIVE FOR STATES TO STRENGTHEN NATIONAL MECHANISMS FOR THE ENFORCEMENT OF ESCR

Article 3 of the OP-ICESCR requires the exhaustion of all available domestic remedies before a complaint can be heard by the Committee.⁶

4 The relevant mechanisms of the Committee on Migrant Workers and the Committee on Economic, Social and Cultural Rights have not yet entered into force.

5 Once the OP-ICESCR and the relevant provision of the CRMW enter into force, the Committee on the Rights of the Child will be the only treaty monitoring body without a complaints procedure.

6 For a further discussion on the exhaustion of domestic remedies, please see the section on Art. 3(1): *Exhaustion of Domestic Remedies as a Condition*

The underlying aim of the exhaustion rule is to provide the State with an opportunity to redress a violation through its domestic legal system before a claim is brought to an international body. This encourages the use and development of mechanisms for the enforcement of ESCR at the national level thus contributing to local efforts for the advancement of these rights.

Human rights practice⁷ makes clear that in order to fall within the scope of the exhaustion rule, a remedy must be available in practice, adequate to provide relief for the harm suffered and effective for the object for which it was conceived. This provision will encourage States to domestically fulfil this requirement in order to avoid facing an international complaint and a potentially adverse decision.

Moreover, because the CDESCR recognizes that both legal and programmatic responses are required to implement the rights in the ICESCR, it would make recommendations in both areas.

E. THE OP-ICESCR WILL CONTRIBUTE TO DOMESTIC CASE LAW CONCERNING ESCR



Photo: Liz Ligon

In deliberating on ESCR, such as the rights to education, food, health, housing and social security, national-level courts (as well as national human rights institutions) will be able to draw upon the case law developed by the Committee under the OP-ICESCR mechanism and will thus be in a better position to apply the ICESCR either directly (where their national law permits) or to interpret existing national law.

The decisions rendered by the CDESCR under the OP-ICESCR will provide further case studies on the adjudication of ESCR. The concept of violations of ESCR and how they should be recognized, interpreted and remedied will gradually be clarified by the treaty body through the complaints and inquiry procedures. Such documentation will in turn be vital in influencing the enactment, execution and interpretation of domestic

laws or procedures to protect the rights in the ICESCR as well as in providing guidance to domestic courts on how to monitor government action.⁸

F. THE OP-ICESCR OFFERS NEW AVENUES TO COMBAT POVERTY

The OP-ICESCR will be a critical tool in addressing poverty. According to the former UN High Commissioner for Human Rights, Louise Arbour, the OP-ICESCR “will provide an important platform to expose abuses that are often linked to poverty, discrimination and neglect, and that victims frequently endure in silence and helplessness. It will provide a way for individuals, who may otherwise be isolated and powerless, to make the international community aware of their situation.”⁹

Poverty remains an important challenge in almost all countries around the world. Many aspects of poverty are avoidable and are caused or maintained by violations of ESCR. Such violations can include: exclusion of people living in informal

of Admissibility in the paper *Considerations of the International NGO Coalition for the OP-ICESCR in relation to the OP-ICESCR and its Rules of Procedure* submitted by the NGO Coalition to the CDESCR available at http://www.eschr-net.org/usr_doc/NGO_Coalition_submission_to_the_CDESCR_on_OP-ICESCR.pdf.

7 The obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the International Court of Justice (see *The Interhandel Case (Switzerland v. United States)*, judgment of March 21, 1959). It can also be found in other international human rights treaties: the International Covenant on Civil and Political Rights (Art. 41(1)(c)) and its First Optional Protocol (Arts. 2 and 5(2)(b)), the American Convention on Human Rights (Art. 46), the African Charter on Human and Peoples' Rights (Arts. 50 and 56(5)).

8 In fact, national courts have increasingly adopted a more active role in reviewing actions of public authorities. See Booklet 1, Section 2(D): *Justiciability of ESCR* and below, Section 2(A), which challenges the view that ESCR are not capable of being applied by judicial bodies.

