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THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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INTRODUCTION

An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations in 2008. A longstanding demand of civil society¹, it completes the international human rights protection that began with the proclamation of the Universal Declaration of Human Rights in 1948. Symbolically, the adoption of this new instrument² was celebrated by the United Nations on 10 December 2008, the sixtieth anniversary to the day of the Universal Declaration.³

Although the two international human rights covenants were adopted the same day, 16 December 1966, two very different monitoring systems were then created. A protocol providing for a complaints mechanism was immediately put in place for civil and political rights, but there was no such procedure set up for economic, social and cultural rights. Until now, there has been no possibility of lodging a complaint at the international level in case of a violation of economic, social and cultural rights. In spite

¹ A coalition of non-governmental organizations (NGOs), including the CETIM, was set up to support the drafting and adoption of the Protocol. Further information: <http://www.opicescr-coalition.org>

² One of the first articles on the *Optional Protocol* was written by Claire Mahon. V. C. Mahon, "Progress at the Front: the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *Human Rights Law Review*, Vol. 8, No 4, 2008.

³ Cf. Resolution of the General Assembly, U.N. Symbol: A/63/435.

of renewed interest in these rights recently, they have never really been considered as being on an equal footing with civil and political rights.

In 1993, during the World Conference on Human Rights in Vienna, the governments unanimously proclaimed, “All human rights are universal, indivisible and interdependent and interrelated,”⁴ and they committed themselves to drafting an optional protocol to the *ICESCR*. In spite of this solemn commitment, it took fifteen years more for it to become reality through the adoption of the *Protocol*, which – finally – formally established the equality of all human rights.⁵

In February 2006, the CETIM published a brochure on the *Optional Protocol to the ICESCR*.⁶ Beyond its information value for the general public as well as for militants of all stripes, the brochure had two purposes: advocate for an improvement in the situation of the Committee on Economic, Social and Cultural Rights’ 1996 *Draft Protocol* ⁷, and encourage the adoption, as fast as possible, of an optional protocol by the United Nations. These two goals were largely realized in 2008. Although it is not perfect, the protocol adopted by the United Nations General Assembly in November 2008 marks significant advances compared with the 1996 draft.

The purpose of this critical report is to present this new international instrument. In its first part, it will describe the recent history leading to the adoption of the *Optional Protocol to the ICESCR*. The *Protocol’s* contents will then be discussed. Finally, the challenges to its implementation will be discussed, in particular those faced by victims of violations of economic, social and cultural rights and by the NGOs wishing to support them in their efforts to obtain justice.

I. THE HISTORY OF THE RECENT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The brochure that the CETIM published in February 2006 described the discussions that had taken place during the first two sessions (March 2004⁸ and January 2005⁹) of the working group on the *Optional Protocol*. During the first two sessions, as during

⁴ Vienna Declaration and Program of Action, Part I, § 5, A/Conf.157/23, 12 July 1993: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

⁵ Regarding the preparatory work on the *Optional Protocol*, v. M. Scheinin, “The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties”, *Human Rights Law Review*, Vol. 6, 2006, pp. 131-142; W. Vandenhole, “Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights”, *Netherlands Quarterly of Human Rights*, Vol. 21, 2003, pp. 423-462.

⁶ M. Özden and F. Ndagijimana, *The Case for a Protocol to the ICESCR*, Geneva: CETIM, 2006: http://www.cetim.ch/en/publications_details.php?pid=133

⁷ V. Status of the International Covenants on Human Rights, Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Note by the Secretary-General, E/CN.4/1997/105, 18 December 1996: <http://www.humanrights.se/upload/files/2/ESK-r%C3%A4ttigheterna/TP-Resolution%2096%20draft%20optional%20protocol.pdf>

⁸ V. the report on the first session of the Working group, E/CN.4/2004/44, 15 March 2004: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d68c855b7af03514c1256e61003fdeda?OpenDocument>.

⁹ V. the report of the second session of the Working group, E/CN.4/2005/52, 10 February 2005: <http://daccessdds.un.org/doc/UNDOC/GEN/G05/108/36/PDF/G0510836.pdf?OpenElement>

the third, held in February 2006,¹⁰ the mandate of the working group was to examine the options regarding the elaboration of an optional protocol. This vague mandate had already resulted in sterile discussions in 2004 and 2006 about the necessity of a complaints mechanism, the justiciability of economic, social and cultural rights and the legal status of the ICESCR.¹¹

A break through was achieved with the creation of the Human Rights Council in 2006 and the willingness of governments to demonstrate that creating this new body signified a real political will to reinforce the international human rights protection system. This willingness to be convincing was translated into reality by two important decisions of the first meeting of the Human Rights Council in June 2006: the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*¹² and the change of the mandate of the working group on the *Optional Protocol to the ICESCR*.¹³ From that point onward, the mandate of the working group became a *mandate to draft*. Thus, the discussion of whether it might be useful to draft such a protocol was ended, and the focus moved on to what its contents would be.

