



## **Joint Submission presented by the International Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**

### **General Assessment**

1. The NGO Coalition for an Optional Protocol for the International Covenant on Economic, Social and Cultural Rights (NGO Coalition), a group comprised of national, regional and international organisations as well as individuals supporting the adoption of a comprehensive Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), welcomes the draft prepared by the President of the Open Ended Working Group on an Optional Protocol to the ICESCR (OEWG).
2. The need for access to justice for those whose rights have been violated is the imperative which drives our participation in this process, both in Geneva and in our work at the national level. This engagement mirrors the concern expressed by governments regarding the current lacuna in procedures to render Economic, Social and Cultural rights (ESC rights) justiciable at the international level. It is these shared concerns which motivates the comments offered in this document. Our aim is to ensure that the best possible Optional Protocol to the ICESCR is swiftly adopted, such that current gaps in protection are finally remedied.
3. The Draft Optional Protocol prepared by the President of the OEWG is generally a well-conceived and balanced document, which reflects the main discussions and opinions expressed previously in the OEWG, and draws on language and principles set by existing human rights mechanisms. The draft is a good starting point to further the negotiation of an Optional Protocol that should promote similar protection to economic, social and cultural rights as to other human rights whose protection already benefits from communication and inquiry procedures.
4. Motivated by a widespread concern for the protection of economic, social and cultural rights, the NGO Coalition has some concerns regarding a number of critical issues, particular those that would substantially impact on the scope and effectiveness of the communication mechanism. The NGO Coalition would also like to share some views regarding some of the solutions offered by the draft on further issues that affect those who have suffered, or are at risk of suffering rights violations.



## **“A la carte” and “limited” approaches. Article 2**

5. As expressed in previous sessions of the OEWG, the NGO Coalition in favor of an Optional Protocol strongly opposes any à la carte option reflected tentatively in Article [2.2]. Similarly, any “limited” approach – excluding either certain rights or certain types of duties from the communications system – should be firmly rejected.
6. Any "a la carte" or "limited" options would perpetuate a historic hierarchy of rights, wrought in a different political age. It would foster an inequality of review procedures within the human rights monitoring mechanisms. It would ignore the broad-ranging jurisprudence and legal enforcement of economic, social and cultural rights in all regions of the world. Most importantly, it would ignore the needs of our shared constituents, those who suffer violations of their economic, social and cultural rights, for a universal standard of review which among other things might serve as a model for the enforcement of ESC rights at the domestic level. Currently those individuals and groups of individuals who are denied justice at the domestic level for violations of ESC rights have no comprehensive international recourse.
7. “A la carte” and/or “limited” approaches should be rejected, not only as the draft Protocol is an “Optional” procedural mechanism to assist in monitoring the good faith implementation by states parties of the ICESCR, without violation, but also for the following reasons:
  - a. Rights are interdependent and indivisible: they cannot be treated like items on an international law menu;
  - b. An “a la carte” approach to the Optional Protocol to the ICESCR would be unprecedented among UN human rights treaties and would set an unfortunate and retrogressive precedent on the right to a remedy for human rights violations. It would weaken the indivisibility and interdependence of all human rights, suggesting that while the protection of civil and political rights accepts no exception, the protection of ESC rights can be selective, and thus left to the State party’s convenience or preference.
  - c. The complaints mechanisms related to the ICCPR, CEDAW, ICERD, Convention on the Rights of Persons with Disabilities, and the Convention on the Protection of Migrant Workers – apply to certain ESC rights protected by the respective treaty; accepting either an “a la carte” or a “limited” approach would enshrine in law normative inconsistencies undermining legal certainty.