9 UN Press release June 18, 2008 [<http://www.un.org/apps/news/story.asp?NewsID=27069&Cr=arbour&Cr1>], where the High Commissioner congratulated the Human Rights Council on its adoption of the OP-ICESCR.



settlements and other marginalized groups from public services, discrimination against women, attacks on the livelihoods and homes of particular groups, corruption and failure to prioritise public resources on those in greatest need among others.

The full realisation of ESCR is therefore critical to overcoming this challenge. However, poverty will not be effectively reduced unless people can hold governments accountable for failing to realize economic, social and cultural rights. In the absence of accountability, people have to rely on the goodwill of governments, and of the particular officials with whom they deal, to take the steps needed to end poverty.

The OP-ICESCR opens up new avenues for combating poverty. The CESCR will not only be able to study situations affecting particular individuals and groups but also be able to address systematic violations of economic, social and cultural rights, identifying circumstances where poverty – or a government's failure to end poverty – is a result of violations of ESCR. Consequently, this will increase levels of accountability and create an incentive to strengthen domestic protection of ESCR.¹⁰

G. THE OP-ICESCR REINFORCES THE UNIVERSALITY, INDIVISIBILITY, INTERRELATEDNESS AND INTERDEPENDENCE OF ALL HUMAN RIGHTS

The Vienna Declaration adopted by the Second World Conference on Human Rights in 1993 unequivocally confirmed the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. It stated that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.¹¹

The interdependence and indivisibility of all human rights require a similar treatment of ESCR and civil and political rights in terms of international legal protection. The International Covenant on Civil and Political Rights has had an Optional Protocol since 1966, to which 115 States are now Party. Ratification or accession by a comparable number of countries to the OP-ICESCR would reinforce the universality, interdependence, indivisibility and interrelatedness of all human rights. States that ratify the Optional Protocol will not only be benefiting their own people, they will be sending a signal to other countries and peoples about the indivisibility of all rights.

According to the former UN High Commissioner for Human Rights, Navanethem Pillay, “[c]losing a historic gap in human rights protection under the international system, the Optional Protocol represents a veritable milestone in the history of universal human rights, making a strong and unequivocal statement about the equal value and importance of all human rights and the need for strengthened legal protection of economic, social and cultural rights. It [will] move us closer to the unified vision of

¹⁰ For further discussion about the ESCR and poverty, see the UN website of the Independent Expert on the question of human rights and extreme poverty and the *Draft Guiding Principles on Extreme Poverty and Human Rights: The rights of the poor* at <http://www2.ohchr.org/english/issues/poverty/expert/index.htm>. See also the Statement by the CESCR on “Poverty and the International Covenant on Economic, Social and Cultural Rights” E/C.12/2001/10, May 10, 2001. Also, you can visit the ESCR-Net website: www.escr-net.org. ESCR-Net’s case-law database provides ESCR-related pleadings, commentary and decisions from a range of countries, legal traditions and languages (Spanish and English), available at <http://www.escr-net.org/caselaw/>. See also the case studies on the impact on poverty of litigation on the right to food in India and on the right to health in South Africa in Amnesty International, *From Promises to Delivery: Putting Human Rights into the Millennium Development Goals*, available at <http://www.amnesty.org/en/demand-dignity>, COHRE, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, 2003, available at <http://www.cohre.org>.

¹¹ UN, Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, Vienna, June 14-25, 1993, A/CONF.157/23, July 12, 1993, para. 5 [[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)].

human rights of the Universal Declaration. Importantly, it [will] enable victims to seek justice for violations of their economic, social and cultural rights at the international level for the first time.”¹²

H. THE OP-ICESCR INCREASES PUBLIC AWARENESS OF ESCR

The **publication of communications, inquiries and views of the CESC under the OP-ICESCR** will serve to promote public awareness, domestically and globally, of the human rights standards enshrined in the ICESCR. This has been the case with complaints submitted under existing complaints procedures and, in particular, complaints under the First Optional Protocol to the ICCPR.

