

Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Summary

On 10 December 2008, the United Nations General Assembly unanimously adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol ensures that, just like victims of civil and political rights violations, victims of economic, social and cultural rights violations have access to remedies at the international level. This article examines the Optional Protocol, starting with the historical background and its content, highlighting some of the main issues of controversy.

1 Introduction

The Universal Declaration of Human Rights, 1948 (Universal Declaration) adopts a holistic approach, recognising the interrelatedness and indivisibility of human rights. It recognises that economic, social and cultural rights are indispensable for everyone's dignity and the free development of their personality. The international community is,

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therefore, required to 'treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis'.¹ The Universal Declaration was a major step forward in the advancement of civilisation at the international and national levels.² It continues to be a source of inspiration to national and international efforts to promote and protect human rights and fundamental freedoms.

'Dignity and justice for all of us', the theme of the 2008 year-long campaign of the United Nations (UN) leading up to the 60th anniversary of the Universal Declaration could not have been more fitting, as this period witnessed a major step towards greater international social justice.³ The 60th anniversary of the Universal Declaration was marked by a milestone: the achievement of an international complaints mechanism for claiming socio-economic rights – the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (CESCR).⁴ This Optional Protocol brings about greater coherence in the human rights system, thus making human rights whole.⁵

Historically, economic, social and cultural rights have often been neglected. They have received less protection through enforcement mechanisms than civil and political rights. Unlike CESCR, 1966, the International Covenant on Civil and Political Rights, 1966 (CCPR) was adopted together with an Optional Protocol (OP1-ICCPR), establishing a procedure for individual complaints.⁶ For over 30 years, victims of civil and political rights violations have had the opportunity to lodge complaints with the Human Rights Committee, the supervisory body of CCPR. The individual complaints procedure under CCPR has helped victims of human rights violations and resulted in the clarification of the rights in CCPR. The Human Rights Committee has created a significant body of case law, requested interim measures, made declarations of violations, and recommended compensation to individual victims.

Victims of economic, social and cultural rights violations, on the other hand, have not had this benefit at the international level. This neglect of economic, social and cultural rights has observably been due to the general perception of these rights as programmatic, having

¹ World Conference on Human Rights: Vienna Declaration and Programme of Action, Part I, para 5, UN doc A/CONF 157/23, 12 July 1993.

² A Eide & A Rosas 'Economic, social and cultural rights: A universal challenge' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 3.

³ On 10 December 2007 (Human Rights Day), the UN Secretary-General launched a year-long campaign to mark the 60th anniversary of the Universal Declaration.

⁴ Optional Protocol, Optional Protocol to CESCR or OP-ICESCR.

⁵ 'Human rights made whole', statement by Louise Arbour, then UN High Commissioner for Human Rights, <http://www.policyinnovations.org/ideas/commentary/data/000068> (accessed 15 January 2009).

⁶ The First Optional Protocol to the International Covenant on Civil and Political Rights, 1966, which establishes an individual complaints procedure for victims of civil and political rights violations.

to be realised gradually, and of a more political nature and not capable of judicial enforcement.⁷ However, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee), academics and other writers have been influential in dispelling myths about economic, social and cultural rights.⁸ Courts have increasingly been willing to apply and enforce economic, social and cultural rights, even in countries where these rights are stated as mere principles to guide state policy.⁹ In addition, Pennegård has pointed out that the difference between civil and political rights and economic, social and cultural rights cannot be interpreted in a strict sense because, although the obligations they impose on governments may seem different at first sight, a more in-depth analysis often reveals a close connection and interrelationship between various human rights.¹⁰

The monitoring of the implementation of economic, social and cultural rights has, therefore, for several decades, been limited to the ESCR Committee's consideration of state reports and other information submitted to it, mostly by non-governmental organisations (NGOs).¹¹ However, UN human rights bodies, governments, civil society and experts have been at work to remedy this long-term gap in human rights protection under the international system, by way of an Optional Protocol to CESC.

Following years of difficult negotiations, the Optional Protocol to CESC has finally been adopted. This article captures some of the key discussions during the development process of the Optional Protocol.¹² However, before examining the content, it is important to first consider the historical background to the Optional Protocol to CESC.

⁷ A Eide 'Economic, social and cultural rights as human rights' in Eide *et al* (n 2 above) 14; M Craven 'The UN Committee on Economic, Social and Cultural Rights' in Eide *et al* (n 2 above) 470; H Steiner *et al* *International human rights in context: Law, politics, morals* (2007) 263-264.

⁸ See generally Eide *et al* (n 2 above).

⁹ See generally R Gargarella *et al* *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006); J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005); Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004).

¹⁰ A Pennegård 'Overview over human rights: The regime of the UN' in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms* (2001) 27-28.

¹¹ Arts 16 & 17 of CESC require states to submit reports on the measures which they have taken and the progress made in achieving observance of the rights in CESC.

¹² It should be noted that throughout the sessions of the Open-Ended Working Group on an OP-ICESC, though some states sustained their positions on various issues, the position of other states changed at various sessions. Hence, this article tries to capture the latest position of states as contained in the reports of the Working Group.

2 Historical background

This section traces the journey from 1990, when the ESCR Committee started discussing the desirability and modalities of an individual complaints procedure for economic, social and cultural rights through an Optional Protocol to CESC. ¹³ Subsequently, the 1993 Vienna Declaration and Programme of Action urged the UN Commission on Human Rights (UNCHR), the predecessor to the Human Rights Council, in co-operation with the ESCR Committee, to continue work on an Optional Protocol to CESC. ¹⁴ In an analytical paper, the Committee submitted that there were strong reasons for the adoption of a complaints procedure in respect of CESC. ¹⁵ Consensus was reached within the ESCR Committee on the need for an individual complaints procedure in 1996. The ESCR Committee then finalised a draft Optional Protocol, which was presented to the UNCHR in 1997. ¹⁶ In the same year, the UNCHR requested the Secretary-General to transmit the text to states, inter-governmental organisations and NGOs for their comments. This process took three years. There was very little enthusiasm at this stage due to a lack of political consensus on the text, particularly among states. Most member states did not submit comments while NGOs strongly supported the draft Optional Protocol. The few states that submitted comments in favour of an Optional Protocol were Croatia, Cyprus, the Czech Republic, Ecuador, Finland, Georgia, Germany, Lebanon, Lithuania, Mauritius, Mexico, Norway and Portugal; while Canada and Sweden expressed doubts on its desirability. ¹⁷

There was, however, some progress in 2001. The UNCHR organised, together with the International Commission of Jurists, a two-day workshop on the justiciability of economic, social and cultural rights, with particular reference to an Optional Protocol to CESC. In the same year, the UNCHR decided to appoint an independent expert to examine the question of a draft Optional Protocol and the comments made on it by states, inter-governmental organisations and NGOs as well as the report of a workshop held in 2001 on the justiciability of economic,

¹³ For additional reading on the historical background and benefits of the OP-ICESCR, see L Chenwi & C Mbazira 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 7(1) *ESR Review* 9.

¹⁴ Vienna Declaration and Programme of Action, para 75.

¹⁵ 'Contribution du Comité des droits économiques, sociaux et culturels' UN Doc A/CONF 157/PC/62/Add.5, 26 March 1993, annex II.

¹⁶ Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, contained in UN Doc E/CN 4/1997/105, 18 December 1996.

¹⁷ W Vandenhole 'An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' para 36, Working paper at the Expert Seminar on *An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* organised by the Institute for Human Rights, Catholic University of Leuven, Belgium, 30 November 2001, <http://www.law.kuleuven.be/humanrights/ebib/Proceedings30112001.doc> (accessed 15 January 2009).

social and cultural rights.¹⁸ The independent expert was required to report back to the UNCHR at its 58th session.

The independent expert, Hatem Kotrane, held a series of consultations with UN bodies and states and, in 2002, submitted his first report, in favour of the adoption of an Optional Protocol.¹⁹ The mandate of the expert was renewed in order to allow him to study in greater detail the nature and scope of state parties' obligations under CESC, the question of the justiciability of economic, social and cultural rights, and questions as to the benefits and practicability of a complaints mechanism under CESC and the issue of complementarity between different mechanisms.²⁰ In his second report, the independent expert recommended that the UNCHR establish, at its 59th session, an Open-Ended Working Group (OEWG) with the mandate to consider options regarding the elaboration of an Optional Protocol to CESC.²¹

In 2003, the UNCHR established the OEWG.²² The UNCHR requested the Working Group to meet for a period of ten working days, prior to the 60th session of the Commission, with a view to considering options regarding the elaboration of an Optional Protocol, in the light of, amongst others, the report of the ESCR Committee on a draft Optional Protocol, comments and views submitted by states, intergovernmental organisations, including UN specialised agencies, and NGOs, and the reports of the independent expert. The OEWG held five sessions — in 2004 (23 February to 5 March), 2005 (10 to 20 January), 2006 (6 to 16 February), 2007 (16 to 27 July) and 2008 (4 to 8 February 2008 and 31 March to 4 April 2008).