8. While the “limited” approach, which would, by contrast to the “a la carte” approach, exclude certain types of duties flowing to states, has not been reflected in the drafting of Article 2.1 (with the exception of the possibility of excluding Part I from the communications mechanism), it has been suggested by certain delegations in previous OEWG Sessions. Attempts to exclude some type of duties – such as the duties to fulfill, according to the tripartite classification employed by the Committee on Economic, Social and Cultural Rights ( the Committee) or the duty to take steps to the maximum of available resources, have no precedent in any other UN human rights communications mechanism, including those which extend to violations of ESC rights. Such an attempt would subject economic, social and cultural rights to a lesser and more constricted protection in comparison to that extended to other human rights. It would be artificial and impossible to apply coherently on a case by case basis. While the distinction between types of duties is a useful analytical tool, in concrete situations, duties appear intertwined in such a way that makes it difficult to set them apart from each other. For example, a situation of mass forced evictions carried on by private parties, where such eviction is due to the lack of adequate protective legislation and results in homelessness because of a failure to develop alternative housing options, will amount to violations of duties to respect, duties to protect, and of duties to fulfill. Limiting the communications mechanism to some types of duties, excluding others, would seriously weaken the effectiveness of the mechanism, undermining the ability of the Committee to determine violations of rights and to recommend effective remedies.
9. Regarding the competence *ratione materiae* of the Committee, it is not appropriate to exclude Part I from the Optional Protocol. The ICCPR Part I is identical and it is not excluded from the relevant Optional Protocol. Furthermore, the jurisprudence of the Human Rights Committee indicates that individual communications based only on the right to self-determination will not be admissible – the precedent will be important for the ICESCR, given the identity of Part I in both Covenants.
10. We believe that it would be mistaken to allow alleged pragmatic considerations to lead to a lessening of the standard to which States parties should be held accountable, and hence, to a weakening of the moral and legal anchor points which such a standard creates. Empirical evidence indicates that such a technique does not encourage progressive rights implementation where it has been tried, e.g. with ILO Conventions, and the European Social Charter.

### **“Reservations” Article 21**

11. The NGO Coalition strongly supports the inclusion of Article 21, stipulating no reservations. The principle of *Pacta Sunt Servanda*, a basic principle of international law, establishes that parties accepting a treaty are bound to honour it. An Optional Protocol is a procedural instrument that would neither introduce new, nor expand existing, rights and obligations that States Parties accepted through their ratification of the Covenant, but



would merely serve as a mechanism for encouraging States Parties to realise existing Covenant obligations. Building on the practice of the Human Rights Committee, which has clarified that it considers reservations to the first OP to the ICCPR to be contrary to the object and purpose of the OP1, the Optional Protocol to the CEDAW (OP-CEDAW) includes a provision which explicitly prohibits reservations (Article 17). This development should be reflected in the OP ICESCR.

### **Standing Articles 2 and 3**

12. The NGO Coalition welcomes the provisions of Articles 2 and 3 of the Draft Optional Protocol as providing in preliminary form a comprehensive view of standing, embracing (i) individuals; (ii) groups of individuals; and (iii) parties who as a result of a particular expertise are in a position to challenge systemic abuses of economic, social and cultural rights, especially where the violation is spread over a large number of individual victims. The final adopted version of the Optional Protocol should preserve these three categories.
13. The provisions concerning standing for individual victims and for groups of victims are in line with existing mechanisms (e.g. Article 2 OP-CEDAW, Art. 14 CERD and the practice of the Human Rights Committee). A communication may be from a single individual whose rights under a treaty have been violated, or from a group of individuals who suffered violations under the same set of facts.
14. The NGO Coalition welcomes the provision for “collective communications” in Article 3. It would enable recognized NGO groups to challenge systemic abuses of economic, social and cultural rights that might involve large numbers of victims or victims who may not be in a position to make individual complaints. However, the NGO Coalition is not in favor of an artificial reliance on the ECOSOC consultative status as a criterion for standing and considers that this should not be a requirement for the presentation of complaints under this article. It considers necessary that the *locus standi* of Article 3 be extended to groups and NGOs with a sufficiently demonstrated interest or expertise in the case.
15. Furthermore, the NGO Coalition notes that Article 3 of the English version of the Draft Optional Protocol grants automatic *locus standi* to “international” NGOs with

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<sup>1</sup> “...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”, 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.



consultative status before the ECOSOC, while the Spanish version of the document excludes the term “international”, recognising *locus standi* to all organizations with ECOSOC status. The version in English is therefore particularly problematic. It excludes domestic NGOs with ECOSOC status, which may have had a closer relation with the case from the possibility of lodging communications. In this sense, the solution is too narrow – it should include a greater range of NGOs. Giving standing only to international NGO with ECOSOC status is too restrictive and may often mean that other important local perspectives are lost. As noted, the NGO Coalition considers necessary that the *locus standi* of Article 3 be extended to groups and NGOs with a sufficiently demonstrated interest or expertise in the case. In this same line, we consider that the capacity to grant standing to organizations should not be subject to the willingness of the State concerned, as set in Article 3.2. It is important that the Committee retains the discretion to accept claims presented by organizations that comply with specific substantive criteria.

16. The NGO Coalition supports amendment to the provisions of Articles 2 and 3 which would (1) preserve and/or strengthen possibilities for standing for (i) individuals; (ii) groups of individuals; and (iii) NGOs which, as a result of a particular expertise are in a position to challenge systemic abuses of economic, social and cultural rights, especially where the violation is spread over a large number of individual victims; while (2) eliminating the requirement that NGOs with standing be international or have ECOSOC Status and that collective complainants exhaust domestic remedies.
  