I. THE OP-ICESCR EMPOWERS INDIVIDUALS AND CIVIL SOCIETY

The complaints procedure constitutes an important tool to empower individuals and civil society. It is a way to assist in the interpretation of the law through people’s lives and experiences.

This mechanism allows individuals to identify the particular violation of their rights and thereby helps to set the ways and means for addressing it.

By interpreting ESCR and providing remedial relief through the lens of actual experience, the CESC also offers civil society the means for domestic advocacy campaigns to change laws, policies or programmes in order to implement ESCR. States that ratify the OP-ICESCR will be able to hold up this ratification as an indication of their willingness to empower their people.

2. Myths and Realities: Overcoming Opposition to the OP-ICESCR

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

Can courts enforce economic, social and cultural rights? Should UN treaty bodies be able to give an opinion that a State has violated such rights and recommend appropriate action to remedy the violation? In answering these questions, there are key issues that should be taken into account.

MYTH 1: ESCR ARE NOT CAPABLE OF BEING APPLIED BY JUDICIAL AND TREATY BODIES AND ARE NOT JUSTICIABLE

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

Jurisprudence surrounding ESCR has gradually emerged over the preceding decades. An increasing number of countries, across all continents and legal systems, have incorporated judicial review of ESCR. These countries include: Argentina, Bangladesh, Brazil, Colombia, Costa Rica, Egypt, Finland, Germany, India, Indonesia, Latvia, Mexico, Pakistan, Portugal, South Africa and Venezuela among others. Moreover, complaints procedures for violations of ESCR have been developed at the regional level (e.g., the individual and inter-State complaints procedures under the African Charter on Human and Peoples’ Rights, the Inter-American System and the Collective Complaints Procedure under the European Social Charter). Domestic and regional courts, as well as some human rights treaty bodies within the universal system,¹³ have adjudicated issues related to the enjoyment of ESCR in many instances, offering an adequate remedy to the victims. As a result, a wide range of

¹² Statement by Navanethem Pillay, United Nations High Commissioner for Human Rights, during the signing ceremony of the OP-ICESCR, held in New York on September 24, 2009 [http://www.escr-net.org/news/news_show.htm?doc_id=1067602].

¹³ ESCR have been addressed, directly or indirectly, under the individual communication procedure of the First Optional Protocol to the ICCPR, the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Racial Discrimination and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

case law related to food, health, shelter, social security and education, among others, has emerged.

In dealing with ESCR, courts have also developed procedural innovations. As such, the existence of domestic, regional and international case law related to ESCR bear witness to the direct justiciability of these rights.

The OP-ICESCR was adopted unanimously by the UN Human Rights Council and the UN General Assembly, following extensive consideration by the UN Working Group in charge of its elaboration. The Working Group, formed by UN member States, discussed the creation of this mechanism over 5 years. The adoption of the OP-ICESCR by consensus, rather than by a contested vote, indicates all States were willing to allow the UN to protect economic, social and cultural rights through legal action.

Further Material

For a comprehensive case-law database on domestic and international enforcement and justiciability of ESCR, visit the International Network for Economic, Social and Cultural Rights' website: <http://www.escr-net.org/caselaw/>.

MYTH 2: ESCR ARE TOO VAGUE TO BE APPLICABLE TO A CASE-BASED COMPLAINTS PROCEDURE

It is often claimed that ESCR are not rights but political aims and that they represent provisions too vague to be enforceable. This perception has been overcome by various methods of elaborating on the nature, content and scope of ESCR and on States' obligations.

The works of the CESCR, the UN Special Rapporteurs, experts, academics and NGOs as well as national and regional case law have all significantly contributed to refuting this assertion and clarifying obligations ensuing from the ICESCR. The CESCR's general comments, along with existing jurisprudence and outcomes of periodic reporting procedures, offer detailed descriptions of the content and scope of ESCR, as well as the respective States' obligations to respect, protect and fulfil these rights.

