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**Submission  
to the Open Ended Working Group to  
consider options for an Optional Protocol  
to the International Covenant on Economic  
Social and Cultural Rights**

**Geneva 10-21 January 2005**



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Regarding the elaboration of an Optional Protocol  
to the International Covenant on Economic, Social  
and Cultural rights  
Second Session  
Geneva, 10-21 January 2005

**Submission by Amnesty International to the Commission on Human Rights Open Ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**

**Geneva 10-21 January 2005**

**“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis”.<sup>1</sup>**

### **1) Introduction**

Amnesty International is committed to working for the recognition of economic, social and cultural rights (ESC rights) as enforceable human rights. The second meeting of the open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the ICESCR (the Working Group) is a crucial opportunity to advance the process towards the elaboration of an effective Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP). Such an optional protocol would allow individuals to submit communications alleging violations of the ICESCR to an international monitoring body.

The observations and recommendations below draw on the emerging body of research and action undertaken by Amnesty International on violations of ESC rights worldwide since 2001, when the organization broadened the scope of its mission.<sup>2</sup> Amnesty International has been campaigning for the adoption of an OP to the ICESCR since 2003.

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<sup>1</sup> Vienna Declaration and Programme of Action A/CONF.157/23, 12 July 1993

<sup>2</sup> See for example *Angola: Mass forced evictions in Luanda – a call for a human rights-based housing policy* (AI Index: AFR 12/007/03); *Bulgaria: Far from the eyes of society, Systematic discrimination against people with mental disabilities* (AI Index: EUR 15/005/2002); *Israel and the Occupied Territories: Surviving under siege: The impact of movement restrictions on the right to work* (AI Index MDE 15/001/2003); *Zimbabwe: Power and Hunger - violations of the right to food* (AI Index AFR 46/026/2004). Amnesty International's mission is to undertake research and action focussed on preventing grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. (Statute of Amnesty International, Article 1).

## 2) Why an optional protocol?

Despite international recognition of the indivisibility of all human rights, the UN human rights system allows for individual complaints against violations of the International Covenant on Civil and Political Rights (ICCPR) but not violations of the ICESCR. This is even more striking when we consider that, within the UN, five out of the seven treaty bodies now have the capacity to receive individual complaints and investigate or carry out inquiries in cases of grave violations.<sup>3</sup> The international community must live up to the pledges made during the World Conference on Human Rights in Vienna in 1993 by addressing the right to a remedy for violations of economic, social and cultural rights. Where national remedies are unavailable or insufficient there is currently no international remedy providing victims with access to justice for violations of all ESC rights.

An OP to the ICESCR would address this disparity, and would complement existing international mechanisms which consider complaints or “communications” on ESC rights, which are all regionally and/ or thematically limited in scope.<sup>4</sup> It would also complement the review of periodic reports and General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) by identifying concrete measures to remedy specific violations of the ICESCR.

An individual complaints procedure under the ICESCR would:

- Recognize and reinforce the fact that ESC rights are justiciable – that is, they can be claimed, enforced and guaranteed in a similar way to civil and political rights;
- Provide an international mechanism for holding states accountable to their international obligations and prompting them to ensure effective remedies at the national level;
- Allow for a more extensive and in-depth framework of enquiry in specific cases and build a body of case-law which can be used as a reference in other situations;
- Stimulate individuals and groups to frame their ESC rights claims in more precise terms;
- Give ESC rights a political salience which they currently lack by providing the possibility of an international finding of an ESC rights violation.<sup>5</sup>

An Optional Protocol would not create “new” rights or obligations. It would simply strengthen monitoring of states’ compliance with their existing obligations under the Covenant. When considering a communication, the monitoring body may adopt decisions or “views” that it concerns a human rights violation. The views may also specify steps which should be taken to remedy the violation. Whilst such views would

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<sup>3</sup> These are the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Protection of Migrant Workers and their Families.