17. In addition, we recommend that provision be made such that, in those cases where, because of the complexity of the facts, or the collective realm of the communication, contextual information is needed to clarify the issues and interests at stake, the Committee should allow information or presentations by other stakeholders and NGOs with relevant expertise or experience. In this regard, the NGO Coalition proposes that the following paragraphs should be added:

*“Non-governmental organizations may communicate information to the Committee when this information relates to any communication filed under Article 2 or 3 of this protocol.”*

### **Consent of victim(s) in individual and group communications**

18. Generally, the victim’s consent is required to submit a communication on his or her behalf, as implied in the first sentence of Article 2. Evidence of consent may be offered in the form of an arrangement for legal representation, power of attorney, or other documentation demonstrating that the representative is authorized to act on behalf of the victim(s).



19. The NGO Coalition considers it necessary to broaden the protection provided in situations where it is difficult or impossible to require the consent of all the victims. Following the OP-CEDAW, the Optional Protocol should establish an exception to the consent requirement, allowing the Committee to admit communications on behalf of victims without their consent if it would be in the interests of the particular victims(s), and/or the public interest, to do so.

#### **Requirement to name all individuals**

20. The NGO Coalition also considers that in line with the object and purpose of the Optional Protocol the phrase “individuals and groups of individuals” should be interpreted to mean not only groups of named individuals but also, in cases where naming would be impractical or would present a threat to the security of those named, to groups of incompletely or even un-named individuals adversely affected by the same set of facts. This would reflect a similar possibility as provided for in Article 6 of the OP-CEDAW.

#### **Admissibility - exhaustion of domestic remedies**

21. We welcome the explicit inclusion of the exception from the requirement to exhaust domestic remedies where “the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.” Such a principle is now an accepted principle of international law applicable to regional and international human rights complaints’ mechanisms. We understand that elements of Article 3 have been derived from the example of the European Social Charter collective complaints mechanism. Insofar, however, as Article 4(1) would, in the current draft, impose a requirement that domestic remedy be exhausted also in complaints lodged under Article 3, much of the strengths of the European Social Charter mechanism would be lost, such as its speed and efficacy, as well as its ability to address issues arising as a result of structural flaws in the domestic system. We urge that the requirement to exhaust domestic remedy be dropped, in cases in which a collective complaint will not find a realistic and timely response at the national level since brought on systemic or structural grounds. We urge that the requirement to exhaust domestic remedy not apply with respect to collective complaints.

#### **Admissibility - *Ratione Temporis***

22. The NGO Coalition considers that the time limit of six months after the exhaustion of domestic remedies set in subparagraph (a) of Article 4.2 should be eliminated. There is no reason to introduce a time limitation to the admissibility *ratione temporis* of the Optional Protocol that does not exist in any other human rights treaty of the United



Nations, setting, for this mechanism more restrictive admissibility criteria than that of other treaties. The time limit seems particularly restrictive given the potential complexity of claims dealing with ESC rights and the impact that this requirement may have on access to justice of victims of violations of these rights.

### **Confidential Communications**

23. In addition, following Article 6 of OP-CEDAW, the NGO Coalition considers that a provision should be made to allow individuals to request to the Committee that their identity be kept confidential and not be made known to the State Party concerned. In certain instances, the individual lodging the complaint might be at risk and this measure would guarantee the physical and psychological integrity of the complainant and his/her family. This request for confidentiality however does not represent a violation of the prohibition of anonymity.

### **Interim measures**

24. We commend the inclusion of a provision for the Committee to request a State party to take interim measures to protect the victim of an alleged violation in those cases where protection is deemed necessary whilst the matter is subjected to formal investigation. The capacity to prescribe interim measures is one of the most important functions of any judicial or quasi-judicial body adjudicating complaints. For the OP to be fully effective, it must be able to perform a preventative function: to stop a harm before it can occur, or to stop an ongoing harm from continuing, or at least mitigating the effects of that harm. The prescription of interim measures can serve to prevent irreparable damage before a complaint can be presented or adjudicated. Interim measures will serve to preserve the rights claimed by the complainant, complainants or the group at issue in the complaint, until such time as the dispute can be settled by the Committee, if related to an existing complaint, or by a competent national body, if not. In that way the Committee will be able to ensure the integrity and effectiveness of the decision they might eventually take on the merits. States will also be on notice when they become party to the Protocol and assume the attendant obligations that the committee retains the power to indicate interim measures and that prescription of such measures will constitute an integral part of the work of the Committee.