In 2007 and 2008, the chairperson of the working group, Catarina de Albuquerque, presented several drafts of the *Optional Protocol*.¹⁴ The governments discussed these drafts during the last two sessions of the working group in July 2007¹⁵ then further in February-March-April 2008.¹⁶ The most controversial subjects were the scope the rights covered by the *Protocol*, the definition of the persons and groups authorized to file complaints, the conditions under which a complaint would be accepted by the Committee on Economic, Social and Cultural Rights, the definition of the “test” that the Committee would have to make to determine if there had, indeed, been a violation of an economic, social or cultural right, and how to take into account the international obligations that states parties had undertaken.¹⁷ The desire of the majority of governments, who favored an optional protocol that would be “progressive” in favor of victims, carried the day for the first four subjects. The demands of the CETIM, expressed in the 2006 brochure, were thus satisfied overall. But the optional protocol adopted by the United Nations accords too little space to international obligations of states parties (such as international solidarity), even though these obligations are explicitly recognized in the ICESCR. About the other subjects, such as the implementation of the *Optional Protocol* in function of the actions and omissions of third party governments or the activities of transnational business enterprises, there was no discussion.

¹⁰ V. the report of the third session of the working group, E/CN.4/2006/47, 14 March 2006: <http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/75/PDF/G0611875.pdf?OpenElement>

¹¹ V. note 5, pp. 10-20.

¹² V. A/HCR/RES/1/2, 13 November 2006: <http://ap.ohchr.org/documents/E/HRC/resolutions/A-HRC-RES-1-2.doc>

¹³ V. A/HRC/RES/1/3: 13 November 2006: <http://ap.ohchr.org/documents/E/HRC/resolutions/A-HRC-RES-1-3.doc>

¹⁴ V. in particular, A/HRC/8/WG.4/2, 24 December 2007: http://209.85.129.132/search?q=cache:kHdiASOIMrEJ:www2.ohchr.org/english/issues/escr/docs/A.HRC.8.WG.4.2_en.doc+A/HRC/8/WG.4/2,+24+December+2007&hl=en&ct=clnk&cd=2&gl=ch; A/HRC/8/WG.4/3, 25 March 2008: http://209.85.129.132/search?q=cache:qOj-hFrvaMIJ:www2.ohchr.org/english/issues/escr/docs/A.HRC.8.WG.4.3_en.doc+A/HRC/8/WG.4/3,+25+March+2008&hl=en&ct=clnk&cd=1&gl=ch

¹⁵ V. the report of the fourth sessions of the Working group: A/HRC/6/8, 30 August 2007: <http://daccessdds.un.org/doc/UNDOC/GEN/G07/138/89/PDF/G0713889.pdf?OpenElement>

¹⁶ V the report of the fifth sessions of the working group, which sat twice, 4 to 8 February and 31 March to 4 April 2008: A/HRC/8/7, 6 May 2008: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=14060

¹⁷ V. note 2.

II. THE CONTENT OF THE OPTIONAL PROTOCOL TO THE ICESCR

A. Rights set forth that can be invoked

The *Protocol* provides that *all rights set forth* in the *ICESCR* can be invoked before the Committee on Economic, Social and Cultural Rights (Article 2 of the *Protocol*). In case of a violation, the victim(s) can thus file a complaint with the Committee.

This protection of all economic, social and cultural rights is a success attributable to the steadfast willingness of the majority of governments, in opposition to a minority that negotiated right up to the last minute in an effort get a restriction on the rights covered by the *Optional Protocol*. Switzerland, for example, defended from the outset an “à la carte” approach, which would have allowed states parties to the *Protocol* to choose for which rights victims might lodge a complaint.¹⁸ This proposal was criticized by the NGOs, by the experts and by the majority of the member states of the Human Rights Council, for it would have established a hierarchy not only among human rights but also among victims.¹⁹ A person whose trade union rights might have been violated would thus have been able to file a complaint, but not somebody whose right to basic medical care (a violation of the right to health), nor somebody who might have been arbitrarily evicted from her/his home or land (violation of the right to adequate housing or of the right to food). Fortunately, this proposal was rejected.

Another discussion arose over the opportunity to include the right to self-determination among the rights that may be invoked before the Committee. Russia, for example, was of the opinion that this right – of a political nature, it was claimed – could not be invoked as an autonomous right before the Committee.²⁰ The draft *Optional Protocol* adopted by the working group in May 2008 had, thus, excluded the right to self-determination.²¹ However, at the last minute, just before its adoption by the Human Rights Council, a coalition of several member states, led by Algeria and Pakistan, succeeded in having the *Optional Protocol* cover all the rights enunciated in the *ICESCR*, which meant also the right to self-determination.²² This right, like the others recognized in the *ICESCR*, may thus be invoked before the Committee.

