

**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 1

Refreshing Your Knowledge About
the International Covenant on
Economic, Social and Cultural Rights

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

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

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

This series has four booklets.

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

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

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

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

The NGO Coalition is led by a Steering Committee, currently comprised of representatives from the following organisations: Amnesty International (AI), Centre on Housing Rights and Evictions (COHRE), Community Law Centre, International Network for Economic, Social and Cultural Rights (ESCR-Net), FoodFirst Information and Action Network (FIAN), International Commission of Jurists (ICJ), International Federation for Human Rights (FIDH), International Women's Rights Action Watch Asia Pacific (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 1:

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

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol or OP-ICESCR) 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).

Booklet 1 provides a general overview of: ESCR, the Covenant and the related States Parties' obligations, the role of the Committee and the challenges related to the implementation and enforcement of ESCR. All of these elements are essential for understanding the OP-ICESCR process.

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1. Economic, Social and Cultural Rights

Economic, social and cultural rights embody essential elements for a life of dignity and freedom, including work, health, education, food, water, sanitation, housing, social security, a healthy environment and culture. Human rights provide a common framework of universally recognized values and norms both to hold States, and increasingly non-State actors, accountable for violations and to mobilize collective efforts for economic and social justice, political participation and equality.

People worldwide have long struggled for these basic rights. Concern for those living in poverty and the oppressed has been expressed in many religious and philosophical traditions, and more recently, human rights have been articulated in international law.

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR),¹ establishing the vision and principles, which recognize the interdependence and indivisibility of all human rights: a vision that guarantees people's civil and political freedom as well as economic and social well-being. The Universal Declaration proclaims "freedom from fear and want" as the highest aspiration of the common people and asserts the equal importance of economic, social and cultural rights. More specifically, the UDHR recognizes the right to social security, the right to work, the right to an adequate standard of living, the right to education and the right to participate in cultural life. Even before the adoption of the UDHR, the International Labour Organisation (ILO) had recognized international labour rights, which now fall under the category of ESCR.

The UDHR, together with the ICESCR and its sister covenant, the International Covenant on Civil and Political Rights (ICCPR), form the International Bill of Human Rights, which is the pillar for human rights protection within the United Nations.

ESCR are embodied in international treaty law through the ICESCR, as well as through other universal and regional treaties.²

2. The International Covenant on Economic, Social and Cultural Rights

A. THE ICESCR AND ITS MONITORING BODY

The International Covenant on Economic, Social and Cultural Rights is the main treaty in the United Nations human rights system to address peoples' economic, social and cultural rights.

As an international human rights treaty, the ICESCR creates legally binding international obligations on those States that have ratified or acceded to it and therefore have agreed to be bound by the standards contained in it. As of August 2010, 160 countries around the world are Party to the ICESCR. Thus, it can be seen as a treaty that reflects global consensus on the universal human rights standards that apply to the economic, social and cultural fields.

1 Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III), UN Doc A/810 at 71 (1948) [<http://www.un.org/en/documents/udhr/index.shtml>].

2 Universal instruments include: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) [<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>] and its Optional Protocol [<http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>]; Convention on the Rights of the Child (CRC) [<http://www2.ohchr.org/english/law/crc.htm>] and its Optional Protocols I [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425593] and II [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425594]; Convention on the Elimination of All Forms of Racial Discrimination (CERD) [<http://www2.ohchr.org/english/law/cerd.htm>]; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425574]; Convention relating to the Status of Refugees (CSR) [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425586]; International Labour (ILO) Conventions [<http://www.ilo.org/ilolex/english/convdisp1.htm>]; Regional Human Rights Instruments, such as the American Declaration on the Rights and Duties of Man [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425903&parent_id=425906]; American Convention on Human Rights [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425919&parent_id=425906]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425922&parent_id=425906]; African Charter on Human and Peoples' Rights and Duties [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425923&parent_id=425906]; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [http://www.achpr.org/english/_info/women_en.html]; European Social Charter (Council of Europe) [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425927&parent_id=425906]. Economic, social and cultural rights are implicitly required to fulfil certain rights in the International Covenant on Civil and Political Rights (ICCPR) [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425178], e.g., the right to life.

When a State ratifies a treaty, it voluntarily accepts a solemn responsibility to apply each of the obligations embodied therein and to ensure the compatibility of its national laws with its international duties, in a spirit of good faith. The obligation to implement the provisions of a treaty through domestic legislation is consistent with the Vienna Convention on the Law of Treaties, which declares, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³ Indeed, the Covenant often requires legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

Through the ratification of human rights treaties, therefore, States become accountable to the international community, to other States that have ratified the same texts and to their own citizens and others residing in their territories.

Once a State becomes a Party to the ICESCR, it must allocate the maximum of its available resources to realise economic, social and cultural rights in its territory and in territories under its control. The ICESCR also recognizes that the level of realisation of ESCR will vary according to different levels of economic development and identifies the necessity of international co-operation for development in order to realise these rights.