25. However, the prescribed threshold –“sufficiently substantiated” evidence that the victim would otherwise suffer “irreparable damage” seems too restrictive. A communication concerning any “sufficiently substantiated” case where grave or serious harm to a victim or victims could result from on-going or unaddressed violations, would be a preferable threshold in the interests of rights protection.



26. The draft as it stands takes a step back from the trends of the most recently adopted human rights treaties that adjudicate complaints: the OP-CEDAW (Article 5) and the Convention for the Protection of All Persons from Enforced Disappearance (Arts. 30-31). Both of these instruments provide explicitly that the relevant Committee has the power to propose interim measures for urgent consideration of a State party. This element of urgency is absent from the text of the draft Optional Protocol to the ICESCR. The key point of interim measures is that they should be considered and acted on with urgency. A mass forced eviction for example, should not need to await lengthy deliberative processes before remedial action can be taken.
27. Another element missing from this text that is contained in OP-CEDAW and the Convention on Enforced Disappearance is a provision indicating that interim/precautionary measures do not imply a determination on either admissibility or the merits of a case. Such a provision is essential, as it enables interim measures to be issued expeditiously. Additionally, both of the other texts speak of irreparable damage to the victim or victims of the alleged violation. The addition of “victims” should clearly be retained for cases where more than one victim is the subject of the request.
28. The provision should revive an element from the 1997 Committee draft, namely that “The State party concerned shall take all necessary steps to comply with a request by the Committee for interim measures.” For interim measures to be effective, they must be, and must be seen to be, binding on the states to which they are addressed. The principle that precautionary measures are of binding quality has been well recognized both by international judicial and quasi-judicial human rights bodies.

### **Interim measures where domestic remedies not exhausted**

29. In order to act as an effective mechanism to prevent imminent human rights violations, the Committee must have the power to make interim orders without the need for the alleged victims to have exhausted domestic remedies. We recommend clarification of this power by the addition of a sub-clause under Article 5.

### **Action in relation to imminent violations**

30. The principle of harm minimization set out above in recommendations regarding the Committee’s powers to waive the requirement for domestic remedies to be exhausted before admitting a communication, and its powers to issue requests for interim measures in serious cases, could be extended by the addition of a principle of harm prevention, to operate in cases where there is “sufficiently substantiated” apprehension of a serious





violation or violations. Enabling the Committee to issue requests for interim measures in such cases, would give it a pro-active role in rights protection.

31. The Inter-American System offers an important and successful example on this regard, granting the Inter-American Commission and the Inter-American Court extensive authority to request precautionary or provisional measures to prevent irreparable damage to people without these being linked necessarily to preexisting cases. This capacity has allowed these bodies to prevent irreparable damage in situations related to forced evictions, right to education, labor rights and right to health, among others. This has also allowed States to address situations in such an effective manner as to render unnecessary the actual presentation of a communication. This is an important advantage from the point of view of procedural economy and effectiveness of the system. Article 30 of the International Convention for the Protection of All Persons from Enforced Disappearance adopts a similar preventive approach as it grants the corresponding Committee the authority to request the State Parties to take the necessary measures to locate and protect the person concerned when certain conditions are met, without linking this faculty to an existing communication
32. We recommend that consideration be given to providing the Committee with the power to request a State party to take interim measures that would avoid otherwise imminent human rights violations in prescribed circumstances.

### **Friendly settlement**

33. The success of a friendly settlement mechanism depends on its ability to protect the rights of victims whilst retaining the good will of the States parties towards the international system. A friendly settlement procedure must therefore not close consideration of the communication until the agreement reached in a friendly settlement is fully implemented.
34. The Committee will need to assess whether States parties have promptly and comprehensively honoured undertakings made pursuant to a friendly settlement. A subparagraph, under Article 11 to this effect would be desirable.
35. The prompt implementation of any friendly settlement and its monitoring by the Committee is essential, especially in ensuring that the friendly settlement is consistent with the objects and purpose of the Covenant and that the mechanism is not used to delay a case indefinitely. Based on the experiences of the Inter-American Commission on Human Rights, the Former European Commission and the European Court of Human Rights, one of the main concerns with regard to a friendly settlement mechanism has been



the need to have strict time frames for the implementation of a friendly settlement and an adequate mechanism for the supervision of its enforcement. Hence, to ensure that the settlement reached is in accordance with the object and purpose of the ICESCR and is properly implemented, the terms of a friendly settlement should be subject to review and approval by the Committee, and must also be subject to follow-up procedures in order to monitor its implementation.