¹⁸ Response of Micheline Calmy-Rey, Swiss Foreign Minister, to NGOs that questioned her about this. “Position de la Suisse sur le protocole facultative au Pacte international relative aux droits économiques, sociaux et culturels”, letter of 21 August 2008. V. the report of the Working group on its fourth session, A/HRC/6/8, 30 August 2007, § 37: <http://www.opicescr-coalition.org/Report%20EWG%202007.pdf>. Switzerland was supported in this “à la carte” approach by Australia, China, Denmark, Germany, Greece, Japan, New Zealand, Netherlands, Poland, Russia, South Korea, Turkey, United Kingdom, United States. (Ibid.)

¹⁹ V. the report of the fourth session of the Working group, A/HRC/6/8, 30 August 2007, § 30. According to this report: “Belgium, Bolivia, Brazil, Burkina Faso, Chile, Ecuador, Egypt (on behalf of the African Group), Ethiopia, Finland, France, Guatemala, Italy, Liechtenstein, Mexico, Nigeria, Norway, Peru, Portugal, Senegal, Slovenia, South Africa, Spain, Sweden, Uruguay, Venezuela (Bolivarian Republic of), Amnesty International, the CETIM, FIAN, the ICJ, the NGO Coalition and International Women’s Rights Action Watch (IWRAW) Asia-Pacific supported a comprehensive approach.... It was noted that an à la carte approach would establish a hierarchy among human rights, disregard the interrelatedness of Covenant articles, amend the substance of the Covenant, disregard the interest of the victims, and defy the purpose of the optional protocol to strengthen the implementation of all economic, social and cultural rights.”

²⁰ Australia, Greece, India, Morocco, and the United States supported Russia’s position. Ibid. § 36.

²¹ V the report of the fifth session of the Working group, A/HRC/8/7, 6 May 2008, Annex: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=14060

²² V. A/HRC/RES/8/2, 18 June 2008: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf

The possibility of invoking all the rights listed in the *ICESCR* is in conformity with the other procedural instruments regarding the protection of human rights, which, with no exceptions, provide that all rights covered by the treaty that they complete may be invoked at the international level.²³ It is worth recalling that the respect of each human rights protection treaty is subject to a treaty oversight body composed of independent experts.²⁴ These treaty bodies receive the states parties' periodic reports on the measures taken to implement their obligations.²⁵ Moreover, as they enjoy a quasi-judicial status, most of them are authorized to hear complaints of alleged violations of the rights they deal with.²⁶

The *Optional Protocol to the International Covenant on Civil and Political Rights*, for example, provides that all civil and political rights covered by it may be invoked before the Human Rights Committee.²⁷ Article 14 of the *Convention on the Elimination of All Forms of Racial Discrimination* provides that all those rights recognized in the *Convention* may be invoked before the Committee on for the Elimination of Racial Discrimination.²⁸ And the *Optional Protocol to the Convention on the Elimination of Discrimination against Women* provides that all those rights protected by the *Convention* may be invoked before the Committee for the Elimination of Discrimination against Women.²⁹ This is equally true of the rights of migrant workers and members of their families³⁰, for the rights of handicapped persons³¹ and for the rights of victims of torture and other cruel, inhuman or degrading treatment or punishment.³² At the international level, there is thus only the *Convention on the Rights of the Child* that is not completed by a complaints procedure allowing victims to have access to justice if their rights are violated.

²³ A comparative study of these procedures was presented during the negotiations of the *Optional Protocol to the ICESCR*. V. Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the United Nations system, E/CN.4/2005/WG.23/2, 22 November 2004, http://www.bayefsky.com/reform/e_cn_4_2005_wg_23_2.doc.

²⁴ Regarding the composition and the functioning of the treaty oversight bodies, v. W. Vandehole, *The Procedures Before the UN Human Rights Bodies: Divergence or Convergence?* Antwerp/Oxford: Intersentia, 2004, pp. 7-73.

²⁵ *Ibid.*, pp. 75-161.

²⁶ *Ibid.*, pp. 193-293.

²⁷ *The Optional Protocol to the International Covenant on Civil and Political Rights* was adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200 A (XXI). It entered into force 23 March 1976.

²⁸ Article 14, § 1, of the *International Convention on the Elimination of All Forms of Racial Discrimination* states: "A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration."

²⁹ *The Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women* was adopted by the General Assembly on 6 October 1999, Resolution 547/4. It entered into force on 22 December 2000.