In a great number of countries, national courts regularly order remedies for unjustified interference with or the denying of ESCR (e.g., provision of housing for disadvantaged groups, cessation of forced evictions, equal access to education and provision of meals for people living in poverty). They have increasingly demonstrated their capacity to contribute to a better understanding about the reach, nature and extension of these rights through their jurisprudence and decisions, and they contribute to the progressive realisation of ESCR.¹⁴

The OP-ICESCR will allow further clarification and improve compliance of the ESCR obligations of States on a case-by-case basis.



Photo: Claudio Papapietro

¹⁴ Justice Beverly McLachlin, Chief Justice of the Supreme Court of Canada, stated: "To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded." Supreme Court of Canada, *RJR-MacDonald Inc. v. Canada* (A.G.), [1995] 3 S.C.R. 199 at para. 136.

MYTH 3: ESCR INVOLVE QUESTIONS OF PUBLIC POLICY AND RESOURCE ALLOCATION THAT SHOULD NOT BE DEALT WITH BY COURTS OR TREATY BODIES

It is sometimes argued that the separation of powers between the policy-making bodies – the legislature and executive – and the judiciary requires that matters involving public policy and the allocation of resources should only be left to the former, with no role for the courts. It is claimed that allowing courts to enforce ESCR is inconsistent with the separation of powers as courts would encroach upon the terrain of the legislature and the executive as the policy-making bodies that have a democratic mandate from the people. A similar argument is sometimes made that review of State performance by human rights treaty bodies transfers legislative powers from the elected national legislature to an international body of experts.¹⁵

DEMOCRATIC PRINCIPLES: SEPARATION OF POWERS

Article 8.4 of the OP-ICESCR¹⁶ makes clear that the CESCR's role, like that of courts, in no way usurps the role of governments in designing legislation, programmes and policies to implement ESCR. The CESCR's role is not to design programmes or determine resource allocation, but rather it is to review whether the State has met its obligations under the Covenant to adopt reasonable measures to implement the Covenant, considering available resources. The choice of specific means or policies from a range of possible measures that would comply with the Covenant remains up to States. This differentiation of roles addresses separation of powers concerns.

In addition, when national courts have ordered that a specific programme or policy be implemented, the orders have recognized the competence and authority of governments to devise the appropriate response, provided that the policy is in compliance with the obligations under the ICESCR.¹⁷ Courts have shown the capacity to set boundaries for their intervention. Thus, in reviewing compliance with the State's obligations, a court will not enquire whether other more desirable or favourable measures could have been adopted but will assess whether the State has implemented its obligation to ensure fundamental human rights.¹⁸

Accordingly, adjudicating ESCR claims does not require courts and treaty bodies to take over policy making from governments. Courts and treaty bodies generally have neither the inclination nor the institutional capacity to do so. Rather, as with civil and political rights cases, courts and other bodies adjudicating ESCR review government decision making to ensure consistency with fundamental human rights.

Holding governments accountable to human rights obligations enhances democracy rather than undermines it. Judicial bodies can play a key role in upholding the rights of individuals and groups in the face of hostile or negligent States. As the Constitutional Court of South Africa has noted, litigation fosters participative democracy, requiring government to be accountable to its citizens over specific aspects of policy in between elections and not just at the time when it seeks election. Litigation requires governments to disclose what they have done to formulate policies, what alternatives they have considered and the reasons why the option underlying a policy was selected.¹⁹ A large number of States have established procedures that allow for the protection of ESCR before courts or other state bodies. Such legal protections have not affected the competency of other public powers, although they can and should have an influence in the design, implementation and

15 Inge Lorange Backer, *Ideals and Implementation – Ratifying another Complaints Procedure?*, (2009) 27 (1) Nordic Journal of Human Rights 91-96, 93.