At the end of its first session, the OEWG did not reach consensus on whether to start drafting an Optional Protocol.²³ At its second session in 2005, the OEWG gave the Chairperson, Catarina de Albuquerque, a mandate to prepare a report containing elements of an Optional Protocol with a view to facilitating the discussions. The Elements Paper addressed a range of issues, including the scope of the rights to a communication procedure, admissibility criteria, standing, proceedings on the merits, friendly settlement of disputes, interim measures, views,

¹⁸ See generally Resolution 2001/30 of 20 April 2001, UN Doc E/CN.4/2002/50.

¹⁹ Report of the Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2002/57.

²⁰ Resolution 2002/24 of 22 April 2002, UN Doc E/CN.4/RES/2002/24.

²¹ Report by Mr Hatem Kotrane, Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2003/53, para 76.

²² Resolution 2003/18 of 22 April 2003, UN Doc E/CN.4/2003/L.11/Add.3.

²³ Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its First Session, UN Doc E/CN.4/2004/44, 15 March 2004 (Report of the First Session of the OEWG) para 76.

follow-up procedures, reservations, inquiry procedure, inter-state procedure, the Optional Protocol and domestic decisions on resource allocation, the relationship of the Optional Protocol with existing mechanisms, and international co-operation and assistance.²⁴ The Elements Paper allowed for a focused discussion on the main elements of an individual communications procedure at the third session of the OEWG.

Following the third session of the OEWG, the debate shifted from whether economic, social and cultural rights should be subject to a complaints procedure to what the specific nature and modalities of such a procedure should be. The Human Rights Council, at its first session, renewed the mandate of the OEWG for a further two years so that it could elaborate on an Optional Protocol.²⁵ The Human Rights Council requested the Chairperson of the OEWG to prepare a draft Optional Protocol to be used as a basis for future negotiations. The Council also requested the OEWG to meet for ten working days each year, and directed that a representative of the ESCR Committee should attend these meetings as a resource person. Between 2007 and 2008 several drafts were discussed.

Though the journey has been riddled with obstacles and setbacks, revolving mainly on continuing doubts about the justiciability of economic, social and cultural rights, a milestone in the history of universal human rights has been achieved. The OEWG completed its mandate in April 2008 with the transmission of the draft Optional Protocol to the Human Rights Council, which subsequently adopted it by consensus in June 2008. The Human Rights Council recommended that the UN General Assembly adopts the Optional Protocol.²⁶ In November 2008, the Third Committee of the UN General Assembly approved by consensus a draft resolution on the adoption of the Optional Protocol to CESCR, recommending its adoption and, similar to the Human Rights Council Resolution, that it be opened for signature in 2009.²⁷ The General Assembly adopted by consensus the Optional Protocol on 10 December 2008, the day of the 60th anniversary of the Universal

²⁴ Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2006/WG.23/2, 21 November 2005 (Elements Paper).

²⁵ Resolution 1/3 of 29 June 2006, para 1.

²⁶ Resolution on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc A/HRC/8/L.2/Rev.1/corr.1, 18 June 2008.

²⁷ Resolution A/C.3/63/L.47, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, contained in UN Doc A/63/435, 28 November 2008. See also Third Committee Recommends General Assembly Adoption of Optional Protocol to International Convention on Economic, Social and Cultural Rights', UN Doc GA/SHC/3938, 18 November 2008. Fifty-two member states co-sponsored the Resolution.

Declaration.²⁸ The Optional Protocol will be open for signature this year (2009) and will come into force after ten ratifications.²⁹

3 Contents of the Optional Protocol

The Optional Protocol reaffirms the universality, indivisibility and inter-relatedness of all human rights.³⁰ It refers to the principles of equality and non-discrimination as embodied in the UN Charter, 1945, the Universal Declaration, CCPR and CESC.³¹ The listed grounds of discrimination are ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.³²

The Optional Protocol further considers it appropriate to enable the ESCR Committee to carry out the functions in the Optional Protocol as a means of furthering the achievement of the purpose of CESC and the implementation of the provisions therein.³³ Hence, article 1 of the Optional Protocol recognises the competence of the ESCR Committee to receive and consider communications alleging violations of the economic, social and cultural rights set forth in CESC by a state party to the Protocol. The ESCR Committee has the discretion to, if necessary, ‘decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance’.³⁴ This provision was included because of the need to add in a threshold that would allow the ESCR Committee not to deal with complaints of minor importance.

The Optional Protocol also provides for the possibility of interim measures in ‘exceptional circumstances’,³⁵ allows for the friendly settlement of disputes,³⁶ creates an inter-state complaints procedure³⁷ and

²⁸ ‘Closing a historic gap in human rights’ UN press release <http://www.unhcr.ch/hurricane/hurricane.nsf/0/D39BD9ED5406650FC125751C0039FE08?opendocument> (accessed 15 January 2009).

²⁹ See art 18(1) OP-ICESCR.

³⁰ Preambular para 3. In drafting the Preambular paragraphs, inspiration was drawn from the Preambles of the OP1-ICCPR and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (OP-CEDAW).

³¹ Preambular para 1.

³² Preambular para 2.

³³ Preambular para 5.

³⁴ Art 4. The inclusion of this provision was proposed by the United Kingdom, Canada and New Zealand, supported by Australia, Denmark, Ireland, Japan, Norway, Poland, Sweden and the United States (see Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fifth Session, UN Doc A/HRC/8/7, 6 May 2008, para 22 (Report of the Fifth Session of the OEWG) para 59.

³⁵ Art 5.

³⁶ Art 7.

³⁷ Art 10.

an inquiry procedure,³⁸ and provides for follow-up mechanisms.³⁹ It requires state parties to 'take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee'.⁴⁰ This provision ensures that the rights and safety of those who use the communication procedure are guaranteed and protected. This provision is identical to article 11 of Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (OP-CEDAW). Its inclusion was not the subject of much discussion; it had, actually, not been discussed prior to the fourth session of the OEWG.⁴¹

The subsequent paragraphs consider, in more detail, the discussions around some of the provisions of the Optional Protocol: who can bring a complaint and the rights that are covered, admissibility criteria and the standard of review to be applied in considering communications, international co-operation and assistance and the establishment of a fund.

3.1 The rights covered

Communications must relate to a violation of any of the economic, social and cultural rights.⁴² The main questions raised during the discussions related to whether the procedure should apply to all of the rights recognised in CESCER or only to some; and whether states should be allowed, on ratification, to choose the rights that would apply to them.

Various approaches were proposed, including: a *comprehensive approach*, allowing for communications under any of the rights in CESCER;⁴³ a *limited approach*, limiting the procedure to parts II and III of CESCER; and an *à la carte approach* (including the *opt-out or reservation approaches*), allowing states to choose the rights or levels

³⁸ Arts 11 & 12.

³⁹ Art 9 (follow-up of the views of the ESCR Committee), and art 12 (follow-up to the inquiry procedure).

⁴⁰ Art 13.

⁴¹ The states that supported the inclusion of protection measures included Australia, Belgium, Canada, Chile, Egypt, France, Germany, Iran, Mexico, the Netherlands, New Zealand, Portugal, South Africa, Switzerland and the United States (see Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fourth Session, UN Doc A/HRC/6/8, 30 August 2007, para 119 (Report of the Fourth Session of the OEWG); and Report of the Fifth Session of the OEWG, para 103).

⁴² Art 2.

⁴³ The ESCR Committee favours a comprehensive approach (see Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session, UN Doc E/CN.4/2006/47, 14 March 2006 (Report of the Third Session of the OEWG) para 32.

of obligations that would apply to them. All existing communication procedures under the international system adopt the comprehensive approach. Hence, the *à la carte* approach is unprecedented within the UN human rights treaty-based system.