In addition to international and regional treaties, many countries have articulated their commitment to ESCR in national constitutions and domestic law.

The CESCR monitors the implementation of the ICESCR. This is a body of independent experts elected by the UN Economic and Social Council (which is in turn made up of 53 States elected by the UN General Assembly).⁴ The CESCR has three primary functions.

First, it adopts **General Comments**. General Comments are not themselves legally binding but are authoritative interpretation of the ICESCR, which is legally binding upon the States Parties to this treaty.

A second function is **periodic monitoring**. States Parties are required to submit a report to the CESCR on their implementation of the ICESCR every five years. The Committee engages in a dialogue with State representatives, takes account of input from non-governmental organisations and issues Concluding Observations evaluating the extent to which the country is implementing its obligations under the Covenant. Concluding Observations are not legally binding either but carry the authority of the United Nations. There is an expectation that, by virtue of being legally bound to the ICESCR and participating in the process, States will seriously consider the Committee’s recommendations. In practice, implementation of the Concluding Observations varies. In some cases, they have led to revisions of law, policy and practise and/or to increased public debate on the relevant issues at the national level. Whether the recommendations are taken up depends on whether there are national actors, either in government or in civil society, who follow up on the recommendations at the national level.

A third function is to carry out the three **procedures established by the OP-ICESCR**: 1) analyse complaints⁵ submitted by or on behalf of individuals or groups of individuals claiming violations of the rights of the ICESCR; 2) conduct **inquiries** when it has received reliable information of grave or systematic violations by a State Party of the ICESCR; and 3) evaluate **inter-State complaints** when a State Party considers that another State Party is not fulfilling its obligations under the Treaty. This is addressed in depth in Booklet 2.

Information on which countries are Parties to the ICESCR is available here:

<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

The full text of the ICESCR can be accessed here:

<http://www2.ohchr.org/english/law/cescr.htm>

The CESCR’s General Comments, which explain the content of the rights in the ICESCR, are available here: <http://www2.ohchr.org/english/bodies/cescr/comments.htm> or http://www.escr-net.org/resources/resources_show.htm?doc_id=425203

³ UN, Vienna Convention on the Law of Treaties, opened for signature in Vienna on May 23, 1969, entered into force on January 27, 1980, UN, Treaty Series, vol. 1155, Art. 27 [<http://untreaty.un.org/cod/avl/ha/vclt/vclt.html>].

⁴ For information on the elections process, see Booklet 4, Part II, Section 1: *Election of ESCR Committee Members*.

⁵ Note that 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.

B. THE RIGHTS PROTECTED UNDER THE ICESCR

The ICESCR is divided into five parts: Part I is similar to the ICCPR and recognizes the right to self-determination, Part II establishes the general obligations of States Parties, Part III includes the catalogue of rights recognized and protected by the Covenant, Part IV is on international implementation and Part V contains the reporting process and interpretation of the Treaty.

BOX 1: THE RIGHTS IN THE ICESCR

Right to work (Articles 6, 7, 8 and 10)

The right to work entitles workers to have the possibility to **earn their living by the work of their choice** (Article 6) and to **working conditions** that are safe and healthy and are not demeaning to human dignity. Workers must be guaranteed a **fair wage** that allows for a decent life for them and their families. There should be **no discrimination** of any kind in employment and promotion. Equal work should be compensated with **equal pay**, and employers should provide their workers with periodic and paid **holidays** (Article 7). The right to work also includes the **right to associate** with one another and **bargain** for better working conditions, the **right to join the trade union** of their choice and the **right to strike** as long as it is in conformity with the laws of the country (Article 8). **Forced labour is illegal** under international law and is a grave violation of human rights (article 10).

Right to social security including social insurance (Article 9)

States must recognize the right of everyone to **social security**, including **social insurance**, which embraces the guarantee that everyone will be provided with the **minimum goods and services** required for a dignified life. It is the duty of the State to make sure that everyone in its territory is afforded **protection without discrimination** from “(a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.”⁶ Special care should be given to disadvantaged and marginalized groups. Governments should enable all sectors of society, including youth, the elderly and ethnic and religious minorities, to have their needs met and achieve self-sufficiency.

