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

A new international mechanism of appeal for victims of economic, social and cultural rights violations

On 5 May 2013, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) will enter into force, three months after Uruguay became the tenth state to ratify the treaty. Under the Protocol, victims of violations of economic, social and cultural rights (ESCR), such as the right to food, health, education, and housing, who are unable to seek relief for their claims within their own country, can seek redress at the international level by filing a complaint with the United Nations Committee on Economic, Social and Cultural Rights.



BACKGROUND

Following the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948, the member states of the United Nations worked to convert the principles of human rights into two binding international treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These two International Covenants entered into force in 1976.

The decision to divide human rights into two distinct categories and translate them into two Covenants was made when it became clear that no agreement could be reached between the Eastern and Western voting blocs in defining the nature of the respective rights. To date, several states have still not ratified either Covenant, despite a renewed push for ratification in the 1990s.

At the end of the Cold War, the World Conference on Human Rights held in Vienna in 1993 clearly reaffirmed that «civil, political, economic, social and cultural rights are universal, indivisible, interdependent and closely interrelated». The Vienna-Conference was also instrumental in setting up a complaint procedure for violations of the ICESCR, a mechanism that had been in place for violations of the ICCPR since its entry into force in the late 70s. The institution of this complaint procedure effectively ensured that economic, social and cultural rights would receive equal protection with civil and political rights. The following discussions and negotiations about the complaint procedure for the ICESCR stimulated an intense debate about the nature of state obligation related to ESCR and has played an important role in strengthening international consensus on the nature of these rights.

What rights are protected by the ICESCR?

The right to work (Articles 6, 7, 8 and 10); the right to social security, including social insurance (Article 9); the right to an adequate standard of living, including the the right to food and the right to housing (Article 11); the right to the highest attainable standard of physical and mental health that may be achieved (Article 12); the right to education (Articles 13 and 14); the right to participate in cultural life and to benefit from scientific progress (Article 15); the right to water and sanitation (Articles 11 and 12 as interpreted by General Comment No. 15 of the ESCR Committee).

HOW DOES THE COMPLAINT PROCEDURE WORK?

The Protocol was adopted by the General Assembly of the United Nations on 10 December 2008 and opened to ratification on 24 September 2009. 42 states have signed the Protocol, thus signalling their intention to ratify it. Ratification is required for the Protocol to become legally binding on each state. The first ten states to have ratified the Protocol are: Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain and Uruguay (the latter on 05.02.2013).

To date, 160 states have ratified the ICESCR and are therefore obliged to respect, protect and fulfil the rights protected by the Covenant. Currently the only international mechanism in place to monitor the implementation of these right is the procedure of state reporting, wherein every five years the state must submit a report to the UN Committee on Economic, Social and Cultural Rights. While civil society has the opportunity to present alternative information to the Committee, the Committee currently does not have a mandate to deal with individual cases of rights violations. Those states that ratify the Optional Protocol grant the Committee just such a mandate, allowing it to assess whether a state has complied with its human rights obligations in specific cases.

The Optional Protocol provides for three types of procedures. During the ratification process, the state must indicate which of these procedures it will adhere to:

- **Individual communications:** The Committee may receive communications (complaints) from individuals or groups of individuals (Art. 1). Complaints may also be filed by organisations on behalf of individuals or groups of individuals. In examining the communications, the Committee may assist the parties in reaching an amicable settlement (Art. 7). If no amicable settlement can be reached, the Committee submits its findings in relation to the complaint to the interested parties, accompanied where appropriate by its recommendations (Art. 9). The states must respond to the findings, and follow-up of the recommendations is assured by the Committee (Art. 9).
- **Interstate communications** (Art. 10): The states party to this Protocol may denounce violations by another state party and request that action be taken to put an end to violations. A similar procedure exists for the Optional Protocol to the ICCPR, but the states have never used it.

- **Enquiry procedure** (Art. 11): This procedure allows the ESCR Committee to initiate investigations if it receives credible information indicating that a

state party to the Protocol is committing serious or systematic violations of any of the economic, social and cultural rights contained in the Covenant.

In what situations can the OP-ICESCR be used?

If, for example, a company enters into an agreement with the government to acquire a large amount of land or to develop a monoculture, or a mining project at the expense of local communities, and if, as a result, the communities lose access to housing, food, and/or ties to their ancestral land without having been appropriately consulted and compensated, the state is in violation of its international obligations, because it has not respected or protected the fundamental rights of its citizens. Victims of such circumstances often have only limited recourse to their national courts, or they might not receive adequate compensation for their claims from those courts as a result of pressure exerted by state authorities, or judges that decide in favour of business interests over the rights of residents.

After the OP comes into force, victims can file their complaints with the ESCR Committee. However, in order to do so, the state must have ratified the Protocol. It is therefore essential that the maximum number of states ratify the treaty. The Committee will then assess the case and make recommendations. While the Committee is not a Court and can therefore not order state action, a recommendation by the Committee can strengthen the public and legal struggle of the victims.

WHY IS UNIVERSAL RATIFICATION OF THE OPTIONAL PROTOCOL SO IMPORTANT?

In addition to its value as a mechanism of redress for victims, the OP-ICESCR is a new international reference tool that will allow advances to be made in economic, social and cultural rights in several areas:

- It will help to clarify the obligations of the states party to the ICESCR by the development of international case law;
- It will assist the party states in the practical implementation of the rights contained in the ICESCR by making recommendations that can be applied to a variety of cases;
- It may motivate the states to strengthen their national monitoring and redress mechanisms;
- It strengthens the universality, indivisibility, interrelatedness and interdependence of all human rights;
- It will raise public and judicial awareness of ESCR,
- It will provide individuals and civil society with a useful tool for the protection of victims of ESCR violations





Join the civil society campaign for the ratification and implementation of the Optional Protocol:

<http://op-icescr.escr-net.org>

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