However, a number of states supported the *à la carte* approach at various sessions, arguing that a selective approach would enable a larger number of states to become parties to the Protocol and allow states to limit the procedure to those rights for which domestic remedies exist.⁴⁴ Poland and the United Kingdom preferred another version of an *à la carte* approach, the 'opt-in approach', arguing that the approach would allow states to add further rights at a later stage while not preventing other states from accepting petitions, and that opt-out from certain rights might send the signal that these rights were less important.⁴⁵ The arguments for an opt-out clause related to the non-justiciability of economic, social and cultural rights, the competence of the ESCR Committee and the difference in the situations of states. For instance, in states where economic, social and cultural rights have not yet been made justiciable, they would be able to freely determine the provisions and obligations arising from CESC that they are ready to assume.

A majority of states supported a comprehensive approach.⁴⁶ Their support for the comprehensive approach was based on the following: that an *à la carte* approach would establish a hierarchy among human rights, disregard the interrelatedness of provisions of CESC, amend the substance of CESC, 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.⁴⁷ Those that supported a comprehensive approach therefore saw the *à la carte* approach as a

⁴⁴ The states are Australia, China, Denmark, Germany, Greece, Japan, the Netherlands, New Zealand, Poland, the Republic of Korea, Russia, Switzerland, Turkey, the United Kingdom and the United States (see Report of the Fourth Session of the OEWG, para 37).

⁴⁵ Report of the Fourth Session of the OEWG, para 38.

⁴⁶ Angola, Argentina, Azerbaijan, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Croatia, Cuba, Ecuador, Egypt, Ethiopia, Finland, France, Guatemala, Italy, Iran, Liechtenstein, Madagascar, Mexico, Nigeria, Norway, Morocco, Peru, Portugal, Senegal, Slovenia, Spain, South Africa, Spain, Sweden, Switzerland, Uruguay and Venezuela (see Explanatory Memorandum, Annex II to the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights prepared by the Chairperson-Rapporteur, Catarina de Albuquerque, UN Doc A/HRC/7/WG.4/2, 23 April 2007, paras 4 & 15 (Explanatory Memorandum)); Report of the Fourth Session of the OEWG, para 33. It should be noted that France initially supported an opt-out approach, but was later persuaded to support the comprehensive approach; and Norway took a retrogressive step at the 5th session of the OEWG by shifting from supporting a comprehensive approach to an *à la carte* approach at the 5th session of the OEWG.

⁴⁷ Report of the Fourth Session of the OEWG, para 33.

way of introducing a hierarchy of rights.⁴⁸ It was further argued that the approach would undermine the integrity and independence of the rights in CESC, as it would allow states to 'opt out' of the obligation to provide effective remedies to particular rights or components of rights in CESC.⁴⁹ This would also reinforce the idea that some rights are different in nature and require a lesser level of protection than others do, and would ignore the importance of maintaining a unitary and indivisible framework of human rights obligations. Furthermore, such an approach would contradict the principle enunciated clearly by the CESC Committee that 'effective remedies' should be made available to all rights recognised in CESC, even if such remedies may not always be judicial.⁵⁰ It was noted during the discussions that, based on experience from the European system, an *à la carte* approach has not helped in promoting a full understanding of the provisions of the European Social Charter, 1961, resulting in the creation of different charters for different countries.⁵¹

It should be noted that though Egypt was, generally, in favour of a comprehensive approach, it indicated at the fourth session of the OEWG that it would be able to accept the exclusion of part I of CESC from the Optional Protocol.⁵² Australia, Greece, India, Morocco, Russia and the United States also favoured excluding part I of CESC.⁵³ This exclusion would mean that the right to self-determination would not be subject to the communications procedure. The right to self-determination is also included in CCPR and is already formally subject to individual complaints under the OP1-ICCPR. The position of the ESCR Committee has always been that, in addition to its civil and political dimensions, this right has economic, social and cultural dimensions that merit protection under the Optional Protocol.⁵⁴ The exclusion of this right would, therefore, deny victims their rights to cultural, economic and social self-determination.

The Optional Protocol does not make reference to any of the parts of CESC, as it requires that a communication must allege a violation of 'any of the economic, social and cultural rights set forth in

⁴⁸ Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session, UN Doc E/CN.4/2005/52, 10 February 2005 (Report of the Second Session of the OEWG), para 37.

⁴⁹ Joint Submission of the NGO Coalition to the 2006 Open-Ended Working Group to Consider Options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, January 2006; see also Report of the Third Session of the OEWG, para 33.

⁵⁰ L Chenwi 'First reading of the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2007) 8(4) *ESR Review* 22-23.

⁵¹ Report of the Second Session of the OEWG, para 52.

⁵² Report of the Fourth Session of the OEWG, para 35.

⁵³ Report of the Fourth Session of the OEWG, para 36.

⁵⁴ Chenwi & Mbazira (n 13 above) 11.

the Covenant'. Hence, it remains open whether the ESCR Committee interprets this to include or exclude the right to self-determination or at least some components of the right.

3.2 Standing

Communications can be submitted by (1) individuals, (2) groups of individuals, or (3) other persons on their behalf, claiming to be victims of a violation.⁵⁵ With regard to the latter group, consent has to be obtained unless the author of the communication can justify acting on the victims' behalf without such consent. This exception was inspired by article 2 of OP-CEDAW. Its inclusion was proposed by Brazil, Chile, Portugal, Uruguay and the NGO Coalition,⁵⁶ amongst others, as an alternative to the requirement of express consent that was being proposed by some states.⁵⁷ The difference between the Optional Protocol to CESCR and OP1-ICCPR is that the latter does not explicitly refer to groups having standing, as it uses the terminology 'individuals'.⁵⁸ However, in practice, the Human Rights Committee has allowed communications from a group acting on behalf of a victim or from groups whose members were individual victims.⁵⁹ Hence, the Optional Protocol to CESCR has reinforced this practice by granting standing to groups.

During the discussions, there was the question of whether to allow NGOs to submit collective communications, which resulted in the inclusion of a provision on collective complaints in earlier drafts. It allowed international NGOs with consultative status before the UN Economic and Social Council (ECOSOC) to submit communications alleging unsatisfactory implementation by any state of the right in CESCR.⁶⁰ This procedure had no victim requirement and the elements of the procedure were derived from the example of the European Social

⁵⁵ Art 2.

⁵⁶ The NGOs' campaign for the complaints procedure for economic, social and cultural rights has been mobilised mainly through the NGO Coalition for an Optional Protocol (NGO Coalition). For more information on the NGO Coalition and its work, see <http://www.opicescr-coalition.org> (accessed 15 January 2009).

⁵⁷ Belarus, Burkina Faso, China, Egypt (on behalf of the African Group), Ethiopia, Morocco and Russia proposed that individuals must give prior 'expressed' consent before communications can be brought on their behalf. However, Ecuador, Peru and the NGO Coalition opposed this submission, arguing that it might be difficult to obtain express consent in certain cases (see Report of the Fourth Session of the OEWG, para 43). It should be noted that at the 5th session of the OEWG, Egypt (on behalf of the African Group) together with Finland, Italy, Lichtenstein, Mexico, the Netherlands, Portugal and NGOs supported the retention of the exception to the consent requirement (see Report of the Fifth Session, para 37).

⁵⁸ Art 1 OP1-ICCPR.

⁵⁹ E de Wet 'Recent developments concerning the Draft Optional Protocol to the International Covenant on Economic Social Cultural Rights' (1997) 13 *South African Journal on Human Rights* 514 533.

⁶⁰ Art 3 of the Draft OP-ICESCR, UN Doc A/HRC/6/WG 4/2, 23 April 2007.

Charter's collective complaints mechanism. However, the provision did not receive much support. Since NGOs do have standing under article 2 when acting in a representative capacity for victims, there was substantial consensus during the discussions that the provision be deleted.⁶¹ The unwillingness of the OEWG to include a provision on collective complaints echoes the practice of the Human Rights Committee, which is to the effect that NGOs cannot submit a communication in the public interest without having to act on behalf of individuals or groups of individuals.⁶²

An important point worth noting with regard to article 2 is that the Optional Protocol is silent on whether or not the NGOs acting on behalf of victims must have consultative status before the UN ECOSOC before they can submit a communication.