<sup>4</sup> For an overview of all mechanisms, see Report of the Secretary-General, *Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the United Nations System*, UN Doc. E/CN.4/2005/WG.23/2 [http://www.ohchr.org/english/issues/escr/docs/2005\\_WG\\_23\\_2.doc](http://www.ohchr.org/english/issues/escr/docs/2005_WG_23_2.doc)

<sup>5</sup> Adapted from the benefits identified by the UN Committee on Economic, Social and Cultural Rights, presented to the World Conference on Human Rights in 1993, UN Doc. A/Conf.157/PC/62/Add.5, paras 18-38.

not amount to a legally binding decision, they would represent an authoritative interpretation of the application of legally binding treaty obligations.

### 3) Basis for an optional protocol: ESC rights are justiciable<sup>6</sup>

All ESC rights have justiciable elements. A wide range of judicial and quasi-judicial bodies already consider alleged violations of ESC rights, including other UN treaty bodies, regional human rights courts and commissions and national mechanisms. The UN Human Rights Committee for instance, has found violations of ICCPR rights *inter alia* where detainees are denied access to adequate food, water and necessary health care<sup>7</sup>, where unemployment benefits were unduly preferential for men,<sup>8</sup> and where public funding was available for schools of one religious group and not others when not a reasonable and objectively necessary special measure.<sup>9</sup> These were considered to amount to violations of the rights in the ICCPR, well illustrating the indivisibility of human rights. The lack of an equivalent procedure under the ICESCR, however, leaves victims of many ESC rights violations without an international remedy.

Some states' delegations have expressed the view that ESC rights are purely progressive "goals" or "aspirations". Amnesty International reminds participants to the Working Group that States parties to the ICESCR are obliged to "achieve progressively the *full* realisation [of ESC rights]"<sup>10</sup>. This formulation does not deny obligations of immediate effect, such as to take steps towards full realization, non-discrimination, and to realise at the very least minimum essential levels of ESC rights, targeting especially marginalised communities. Indeed, without such obligations the Covenant would largely be deprived of its *raison d'être*.<sup>11</sup>

Amnesty International takes the view that an Optional Protocol to the ICESCR should allow individuals and groups of individuals who claim to be victims of violations of the ESC rights protected in the Covenant to submit complaints to an independent body of experts. This formulation accords with the recommendation made by the CESCR to the Commission,<sup>12</sup> and is comparable to the formulation in the first OP to the ICCPR. This implies a higher threshold for communications than that already applied, for example in the Additional Protocol to the European Social Charter (allegations of "unsatisfactory application of the Charter") or by the International Labour Organisation (which envisages complaints by those "who allege failure by that state party to secure the observance of the rights").

A requirement that a 'violation' be alleged provides a more objective standard for assessing where state action or inaction to realise ESC rights obligations has fallen below an acceptable standard in a particular situation. Understanding of the threshold and appropriate tests for violations of ESC rights has been developed by eminent experts in the Maastricht Guidelines on Violations of ESC rights

<sup>6</sup> "A right is said to be justiciable when a judge can apply it in a specific case, and when this application can result in the further determination of this right's meaning." Arambulo, Kitty, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia-Hart, 1999, p 55.

<sup>7</sup> Communications 763/1997 Lantsova v Russian Federation, 253/1987 Kelly v Jamaica, 326/1988 Kalenga v Zambia, 414/1990 Mika Miha v Equatorial Guinea, 526/1993 Hill et al. v Spain.

<sup>8</sup> Communication 182/1984, *Zwaan-de Vries v the Netherlands* and Communication 172/1984 *Broeks v the Netherlands*, Yearbook of the Human Rights Committee 1987, Vol II.

<sup>9</sup> Communication 694/1996 Waldman v Canada.

<sup>10</sup> ICESCR, Article 2(1).

<sup>11</sup> CESCR, General Comment Number 3, *The Nature of States Parties Obligations (Art 2, para 1)*: 14/12/90, UN Doc. E/1991/23, at para 9.

<sup>12</sup> Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1997/105, para 18.

(increasingly referred to by UN human rights organs),<sup>13</sup> and by the CESCR in its most recent General Comments.<sup>14</sup>

Other situations, not amounting to an alleged “violation” would remain to be considered under the existing procedure of State reporting.