³⁰ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 77, adopted by the General Assembly on 18 December 1990, Resolution 45/158. It entered into force 1 July 2003. The complaint procedure of the Committee on Migrant Workers is not yet operational, for it has not yet obtained the required 10 ratifications.

³¹ By virtue of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, adopted by the General Assembly on 13 December 2006, Resolution 61/106. The Committee on the Rights of Persons with Disabilities will hold its first session in 2009.

³² By virtue of the *Optional Protocol on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* adopted by the General Assembly on 9 January 2003, Resolution 27/1999.

B. Who can file a complaint?

By virtue of Article 2 of the *Optional Protocol to the ICESCR*, complaints may be filed “by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party”.

There are thus several conditions that must be respected for one to be able to file a complaint. The most important are that the victim(s) must come under the jurisdiction of the state responsible for the violation and that this state must have ratified both the *ICESCR* and the *Optional Protocol to the ICESCR*. Similar conditions prevail for filing complaints before the other treaty oversight bodies.³³ This excludes the possibility of filing a complaint against third party states, even if they violate a protected right beyond their own borders. However, in practice, the jurisprudence of the international control mechanisms such as the Human Rights Committee³⁴ and the International Court of Justice³⁵ has demonstrated that it is possible to hold governments accountable for violations of fundamental rights of persons living outside their borders. The Committee on Economic, Social and Cultural Rights could be flexible and accept complaints against third party states, in so far as these states have ratified the *Optional Protocol to the ICESCR*.³⁶

One of the particularities of the protocol to the *ICESCR* is that it provides that communications may be presented by individuals or *groups of individuals* or *in the name of* individuals or groups of individuals.³⁷ The possibility of filing a group complaint has long been accepted by the Human Rights Committee. In spite of the terms of the *Optional Protocol to the International Covenant on Civil and Political Rights* saying that only individuals may present communications, the Human Rights Committee has declared, in several cases, that it would accept communications from groups of individuals.³⁸ It is thus only logical that this principle should be explicitly recognized as being equally valid for the Committee on Economic, Social and Cultural Rights.

The possibility of filing a complaint *in the name of* individuals or groups of individuals is a significant step forward. If one considers the similar procedures, this possibility is provided for only in the *Optional Protocol to the Convention for the Elimination of Discrimination against Women*.³⁹ Article 2 of the *Optional Protocol to the ICESCR* stipulates: “Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf

³³ For example, *Optional Protocol to the International Covenant on Civil and Political Rights*, Articles 1, 2; *Optional Protocol to the Convention for the Elimination of Discrimination against Women*, Article 2; *Convention on the Elimination of All Forms of Racial Discrimination*, Article 14, § 1.

³⁴ V. Human Rights Committee, *Concluding Observations, Israel* CCPR/CO/78/ISR, 21 August 2003, § 11: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument)

³⁵ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, §§ 109-113. V. also Committee on Economic, Social and Cultural Rights, *Final Observations, Israel*, E/C.12/Add.90, 23 May 2003, §§ 15, 31: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.90.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.90.En?OpenDocument)

³⁶ Article 1, § 2, of the *Optional Protocol to the ICESCR* explicitly states: “No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”

³⁷ *Optional Protocol to the ICESCR*, Article 2.

³⁸ V. Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No 547/1993, U.N. Doc. CCPR/C/70/D/858/1999 (2000): <http://humanrights.law.monash.edu.au/undocs/547-1993.html>

³⁹ *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 2.

without such consent.” This stipulation makes sense. It in no way lessens the central role that national and international human rights protection bodies can play by representing victims of economic, social and cultural rights violations before the Committee. As the violations of these rights tend to involve the poorest people on the planet, it was essential that they be able to be represented by organizations with access to the Committee.

It is worth noting that the *Protocol to the ICESCR*, like the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Racial Discrimination* provides for an interstate complaints procedure in which a country may accuse another country of a violation of one of the protected rights. This procedure is used only if the two countries have declared that they accept the authority of the Committee on Economic, Social and Cultural Rights to hear a complaint of this nature.⁴⁰ This possibility is interesting, even if no such complaints have yet been filed before the treaty bodies.⁴¹

C. Conditions under which a Complaint can be Heard by the Committee on Economic, Social and Cultural Rights

When it receives a complaint, the Committee, like the other treaty oversight bodies, notifies the country accused of having violated rights protected by the *ICESCR*.⁴² A procedure follows during which the Committee begins by examining if the case will be heard.

