# First reading of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

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In an earlier article in the *ESR Review* (Chenwi & Mbazira, 2006) we indicated that governments were about to decide on whether to proceed with the drafting of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which will provide for a complaints procedure. We also set out the historical background and the debate about the need for the optional protocol.

The debate on this issue has now shifted from whether economic, social and cultural (ESC) rights should be subject to a complaints procedure to what the specific nature and modalities of such a procedure should be. During its 21st meeting, the UN Human Rights Council (HRC) decided to extend the mandate of the Open-Ended Working Group on an optional protocol to the ICESCR (OEWG) for a period of two years in order to elaborate on an optional protocol (Resolution 1/3 of 29 June 2006, para 1). It requested the chairperson of the OEWG, Catarina de Albuquerque, to prepare a draft optional protocol to be used as a basis for future negotiations. It also requested the OEWG to meet for ten working days each year. It also directed that a representative of the Committee on Economic, Social and Cultural Rights (the Committee) should attend these meetings as a resource person.

Accordingly, a draft optional protocol was prepared by the chairperson (UN doc A/HRC/7/WG.4/2 of 23 April 2007) and considered at the fourth session of the OEWG held in Geneva from 16 to 27 July 2007. It was at this session that the first reading of the draft occurred and comments on it were received from states parties, non-governmental organisations (NGOs) and individual experts. This paper highlights some of the positions of the delegates on certain provisions of the draft optional protocol.

## General remarks

In an opening address, the UN High Commissioner for Human Rights, Louise Arbour, noted that the adoption of an optional protocol would be an important step towards a greater recognition of the indivisibility and interrelatedness of all human rights. She emphasised the importance of strengthening the protection of ESC rights through the optional protocol.

The draft optional protocol was welcomed by most of the delegates, including African countries such as Egypt (on behalf of the African Group) and South Africa. Other states in support of the protocol included Azerbaijan and Chile.

However, the United States of America (USA) persisted with its argument that ESC rights are not as justiciable as civil and political rights, as the former cannot be adjudicated without interfering in the internal decisions of states. It added that, because ESC rights have to be realised progressively within available resources, these rights are not suitable for (quasi-)judicial adjudication. It maintained that the optional protocol would undermine the right of states to determine their own policy priorities.

## Specific provisions

### Scope (art 2)

At the meeting, one of the most controversial issues related to the rights under the ICESCR that should be subjected to the complaints procedure. Various approaches were proposed: a *comprehensive approach*, allowing for communications in respect of all rights in the ICESCR; a *limited approach*, limiting the procedure to Parts II and III of the ICESCR; and an *à la carte approach* (with *opt-out or reservation* provisions), allowing states to choose the rights or levels of obligations that they would like to be bound by.

A large number of states supported a comprehensive approach (Belgium, Bolivia, Brazil, Burkina Faso, Chile, Ecuador, Egypt, Ethiopia, Finland, France, Guatemala, Italy, Liechtenstein, Mexico, Nigeria, Norway, Peru, Portugal, Senegal, Slovenia, South Africa, Spain, Sweden, Uruguay and Venezuela).

France initially preferred an opt-out approach but was later persuaded to support the comprehensive approach. The NGO Coalition for an Optional Protocol to the ICESCR (the NGO Coalition) continued with its strong support for the comprehensive approach and argued that other approaches would undermine the indivisibility, interdependence and interrelatedness of all rights under the ICESCR.

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Though generally in favour of a comprehensive approach, Egypt added that it would be able to accept the exclusion of Part I of the ICESCR from the optional protocol. In other words, Egypt is also open to the limited application of the complaints procedure. Australia, Greece, India, Morocco, Russia and the USA were also in favour of excluding Part I of the ICESCR from the optional protocol.

States that favoured an à la carte approach were Australia, China, Denmark, Germany, Japan, the Netherlands, New Zealand, Poland, the Republic of Korea, Russia, Switzerland, Turkey, the United Kingdom (UK) and the USA. They argued that this approach would elicit wide acceptance of the protocol.

The UK preferred an opt-out approach, arguing that it would allow states to sign on to more rights at a later stage while not preventing other states from subscribing to all rights under the ICESCR. Poland, also preferring an opt-out approach, proposed that a minimum number of articles should be established that all state parties would have to accept. The arguments for an opt-out clause related to the non-justiciability of ESC rights, the competence of the Committee and the difference in the situations of states. In other words, states where ESC rights have not yet been made justiciable would be able to freely determine which provisions and obligations arising from the ICESCR they were ready to assume.