#### 4) The OP should recognise obligations to respect, protect and fulfil ESC rights

Simply stated:

- *Obligations to **respect** human rights* are obligations on states parties to refrain from action which interferes with the enjoyment of human rights, or obstructs the ability to realise human rights (to refrain from torture, from unduly inhibiting the right to strike, to refrain from arbitrarily closing private schools teaching in minority languages, to refrain from forcibly evicting communities without the provision of alternative accommodation and respect for due process etc).
- *Obligations to **protect** human rights* are obligations on states parties to ensure that other actors (individuals, corporations others intervening in their territory) refrain from action which directly or indirectly interferes with the enjoyment of human rights (regulating and monitoring corporate use of private security firms, potentially hazardous emissions, treatment of workers; ensuring that private medical practices are of an acceptable standard etc).
- *Obligations to **fulfil** human rights* are obligations on states parties to take steps in line with the maximum available resources to ensure the full realisation of human rights (providing interpretation for defendants, ensuring humane conditions of detention including food, water and adequate medical care, introducing meaningful vocational training schemes etc).

Understanding state obligations under the ICESCR in terms of duties to respect, protect and fulfil human rights illustrates how obligations under ESC rights do not necessarily require huge resource investment. As is the case for all human rights, many potential violations involve failures of the state to *desist* from a specific policy, legislative change or practice which is inconsistent with its obligations under the Covenant. This includes a heavy presumption against retrogressive measures.<sup>15</sup>

The obligation to “achieve progressively the full realisation”<sup>16</sup> of ESC rights to the maximum of available resources allows the monitoring body to balance the obligations with the possibilities for realising them. The CESCR has consistently differentiated inability from unwillingness to realise ESC rights. Nevertheless, recognising that no state is completely bereft of resources, the CESCR has explicitly held that, “even in times of severe resources constraints ... the vulnerable members

<sup>13</sup> Maastricht Guidelines on Violations of ESC rights, UN Doc. E/C.12/2000/13, para 11.

<sup>14</sup> See the General Comments No. 11 (Right to Free and Compulsory Primary Education), 12 (Right to Adequate Food), 13 (Right to Education), 14 (Right to Health) and 15 (Right to Water).

<sup>15</sup> Thus the African Commission on Human and Peoples’ Rights found Zaire (as it then was) in violation of the right to education where secondary schools and universities were closed for two years during the armed conflict in that country. *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interfricaine des Droits de l’homme, Les Témoins de Jehovah v Zaire*, African Commission on Human and Peoples’ Rights, Communications 25/89, 47/90, 56/91 and 100/93 (joined), *Ninth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1995/96, Assembly of Heads of State and Government, 32nd Ordinary Session, 7-10 July, Yaoundé, Cameroon*.

<sup>16</sup> ICESCR, Article 2(1).

of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.”<sup>17</sup>

Individual communications on the state’s failure to fulfil ESC rights obligations may be contemplated<sup>18</sup> i) where the State itself actively created and/or maintained the conditions of deprivation underlying the alleged infringement of ESC rights; ii) where the alleged violation could be rectified by a relatively insignificant investment; iii) where resource allocation is not reasonably justifiable.<sup>19</sup>

### **5) The OP should include an inquiry procedure, allow calls for interim measures and should not permit reservations**

***Inquiry procedure:*** Existing individual communications mechanisms under the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Elimination of All Forms of Discrimination Against Women (the Women’s Convention) allow the monitoring body to initiate an inquiry where it receives credible evidence of systematic human rights violations in a state party. Such a mechanism under the OP to the ICESCR would, for example, allow investigation into alleged plans to undertake mass forced evictions, and failure to allow the entry of humanitarian assistance where the state is either unable or unwilling to provide adequate nutritious food to prevent starvation.

On receiving such a complaint, the monitoring body would invite the state party to cooperate in the examination by submitting observations. It may then, on the basis of the state party’s observations and other relevant information available to it, decide to designate one or more of its members to make a confidential inquiry and report back urgently. Both the CAT and the Women’s Convention specifically authorize a visit to the territory of the State concerned, where warranted and with the State’s consent. The findings of the member(s) are then examined by the Committee and transmitted to the state party together with any appropriate comments or recommendations.

In both cases, this procedure is confidential and the cooperation of the state party must be sought throughout the proceedings.