There are three main conditions that must be met for a complaint to be heard, and these conditions are similar to those provided for by the other treaties. First, the case must not be in the process of being examined by another international instance of inquiry or settlement.⁴³ Victims of violations of economic, social and cultural rights may thus not bring a complaint before the Committee if a procedure is underway before an ILO oversight body or a regional oversight body such as the African Court or Commission of Peoples’ and Human Rights, the Inter-American Court of Human Rights, the European Committee on Social Rights or the European Court of Human Rights. Second, the plaintiff must have exhausted all other sources of redress available, keeping in mind that this rule does not apply if the redress procedures exceed a reasonable period,⁴⁴ and the complaint should, theoretically, have been filed in the twelve months

⁴⁰ *Optional Protocol to the ICESCR*, Article 10; *International Covenant on Civil and Political Rights (ICCPR)* Articles 41, 42; *Convention for the Elimination of All Forms of Racial Discrimination*, Articles 11-13. Whereas the *ICCPR* and the *Optional Protocol to the ICESCR* limit the use of this procedure to countries that have declared their willingness to accept the authority of the committee to hear such complaints, the *Convention on the Elimination of All Forms of Racial Discrimination* allows the procedure to be used between all states parties to the *Convention*.

⁴¹ W. Vandenhoe, *The Procedures Before the UN Human Rights Bodies: Divergence or Convergence?*, Antwerp/Oxford: Intersentia, 2004, p. 5; F. Voeffray, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales*, Paris: PUF, 2004, pp. 128-130.

⁴² *Optional Protocol to the ICESCR*, Article 6, § 1; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 4; *Convention on the Elimination of All Forms of Racial Discrimination*, Article 14, § 6; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 6.

⁴³ *Optional Protocol to the ICESCR*, Article 3, § 2; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 5, § 2.a; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 4, § 2.a.

⁴⁴ *Optional Protocol to the ICESCR*, Article 3, § 1; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 5, § 2.a; *Convention for the Elimination of All Forms of Racial Discrimination*, Article 14, § 7.a; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 4, § 1.

following the exhaustion of domestic avenues of redress⁴⁵ (see below, III. C). Third, the complaints must not be anonymous.⁴⁶

D. The Powers of the Committee on Economic Social and Cultural Rights

If the Committee agrees to hear the complaint, it then opens an adversarial procedure between the victim(s) and the accused country. The Committee then tries to propose its good offices so that the procedure is settled by an amicable agreement between the two parties (Article 7 of the *Optional Protocol*). If such an agreement is not possible, the Committee determines if the country has indeed violated the economic, social or cultural rights invoked by the victims.

At the end of the procedure, the Committee, like the other treaty oversight bodies, communicates its conclusions and recommendations to the government deemed to have violated the rights invoked.⁴⁷ The Committee's inability to render binding judgments on governments means that it is ranked in the category of quasi-judicial bodies, like the other treaty oversight bodies.⁴⁸

Like the Committee for the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights can carry out investigations if, through reliable information, it is informed that a state party seriously or systematically threatens the rights protected by the *Covenant*.⁴⁹ It cannot, however, carry out an inquiry unless the country in question has made a declaration accepting this authority of the Committee.⁵⁰ The Committee can also at any time ask a state party to take provisional measures to avoid irreparable harm to victims of the alleged violation.⁵¹

E. The Test Used by the Committee to Determine if an Economic, Social or Cultural Right has been Violated

The *Optional Protocol to the ICESCR* is different from the other similar procedures in that it provides that the Committee, in order to determine if an economic, social or cultural right has been violated, must consider the *reasonable* character of the measures taken by the government in conformity with Article 2, § 1, of the *Covenant*, while keeping in mind that the state party can adopt a variety of measures to implement the rights protected by the *Covenant*.⁵²

⁴⁵ *Optional Protocol to the ICESCR*, Article 3, § 2.a. An exception may be made if the victim can show that he it has not been possible to present the communication within the allotted time.

⁴⁶ *Optional Protocol to the ICESCR*, Article 3, § 2.g; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 3; *Convention for the Elimination of All Forms of Racial Discrimination*, Article 14, § 6.a; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 3.

⁴⁷ *Optional Protocol to the ICESCR*, Article 9, § 1; *Optional Protocol to the International Covenant on Civil and Political Rights*, Article 5, § 4; *Convention for the Elimination of All Forms of Racial Discrimination*, Article 14, § 7.b.

⁴⁸ W. Vandenhoe, *The Procedures Before the UN Human Rights Bodies: Divergence or Convergence?*, Antwerp/Oxford: Intersentia, 2004, pp. 193-293.

⁴⁹ *Optional Protocol to the ICESCR*, Article 11; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 8; W. Vandenhoe, *The Procedures Before the UN Human Rights Bodies: Divergence or Convergence?*, Antwerp/Oxford: Intersentia, 2004, pp. 303-304.

⁵⁰ *Optional Protocol to the ICESCR*, Article 11, § 1.