3.3 Admissibility criteria

National remedies that are accessible and effective are the primary means of protecting economic and social rights.⁶³ Accordingly, similar to other human rights treaties at both the international and regional level, in order for a communication to be considered by the ESCR Committee, all available domestic remedies have to be exhausted, unless where the application of such remedies is unreasonably prolonged.⁶⁴ The exception to the exhaustion of local remedies rule that a communication may be declared admissible if local remedies are 'unlikely to bring effective relief', which is contained in OP-CEDAW, for instance, has been left out.⁶⁵ In an earlier draft, 'unlikely to bring effective relief' was also an exception, but its deletion was proposed by Burkina Faso, Ecuador, Egypt (on behalf of the African Group), Poland and the United States.⁶⁶

The exhaustion of domestic remedies requirement provides a state with an opportunity to redress any wrongs that it may have committed — to remedy the alleged violation — before the case is brought to the ESCR Committee. It also prevents the ESCR Committee from becoming

⁶¹ The states that called for its deletion included Algeria, Australia, Belarus, Burkina Faso, China, Colombia, Ecuador, Egypt (on behalf of the African Group), Greece, India, Japan, Morocco, Nigeria, Norway, the Republic of Korea, Russia, Senegal, Tanzania, the United Kingdom, Ukraine, the United States and Venezuela (see Report of the Fourth Session of the OEWG, para 47).

⁶² De Wet (n 59 above) 533.

⁶³ See S Liebenberg 'The protection of economic and social rights in domestic legal systems' in Eide *et al* (n 2 above) 55; ESCR Committee General Comment 9 on the domestic application of CESCR, para 4, UN Doc E/C 12/1998/24, 3 December 1998.

⁶⁴ Art 3.

⁶⁵ See art 4(1) of OP-CEDAW; see also art 2(d) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2007 (not yet in force).

⁶⁶ Report of the Fourth Session of the OEWG, para 59.

ing a tribunal of first instance for cases for which an effective domestic remedy exists.⁶⁷

A practical question arises with regard to this requirement in situations where economic, social and cultural rights are not provided for as justiciable rights. Would this mean that domestic remedies are not available? Viljoen observes that ‘a remedy is “available” if it can be utilised as a matter of fact and without impediment’.⁶⁸ Where economic, social and cultural rights are not justiciable, access to courts in order to seek direct enforcement and protection of these rights becomes difficult. The African Commission on Human and Peoples’ Rights (African Commission) is of the view that where courts are prevented from taking up cases, local remedies become non-existent and that if a right is not well provided for in domestic law, there cannot be effective remedies or any remedies at all.⁶⁹ In addition, in the Inter-American system, where domestic legislation does not afford due process of law for the protection of rights, the requirement to exhaust domestic remedies is not applicable.⁷⁰

However, domestic remedies are not limited to judicial remedies. Economic, social and cultural rights may be subject to judicial or quasi-judicial remedies such as national human rights commissions, the ombudsman or administrative complaints.⁷¹ The provision in the Optional Protocol to CESC is similar to that in the OP1-ICCPR,⁷² and the Human Rights Committee has explained that the requirement to exhaust ‘all available domestic remedies’ in the latter ‘not only refers to judicial but also to administrative remedies’.⁷³ The Human Rights Committee has also pointed out that if administrative remedies are

⁶⁷ Viljoen has elucidated on the purpose of the requirement to exhaust domestic remedies when discussing the protective mandate of the African Commission (see F Viljoen *International human rights law in Africa* (2007) 336).

⁶⁸ Viljoen (n 67 above) 336. See also T Zwart *The admissibility of human rights petitions: The case law of the European Commission of Human Rights and the Human Rights Committee* (1994) 188, stating that ‘a remedy is considered available only if the petitioner can make use of it in the circumstances of his case’.

⁶⁹ See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 49-5; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 37 & 41 (*SERAC* case).

⁷⁰ Art 46(2) of the American Convention on Human Rights 1969.

⁷¹ A Rosas & M Scheinin ‘Implementation mechanisms and remedies’ in Eide *et al* (n 2 above) 452. See also Report of the Second Session of the OEWG, para 43. In fact, at the 5th session of the OEWG, some states proposed that the list of remedies be specified instead of simply referring to ‘domestic remedies’. These included Denmark, Greece, New Zealand, Poland and the United Kingdom, who wanted the list of remedies to be mentioned — ‘judicial, administrative and other’ remedies (see Report of the Fifth Session of the OEWG, para 47). This proposal did not receive much support as it was seen as unnecessary.

⁷² See art 5(2)(b) of OP1-ICCPR.

⁷³ See, eg, *Brough v Australia*, Communication 1184/2003, UN Doc CCPR/C/86/D/1184/2003, 27 April 2006, para 8.6.

the only remedies available, they have to be exhausted.⁷⁴ The ESCR Committee, in dealing with the domestic application of CDESCR, has observed that⁷⁵

[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a state party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.

It is important to note that the particular circumstance of the individual case would be relevant in any determination of whether domestic remedies are in fact available.⁷⁶ Where no domestic remedies exist, a petitioner would be able to take a communication straight to the international level.⁷⁷

In addition to the exhaustion of domestic remedies requirement, communications have to be submitted within one year after the exhaustion of such remedies, unless the author of the communication can show that it was not possible for him or her to submit the communication within this time frame.⁷⁸ Initially, the time limit was six months, but it was felt by a number of states and the NGO Coalition that this was particularly restrictive given the potential complexity of economic, social and cultural rights claims and the impact it may have on access to justice for victims of violations of these rights.⁷⁹

Article 3 further elaborates other grounds on which a communication may be declared inadmissible. These are where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the state party concerned, unless those facts continued after that date; where the same matter has already been

⁷⁴ See generally *SS v Norway*, Communication 79/1980, UN Doc CCPR/C/15/D/79/1980, 2 April 1982.

⁷⁵ ESCR Committee General Comment 9, para 9. It should be noted that parliamentary procedures do not, however, qualify as judicial or quasi-judicial remedies, even though they might end up providing redress to a complainant (see Report of the Second Session of the OEWG, para 92).

⁷⁶ The European Court of Human Rights, eg, has on several occasions emphasised that 'the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case'. Hence, 'the court must take realistic account not only of the existence of formal remedies in the legal system of the contracting state concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant' (see, eg, *Van Oosterwijck v Belgium*, Application 7654/76, para 35, 6 November 1980; and *Isayeva v Russia*, Application 57950/00, 24 February 2005, para 153).

⁷⁷ See Report of the Second Session of the OEWG, para 43.

⁷⁸ Art 3(2)(a) OP-ICESCR.

⁷⁹ The Netherlands, Peru, South Africa and Spain, eg, proposed extending the time limit to one or three years (see Report of the Fourth Session of the OEWG, para 61).

examined by the ESCR Committee or has been or is being examined under another procedure of international investigation or settlement; where it is incompatible with the provisions of CESC; where it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;⁸⁰ where it is an abuse of the right to submit a communication; or where it is anonymous or not in writing.⁸¹

Some states had proposed the inclusion of the requirement that regional remedies must be exhausted first before a complaint can be lodged with the ESCR Committee, as a means of ensuring that the communications procedure under CESC would not undermine existing procedures in regional human rights systems.⁸² It was also noted that regional mechanisms were better positioned to take into account a state's level of development.⁸³ However, a number of states as well as the NGO Coalition opposed the proposal arguing that such a criterion, combined with the prohibition to admit matters already examined, would prevent victims from accessing the system and introduce a hierarchy between international and regional mechanisms.⁸⁴ It was also argued that regional mechanisms differed widely and none corresponded fully with a complaints procedure under CESC.⁸⁵ This criterion has not been included in the Optional Protocol. This exclusion is plausible, as regional mechanisms should play a complementary role to UN mechanisms rather than provide a basis for denying complaints from regions where regional remedies are available.

3.4 Interim measures

The capacity to prescribe interim measures is one of the most important functions of any judicial or quasi-judicial body adjudicating complaints. For any complaints mechanism to be fully effective, it must be able to perform a pre-emptive function — to stop harm before it can occur, or to stop an ongoing harm from continuing, or at least mitigating the effects of that harm. In fact, all UN communication procedures make provision for interim measures either in the rules of procedure of the respective committees or in a treaty provision. Compliance with interim

⁸⁰ This criterion is derived from art 56(4) of the African Charter on Human and Peoples' Rights, 1982 (African Charter), a proposal that was put forward by the NGO Coalition (see Report of the fourth Session of the OEWG, para 61).

⁸¹ Art 3(2)(b-g) OP-ICESCR.

⁸² These states include Angola, Egypt, Ethiopia, Nigeria and the United Kingdom, which had initially indicated that victims should be free to decide which procedure to use (see Report of the Third Session of the OEWG, para 52; and Report of the Fourth Session of the OEWG, para 62).