Right to food (Article 11)

The right to food is essential for a dignified life and is vital for the realisation of many other rights, such as the right to health and adequate standards of living. Food is important not just for physiological survival but also for the full development of one’s physical and mental capabilities. The right to food is **not limited to just having a certain amount of calories** and necessary nutrients in one’s diet. It means that everybody should have **physical and economic access** to food or the means of producing it at all times. Governments are obligated to take all necessary steps to respect, protect and fulfil **the right to food** for everyone. It is the duty of every State Party to make sure that at least the minimum nutritional needs of every person under its jurisdiction are fulfilled.⁷

Right to housing (Article 11)

The right to housing should be understood as encompassing all those elements in a living abode that are essential to a life with dignity: **security from outside threats**, a **healthy living environment** and **freedom to choose one’s place of settlement**. Government must **develop national policies** that will guarantee this right to all its citizens. Special consideration should be given to **vulnerable groups** such as minorities and the elderly. No one should be deprived of some form of housing

⁶ UN, CESCR, *The right to social security (Art. 9)*, General Comment 19, E/C.12/GC/19, February 18, 2008 [<http://www2.ohchr.org/english/bodies/cescr/comments.htm>].

⁷ See also UN, CESCR, *The right to adequate food (Art. 11)*, General Comment 12, E/C.12/1999/5, May 12, 1999 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425234].

even in times of **economic downturn**.⁸

Right to the highest attainable standard of physical and mental health (Article 12)

The right to health is related to the fundamental right of each person to **live in dignity**. It entitles people to enjoy the **best available health care**, but it is not limited to this. The World Health Organisation defines the right to health as being “a state of **complete physical, mental, and social well-being**,” which “consists not only of access to healthcare but also of access to all those goods and services that are **essential or conducive to a healthy life**.” Safe housing, a clean environment, proper nutrition and accurate information on prevention of diseases are the bases for a healthy life. The right to health also entitles people to have **control over their bodies** and their health.⁹

Right to education (Articles 13 and 14)

Education has been regarded both as an end in itself and as a means for the individual and society to grow. It is the key to full economic, social, cultural and political participation in society. It encompasses two broad components: enhancement of **access for all to education** on the basis of **equality and non-discrimination** and **freedom to choose** the kind and content of education. Access to primary education is a minimum core obligation; **universal primary education** must be compulsory and free of charge. The compulsory nature of primary education guards against violations of this right by parents or government. Making primary education free eliminates income-based discrimination and at the same time removes incentives for not attending school.¹⁰

Right to take part in cultural life and to benefit from scientific progress (Article 15)

People have the right to **freely determine their identity, chose their religion and decide their own political beliefs**. Education plays an important role in promoting cultural diversity and forging tolerance among different groups. Moreover, education imparts individuals with the necessary skills and knowledge needed to actively participate in cultural and scientific life. Governments should recognise and protect the **cultural diversity** of their citizens. Particular attention should be given to the cultural rights of **minority groups and indigenous peoples**. They should be allowed cultural autonomy within the limits of national laws. Cultural rights cannot be used, however, as a justification for practices that **discriminate against specific groups** or violate human rights.¹¹

Rights to water and sanitation (Articles 11 and 12)

In General Comment 15, the CESCR stated that the right to water is implicitly included within Article 11 of the ICESCR, which recognises “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.” The CESCR stated that the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. It is also inextricably linked to the right to health in Article 12.¹² The right to water requires that everyone has access to an adequate

8 UN, CESCR, *The right to adequate housing (Art. 11 (1))*, General Comment 4, E/1992/23, December 13, 1991 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425218].

9 UN, CESCR, *The right to the highest attainable standard of health*, General Comment 14, E/C.12/2000/4, August 8, 2000 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425238].

10 For further information on the right to education, see UN, CESCR, *The right to education (Art. 13)*, General Comment 13, E/C.12/1999/10, December 8, 1999 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425236]; *Plans of action for primary education (Art. 14)*, General Comment 11, E/C.12/1999/4, May 10, 1999 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425233].

11 UNESCO, *Declaration on Cultural Diversity*, adopted by the 31st Session of the General Conference of UNESCO, Paris, November 2, 2001 [http://www.unesco.org/confgen/press_rel/021101_ct_diversity.shtml]: Culture is “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and...it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”

12 UN, CESCR, *The right to water*, General Comment 15, E/C.12/2002/11, January 20, 2003 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425240].

amount of drinking water for **personal and domestic uses**. The full enjoyment of this right means access to water that is **affordable, clean and physically accessible**. The fulfilment of the right to water is crucial for the fulfilment of other rights. The rights to health, food and housing cannot be achieved unless people have access to clean water. The UN Independent Expert on human rights obligations related to safe drinking water and sanitation has argued that sanitation, like water, could be implied under the right to an adequate standard of living and that there is considerable precedents – in international political declarations as well as in the work of United Nations human rights mechanisms – for this position.¹³

13 Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/12/24, July 2009, para. 58 [<http://www2.ohchr.org/english/issues/water/iexpert/annual.htm>].

C. OBLIGATIONS OF STATES UNDER THE ICESCR

When States become Party to the ICESCR, there are legally-binding obligations to **respect, protect and fulfil** the human rights recognised under the Treaty.