⁵¹ *Optional Protocol to the ICESCR*, Article 5, § 11; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 5.

⁵² *Optional Protocol to the ICESCR*, Article 8, § 4.

This “test” of the reasonable character of the measures taken by states parties, which the Committee must undertake, is unique in international law. The other treaty oversight bodies, of course, use similar criteria to determine if a protected right has been violated, that is if a government has failed to keep its international obligations, but they are free to do so in conformity with criteria that they themselves choose.

In determining the *reasonable* character of the measure taken by governments regarding the obligations under the *Covenant*, the Committee – one hopes, at least – can draw inspiration from the existing jurisprudence at the national, regional and international levels. In many countries, for example at the African, Inter-American and European levels, a considerable body of jurisprudence has demonstrated that it was possible to determine that a government had violated one of its obligations under the ICESCR by not taking reasonable measures to *respect, protect or implement* these rights.⁵³ South African jurisprudence is particularly interesting for the Committee, for the South African Constitutional Court as well as numerous provincial high courts have explored the reasonable character of measures taken by the state to respect, protect or implement the right to health, the adequate housing, to water, to education or to food.⁵⁴

A significant body of jurisprudence has also shown that a government could be found guilty for having taken measures that discriminate in the enjoyment of economic, social and cultural rights, or for not having properly regulated the activities of transnational corporations. It is the same for governments that have ratified commercial treaties that negatively affect the enjoyment of such rights. In 2001, for example, the African Commission on Peoples’ and Human Rights, found Nigeria guilty of not supervising the activities of the transnational Shell, thus violating the right to food, the right to adequate housing and the right to health of the Ogoni people.⁵⁵ The same year, the Inter-American Court of Human Rights found Nicaragua guilty of granting a concession to a South Korean company, in violation of the right to land of the *Mayagna*

⁵³ V. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of Justiciability*, Geneva, International Commission of Jurists, 2008; F. Coomans, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Maastricht Center for Human Rights, Intersentia, 2006; J. Squires, M. Langford, B. Thele, *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Sydney, Australian Human Rights Centre, 2005; S. Liebenberg, “The Protection of Economic and Social Rights in Domestic Legal Systems”, in A. Eide, C. Rosas (eds), *Economic, Social and Cultural Right: A Textbook*, second revised edition, The Hague: Kluwer Law International, 2001, pp. 55-84; B.G. Ramcharan (ed), *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*, Leiden: Martinus Nijhoff, 2005; M. Langford, A. Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, second edition, Geneva: COHRE, 2006.

⁵⁴ V. on South African jurisprudence, S. Liebenberg, “Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review” in J. Squires, M. Langford, B. Thiele, *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Sydney: Australian Human rights Centre, 2005, pp.73-88; D. Brand, “Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale” in F. Coomans, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Maastricht Center for Human Rights, Intersentia, 2006, pp. 207-236; M. Pieterse, “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” *Human Rights Quarterly*, Vol. 26, 2004, pp. 882-905; M. Tveiten, “Justiciability of Socio-Economic rights: Reflections on Norwegian and South African Debate and Experience” in W. Barth Eide, U. Kracht (eds), *Food and Human rights in Development: Legal and Institutional Dimensions and Selected Topics*, Intersentia, 2005, pp. 163-185; C. Golay, *Droit à l’alimentation et accès à la justice*, doctoral thesis, Graduate Institute of International and Development Studies, Geneva, 2009.

⁵⁵ ComADHP, *Social and Economic Rights Actions Center, Center for Economic and social Rights v. Nigeria*, Communication 155/96, Decision of 27 October 2001; C. Golay and M. Özden, *The Right to Food*, Geneva: CETIM, 2005.

(*Sumo*) *Awas Tingni* indigenous communities.⁵⁶ In 2006, the same Inter-American Court found Paraguay guilty of having allowed the appropriation of indigenous lands by foreigners, in violation of the ancestral rights of the *Sawhoyamaxa* community.⁵⁷ To the Paraguayan government, which claimed the existence of a bilateral trade treaty with Germany as justification for not returning the lands to the indigenous communities, the judges responded that human rights prevailed over any commercial rights.⁵⁸ The Committee could take the same line of reasoning within the framework of the *Optional Protocol to the ICESCR*.