16 Art. 8.4 OP-ICESCR: "When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."

17 See, for example, *Ain O Salish Kendro (ASK) and Others v. Government of Bangladesh and Others*, Writ Petition No 3034 of 1999, 2 CHRLD. The Bangladesh High Court noted in 1999 that in order to fulfil the basic rights of equality, life and livelihood, the government had to complement its project to demolish slum dwellings in Dhaka with a plan to rehabilitate the dwellers and that the project needed to be carried out in stages with reasonable notice given to evict.

18 See, for example, *V. v. Resident Municipality X. and Bern Canton Government Council (Constitutional Complaint)*, October 27, 1995. In this case, the Swiss Federal Court has said it lacked the "competence to set priorities in allocating resources" but would intervene if the legislative framework failed to ensure constitutional entitlements. Also, the South African Constitutional Court has held in several cases that the State could adopt a wide range of measures to meet its ESCR obligations, but the question that a court should answer is whether the measures are reasonable. Therefore, in reviewing compliance with the State's obligation, a court "will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been well spent." See, for example, *Government of the Republic of South Africa and Others v. Grootboom*, 2001 (1) SA 46 (CC), para. 41.

19 *Lindiwe Mazibuko & Others v. City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28, para. 160-161.

monitoring of laws and policies in order to ensure conformity with the State's human rights obligations.

It should be noted that the CESCR already has a mandate to review States Parties implementation of the ICESCR through the periodic reporting process established by the United Nations Economic and Social Council. The OP-ICESCR adds to the existing periodic reporting process by providing individuals and groups within the State's jurisdiction the capacity to bring complaints about alleged violations to the Committee for its views. A country that chooses not to become a Party to the OP-ICESCR will still have its overall performance reviewed, but this country would exclude its people from having an opportunity to influence the review of its performance by the CESCR through the analysis of particular cases claiming ESCR violations. Such an exclusion can only diminish democratic accountability to those living under that State's jurisdiction.

RESOURCE ALLOCATION AND PUBLIC POLICIES

While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts and international treaty bodies already make decisions on a considerable range of matters with important resource implications. The adjudication of matters concerning civil and political rights, discrimination against women, racial discrimination and torture, as well as many other legal rules such as trade, investment and intellectual property law, regularly impinges upon the political options of governments, notably with regard to the allocation of resources as well as on other public policy issues such as national security and family law. Indeed, while judges should respect the division of competences between the various branches of government, it is important to recognize that their decisions frequently have budgetary consequences.²⁰ For instance, the right to a fair trial necessitates significant financial investments in court systems and frequently legal aid.²¹ While it is obvious that the realisation of civil and political rights involve allocation of resources, the related costs are often not considered because the institutions are already in place.

While ESCR claims may often involve issues of resource allocation (just like other human rights), they also challenge policies, which may be very costly because they fail to address problems of discrimination, neglect or exclusion with long-term cost consequences. Systematic violations, which leave large segments of society without access to work, education and adequate food, clothing and housing, are linked to patterns of discrimination and exclusion. It is often only from the standpoint of dominant groups that ESCR claims appear as demands that governments must "provide" for particular needs when in fact the needs have been created by government policies and programmes that perpetuate injustice. Policies and programmes designed and implemented without considering the needs of all members of society and that leave out particularly vulnerable groups ought not to be immune from human rights scrutiny solely because they involve resource and policy decisions.

Certain groups, whose economic, social and cultural rights are denied, are generally the most vulnerable and disadvantaged segments of society. If a government denies an international remedy for violations of economic, social and cultural rights, the ability of these groups to claim their human rights is reduced, and consequently, existing inequalities are further entrenched.

Resource allocation decisions have never been excluded from human rights review, either domestically or internationally, due to their important implications for human rights. To the extent that decisions affect the enjoyment of human rights, they must be subject to review for compliance with human rights standards. No category of decision-making can be exempt from review.

With increasing numbers of jurisdictions making ESCR justiciable at the domestic level, courts have shown that they are capable of developing meaningful standards by which to



²⁰ UN, CESCR, General Comment No. 9, *The domestic application of the Covenant*, E/C.12/1998/24, February 19, 2005, para. 10 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425230].