⁸³ Report of the Third Session of the OEWG, para 52.

⁸⁴ These states include Argentina, Azerbaijan, Belgium, Norway, Peru and Portugal (see Report of the Third Session of the OEWG, para 54; and Report of the Fourth Session, para 62).

⁸⁵ Report of the Third Session of the OEWG, para 54.

measures does not only ensure respect for human rights but they are, as Viljoen states, aimed at upholding the integrity of the body that will take the final decision.⁸⁶

During the discussions of the OEWG, a number of states and the NGO Coalition highlighted the need for the ESCR Committee to have the power to request interim measures.⁸⁷ Accordingly, the Optional Protocol in article 5 enables the ESCR Committee to respond to exceptional or life-threatening situations in order to avoid possible irreparable harm to the victim(s) of the alleged violation. The risk of such harm would have to be sufficiently substantiated. The request to take interim measures can be made at any time after the receipt of a communication and before a determination on the merits has been reached. A state is required to act on such request with urgency.⁸⁸

Furthermore, a proposal that a linkage should be established between the use of interim measures and the capacity or resources available to the state concerned was not incorporated,⁸⁹ the reasons being that such a provision is not contained in any of the existing communications procedures and, based on its practice in considering state reports, the ESCR Committee would be expected to take into account the issue of resource constraints in the consideration of interim measures and communications in general.⁹⁰ Some states opposed referring to resource availability, as states are obliged to avoid possible irreparable damage at all times.⁹¹

Among the states that had reservations as to the inclusion of interim measures in general were Japan, which, surprisingly, found it difficult to imagine an urgent situation requiring interim measures given the nature of economic, social and cultural rights and questioned the need for such measures.⁹² Others wanted states to be given an opportunity

⁸⁶ Viljoen (n 67 above) 326.

⁸⁷ These states include Angola, Argentina, Belgium, Brazil, Canada, Chile, Ecuador, Finland, France, Liechtenstein, Mexico, Morocco (on behalf of the African Group), Portugal, Russia, Spain, Switzerland, Uruguay and Venezuela (see Report of the Third Session of the OEWG, para 65; Report of the Fourth Session of the OEWG, para 67; and Report of the Fifth Session of the OEWG, para 60). It should be noted that Germany, the Republic of Korea and Switzerland proposed the inclusion of interim measures in the rules of procedures instead.

⁸⁸ In initial drafts, the urgency of interim measures was not emphasised. Consequently, the NGO Coalition, supported by Colombia and Uruguay, amongst others, argued that interim measures should be considered with urgency in order to protect victims of violations (see Chenwi (n 50 above) 24).

⁸⁹ Proposed by Morocco, supported by China, Ethiopia, India and Nepal (see Report of the Third Session of the OEWG, para 137; Report of the Fourth Session of the OEWG, para 72; and Report of the Fifth Session of the OEWG, para 62).

⁹⁰ Explanatory Memorandum paras 18 & 19.

⁹¹ Australia, Belgium, Egypt, France, South Africa, Switzerland, Syria and Venezuela (see Report of the Fourth Session of the OEWG, para 72; and Report of the Fifth Session of the OEWG, para 62).

⁹² Report of the Third Session of the OEWG, para 66.

to comment on the appropriateness of interim measures prior to their application, which, apparently, defeats the whole purpose of interim measures.⁹³

Another issue that came up during the discussions on interim measures was a proposal by Norway and Sweden to specify in the text the voluntary nature of requests for interim measures. Such specification would limit the purpose of interim measures. The proposal was not incorporated, with some states noting that its inclusion was not necessary since the ESCR Committee's views and requests were non-binding and voluntary in nature.⁹⁴

The practical challenge would be to get states to comply with a request to take interim measures. Based on a comprehensive study of interim measures ordered in human rights cases before international enforcement bodies, Pasqualucci concludes that, though states have generally accepted the decisions of international courts that interim measures are binding, many states have not yet accepted the view that interim measures specified by international quasi-judicial bodies are also binding on them.⁹⁵ This is a critical challenge if one looks at, for instance, the African human rights system, where 'states almost uniformly disregarded' such requests made by the African Commission, though not in the context of economic, social and cultural rights.⁹⁶

3.5 Friendly settlement

Friendly settlement is a general principle of international law. It is included explicitly in article 41(1)(e) of CCPR, article 21(1)(c) of the Convention against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) and article 76(d) of the International Convention on the Rights of Migrant Workers and Members of Their Families, 1990 (CRMW). It is also recognised in the Inter-American, European and African human rights systems.

Accordingly, article 7 makes provision for friendly settlement of disputes and it is applicable to all communications. A friendly settlement agreement closes consideration of a communication,⁹⁷ despite warnings by Brazil, Switzerland and the NGO Coalition that no communication should be closed before a friendly settlement has been fully implemented.⁹⁸

⁹³ Brazil, Canada, Mexico, Poland and the United Kingdom (see Report of the Third Session of the OEWG, para 66; and Report of the Fourth Session of the OEWG, paras 74 and 182).

⁹⁴ Report of the Fifth Session of the OEWG, para 66.

⁹⁵ See, generally, J Pasqualucci 'Interim measures in international human rights: Evolution and harmonisation' (2005) 38 *Vanderbilt Journal of Transnational Law* 1.

⁹⁶ See Viljoen (n 67 above) 326-329.

⁹⁷ Art 7(2) OP-ICESCR.

⁹⁸ Report of the Fourth Session of the OEWG, para 86.

A number of states and the NGO Coalition supported its inclusion,⁹⁹ while others wanted the friendly settlement procedure to apply only to inter-state communications.¹⁰⁰ The success of a friendly settlement mechanism depends on its ability to guarantee the rights of both the individual and society as a whole, and must, therefore, not prejudice the subsequent consideration of a communication should the efforts for a friendly settlement fail. Hence, those that supported its inclusion proposed that it should be subject to one or more of the following safeguards: fairness; good faith; respect for human rights; optional character; close monitoring of the implementation of the settlement; possibility to return to the adversarial procedure in the case the friendly settlement fails or is unduly delayed; possibility of the ESCR Committee to end the settlement at any time and continue with the consideration of the communication, and the terms of the settlement should be subject to review and approval by the ESCR Committee.¹⁰¹ However, there were oppositions to the Committee reviewing friendly settlements, arguing that it would undermine the nature of such a settlement.¹⁰²

Notwithstanding, the ESCR Committee might consider the review of such settlements in its Rules of Procedure. For a friendly settlement procedure to be effective, the possibility of the ESCR Committee considering the communication should be left open until the settlement agreement itself has been implemented fully.

3.6 Examination of communications and the standard of review

The relevant documentation that the ESCR Committee may consult when examining a communication are those emanating from other UN bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including regional human rights systems, and any observations or comments by the state party concerned.¹⁰³ In addition, the standard of review in socio-economic rights cases is that of reasonableness.¹⁰⁴

The key issues that arose during the discussions of the OEWG were whether oral hearings should be allowed; whether regional mecha-

⁹⁹ These states include Argentina, Australia, Azerbaijan, Brazil, Canada, Colombia, Denmark, Ecuador, Ethiopia, Finland, France, Iran, Mexico, Morocco, the Netherlands, Russia, South Africa, Spain, Switzerland, the United Kingdom and Venezuela (see Report of the Third Session of the OEWG, para 64; Report of the Fourth Session of the OEWG, paras 80 & 183).

¹⁰⁰ These states are China, India, Sweden and the United States (see Report of the Fourth Session of the OEWG, para 81; and report of the Fifth Session of the OEWG, para 72).

¹⁰¹ Report of the Third Session of the OEWG, paras 64 & 185.

¹⁰² Australia, China, the United Kingdom, the United States and Venezuela, amongst others (see Report of the Fourth Session of the OEWG, paras 87 & 185).

¹⁰³ Art 8(3).

¹⁰⁴ Art 8(4).

nisms should be consulted; and the standard the ESCR Committee would apply in its assessment.