However, those states that favoured a comprehensive approach had some objections to an opt-out or à la carte approach. These included the fact that it would establish a hierarchy among human rights, undermine the interrelatedness of all rights in the ICESCR and the interests of victims, foster inequality among review procedures within the human rights monitoring mechanisms and undermine the purpose of the optional protocol to strengthen the implementation of ESC rights (UN doc A/HRC/6/8 at para 33).

### Standing (arts 2 & 3)

Article 2 of the draft optional protocol gives standing to individuals or group of individuals claiming to be victims of a violation. It also allows representative actions by NGOs or other actors who may submit a communication on behalf of victims, with their consent.

Article 3 deals with collective complaints, an issue that has not received much attention in the discussions of the OEWG. It grants standing to "international" NGOs with consultative status before the UN Economic and Social Council to submit communications alleging unsatisfactory implementation by any state of any right in the ICESCR (art 3(1)). National NGOs with particular competence in the matters covered by the ICESCR have standing only if, upon ratification or accession, the state party declares that it recognises the right of such NGOs to submit collective communications against it (art 3(2)).

It should be noted that there is some discrepancy between the English and Spanish versions of article 3(1). The English version uses the term "international", but the Spanish version does not, hence granting standing to all organisations with consultative status. The NGO Coalition found the English version to be particularly problematic, as it excludes domestic NGOs with consultative status. These NGOs may be better placed to lodge such communications because of their proximity to victims of violations within the states in which they operate.

The issue of having consultative status as a criterion for standing was the subject of concern by delegates from Belgium, Brazil, Ecuador, Ethiopia, Mexico and the NGO Coalition.

Since NGOs do have standing under article 2 when acting in a representative capacity for victims, there was substantial consensus that article 3 should be deleted. The states that called for its deletion were Algeria, Australia, Belarus, Burkina Faso, China, Colombia, Ecuador, Egypt, Greece, India, Japan, Morocco, Nigeria, Norway, the Republic of Korea, Russia, Senegal, Tanzania, the UK, Ukraine, the USA and Venezuela.

Another issue raised in relation to standing was that of consent. Some

states were of the view that individuals must be allowed to give prior "express" consent before communications can be brought on behalf of individuals or groups of individuals (Belarus, Burkina Faso, China, Egypt, Ethiopia, Morocco and Russia). However, Ecuador, Peru and the NGO Coalition opposed this submission, arguing that it might be difficult to obtain express consent in certain cases. As an alternative to requiring express consent, Brazil, Chile, Portugal and Uruguay proposed an exception to the consent requirement where the author of the communication can justify acting on behalf of the victim(s) without such consent. This view was also supported by the NGO Coalition.

### Admissibility – exhaustion of domestic remedies (art 4(1))

In previous sessions of the OEWG, the need for clear admissibility criteria similar to those of other human rights instruments was highlighted. The draft incorporates such admissibility requirements.

Article 4(1) requires that all available domestic remedies should be exhausted except "where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief". Some states found the draft text acceptable (Argentina, Belgium, Mexico, Slovenia and Switzerland). Ecuador proposed that the exhaustion of domestic remedies requirement should not be applicable when no such remedies have been established in national legislation.

In previous sessions of the OEWG, some states proposed the inclusion of the requirement that regional remedies must be exhausted first before a complaint can be lodged with the Committee. This proposition was restated during the fourth session by the UK. This proposal, though supported by some, did not receive universal support. States that opposed this submission argued that it would prevent victims from accessing the system (Portugal, Argentina, Azerbaijan, Belgium, Norway, Peru and the NGO Coalition).

### Interim measures (art 5)

All communication procedures make provision for interim measures. The draft optional protocol accordingly includes a provision on interim measures so as "to avoid possible irreparable damage to the victim of the alleged violation". The risk of such damage has to be sufficiently substantiated.

Some states welcomed this provision (Argentina, Belgium, Brazil, Chile, Ecuador, Egypt, France, Finland, Liechtenstein, Mexico, Peru, Poland, Portugal, South Africa, Spain, Uruguay and Venezuela). Others proposed that it should be included in the rules of procedure (Germany, the Republic of Korea and Switzerland).

Some states suggested that interim measures should only be granted after a communication has been declared admissible (Ecuador, Italy, India, New Zealand and Russia). However, other delegates opposed this view on the ground that it could prevent victims from obtaining timely, immediate relief (the NGO Coalition, Argentina, Belgium, Chile, Peru and Portugal).