²¹ See, for example, *Airey v. Ireland*, [1979] 2 EHRR 305. Here, the European Court of Human Rights held that the lack of legal assistance to seek a decree of judicial separation and, consequently, the lack of effective access to the courts violated the right to a fair trial and the right to respect for family life. Ireland subsequently enacted a civil legal aid system.

review resource allocation decisions against the requirements of ESCR, without usurping the role of legislatures or ignoring the importance of the many competing demands on resources that are faced by governments.²²

D. A COMPLAINTS PROCEDURE FOR ESCR WOULD IMPLY AN UNFEASIBLE FINANCIAL BURDEN FOR STATES

An argument that is sometimes put forward against the OP-ICESCR is that a complaints procedure for ESCR at the international level would impose large financial burdens on States. It is sometimes suggested that States would consequently be condemned as rights violators simply because they lack sufficient resources.

It should be noted that the OP-ICESCR is a procedural instrument and does not introduce any new substantive obligations. States already accepted all of the substantive obligations by becoming Parties to the ICESCR. Therefore, the mechanism does not require additional obligations from States Parties but rather provides a mechanism to ensure the commitment they made when they became Party to the ICESCR.

It is, however, important to clarify that the ICESCR does not impose unreasonable resource-related obligations upon States. State obligations under the ICESCR are subject to **available resources**, and many of these obligations do not require large amounts of financial resources.

In many instances, the realisation of ESCR only requires restraint from governments (e.g., refraining from certain behaviour) or regulating the actions of third parties (e.g., landlords and health professionals). The ICESCR imposes three different types of obligations on States: the obligations to respect, protect and fulfil.²³ Under the obligations to respect and protect, States have to refrain from interfering with the enjoyment of ESCR and to prevent violations of these rights by state agents or third parties. In both cases, the costs are limited to those of monitoring and enforcing legislation. States may simply need to revise the tasks carried out by existing government officials. For instance, States Parties to the ICESCR have to ensure that there are no arbitrary restrictions on the right to work and that no forced evictions are carried out in the absence of adequate compensation and resettlement. In such cases, the realisation of ESCR does not involve significant questions of resource allocation.

The obligation to fulfil rights may require the use of significant amounts of public resources. However, because State obligations under the ICESCR are subject to available resources, where economic, social and cultural rights are not realised due to a genuine lack of resources, there is no violation of such rights. The CESCER may only find that a violation has occurred where the government has failed to reasonably implement a measure that was within its power or where it has unnecessarily taken an action that undermines existing access to an economic, social or cultural right. Many violations of ESCR occur for reasons that do not relate to the lack of resources and capacity, e.g., subsidy programmes that exclude the poorest people in law or practise, failure to consider the needs of disadvantaged and marginalized groups when constructing public policy or denial of a public service on arbitrary grounds. Domestic courts and regional bodies have demonstrated that they are able to assess human rights without imposing unmanageable financial burdens on States lacking necessary resources. A government that believes it is taking reasonable steps to realise economic, social and cultural rights within its available capacity and resources should have no concern about allowing those living under its jurisdiction to test this belief before the CESCER. External review is essential for the purposes of accountability and to provide a right to a remedy for violations of human rights. Ratifying the OP-ICESCR will provide an important tool for people to demand that their government demonstrate that it is taking reasonable steps within its power to realise their economic, social and cultural rights.

The OP-ICESCR anticipates that in some circumstances the CESCER may determine that the ESCR of complainants in a particular country are unrealised due to a lack of resources. For those cases, it establishes a procedure to generate resources through international cooperation and assistance, an obligation States already have under the ICESCR. Article 14 of the OP-ICESCR requires that the CESCER must transmit, when appropriate and with the consent of the State Party, its views and recommendations concerning complaints and inquiries that indicate a need for technical advice or assistance to UN specialized agencies, funds and programmes and other competent bodies. Article 14.3 provides for the establishment of a

²² See, for example, the case of *The Government of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), which illustrates how courts adapt legal concepts, such as the test of reasonableness, to assess whether a policy with resource implications is compatible with constitutional rights.