States Parties must also **avoid discrimination** in access to these basic rights, **take progressive steps** towards the **full realisation** of ESCR to the **maximum of their available resources**, prioritise **minimum core obligations** and ensure that no unjustified retrogressive measures are taken.

THE OBLIGATION TO RESPECT

The obligation to respect human rights requires States Parties to refrain from interfering directly or indirectly with people's enjoyment of these rights.¹⁴ This is an immediate obligation and includes respecting people's efforts to realise their own rights.

For instance, respecting these rights obliges States Parties not to adopt laws, policies, administrative measures and programmes that do not conform or could result in a negative impact on the ability of men and women to equally enjoy their human rights.

Another example relates to evictions. When carried out by the government against the people's will and "without the provision of, and access to appropriate forms of legal or other protection," they are often a blatant violation of the obligation to respect. In this example, the duty to respect means governments must ensure that such interference can only be justified in the most "exceptional circumstances," such as the persistent non-payment of rent or damage to property without any reasonable cause. Relocation should be avoided where possible and minimised when not avoidable. When relocation is unavoidable, it can only occur when carried out in consultation with the affected communities and with provision of compensation or adequate alternatives where appropriate among other provisions.¹⁵ Courts or other bodies can monitor this duty by hearing complaints from individuals and communities.

THE OBLIGATION TO PROTECT

Under the obligation to protect human rights, States Parties must prevent, investigate, punish and ensure redress for the harm caused by abuses of human rights by third parties, such as private individuals, commercial enterprises or other non-

14 UN Charter, Articles 55 and 56, which provides that all members pledge themselves to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction. UN Charter, October 24, 1945, 1 UNTS XVI [<http://www.un.org/en/documents/charter/index.shtml>].

15 UN, CESCR, *The right to adequate housing (Art. 11.1): forced evictions*, General Comment 7, May 20, 1997 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425237]. See also the *Basic principles and guidelines on development-based evictions and displacement* presented in 2007 to the Human Rights Council by the Special Rapporteur on adequate housing: http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf.

State actors, as well as other States and inter-governmental organisations such as the World Bank. This is also an immediate obligation.

Private actors often impede ESCR. The State Party has an obligation to protect human rights, for example, by regulating and monitoring corporate use of private security firms, potentially hazardous industrial emissions from energy plants, the treatment of workers by their employers and the adequacy and appropriateness of services that the State delegates or privatises, including medical services, water provision and education.¹⁶

THE OBLIGATION TO FULFIL

States Parties have the obligation to fulfil economic, social and cultural rights by taking legislative, administrative, budgetary, judicial and other steps towards the full realisation of all human rights. This obligation requires that a State Party use the maximum of its available resources from national and international sources.

The obligation includes duties to:

- i) *Facilitate* – This duty requires States Parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and means to ensure the realisation of attaining rights. For example, measures such as establishing a national food strategy and plan of action, building roads to markets and regulating food prices and quality could be used to promote access to and distribution of food.
- ii) *Provide* – This duty requires States Parties to ensure that people within their jurisdiction may realise their rights whenever they, for reasons beyond their control, are unable to do so themselves. For example, this encompasses providing cash and essential goods to households requiring assistance.
- iii) *Promote* – This duty involves informing individuals and communities about their rights and making available other relevant information allowing them to realise those rights, for example, by widely disseminating information on hygiene and safety measures.



¹⁶ UN, CESCR, *The nature of States parties obligations (Art. 2, para. 1)*; General Comment 3, E/1991/23, December 14, 1990 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425215].

NON-DISCRIMINATION AND EQUALITY

A fundamental aspect of States Parties' obligations is that of non-discrimination. The ICESCR requires that ESCR are available to all people without discrimination regardless of the individual's race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status.¹⁷ "Other status" includes age, disability, nationality (including refugee status, migrant workers and stateless persons), marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.¹⁸

Consequently, laws and practices that directly or indirectly discriminate against minorities, women, children, marginalized groups or other groups are forbidden by the ICESCR.

Non-discrimination is an immediate obligation. The provisions regarding progressive realisation or maximum available resources¹⁹ cannot be used as an excuse to exclude certain groups, either overtly or covertly, from housing, health care, education, work or any other ESCR. The CESCR was clear in General Comment 3 establishing that "while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect...[o]ne of these...is 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination.'"²⁰

The CESCR has also emphasised several factors negatively affecting the equal right of men and women to the enjoyment of ESCR in many of its General Comments, including those on the right to adequate housing,²¹ the right to adequate food,²² the right to education,²³ the right to the highest attainable standard of health²⁴ and the right to water.²⁵ In addition, General Comment 16 on the equal rights of men and women to the enjoyment of ESCR was a critical development in integrating the concept of substantive equality into the ESCR framework thereby contributing to the normative development of ESCR as they relate to women.²⁶

The Committee also acknowledged the legal situation of persons with disabilities and underlined the importance of remedying past and present discrimination and deterring future discrimination. It encouraged States Parties to adopt comprehensive anti-discrimination legislation for persons with disabilities that should not only guarantee judicial remedies but also provide for social policy programmes that enable such persons to live integrated, self-determined and independent lives.²⁷ Similarly, General Comment 6 considered the application of the principle of non-discrimination for the elderly.²⁸

17 ICESCR, Arts. 2(2) and 3 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425163].

18 See UN, CESCR, *Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2)*, General Comment 20, E/C.12/GC/20, June 10, 2009 [<http://www.unhcr.org/refworld/publisher,CESCR,GENERAL,,4a60961f2,0.html>].