The possibility of oral hearings was not discussed at length. At the third session of the OEWG, Finland and Mexico stressed the usefulness of oral hearings as provided for in the Rules of Procedure of the Committee against Torture and the Committee on the Elimination of Racial Discrimination, but did not specifically suggest whether or not it should be included in the Optional Protocol.¹⁰⁵ At the fourth session, Finland and Slovenia supported the possibility of oral hearings with basic rules included in the Protocol, while Ethiopia suggested that such hearings were better dealt with in the Rules of Procedure.¹⁰⁶ The use of oral hearings has been encouraged as a way of enhancing the complaints procedure under OP1-ICCPR.¹⁰⁷ Some regional human rights mechanisms allow oral hearings. The African Commission, for example, allows oral representation.¹⁰⁸

The Optional Protocol does not make explicit reference to oral hearings or oral documentation when considering individual communications. However, unlike the OP1-ICCPR,¹⁰⁹ the Optional Protocol does not explicitly limit the information submitted to the ESCR Committee to written information either. It merely refers to 'all documentation'.¹¹⁰ It is therefore left to the Committee to decide whether or not to allow oral hearings. It is important to note that the inter-state procedure under the Optional Protocol makes explicit reference to oral and written submissions.¹¹¹

It should be noted further that the Optional Protocol does not allow for public hearings. Similar to OP1-ICCPR, the ESCR Committee is required to hold closed meetings when examining communications.¹¹²

The question of whether regional mechanisms should be consulted was based on the need for the Optional Protocol to take due account of, and benefit from, the experiences of existing regional human rights mechanisms, and the importance of ensuring co-operation and avoid

¹⁰⁵ Report of the Third Session of the OEWG, para 60.

¹⁰⁶ Report of the Fourth Session of the OEWG, para 107.

¹⁰⁷ See Steiner *et al* (n 7 above) 895.

¹⁰⁸ The legal basis for oral presentations is found in art 46 of the African Charter, which allows the African Commission to resort to any appropriate method of investigation and hear from any other person capable of enlightening it. See R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412 427.

¹⁰⁹ Art 5(1) of OP1-ICCPR states: 'The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the state party concerned.'

¹¹⁰ Art 8(1) OP-ICESCR.

¹¹¹ Art 10(1)(g) OP-ICESCR.

¹¹² Art 8(2) of OP-ICESCR as well as art 5(3) of OP1-ICCPR read: 'The Committee shall hold closed meetings when examining communications under the present Protocol.'

duplication between regional and UN human rights mechanisms. During the discussions of the OEWG, a number of states supported the possibility of seeking additional information on a case from international and regional mechanisms, including from UN specialised agencies.¹¹³ Under the Optional Protocol, the ESCR Committee¹¹⁴

may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including from regional human rights systems, and any observations or comments by the state party concerned.

Hence, international NGOs with expertise in the area under consideration may be consulted as well.

It is worth noting that the International Labour Organisation (ILO) wanted a specific provision to be included requiring the ESCR Committee, when considering communications dealing with matters falling within the ILO's competence, to invite it to participate in the examination of the communication. However, this proposal did not receive much support, since article 8(3) already makes provision for information from specialised agencies. The ILO subsequently withdrew its proposal on the understanding that it would be accommodated in the practice of the Committee.¹¹⁵

Furthermore, the OEWG discussed at length what standard the ESCR Committee would use in measuring compliance by states with their obligations under CDESCR. The different criteria for the assessment of violations of rights that were considered during the discussions include 'reasonableness', 'unreasonableness' and a wide 'margin of appreciation' for states in their policy choices.

A number of states supported the application of the standard of reasonableness.¹¹⁶ This standard is consistent with both international and domestic standards of review in the field of economic, social and cultural rights. In fact, many international human rights treaties contain several references to the concept of reasonableness, UN treaty bodies have also used the concept in different contexts and with regard to various rights, and the concept has been largely used either as a

¹¹³ Argentina, Belgium, Brazil, Chile, Finland, Germany, Italy, Nigeria, Poland, Slovenia, Spain and Switzerland. Ethiopia proposed adding a reference to UN-specialised agencies (see Report of the Third Session of the OEWG, para 61; Report of the Fourth Session of the OEWG, paras 90 & 91).

¹¹⁴ Art 8(3) OP-ICESCR.

¹¹⁵ Report of the Fifth Session of the OEWG, para 175.

¹¹⁶ Belgium, Chile, Finland, Germany, Mexico, the Netherlands, Portugal, Slovenia and Spain (see Report of the Fourth Session of the OEWG, para 94). The NGO Coalition also supported the use of the standard of reasonableness but suggested, for purpose of clarification, the addition of 'effectiveness' (see Joint Submission of the NGO Coalition to the 2008 Open-Ended Working Group to consider options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, February 2008).

criterion relating to the time frame for carrying out an action or as a criterion for legitimate restrictions on rights.¹¹⁷ In addition, the South African Constitutional Court also applies this standard in assessing the state's compliance with its obligation to take steps towards realising a right, as the state could adopt a wide range of measures to meet its obligations, but the question that remains to be answered is whether the measures are reasonable.¹¹⁸

Other states expressed concern over the term 'reasonableness'.¹¹⁹ The United States was against the use of the term, and proposed its replacement with the concept of 'unreasonableness' and the addition of a reference to 'the broad margin of appreciation of the state party to determine the optimum use of its resources'.¹²⁰ The test of 'unreasonableness' is to the effect that an administrative decision would be considered unreasonable if the court considers it to be a decision that no reasonable body could have come to.¹²¹ Reference is also made to the concept of unreasonableness in South African administrative law. Article 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 gives a court or tribunal the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, 'is so unreasonable that no reasonable person could have so exercised the power or performed the function'. Some states at the discussions of the OEWG expressed support or interest in the 'unreasonableness' standard.¹²² However, others, including the NGO Coalition, objected to the standard, holding the view that it is rather restrictive and comes close to amending CESC, especially as the 'reasonableness' standard is implicit in the provisions

¹¹⁷ For the various instances in which the concept has been used, see generally 'The use of the "reasonableness" test in assessing compliance with international human rights obligations' UN Doc A/HRC/8/WG 4/CPR.1, 1 February 2008.

¹¹⁸ The South African Constitutional Court's jurisprudence is to the effect that, in order for measures to be reasonable, they must aim at the effective and expeditious progressive realisation of the right in question, within the state's available resources for implementation. The measures must be comprehensive, coherent, inclusive, balance, flexible, transparent, be properly conceived and properly implemented, and make short, medium and long-term provision for those in desperate need or in crisis situations. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation. See L Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8 *Human Rights Law Review* 105 119.

¹¹⁹ Azerbaijan, Denmark, Nigeria, Norway and Russia (see Report of the Fourth Session of the OEWG, para 94).

¹²⁰ Report of the Fourth Session of the OEWG, paras 95 & 95.

¹²¹ See *Associated Provincial Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 223 230.

¹²² China, India, Japan, Norway, Poland and, surprisingly, the United Kingdom, which had earlier shown support for the 'reasonableness' standard (see Report of the Fourth Session of the OEWG, paras 94 & 95).

of CESCR as seen in the use of the phrase ‘appropriate means’ in article 2(1).¹²³

The ‘broad margin of appreciation’ proposal was supported by some states.¹²⁴ However, the NGO Coalition as well as other states expressed concern about referring to the ‘broad margin of appreciation’, arguing that, while it is implicit in CESCR, it is a flexible notion the application whereof varies depending on the specific context and the right in question; it would undermine the core objective of the Protocol; increase the burden of proof on victims; and it could undermine the sovereignty of states.¹²⁵

As noted above, the standard of review in the Optional Protocol is that of ‘reasonableness’ and there is no explicit reference to the ‘margin of appreciation’ of states. The particular provision reads:¹²⁶

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the state party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the state party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

It is hoped that, when applying this standard, the ESCR Committee would draw inspiration from the existing jurisprudence at the international and national levels that have applied this standard.

3.7 Inter-state communications

Inter-state communications procedures allow a state to bring a complaint against another, so as to ensure that the other state abides by its treaty obligations. Such procedures have been included in other UN human rights treaties.¹²⁷

Article 10 of the Optional Protocol makes provision for the ESCR Committee to receive and consider communications from a state party alleging that another state party is not fulfilling its obligations under CESCR. The procedure is optional — ‘opt-in’ — as state parties have to declare that they recognise the competence of the ESCR Committee in this regard before the provision can be applicable to them. This is

¹²³ Belgium, Ethiopia, Mexico, Portugal, Slovenia (see Report of the Fourth Session of the OEWG, para 95).

¹²⁴ Austria, Canada, Denmark, Greece, Italy, Ireland, Japan, Netherlands, New Zealand, Norway, Poland, the Sweden, Turkey, the United Kingdom and Venezuela (see Report of the Fourth Session of the OEWG, para 96; Report of the Fifth Session of the OEWG, paras 91, 145 & 230).