F. The limited space accorded to the international dimension of governments' obligations

Of all the international human rights treaties, the *International Covenant on Economic, Social and Cultural Rights* commits governments most clearly to cooperating in implementing protected rights. By becoming parties to the *Covenant*, countries commit themselves to acting, as much through their own efforts as through international assistance and cooperation, particularly on the technical and economic levels, to the best of their ability, in order to assure progressively the full enjoyment of economic, social and cultural rights, regardless of jurisdictional or territorial limitation.⁵⁹ This commitment thus entails an *obligation of international cooperation and assistance*, which has as its origin the commitment made by governments, in the *Charter of the United Nations*, to take both joint and separate action so as to favor the universal and effective respect of human rights in cooperation with the United Nations.⁶⁰ In the words of the Committee on Economic, Social and Cultural Rights:

“The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization 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.”⁶¹

In spite of the existence of this very clear obligation of international assistance and cooperation to implement the rights protected in the *Covenant* and the absence of territorial or jurisdictional limitation, the space accorded to it in the *Optional Protocol*

⁵⁶ Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, ruling of 31 August 2001.

⁵⁷ Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, ruling of 29 March 2006.

⁵⁸ For the Inter-American Court of Human Rights: “The enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American convention, which is a multilateral treaty, on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.” *Ibid.*, § 140.

⁵⁹ *ICESCR*, Article 2, § 1.

⁶⁰ Article 55 the *Charter of the United Nations* lists the economic, social and cultural rights that member states commit themselves to promoting with a view to favoring the effective and universal respect of human rights; Article 56 commits member states to taking “joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55”.

⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, E/1991/23, 14 December 1990, § 14. A similar obligation is to be found in the *Convention on the Rights of the Child*, which prompted the Committee on the Rights of the Child to state: “When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.” *General Comment No 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, 27 November 2003, § 7.

to the ICESCR is, unfortunately, quite modest. As we have seen, the possibility of filing a complaint against a third party state which has not fulfilled this obligation has not been upheld, since it is not possible to file a complaint against another government than that under whose jurisdiction victim falls.

Under pressure from countries of the South, the working group on the *Optional Protocol* was nonetheless obliged to treat this problem indirectly. In its final version, the *Optional Protocol* provides that the Committee may make recommendations to United Nations agencies and programs – with the consent of the state party in question – so that these international institutions may support the effort of the government in implementing the Committee’s recommendations.⁶² When a government is found guilty of not having taken reasonable measure so that everybody may have access to adequate housing, and the government has defended itself by citing a lack of resources, the Committee could then recommend that the United Nations agencies and programs help the government fulfill its obligations in this area. In the same spirit, the *Optional Protocol* also provides for the creation of a fund to help states parties in realizing the rights protected in the ICESCR.⁶³

III. THE CHALLENGES TO IMPLEMENTING THE OPTIONAL PROTOCOL TO THE ICESCR

A. The Entry into Force of the Protocol

The first challenge to the implementation of the *Optional Protocol to the ICESCR* is its entry into force. The *Protocol* was adopted by the United Nations in 2008, but Article 18 stipulates that it must be ratified by at least ten countries before it can enter into force. It is only when these first ten countries have ratified it that the Committee will be able to start hearing complaints – individual or collective – regarding violations of economic, social and cultural rights. In the next months and years, *it will thus be essential that all stake holders, in particular the NGOs, bring pressure to bear on the states parties to the ICESCR to ratify the Optional Protocol.*⁶⁴

B. Exhaustion of Domestic Avenues of Redress

Another challenge is related to exhausting the domestic avenues of redress. Article 3 of the *Protocol* stipulates that all these national means must have been exhausted before a complaint may be heard by the Committee, in so far as the procedures of these avenues of redress do not exceed a reasonable period.

This condition is allowed for in all similar procedures at the regional and international levels. It is necessary for at least two reasons. First, it allows governments to correct violations of basic rights at the national level before being accused of having violated them at the regional or international level. Second, it prevents the regional and international bodies from becoming courts of first instance.

⁶² *Optional Protocol to the ICESCR*, Article 14, §§ 1, 2.

⁶³ *Optional Protocol to the ICESCR*, Article 14, § 3.

⁶⁴ The lists of states parties to the ICESCR is given contained in the annexes.

This condition, although well known, nonetheless represents a real challenge for the victims of violations of economic, social and cultural rights and for the organizations that act in their name. These organizations must thus prove that they have tried all local and national instances without satisfaction, before addressing their complaints to the Committee. In many countries, there are simple administrative procedures in case of violations of basic rights. These procedures must be resorted to first. In some countries, it is also possible to use constitutional courts, such as a constitutional court per se or a supreme court. This is, notably, the case in South Africa, in India, in Colombia and in Argentina.⁶⁵

In some countries, these avenues of redress must also have been exhausted. But in many countries, such constitutional instances do not exist in case of violations of economic, social and cultural rights. The Committee must then show flexibility and declare itself competent to hear directly the complaints of the victims and their representatives. In conformity with the practice of other treaty oversight bodies, the Committee on Economic, Social and Cultural Rights must also declare itself competent if domestic instances exceed a reasonable period of time or if it is clear that they cannot guarantee effective redress to the victims.⁶⁶