19 "The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties." UN, CESCR, *The equal right of men and women to the enjoyment of all economic, social and cultural rights (ICESCR (Art. 3))*, General Comment 16, E/C.12/2005/4, August 11, 2005, para. 16 [<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.2005.4.En?Opendocument>].

20 UN, CESCR, General Comment 3, fn. 16 above.

21 See UN, CESCR, General Comment 4, fn. 8 above, para. 6; General Comment 7, fn. 15 above, para. 10.

22 See UN, CESCR, General Comment 12, fn. 7 above, para. 26.

23 See UN, CESCR, General Comment 13, fn. 10 above, para. 32.

24 See UN, CESCR, General Comment 14, fn. 9 above, para. 20.

25 See UN, CESCR, General Comment 15, fn. 12 above, para. 16.

26 UN, CESCR, *The equal right of men and women to the enjoyment of all economic, social and cultural rights*, General Comment 16 (2005), fn. 19 above.

27 UN, CESCR, *Persons with disabilities*, General Comment 5, E/1995/22, December 9, 1994 [<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument>].

28 UN, CESCR, *The economic, social and cultural rights of older persons*, General Comment 6, E/1996/22, December 8, 1995, para. 12 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425221]. "The Committee notes that while it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant...it must be emphasized that the unacceptableness of discrimination against older persons is underlined in many international policy documents and is confirmed in the legislation of the vast majority of States. In the few areas in which discrimination continues to be tolerated, such as in relation to mandatory retirement ages or access to tertiary education, there is a clear trend towards the elimination of such barriers. The Committee is of the view that States parties should seek to expedite this trend to the greatest extent possible."

PROGRESSIVE REALIZATION

The obligation to **achieve progressively** the **full realisation** of the rights requires States Parties to move as rapidly as possible towards the implementation of ESCR. Under no circumstances shall **progressive realisation** be interpreted as allowing States Parties the right to indefinitely defer efforts to ensure full realisation. Although the level of fulfilment of economic, social and cultural rights may depend on available resources, each State Party has an obligation to **take immediate steps** towards the full implementation of ESCR.²⁹ The obligations concerning the most vulnerable should be prioritized.



Photo: Suzanne Shende

The CESCR has stated that although the term “progressive realisation” recognises that full realisation of all economic, social and cultural rights will generally be achieved over a period of time, this should not be misinterpreted as depriving the obligation of meaningful content. “It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être* of the Covenant, which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”³⁰

Therefore, while the full realisation of the economic, social and cultural rights may be achieved progressively. Deliberate, concrete and targeted steps must be taken immediately to meet the obligations recognised in the Covenant.

NO RETROGRESSIVE MEASURES

States Parties must ensure that no deliberate retrogressive measures are taken by, for example, cutting essential rights-realising programmes.

Even in the face of public revenue limitations or fiscal austerity measures imposed by international financial institutions, States Parties must marshal the maximum available resources to ensure that full implementation of economic and social rights is progressively realised in the short and long term. States have a specific and continuing obligation to move towards their full implementation.

Accordingly, the CESCR has interpreted that “[i]f any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.”³¹

²⁹ The obligation to take immediate steps towards the full implementation of ESCR is provided under Article 2 of the ICESCR.

³⁰ UN, CESCR, General Comment 3, fn. 16 above.

³¹ UN, CESCR, General Comment 15, fn. 12 above.

MAXIMUM AVAILABLE RESOURCES

States Parties are obliged to take steps to realise ESCR to the **maximum of their available resources**, including those available through international cooperation and assistance. “The ‘availability of resources’ although an important qualifier to the obligation to take steps, does not alter the **immediacy of the obligation**, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.”³²

For example, States Parties must provide adequate and effective health care within maximum available resources, prioritising the most disadvantaged and vulnerable groups, and must continually strive to improve health care for all. If a State Party chooses to spend its resources in ways that are not aimed at the full realisation of human rights, it is violating its human rights obligations. Courts can play an active role in monitoring States Parties’ progress in fully realising rights by hearing complaints about the failure to allocate the necessary and available resources in the national/State/municipal budgets.

