



THE PROMISE OF A PROTOCOL

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Uruguay's ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights marked an important milestone in its protection in international law. The Optional Protocol for economic, social and cultural rights will come into force on May 5th, 2013, about 40 years after demand for such a protocol was developed. This policy brief examines what that really means and what impact it may have, if any.

On February 5th, 2013, Uruguay ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Optional Protocol sets up a complaints mechanism to the ICESCR, which means that individuals can seek justice, if their economic, social or cultural rights are violated by a state party to the Covenant. Uruguay was the tenth country to ratify the Optional Protocol and by doing so the protocol will come into force under international law on May 5th, 2013.

The Optional Protocol has been demanded by proponents of the ICESCR since its adoption in 1966. Supporters argued that the ICESCR lacks oversight and implementation mechanisms. The Committee on Economic, Social and Cultural Rights (the Committee) began studying the possibility for an Optional Protocol in 1990 and submitted a draft to the UN Commission on Human Rights for their consideration in 1996. In 2008 the Optional Protocol was adopted by the General Assembly. It has taken about 40 years for the Optional Protocol to be adopted by the General Assembly and another four years to be ratified by ten countries.

In 1966 the UN adopted the ICESCR which obliges all state parties to respect, protect and fulfil the rights. Ten years later the Covenant was ratified and entered into force; in 2013 the Covenant has 160 parties to it. From a normative point of view all human rights are universal, indivisible and of equal value. However, the economic, social and cultural rights (ESCR) are largely aspirational in nature and therefore difficult to implement.

The notion of 'progressive development' reflected in the ICESCR does not feature in other human rights treaties. The Covenant was written in such a manner because of the "significant practical difficulties that states would face in implementing generalised norms requiring substantial time

and resources" (Dennis & Stewart, 2004: 465). For instance the right to primary education under the Covenant obliges the states to take steps towards providing primary education. However, the state is not obliged to ensure that all citizens have access to primary education within a given time period. Still, article 2.1 in the ICESCR provides that all states should work towards fully realizing these rights in the long run, to the maximum of the state's available resources.

Despite such practical difficulties, the Constitutional Courts of an increasing number of states have applied ESCR in individual cases. While such cases are rare, the most famous example was the Grootboom case in South Africa.

In 1999 a community in Cape Town, South Africa was forcibly evicted from private land earmarked for low-cost housing. The occupants had lived on the land waiting for a response on their application (for low-cost housing) from the municipality and many had waited as long as seven years. After the eviction the community was left homeless and demanded basic shelter of the municipality, in accordance with their right to housing under the South African Constitution. The High Court and the Constitutional Court ruled that the municipality had violated the community's rights to basic housing, however, the community had to wait until 2005 for land and housing to be made available to them. The long-term effect on the South African governments' policy is questionable.

The Optional Protocol allows individuals (or groups) to seek justice if their economic, social and cultural rights are violated by a state party to the Covenant. Such rights include labour rights, the right to housing, the right to primary education and the right to health care. The Committee can only look into the matter if all available domestic remedies have been exhausted. Importantly, the protocol also provides for



a state to state complaints mechanism, which means that a state party can hand in a communication against another state party if the latter has not fulfilled its obligations under the Covenant.

When examining the matter the Committee will hold closed meetings and consequently transmit its views, and possible recommendations, on the complaint to the parties concerned. The state party should give due consideration to the views of the Committee and submit a response within six months, including information on actions taken. However, the Optional Protocol has no real authority to sanction a state party for violating the rights.

The ICESCR in no uncertain terms, provides a right to development. Therefore, ideally, the complaint mechanism set up under the Optional Protocol would provide an opportunity for everyone, including those living in poverty and other marginalized groups to hold states accountable for violations against their economic, social and cultural rights. And ideally, the Optional Protocol would also ensure that human rights globally were treated in a fair and equal manner as required by the Vienna Declaration on Human Rights.

The Covenant highlights the basic components of development. Proponents of the ICESCR and those of human development hold a shared vision to improve the lives of people. It is therefore no surprise that the Committee is highlighting the important link between the Covenant and the Post-2015 Development Agenda, arguing that “linking development with human rights places the spotlight on equality and development-for-all, while reducing social and political tensions driven by discrimination and inequality” (ESCR Committee, November 30, 2012). By linking development goals to the legal obligations under the Covenant the responsibilities of development actors can be better defined. Similarly, linking the Covenant with the Post-2015 Development Agenda strengthens economic, social and cultural rights as international norms.

Despite the good notion of the Optional Protocol it will only apply to the ten countries which have ratified it (Argentina, Spain, Ecuador, Mongolia, Bolivia, Bosnia & Herzegovina, Slovakia, El Salvador, Portugal and Uruguay). Thus as it stands the Optional Protocol will have very little impact.

There are a number of practical and empirical issues that still stand and have done so since 1966. First, legally, how should the compliance of the state party be assessed and judged? Second, gathering enough information to monitor state parties effectively is a practical challenge and thus holding the state parties accountable is exceedingly difficult. Third, how should a state party decide which economic, social and cultural rights to prioritize when multiple rights coincide and requires different actions?

The Optional Protocol is a good step forward in ensuring the principle of the Covenant is upheld. However, the problems that existed prior to the Optional Protocol still prevail and until more states ratify the protocol it has very limited reach. The international community must take further steps to ensure the legal protection of these rights to development and to find a concrete and practical solution to strengthen the Covenant.

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