The NGO Coalition pointed out that, in its current form, the optional protocol does not emphasise the urgency of interim relief. It argued that interim measures should be considered with urgency in order to protect victims of violations, such as a mass forced eviction, for example, who should not have to await lengthy deliberative processes before remedial action can be taken. This view was also supported by Colombia and Uruguay.

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### Friendly settlement (art 7)

A number of states were in support of the inclusion of provisions encouraging friendly settlement of disputes (Argentina, Brazil, Colombia, Denmark, Ethiopia, Finland, France Mexico, South Africa, Spain, Switzerland and Venezuela).

Some suggested that friendly settlement should not be mandatorily required in every case (Argentina and Mexico) or that it should only apply in relation to interstate communications in line with other human rights instruments (China, India, Sweden and the USA).

Further, Australia, Ethiopia, France and the USA were in support of the position in the draft that a friendly settlement should automatically close consideration of a communication, meaning that the Committee would not proceed to consider the communication. However, Brazil and Switzerland warned that no communication should be closed before a friendly settlement had been fully implemented. This is a point that the NGO Coalition also emphasised. The coalition was of the view that the friendly settlement procedure must not prejudice consideration of the communication in the event that the agreement reached in a friendly

settlement fails. This is so because the success of a friendly settlement mechanism depends on its ability to protect the rights of victims whilst retaining the goodwill of the states parties towards the international system. The competence of the Committee to review friendly settlements was supported by Denmark, Finland and Spain, and opposed by Australia, China, the USA and Venezuela.

Mexico added that the Committee would need to follow up on the implementation of a friendly settlement.

### Reasonableness standard (art 8(4))

Article 8(4) of the draft optional protocol makes reference to reasonableness as the standard that the Committee would use for measuring compliance by states with their obligations under the ICESCR. This provision was welcomed by some states at the fourth session of the OEWG (Belgium, Chile, Finland, Germany, Mexico, the Netherlands, Portugal, Norway and Russia). The UK stated that "reasonableness" actually reflects how states should implement ESC rights and is an appropriate standard of review.

The USA suggested a replacement of the term "reasonableness" with "unreasonableness" and the addition of a provision that expressly acknowledges that states have "the broad margin of appreciation" to determine how to use their resources optimally.

The "unreasonableness" proposal was supported by China, India, Japan, Norway, Poland and, surprisingly, the UK, which had found the "reasonableness" concept to be acceptable.

On the other hand, the NGO Coalition and some states found it rather restrictive (Egypt, Ethiopia, Portugal and Slovenia) and felt that it comes close to amending the ICESCR (Belgium, Ethiopia, Mexico, Portugal and Slovenia). This is because, the coalition argued, reasonableness is implicit in the provisions of the covenant as seen in the use of the phrase "appropriate means" in article 2(1).

The phrase "broad margin of appreciation" received support from Egypt, Norway, Poland and Sweden. However, some states pointed out that this notion is already implicitly recognised in the ICESCR. They argued that it is a flexible notion whose application varies depending on the specific context and the right in question (Mexico and the NGO Coalition). Russia, in an attempt to reach a compromise, proposed that the notion of "margin of appreciation" be included in the preamble instead.

### Interstate communications (art 9)

Some states were opposed to including interstate communications procedure partly because states have rarely brought communications against each other. The same concern was raised at the fourth session. Other states wanted further clarity and information on this procedure from the Committee and other human rights treaty bodies.

Notwithstanding this scepticism, the NGO Coalition and some states supported retaining this procedure (Egypt, France, Mexico, the Netherlands, Portugal, South Africa and Spain). Egypt and Portugal proposed that the procedure should be made optional.

On the other hand, China submitted that this procedure would undermine the principle of autonomy and sovereignty of states. It therefore, together with Ecuador, Ethiopia, Japan, Norway and the UK, called for its exclusion.

### Inquiry procedure (arts 10, 11 & 20)

The inquiry procedure is generally important as it allows supervisory bodies to respond in a timely fashion to grave or systematic violations. Articles 10 and 11 of the draft optional protocol make provision for such a procedure. Article 20 gives state parties the option to opt out of articles 10 and 11 at the time of signature or ratification.

The NGO Coalition and several states supported the inquiry procedure (Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa and Sweden). The NGO Coalition noted that the procedure offers a means of addressing grave or systematic violations of human rights which may not be successfully resolved by individual complaints. It also may resolve issues that affect large numbers of people who, for various reasons, may not have access to the communications mechanism.