The CESCR has indicated that the standard of review to determine compliance with the obligation to use the maximum available resources would be the reasonableness and the adequacy of the steps taken.³³ The CESCR has also established that “the undertaking by a State party to use ‘the maximum’ of its available resources towards fully realising the provisions of the Covenant entitles it to receive resources offered by the international community. In this regard, the phrase ‘to the maximum of its available resources’ refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.”³⁴

MINIMUM CORE OBLIGATIONS

The “minimum core content” of a right consists of the baseline level to which a State Party must give priority for all persons and indicates a minimum standard below which a State is presumed to be failing to comply with the ICESCR.³⁵

The Committee has defined **core minimum obligations** that all States Parties should meet to ensure the satisfaction of at least the minimum essential levels of each of the rights in several of its General Comments.³⁶ It has stated that a State Party in which any significant number of individuals are deprived “of essential food-stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”³⁷ Where this is the



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32 UN, CESCR, *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*, E/C.12/2007/11, May 10, 2007, para. 3 [<http://www2.ohchr.org/english/bodies/cescr/cescrs38.htm>].

33 The CESCR provided a list of considerations that it would take into account in assessing whether the steps taken by the State were “adequate” or “reasonable”: “(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment 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 prioritised grave situations or situations of risk.” *Id.*

34 *Id.*

35 The concepts of core content and minimum core content are not unique to ESCR. An example of minimum core content in the area of civil and political rights can be found in the right to freedom from arbitrary detention. One element of the core content of this right is that a warrant for a person’s arrest must be obtained by the State and presented to the individual. Circle of Rights, *Economic, Social and Cultural Rights Activism: A Training Resource, Module 8*, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm>.

36 UN, CESCR, General Comment 3, fn. 16 above. See also UN, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, E/CN.4/1987/17 [http://www.acpp.org/RBAVer1_0/archives/Limburg_Principles.pdf].

37 UN, CESCR, General Comment 3, fn. 16 above, para. 10.

case, the State has the burden of showing that its failure to realise minimum core obligations is due to inability rather than unwillingness: “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.” The CESCR has emphasised that “if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.”³⁸

The Committee has emphasized that “even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.”³⁹

For example, in General Comment 12, the CESCR stated that the right to adequate food is realised when every man, woman and child has physical and economic access at all times to adequate food or means for its procurement. In defining its content, the Committee underlined that it should not be interpreted “in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients,” but rather in such a way that includes “the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances.”

EXTRA-TERRITORIAL OBLIGATIONS / EXTRA-TERRITORIAL APPLICATION

Article 2, building on the UDHR, recognizes that international cooperation and assistance are important elements for complying with economic, social and cultural rights and obligations on all States.

Extra-territorial obligations in relation to ESCR include three States’ duties: first, **to do no harm** to (respect) the ESCR of any person beyond their borders; second, **to protect all people from harm** caused by third parties under their control or influence; and third, **to take steps to fulfil ESCR** through international cooperation and assistance. The Committee has established that “international cooperation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.”⁴⁰

For example, General Comment 14 on the right to health acknowledges that: “States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.”⁴¹

OBLIGATIONS OF NON-STATE ACTORS

Although the Covenant imposes duties on States Parties, the responsibility of non-State actors with regard to human rights is increasingly recognized. Considering the dramatic impact on the enjoyment of ESCR of the activities of non-State actors, including international financial institutions and transnational corporations, this is of particular importance.



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38 Id.

39 Id.

40 Id. at para. 14.

41 UN, CESCR, General Comment 14, fn. 9 above.

According to the Preamble of the UDHR, “every individual and organ of society shall strive...to promote respect for these rights and freedoms and...to secure their universal and effective recognition and observance.”⁴² Therefore, businesses and international organisations also have a legal responsibility to respect human rights. In addition, States Parties have an obligation to protect people from violations by non-State actors through regulation and enforcement. Failure to regulate the extra-territorial actions of corporations under a State’s jurisdiction or control may thus amount to a violation of the ICESCR.

D. JUSTICIABILITY OF ESCR

Despite its importance, it cannot be denied that the implementation of the ICESCR has been an on-going challenge for advocates. Notwithstanding continuous efforts to advance the rights and principles contained in the Covenant, violations of these rights remain widespread in all societies and cultures.

In many countries, there remains resistance to recognizing economic and social rights as fully justiciable (i.e., opponents claim that it is not possible to access these rights through legal processes), and for this reason, remedies are sometimes limited or in some cases non-existent.

Assumptions about the role and competence of courts have largely influenced the notion of what is justiciable. An argument frequently used is that by adjudicating ESCR, courts would interfere with the policy-making role of the legislative body. (To see more about these arguments, please go to Booklet 3, Section 2: *Myths and Realities: Overcoming opposition to the OP-ICESCR*.) The question of which rights or components of rights should be subject to adjudication and remedied by courts or other bodies raises critical questions about how governments are to be made accountable, in practical terms, to human rights norms.