¹²⁵ The states that were not in support of the reference to margin of appreciation include Argentina, Bangladesh, Belgium, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation and Sri Lanka (see Report of the Fourth Session of the OEWG, para 100; Report of the Fifth Session of the OEWG, paras 91 & 171).

¹²⁶ Art 8(4) OP-ICESCR.

¹²⁷ Eg, art 41 of CCPR, art 21 of CAT, art 76 of CRMW and art 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD).

similar to most treaties. Acceptance of an inter-state complaints procedure is optional in CCPR, CAT and CRMW. However, it is mandatory in CERD, as well as, at the regional level, under, for instance, the African Charter on Human and Peoples' Rights (African Charter).

Inter-state communications received much attention during the discussions of the OEWG, particularly in relation to whether or not it should be included and whether it should be mandatory or optional. This was partly because similar procedures under other human rights mechanisms have hardly been used. In fact, no inter-state communication has been submitted under any of the UN human rights treaties. However, at the regional level, as at 2007, 13 have been decided under the European human rights system and one under the African human rights system.¹²⁸

Though states were sceptical or had reservations¹²⁹ about the procedure during the discussions of the OEWG, a number of states supported its inclusion in the Optional Protocol, especially as an optional procedure.¹³⁰ Under the Optional Protocol to CESC, states may withdraw from this procedure at any time by notification to the Secretary-General in terms of the declaration made under article 10. Once the notification of withdrawal has been received, the ESCR Committee can no longer receive communications against the state party concerned.¹³¹

3.8 Inquiry procedure

Inquiry procedures are generally important as they allow the supervisory bodies to respond, in a timely fashion, to grave or systematic violations that are in progress. Articles 11 and 12 make provision for an inquiry procedure. Similar to the interstate procedure, the inquiry procedure is an 'opt-in' one. The ESCR Committee is able to respond to 'grave or systematic violations' based on 'reliable information' it receives. The inquiry procedure is different from communications procedures in that, in the inquiry procedure, the ESCR Committee does not have to receive a formal complaint; it is up to it to decide to initiate the procedure and there is no victim requirement.

A similar procedure exists under CAT and the OP-CEDAW and both are 'opt-out', as states may enter a reservation that they do not recognise the competence of the respective committee in this regard.¹³²

¹²⁸ Viljoen (n 67 above) 35.

¹²⁹ Russia had reservations; and China, Ecuador, Ethiopia, Japan, Norway, New Zealand, Senegal, Syria, Russia and the United Kingdom were not in support of its inclusion (see Report of the Fourth Session of the OEWG, para 109; Report of the Fifth Session of the OEWG, paras 95 & 177).

¹³⁰ Argentina, Egypt, France, Ghana, Poland, Mexico, the Netherlands, South Africa, Spain and Venezuela as well as the NGO Coalition (see Report of the Fourth Session of the OEWG, para 109; Report of the Fifth Session of the OEWG, para 94).

¹³¹ Art 10(2) OP-ICESCR.

¹³² See art 20 of OP-CAT and arts 8, 9 & 10 of OP-CEDAW

During the discussions of the OEWG, its inclusion was justified on the grounds that it would allow a response to be made to serious violations in a timely manner and it could be used by individuals and groups facing difficulties in accessing the communication procedure or in danger of reprisal.¹³³ Accordingly, several states and the NGO Coalition supported its inclusion, with some emphasising that it must be optional.¹³⁴ Others were not in support of or expressed reservations about such a procedure,¹³⁵ while Denmark wanted it to be limited to cases of non-discrimination or other fundamental and well-defined principles.¹³⁶ Some of the concerns were based on the fear of an overlap between this procedure and the work of UN Special Rapporteurs.¹³⁷

The inquiry procedure is confidential at all stages — all meetings of the ESCR Committee dealing with an inquiry procedure are closed — but the results can be included in the Committee's report following consultation with the state concerned. The ESCR Committee is also required to seek the co-operation of the state concerned at all stages of the proceedings. Moreover, where the ESCR Committee decides to initiate a visit to the state concerned, it cannot do so without the state's consent. The practical challenge would be getting states to fully co-operate with regard to country visits, as consent itself does not necessarily guarantee full co-operation. Hence, respect for state sovereignty is a key element in the procedure.

It should be noted that a state party can, at any time, withdraw the declaration under article 11.¹³⁸ Unlike with the inter-state communication procedure, it is not clear whether the ESCR Committee can continue with an inquiry it commenced before the withdrawal notification, due to the absence of the qualification contained in article 10 of the Optional Protocol.

3.9 Follow-up mechanism

Generally, follow-up mechanisms may take various forms, including calling on the offending state to discuss the measures it has taken to give effect to the recommendations, or inviting the state party to include in its report the details of the measures taken. The advantage of the follow-up procedure is that it opens an avenue for addressing problems encountered when implementing views and recommendations and guarantees that they would be actually implemented. It also allows for guidance and support to be provided to states regarding

¹³³ Report of the Fourth Session of the OEWG, para 111.

¹³⁴ Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa, Sweden (see Report of the Fourth Session of the OEWG, para 111).

¹³⁵ Australia, China, Egypt, India, Nigeria, Poland, Russia and the United States.

¹³⁶ Report of the Fourth Session of the OEWG, para 112.

¹³⁷ Report of the Fourth Session of the OEWG, para 113.

¹³⁸ Art 11(8) OP-ICESCR.

measures taken to comply with the decisions. In addition, it is a means of assessing the impact of the decisions of the ESCR Committee on the lives of those affected or others living in the state concerned.

Article 9 of the Optional Protocol emphasises the obligation of states to implement the views and recommendations of the ESCR Committee and enables the Committee to monitor their implementation. It requires a state party to submit to the Committee, within six months, a written response to its views and recommendations, including information on any action taken in light of the views and recommendations. The Committee may invite the state party to submit further information on any measures taken in response to its views or recommendations in its subsequent state party report under CESC.¹³⁹ This provision ensures that decisions and recommendations are effectively enforced.

The provision on follow-up to the views of the ESCR Committee was not a controversial one. In fact, the Optional Protocol to CESC goes a step further than the OP1-ICCPR, as the latter does not explicitly provide for a follow-up mechanism. Rather, it only requires the Human Rights Committee to transmit its views to the parties.¹⁴⁰ However, rule 95 of the Rules of Procedure of the Human Rights Committee allows it to 'designate a Special Rapporteur for follow-up on views adopted under article 5, paragraph 4, of the Optional Protocol, for the purpose of ascertaining the measures taken by state parties to give effect to the Committee's views'.¹⁴¹ The Optional Protocol to CESC does not make reference to a Special Rapporteur, but it is important that this issue be addressed in the Rules of Procedure as the ESCR Committee might not have the capacity to follow up on views on its own. Furthermore, though the Human Rights Committee had adopted a statement indicating that the state has to reply within a period not exceeding 180 days, in practice, it usually indicates a period of 90 days.¹⁴² It would be interesting to see if, in practice, the ESCR Committee will stick to the six month period or reduce it as the Human Rights Committee usually does. It would also be interesting to see the extent to which states will comply with the follow-up procedure, since it is contained in the treaty itself, as states have not often co-operated with the Human rights Committee in this regard.

In addition, the inquiry procedure, just like the individual communications procedure, includes a follow-up mechanism. This gives the ESCR Committee room to monitor the implementation of its recommendations and the measures taken by a state party in response to the inquiry conducted.

¹³⁹ Art 9(3) OP-ICESCR.

¹⁴⁰ Art 5(4) OP1-ICCPR.

¹⁴¹ Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev 6 of 24 April 2001.

¹⁴² De Wet (n 59 above) 541.

3.10 International assistance and co-operation and the fund

Article 14 of the Optional Protocol requires the ESCR Committee to transmit, when appropriate, to UN specialised agencies, funds and programmes and other competent bodies, its views and recommendations concerning communications and inquiries that indicate a need for technical advice or assistance. This has to be done with the consent of the state party concerned.¹⁴³

The importance of international co-operation and assistance as a tool in ensuring enhanced implementation of economic, social and cultural rights in general, and the views and recommendations of the ESCR Committee in particular, was highlighted during the discussions of OEWG.¹⁴⁴ It is an obligation of states that is underlined in articles 2(1), 11(1) and (2), 15(4), 22 and 23 of CDESCR, and is based on free consent.¹⁴⁵ The view of the ESCR Committee is that in the absence of an active programme of international assistance and co-operation on the part of all those states that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.¹⁴⁶ In fact, one of the roles of the ESCR Committee is¹⁴⁷

to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international development co-operation activities undertaken by, or with the assistance of, the United Nations and its agencies.