Other states were sceptical of the procedure and called for its exclusion (Australia, China, Egypt, India, Italy, R'ussia and the USA). They argued, amongst other things, that the procedure is not practicable, interferes with the sovereignty of states, and might overburden the optional protocol.

### Protection of individuals (art 12)

Article 12 requires a state party to "take all appropriate steps to ensure that individuals subject to its jurisdiction are not subjected to ill-treatment or intimidation as a consequence of

communicating with the Committee". This provision is identical to article 11 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. It was a surprise inclusion as it had not been discussed in previous sessions of the OEWG.

This provision was supported by Chile, Egypt, France, Mexico, Portugal, South Africa, Switzerland and Amnesty International. In fact, many delegates argued for the inclusion of a provision that would obligate states to protect individuals from "any form of reprisal" or "victimization of any form" (UN doc A/HRC/6/8 at para 119).

### International cooperation and assistance (art 13) and the fund (art 14)

Article 13 of the draft optional protocol requires the Committee, if it considers it appropriate, to convey to UN specialised agencies, funds, programmes and other competent bodies its view on communications or inquiries which require technical advice or assistance.

Article 14 proposes the establishment of a fund to support the implementation of recommendations of the Committee and to benefit victims of violations of the rights in the ICESCR. The fund would be financed through voluntary contributions made by governments, intergovernmental organisations, NGOs and other private or public entities (art 14(2)).

There was some support for article 13 (Argentina, Austria, Australia, Belgium, Finland, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Slovenia, Sweden, Switzerland and the UK). Although Argentina, Belarus, Germany, Slovenia and Ukraine supported the establishment of the fund, most developed states opposed the idea because it was not clear who its beneficiaries would be and what it would be used for. It was also argued that the idea was impractical and would duplicate existing efforts (Austria, Australia, Belgium, Denmark, France, Liechtenstein, New Zealand, Poland, Sweden, Switzerland, the Netherlands, New Zealand, the UK and the USA).

The African Group, together with China, Belarus, India, Nepal and Peru, wanted articles 13 and 14 to be merged and proposed the deletion of the words "special" and "voluntary" in those provisions. China and Egypt added that deleting the word "voluntary" did not mean that contributions to the fund would become mandatory. States that supported the proposal that the fund, if created, should be based on voluntary contributions included Argentina, Guatemala, Italy, Mexico, Slovenia and Ukraine.

The need to develop criteria for deciding which states could receive resources from the fund was highlighted by the Netherlands and Ukraine.

### Reservations (art 21)

Article 21 of the draft optional protocol prohibits reservations.

Greece, Poland and Turkey were of the view that the protocol should be silent on reservations and leave the issue to be determined in accordance with the applicable principles of international law. Argentina, Belgium, Chile, Finland, Germany, Mexico, Portugal, South Africa, Venezuela and the NGO Coalition were against the possibility of reservations, arguing that reservations were incompatible with the complaints mechanism and have been excluded from recent human rights instruments.

Australia, Germany, Italy and the UK cautioned against the use of reservations to limit the scope of the optional protocol. Likewise, Egypt and China stated that reservations would not be used to limit the scope of the rights enforceable through the complaints procedure but only to clarify how a state would go about implementing its obligations under the protocol. Denmark added that more states would ratify the protocol if reservations were allowed.

## Conclusion

The optional protocol is a valuable initiative as it will bolster the protection of and enhance the understanding of ESC rights. Once adopted, it will put an end to the unequal protection of human rights in international law. The protocol should therefore follow a comprehensive approach just like any other existing UN complaints mechanism, by widening its application to all the rights and duties enshrined in the ICESCR.

The debate held during the fourth session suggests that the à la carte or opt-out approaches could fall away with time. NGOs, policy-makers and other stakeholders have an important role to play to ensure that a comprehensive and effective protocol is adopted.

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## References

Chenwi, L and Mbazira, C 2006. The draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. *ESR Review*, 7(1): 9-12.

Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, 2007. UN doc A/HRC/7/WG.4.2, 23 April.

Report of the Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session (Geneva 16-27 July 2007), 2007. UN doc A/HRC/6/8, 30 August.

Documents of the Open-Ended Working Group are available at http://www.ohchr.org/english/issues/escr/intro.htm [accessed 14 November 2007].

Documents of the Human Rights Council are available at http://www.ohchr.org/english/bodies/hrcouncil/ [accessed 14 November 2007].