Nonetheless, the CESCR has made clear that regardless of whether or not domestic courts in a particular legal system are able to enforce all or only some aspects of social and economic rights, effective remedies must still be available.⁴³ To be effective, all remedies must be accessible, affordable and timely. A remedy can be provided by a court or by another institution that can act on complaints. However, victims must have access to courts where this is the only effective means of securing a remedy.⁴⁴ The right to be heard must be guaranteed, as emphasized by the Committee. This is fundamental to the relationship between human rights and the rule of law.⁴⁵

Legal actions – especially when complemented with broader social mobilization, political activism and media campaigns – are important tools that may be employed to save or improve the lives of many people. Therefore, proceedings before domestic courts, administrative tribunals, international judicial and quasi-judicial bodies and other legal entities are key avenues through which the implementation of ESCR may be advanced.

Box 2 provides some examples of the justiciability of ESCR at the domestic and regional level.

In addition, the **ESCR-Net Case-Law Database** contains examples of instances in which legal strategies have been used to claim ESCR at both the international and national levels – available at <http://www.escr-net.org/caselaw/>. It contains cases related to countries, including Argentina, Bangladesh, Brazil, Canada, Chile, Colombia, Democratic Republic of Congo, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gambia, Greece, Guatemala, Hong Kong SAR China, Hungary, India, Ireland, Kenya, Latvia, Mauritania, Netherlands, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Slovakia, South Africa, Spain, Sudan, Switzerland, United Kingdom, United States of America, Venezuela and Zimbabwe, and from the universal as well as all the regional human rights systems.

42 UN, Universal Declaration of Human Rights, fn. 1 above, Preamble.

43 UN, CESCR, *The Domestic Application of the Covenant*, General Comment 9, E/C.12/1998/24, December 3, 1998, para. 2 [http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425230].

44 Id. at para. 9.

45 Id. at para. 13.

BOX 2: JUSTICIABILITY OF ESCR IN PRACTICE

Domestic Systems

Argentina

Viceconte v. Ministry of Health and Social Welfare

The Court held that the Government was legally obliged to intervene to provide health care when the health of individuals might not be guaranteed either by themselves or by the private sector. The Court ordered the State to provide a necessary vaccine. (*Federal Court of Appeal, Case No. 31.777/96, June 2, 1998.*)

Canada

Eldridge v. British Columbia (Attorney General)

The Court held that the right to equality places obligations on governmental actors to allocate resources to ensure that disadvantaged groups have full advantage of public benefits. It also held that the government had failed to demonstrate

that it had a reasonable basis for denying interpretation services to those with a hearing disability in light of their relatively minimal implication on the government's health budget. (*Supreme Court of Canada, December 20, 2001.*)

Colombia

Decision T-760 of 2008 – Access to health

The Constitutional Court reaffirmed the justiciability of the right to health and ordered a substantial restructuring of the country's health system. The Court ordered remedies for the 22 individual cases and compelled the authorities to modify regulations that caused structural problems within the health insurance system. It highlighted State responsibility to adopt deliberate measures to achieve progressive realisation of the right to health and asserted that this right calls for transparency and access to information, as well as for evidence-based planning and coverage decisions based on participatory processes. Additionally, the Court ordered that resources be expedited into the system and that evaluation and supervision of the private companies that supply sanitary services be enhanced. (*Colombian Constitutional Court, July 31, 2008.*)

India

People's Union for Civil Liberties v. Union of India & Ors

Starvation deaths had occurred despite excess grain being kept for official times of famine, and various schemes throughout India for food distribution were also not functioning. The Court issued a judgment that linked the right to food with the right to life and found that it was imperilled due to the failure of the delivery schemes. It refused to hear arguments concerning the non-availability of resources given the severity of the situation. It also ordered implementation of a famine code, food schemes and midday meals of adequate quality in schools. (*Supreme Court of India, May 2, 2003.*)

South Africa

Government of the Republic of South Africa & Ors v. Grootboom & Ors

The case challenged the failure of governments to provide adequate housing under s. 26 (right to adequate housing) and s. 28 (children's right to shelter) of the South African Constitution. The Court ruled that the housing programme did not meet the constitutional requirement to take reasonable steps to realise these rights because it did not address the needs of those in vulnerable situations. It held that the government should revise its housing programme in order to fund, implement and supervise measures to provide relief to those in desperate need. (*Constitutional Court of South Africa, October 4, 2000.*)

Regional Human Rights Systems

At the regional level, the African Commission on Human and Peoples' Rights, the European Committee for Social Rights and the Inter-American System on Human Rights have contributed to building the jurisprudence on ESCR.