²³ These are set out in several CESCER General Comments [http://www.escr-net.org/resources/resources_show.htm?doc_id=425203], e.g., UN CESCER, *The right to adequate Food*, General Comment No 12, E/C.12/1999/5, May 12, 1999, para. 15 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425234]. See Booklet 1, Section 2(C) for an explanation of the obligations to respect, protect and fulfil.

fund to provide expert and technical assistance to States Parties, with their consent, for the enhanced implementation of the ESCR contained in the ICESCR, thus contributing to building national capacities in the area of ESCR in the context of the OP-ICESCR.

MYTH 5. JUDICIAL REMEDIES ARE NOT EFFECTIVE IN REALISING ESCR

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

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

As judicial or quasi-judicial entities look at specific cases of human rights violations, their remedies may sometimes be limited in terms of their ability to address or change an entire country's situation. In this regard, such limitations apply equally to civil and political rights, as well as to ESCR. For instance, it is unlikely that a decision of the Human Rights Committee on a torture case alone would be effective in putting a stop to an institutionalised practice that is taking place throughout the country in question. However, the decision in conjunction with civil society actions and media awareness can trigger a change in a given situation and establish a precedent for other victims in a similar situation to the complainant. Decisions by the CESCR as to what constitutes reasonable measures in various contexts will set a standard for decision-making and programme design, which will provide guidance to governments, courts and decision-makers in many other areas as to what constitutes human rights compliance. Litigation can also spur legislative changes and play a useful educational and transformative role in the dissemination and understanding of human rights principles within the society at large.



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MYTH 6. THE OP-ICESCR CREATES NEW ESCR AND NEW CORRESPONDING OBLIGATIONS FOR STATES

At times, there is a misconception that the OP-ICESCR creates new obligations for States Parties to the ICESCR.

As mentioned, the OP-ICESCR is a procedural protocol and not a substantive protocol, which means that it does not add new ESCR and corresponding obligations for States. It creates a new complaints procedure for rights and corresponding obligations that already exist under the ICESCR. The procedure created by the OP-ICESCR is not different from the ones existing under, for instance, the First Optional Protocol to the ICCPR, the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Racial Discrimination or the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

MYTH 7. THE OP-ICESCR COMPETES OR CONFLICTS WITH OTHER COMPLAINTS PROCEDURES

Some argue that the OP-ICESCR would duplicate the work carried out by other bodies under other complaints mechanisms, e.g., the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), or that it contributes to conflict with other complaints mechanisms.

The OP-ICESCR is the only international complaints mechanism that provides a remedy for all ESCR. Before the adoption of the OP-ICESCR, there was no individual complaints mechanism for violations of most ESCR unless those violations could be attributed to discrimination or linked to situations where they violated civil and political rights such as the right to life or constituted torture or cruel, inhuman or degrading treatment or punishment.

The OP-ICESCR guards against the potential duplication of work between these different mechanisms by including a clause, under Article 3, that prevents the CESCER from examining a case that has been or is being examined under another procedure of international investigation or settlement. In addition, the CESCER is authorized, under Article 8.3 of the OP-ICESCR, to consult, as appropriate, documentation from UN bodies, specialized agencies, funds, programmes and mechanisms and other international organisations, including regional human rights systems.

The OP-ICESCR complements other existing international and regional mechanisms. It provides remedies for ESCR that are not included within other international or regional human rights systems. It also provides a broader remedy than other systems. For example, the OP-ICESCR complements the European Social Charter by permitting all affected individuals and groups to seek a remedy at the international level. The collective complaints procedure under the European Social Charter restricts this remedy to a limited number of accredited civil society organisations. The OP-ICESCR also complements the Inter-American Human Rights System. While ESCR are generally protected under Article 26 of the American Convention on Human Rights, the main ESCR treaty, the San Salvador Protocol, only allows individual complaints to be submitted for alleged violations of two rights – the right of workers to form and join trade unions and the right to education. The OP-ICESCR complements this treaty by enabling victims of violations of other ESCR to submit individual complaints to an international supervisory body. In addition, the OP-ICESCR allows the CESCER to investigate systematic ESCR violations, a mechanism not contemplated by the San Salvador Protocol. Complementarity between different human rights mechanisms can be found at the regional and international levels and with respect to conventional and non-conventional mechanisms. It results from the development of human rights law, along with the identified need to bring special protection to vulnerable groups, address particular subjects of concern or respond to regional specificities.