C. The Participation of the Victims in the Process

The third challenge is related to the participation of the victims in the process, which is made difficult by the fixed location of the Committee in Geneva. For many victims, Geneva is a distant city, inaccessible and well beyond their reach. As much as possible, the victims should, in spite of everything, participate fully in the complaint process, including by coming to testify before the Committee. *The NGOs working for the protection of human rights based in Switzerland, whether they be national or international, with thus have an essential role to play to allow these victims to have full access to the procedures in Geneva against their governments. It will also be necessary that they dispose of the means necessary to play this role.*

D. Follow-Up to the Conclusions of the Committee

The last challenge is, of course, related to the follow-up of the Committee's conclusions. In case of violations of basic rights, the Committee may recommend that the government responsible for the violations compensate the victim(s) for what has been suffered. But the Committee, like the other treaty oversight bodies, has no way of making its recommendations binding. Moreover, as these recommendations are just that, governments can refuse to implement them.

The *Optional Protocol* provides that the state party should submit a written response within six months on the measures it will take to give effect to the Committee's recommendations.⁶⁷ The Committee can also request the government to submit

⁶⁵ C. Golay, *Droit à l'alimentation et accès à la justice*, doctoral thesis, Graduate Institute of International and Development Studies, Geneva, 2009.

⁶⁶ *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Article 4, § 1, states, for example, that a communication can be examined if it is improbable that the plaintiff will obtain redress through the available domestic instances.

⁶⁷ *Optional Protocol to the ICESCR*, Article 9, § 2.

complementary information, including in its later periodic reports.⁶⁸ The Committee can thus create a follow-up mechanism to assure that its decisions are being implemented. Civil society will thus have a determining role to play to assure that the conclusions of the Committee and its recommendations are given effect, and that they improve, concretely, the lives of the victims of violations of economic, social and cultural rights. From the beginning to the end of the procedure, the civil society organizations will have a central role.

CONCLUSION

The adoption of the *Optional Protocol to the ICESCR* is a major step forward in the international protection of human rights. For the first time since the adoption of the *Universal Declaration of Human Rights* in 1948, all human rights are considered to be on an equal footing and can, potentially, be protected similarly. The *Optional Protocol* is not perfect, notably because it does not apply to actions and omissions of third-party governments nor to the activities of transnational corporations. But the Committee on Economic, Social and Cultural Rights will be able to demonstrate creativity so that these actions and omissions, when they result in violations of economic, social and cultural rights, do not go unpunished. The *Optional Protocol* thus represents an important instrument permitting victims of violations of these rights to have access to justice.

As this paper suggests, the adoption of the *Protocol* by the United Nations in 2008 is only the beginning of the process. In the years to come, it will be essential that governments ratify it so that it can enter into force. For that to happen, it is indispensable that social movements and civil society organizations bring pressure to bear on their national governments and parliaments. It is also indispensable to bring pressure to bear on governments so that they recognize the authority of the Committee on Economic, Social and Cultural Rights to conduct inquiries and hear complaints from other governments.

When the *Protocol* has entered into force, there will be time for the victims and their representatives to demand their rights at the local and national levels before appealing to the Committee when such domestic procedures are not effective. The role of organizations of international solidarity and human rights protection will be essential to this process. Through their commitment, they will allow the victims to participate fully in the deliberations of the Committee. They will also play an essential role in assuring that the conclusions of the Committee are implemented. They will be the ones, as before, who will have to make the link between the conclusions of the United Nations experts and the daily reality of the victims of the violations of economic, social and cultural rights.

⁶⁸ *Optional Protocol to the ICESCR*, Article 9, § 3.

ANNEXES

1. *Resolution of the Human Rights Council A/HRC/RES/8/2 on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted 18 June 2008*
2. *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
3. *Status of Ratification ICESCR*
4. *Report on the first session of the Working group, E/CN.4/2004/44, 15 March 2004*
5. *Report on the second session of the Working group, E/CN.4/2005/52, 10 February 2005*
6. *Report on the third session of the Working group, E/CN.4/2006/47, 14 March 2006*
7. *Report on the fourth session of the Working group, A/HRC/6/8, 30 August 2007*
8. *Report on the fifth session of the Working group, A/HRC/8/7, 6 May 2008*

Main reference Websites regarding ESCR and the optional Protocol:

<http://www2.ohchr.org/english/issues/escr/intro.htm>

<http://www.escr-net.org>

<http://www.opicescr-coalition.org>

<http://www.cohre.org>

<http://www.fian.org>

<http://www.icj.org>

<http://www.adh-geneva.ch/ESCRProject>

http://www.cetim.ch/fr/dossier_desc.php

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