African System

Centre on Housing Rights and Evictions v. Sudan

The African Commission on Human and People's Rights found that forced evictions, in the context of Darfur, not only violated the right to adequate housing but also several civil and political rights. The Commission held that "the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells" amounted to a violation of the right to health and that the military campaign "constituted a massive violation of not only the economic, social and cultural rights, but other individual rights of the Darfurian People." (*Communication 296/2005, July 29, 2009.*)

SERAC v. Nigeria

The African Commission considered that Nigeria's failure to prevent Shell from polluting the environment was a breach of their duty to protect the right to food, housing and a healthy environment for the Ogoni people. (*Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, October 13-27, 2001.*)

European System

European Roma Rights Centre v. Greece

The European Committee of Social Rights recognized the imperative to avoid Roma social exclusion, respect difference and not discriminate. It emphasized that the right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural. Finally, it concluded that States must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing is of an adequate standard that includes essential services and extends to security from unlawful eviction. (*Complaint No. 15/2003, December 8, 2004.*)

Inter-American System

Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua

The Inter-American Court of Human Rights held that States have the duty to protect the right to property, including the rights of members of indigenous communities within the framework of communal property. The Court noted that the State had no right to grant concessions to third parties in indigenous people's land and that the necessary measures to create an effective mechanism for demarcation and titling of the indigenous communities' territory, in accordance with their customary law, values, customs and mores, needed to be adopted. (*Judgment of August 31, 2001, Inter-Am. Ct. H.R. (Ser. C), No. 79 (2001).*)

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



About the International NGO Coalition for the OP-ICESCR

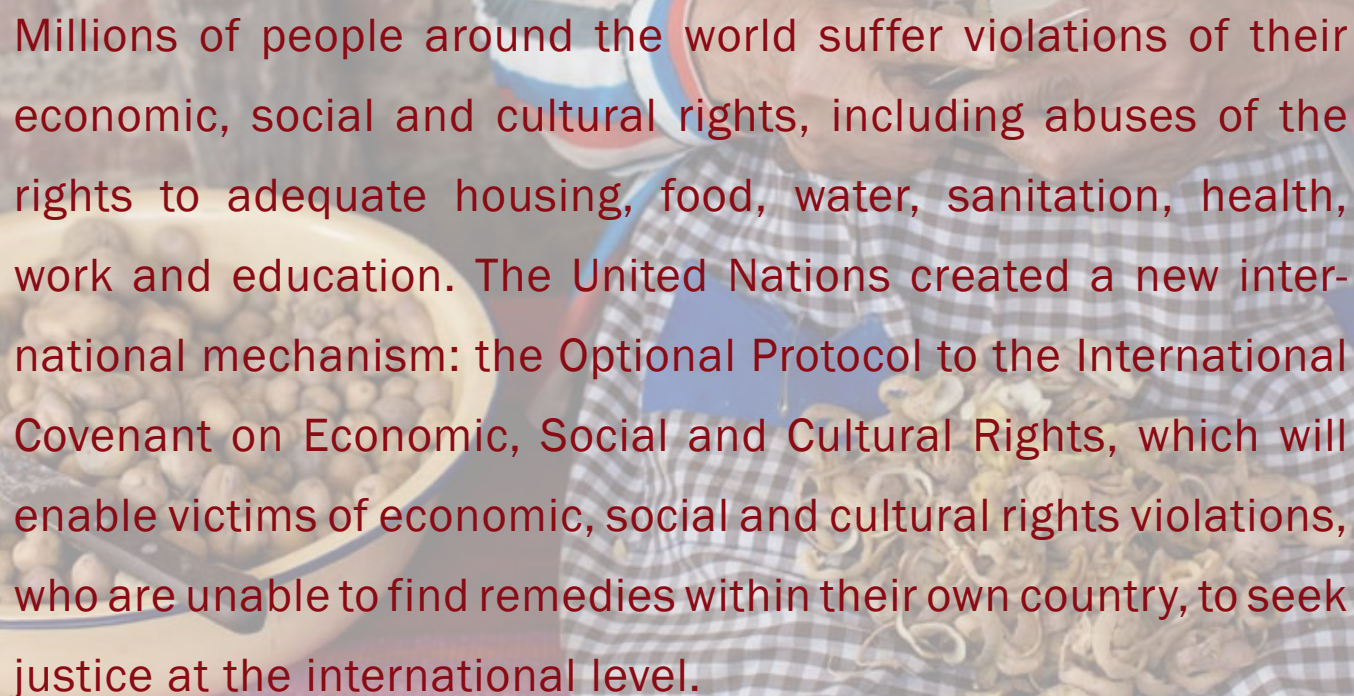
The International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (NGO Coalition) brings together hundreds of individuals and organisations from around the world who share the common goal of promoting the ratification and implementation of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

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

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

Get
Involved!

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

A photograph of a person wearing a checkered shirt and a blue apron, peeling potatoes. A bowl of peeled potatoes is visible on the left. The background is slightly blurred, showing a kitchen environment.

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.

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