### **International cooperation and assistance**

36. The NGO Coalition welcomes Article 13 of the draft Optional Protocol which would enable the Committee to convey to UN specialized agencies, funds, programmes and other competent bodies, its view on communications or inquiries which indicate a need of States parties for technical advice or assistance. This reflects the content of Article 22 of the ICESCR.
37. It will also be valuable to make explicit the need for the Committee to take into account the resources available to a State party through international cooperation and assistance when it is assessing alleged ICSECR violations under Article 8 of the draft Optional Protocol.
38. From the text of Article 2.1 of the ICESCR it is clear that international assistance and cooperation forms a component of states' obligations under the Covenant. Consequently, the availability of international assistance is relevant to determining whether lack of fulfillment of the rights in the Covenant can be considered a violation. Article 8.4 of the first draft Optional Protocol should therefore be amended to reflect the place of international assistance and cooperation in Article 2.1 of the ICESCR. The article currently states: "4. When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means." A helpful revision would be to include the construction "including those available through international assistance and cooperation" after the words "to the maximum of its available resources".

### **Consideration of the merits**

39. The NGO Coalition considers of the essence to clarify that the requirement to give "due consideration to relevant decisions and recommendations of other United Nations mechanisms as well as of bodies belonging to regional human rights systems" established in Article 8.3 shall not (i) impose an additional admissibility requirement for any case, or



(ii) set mandatory precedents for the Committee to take into account in the consideration of the merits of a case.

### **“Reasonableness”**

40. Article 8.4 of the Draft Optional Protocol gives direction as to the standard of review to be employed by the Committee in cases involving obligations under Article 2(1). (“When examining communications under the present Protocol concerning Article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means”). The NGO Coalition supports the proposal to identify the standard to be employed as that of “reasonableness”., but suggests, for clarification, the addition of “effectiveness” – i.e. “The Committee will assess **the reasonableness and effectiveness** of the steps ...).
41. The standard of “reasonableness” is consistent with both international and domestic standards of review in the field of ESC rights. As a general principle of international law, a norm cannot require the State to undertake acts which are unreasonable. Article 2.1 of the ICESCR requires the State to undertake steps for the full realization of ESC rights “by all appropriate means”. Article 4 of the ICESCR requires that limitations to ESC rights be “compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. The principle of reasonable limitations of rights arising from limited resources and competing needs related to the promotion of general welfare is thus a fundamental principle within the ICESCR. Including reference to the reasonableness standard in the Optional Protocol is therefore, in the view of the NGO Coalition, consistent with the substantive provisions of the ICESCR and norms of international law. It is also consistent with emerging domestic jurisprudence in this area.
42. We propose the addition of “effectiveness”, however, to clarify that the reasonableness standard applicable to the ICESCR must include consideration not only of the limitations on the state in relation to available resources and competing needs, and the integrity of the decision-making process, but also whether the measures adopted by the State Party are in fact effective in realizing Covenant rights. The additional reference to consideration of the “effectiveness” is consistent with the requirement of “effective” measures in the Disability Convention, the Migrant Workers’ Convention, the Convention against Torture, the Convention on the Rights of the Child, ICERD, and with the requirement of effective remedies and effective protection from discrimination under the ICCPR.



### **Implementation and follow-Up**

43. The NGO Coalition considers of extreme importance that the Optional Protocol emphasizes the obligations of State parties to implement the views of the Committee, all recommendations on the remedies, as well as the obligations to submit to the Committee, make public and disseminate information related to a case, except in circumstances where this would give rise to other human rights violations. While we recognize the appropriateness of having the majority of issues related to implementation and follow-up included in the rules of procedure that will be created according to Article 17, we recommend that an explicit recognition of these obligations be made in the Preamble of the Optional Protocol.

### **Participation of the victims and/or his/her representative**

44. The NGO Coalition considers that as a matter of principle the participation of the victims and/or his/her representatives should be guaranteed during all instances of the different procedures established in the Optional Protocol.

45. Nowadays, there is a preponderant international tendency towards broadening the scenarios for a victim's participation in international mechanisms for the protection of human rights, recognizing them as the interested parties. In this sense, for example, the 2002 reform to the rules of procedure of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights provides for the participation of victims or their representatives in every stage in which their interests could be compromised (Article 23 of the rules of procedure, of the Commission and Article 44 of the rules of procedure of the Court).

46. Particularly, in relation to the Inquiry procedure established in Article 10 of the Optional Protocol, the process will increase its effectiveness in a considerable manner if a wide participation of civil society were ensured, such as the one granted to interested parties during the process of periodic reports.