***Interim measures:*** The Committee against Torture, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination may all express the view that interim measures are necessary where an initial investigation points to the possibility of irreparable harm to the victim. This does not prejudice either a finding of admissibility, or of a violation. Recent reports of these treaty bodies to the General Assembly<sup>20</sup> indicate the tendency of some states to take action without waiting for the treaty bodies to consider a communication, highlighting the need for interim measures. The CEDAW OP codified the possibility to call for interim measures in its article 5.

***Reservations:*** as an Optional Protocol to the ICESCR would create no new obligations, but would merely represent an improved monitoring of compliance with

<sup>17</sup> CESCR, General Comment Number 3, *The Nature of States Parties Obligations (Art 2, para 1)*: 14/12/90, UN Doc. E/1991/23, at para 12.

<sup>18</sup> Craven, *supra*.

<sup>19</sup> Applying the test of “reasonableness” to analyse the state’s housing policy, the Constitutional Court of South Africa determined a reasonable housing policy, under obligations of the right to adequate housing must prioritise core obligations, in particular by addressing as a matter of priority the improvement of the housing condition of those living “with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.”, *Government of the Republic of South Africa and Ors v. Irene Grootboom and Ors*, Case CCT 11/00, <http://www.concourt.gov.za/files/grootboom1/grootboom1.pdf>

<sup>20</sup> see, for example, General Assembly, *Report of the Human Rights Committee*, UN Doc. A/59/40.

existing obligations, any reservation would be contrary to the spirit of any proposed the OP. The Human Rights Committee has clarified that it considers such reservations to the first OP to the ICCPR to be contrary to the object and purpose of the OP.<sup>21</sup>

“States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant.”<sup>22</sup>

In 2000 the OP to CEDAW was adopted which does not allow for the possibility of reservations (Article 17). This has not inhibited states from ratifying the CEDAW OP, which currently has 70 states parties.<sup>23</sup>

## 6) Conclusion

Amnesty International believes that the adoption of an Optional Protocol is an essential means of furthering the global respect for and protection of ESC rights and of realising the commitment to the indivisibility of human rights reaffirmed by the international community in 1993.

On this basis Amnesty International calls on all states to engage positively and meaningfully in the debates of the Working Group and to express support for the swift development and adoption of an effective optional protocol. Understanding of the scope of obligations under the ICESCR has developed tremendously since the CDESCR was established in 1986. The adoption of many General Comments and a growing body of ESC rights jurisprudence around the globe has greatly elucidated the scope and content of specific ESC rights and demonstrated their justiciability. As a human rights organisation with more than 1.8 million members in over 150 countries, Amnesty International is deeply concerned that victims of human rights violations should have the right to an effective remedy. Creating an international mechanism to consider allegations of violations of ESC rights would bring further concrete benefits to the lives and dignity of human beings across the globe.

Only with the establishment of an individual communications mechanism under the auspices of the United Nations will ESC rights truly reclaim their place as human rights of equal status.

Amnesty International calls on the members of the Working Group to consider the following:

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<sup>21</sup> And hence incompatible with the Vienna Convention on the Law of Treaties, 1969, Article 19.

<sup>22</sup> Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.6, para 13.

<sup>23</sup> <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm> (as of 17 December 2004).

- An optional protocol to the ICESCR should clearly address violations of the economic, social and cultural rights enshrined in the Covenant;
- An optional protocol should extend to violations of obligations to respect, protect and fulfil rights. That is, it should recognize states' obligations to: a) refrain from action which interferes with the enjoyment of Covenant rights, or obstructs the ability to realise such rights; b) ensure that other actors (individuals, corporations, others intervening in their territory) refrain from action which directly or indirectly interferes with the enjoyment of Covenant rights; and c) take steps in line with the maximum available resources to achieve progressively the full realization of Covenant rights;
- An optional protocol should provide for a complaint and inquiry procedure;
- An optional protocol should allow individuals and groups of individuals who claim to have been victims of violations to submit a communication;
- An optional protocol should allow representatives of individuals or groups of individuals to file communications on their behalf;
- An optional protocol should provide for a monitoring body, upon receiving a communication, to call for interim measures to avoid irreparable harm;
- An optional protocol should contain a provision to preclude states parties from making reservations to the protocol.

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