At the regional level, looking at the African system, for instance, international co-operation and assistance is an objective of the African Union (AU).¹⁴⁸

Though Venezuela observed that the state reporting procedure was more appropriate to identify needs for technical assistance, a number of states supported its inclusion in the Optional Protocol.¹⁴⁹

¹⁴³ Art 14(1) OP-ICESCR.

¹⁴⁴ See, eg, Explanatory Memorandum, para 35 22.

¹⁴⁵ Art 11(2) CDESCR.

¹⁴⁶ General Comment 3 on the nature of state parties' obligations, 14/12/1990, para 14, UN Doc E/1991/23. In the same General Comment, the ESCR Committee also observed that the phrase 'to the maximum of its available resources' was intended by the drafters of CDESCR to refer to both the resources existing within a state and those available from the international community through international co-operation and assistance (para 13).

¹⁴⁷ General Comment 2 on international technical assistance measures, 02/02/1990, para 3, UN Doc E/1990/23.

¹⁴⁸ See art 3(d) of the Constitutive Act of the AU; art 2(1)(e) of the Charter of the Organisation of African Unity (OAU). In addition, African states have an obligation to promote international (economic) co-operation (see the Preamble to and art 21(3) of the African Charter).

¹⁴⁹ Argentina, Austria, Belgium, Finland, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Slovenia, Sweden, Switzerland and the United Kingdom (see Report of the fourth Session of the OEWG, para 122).

Furthermore, article 14(3) makes provision for the establishment of a fund to provide

expert and technical assistance to state parties, with the consent of the state party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.

States are the direct beneficiaries of the fund, though victims were also beneficiaries in earlier drafts and some states had indicated their support for providing assistance to victims.¹⁵⁰ Moreover, the kind of assistance under the fund is not financial assistance, but ‘expert and technical’ assistance. It is important to note that issues relating to the modalities of the fund have not been addressed in the Optional Protocol, but have been left to the General Assembly.

The establishment of a fund was proposed as a means of encouraging and facilitating international assistance and co-operation. Some human rights treaties make provision for the establishment of a fund. For instance, the Optional Protocol to CAT, 2002 (OP-CAT) establishes a fund to help finance the implementation of the recommendations made by the Sub-Committee on Prevention after a Visit to a State Party, as well as education programmes of the national preventive mechanisms.¹⁵¹ This fund is financed through voluntary contributions made by governments, inter-governmental organisations, NGOs and other private or public entities.¹⁵² Also, the Rome Statute of the International Criminal Court, 1998, establishes a fund for the benefit of victims of crimes within its jurisdiction and their families.¹⁵³ This fund is financed through money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the trust fund. The Rome Statute does not exclude the possibility that it might be financed from other sources, and it sketches the general outlines of the trust fund, leaving the Assembly of State Parties to decide on how to implement it in practice.

While the establishment of a fund received some support,¹⁵⁴ a majority of states objected to it.¹⁵⁵ The objections were based on the risk of

¹⁵⁰ Argentina, Australia, Bangladesh, Belgium, Germany, India, Sweden and Switzerland, for instance, supported the provision of assistance to victims. Russia supported assistance to both victims and states (see Report of the fifth Session of the OEWG, paras 184 & 192).

¹⁵¹ Art 26 OP-CAT.

¹⁵² The fund is not yet formally established by the General Assembly.

¹⁵³ Art 79 Rome Statute.

¹⁵⁴ Algeria, Austria, Argentina, Bangladesh, Belarus, Egypt (on behalf of the African Group), Germany, Slovenia and Ukraine (see Report of the Fourth Session of the OEWG, para 127; and Report of the Fifth Session of the OEWG, paras 107, 114, 115, 117 & 183).

¹⁵⁵ Austria, Australia, Belgium, Canada, Denmark, France, Liechtenstein, Netherlands, New Zealand, Poland, Sweden, Switzerland, United Kingdom and the United States (see Report of the Fourth Session of the OEWG, para 127; and Report of the Fifth Session of the OEWG, paras 107, 114, 115, 117 & 183).

duplicating other funds and the practical difficulties in implementing and managing the fund. It was also argued that there are dangers in linking violations to funding and that the fund would involve high administrative costs and imposes an additional burden on the Office of the High Commissioner for Human Rights (OHCHR).¹⁵⁶ It was pointed out, however, that concerns about duplication had not been an issue when OP-CAT was adopted, the fear of additional burden for the OHCHR should not prevent the creation of the fund, and that developing countries could not fully realise the rights in CESCER without international assistance.¹⁵⁷ One thing that was clear from states, even those who supported the fund, was that the fund should not be mandatory.¹⁵⁸

4 Conclusion

Individual complaints procedures are vital in that they further develop and fine-tune international human rights law, create precedents, draw attention to the specific, concrete human rights violation, making the problem and the victim more visible, and the remedy more specific and implemental.¹⁵⁹ Though some writers have questioned the establishment of this new international adjudicative mechanism,¹⁶⁰ the benefits of having the Optional Protocol to CESCER are numerous: It would encourage state parties to ensure more effective local remedies; promote the development of international jurisprudence which would in turn promote the development of domestic jurisprudence on economic, social and cultural rights; strengthen international accountability; enable the adjudicating body to study concrete cases and thus enable it to create a more concise jurisprudence; help empower vul-

¹⁵⁶ Report of the Fourth Session of the OEWG, paras 129 & 168; Report of the Fifth Session of the OEWG, para 114. The funds administered by the UN Secretary-General and the OHCHR include a Voluntary Fund for Victims of Torture, Voluntary Trust Fund on Contemporary Forms of Slavery, Voluntary Fund for Indigenous Populations, and a Voluntary Fund for Technical Co-operation in the Field of Human Rights. These funds have a specific focus, are voluntary, and most of them either provide assistance to NGOs assisting victims or assist representative organisations or communities to participate in meetings.

¹⁵⁷ Report of the Fourth Session of the OEWG, para 130.

¹⁵⁸ Report of the Fourth Session of the OEWG, para 165.

¹⁵⁹ A de Zayas 'The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' in Alfredsson *et al* (n 10 above) 73.

¹⁶⁰ See, eg, M Dennis & D Stewart 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health' (2004) 98 *American Journal of International Law* 462-515.

nerable and marginal groups; and would combat arguments against the justiciability of economic, social and cultural rights.¹⁶¹

The next step is the effective implementation of the Optional Protocol, which is challenging, considering its 'optional' nature and the continuous existence of objections to the justiciability of economic, social and cultural rights as evidenced in the discussions of the OEWG. There are a number of challenges to the implementation of the Optional Protocol, including: getting states to ratify; accessibility to the mechanism since victims would need to have the financial means to travel to Geneva, Switzerland, where the ESCR Committee is based, should they have to testify during hearings; and ensuring effective implementation of the request for interim measures, and the views and recommendations of the Committee, which are non-binding and left to the political will of states.¹⁶² The effective implementation of the views and recommendations of the ESCR Committee is another challenge, as is the case with the implementation of the recommendations of other human rights bodies.

Notwithstanding these challenges, the Optional Protocol has been seen as an important mechanism to expose visible economic, social and cultural rights abuses that are usually linked to poverty, discrimination and neglect.¹⁶³ Most importantly, it has brought CESC into line with other human rights treaties by placing economic, social and cultural rights on an equal footing with civil and political rights, thereby correcting the historical asymmetry between these categories of rights and emphasising their indivisibility and interrelatedness.

¹⁶¹ Report of the First Session of the OEWG, paras 23 & 67-70. See also P Alston 'Establishing a right to petition under the Covenant on Economic, Social and Cultural Rights' in *Collected Courses of the Academy of European Law* (1995) 107, quoted in H Steiner *et al International human rights In context: Law, politics, morals* (2007) 363-364.

¹⁶² For additional reading on the challenges to the implementation of the OP-ICESCR, see C Golay 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' CETIM Critical Report No 2, November 2008 <http://www.cetim.ch/en/documents/CETIM-Report-2.pdf> (accessed 20 January 2009).

¹⁶³ UN High Commissioner for Human Rights, Louise Arbour, when congratulating HRC on its adoption of OP-ICESCR (Press release, 2008).