About the International NGO Coalition for the OP-ICESCR

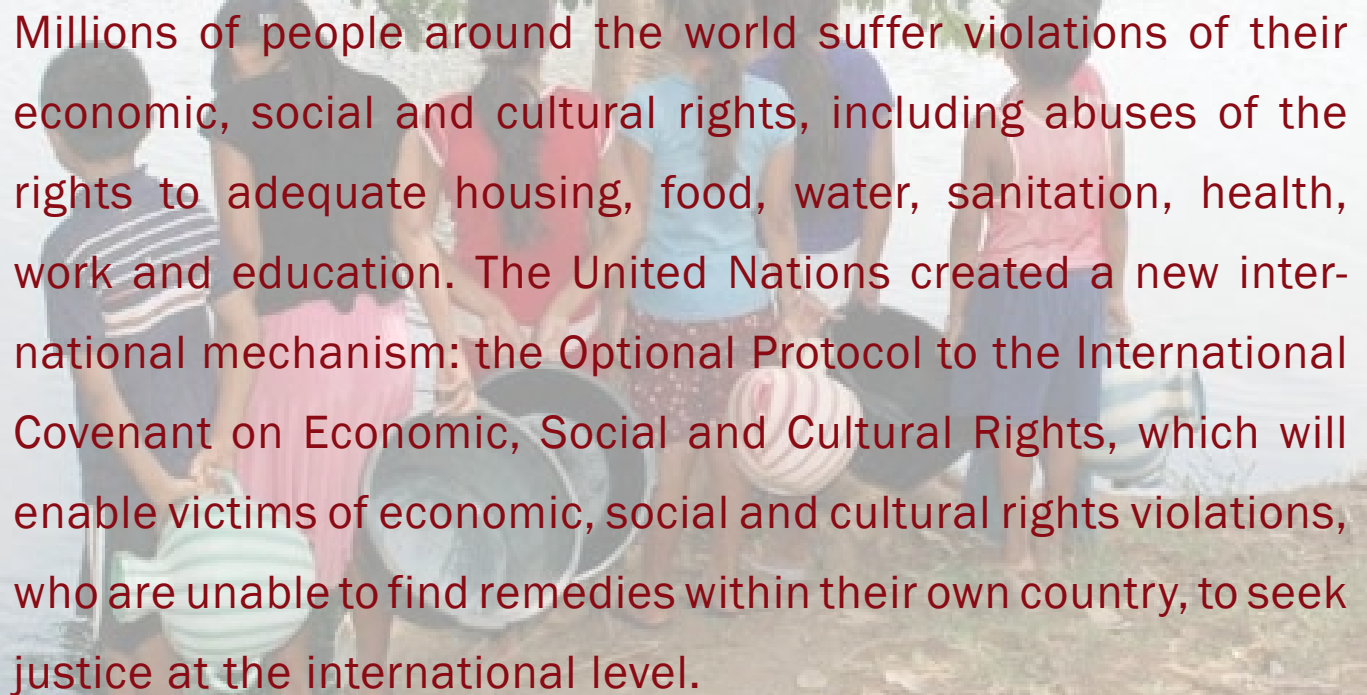
The International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (NGO Coalition) brings together hundreds of individuals and organisations from around the world who share the common goal of promoting the ratification and implementation of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

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

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

Get
Involved!

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



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

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

A TOOLKIT FOR ACTION:

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

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

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

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

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