

The optional protocol to the International Covenant on Economic, Social and Cultural Rights

After the fourth session of the Open-Ended Working Group (OEWG) on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), a revised draft of the protocol was produced (UN doc A/HRC/8/WG.4/2 of 24 December 2007).

During the first part of the fifth session of the OEWG, held in Geneva from 4 to 8 February 2008, delegates of governments, institutions and non-governmental organisations (NGOs) discussed the revised draft. A few key points should be noted.

- There was increasing support for a comprehensive approach. However, a few states continued to support the à la carte approach.
- The proposal by the NGO Coalition for an Optional Protocol to the ICESCR that a provision be included granting NGOs *amicus* standing was supported by many states.
- The provision allowing for communications to be received from NGOs in appropriate circumstances [article 2(1 ter) of the revised draft optional protocol] did not receive much support. The difference between article 2(1 ter) and article 2(1), which also allows NGOs to bring communications on behalf of individuals or groups of individuals, is that there is no victim requirement under the former.
- Proposals made at the fourth session to specify a list of local remedies – judicial, administrative and others – to be exhausted, instead of simply referring to “domestic” remedies, did not receive much support.
- A substantial number of states were in favour of including a provision for interim measures. Few, however, supported the view that this provision should be included in the rules of procedure instead.

- There was general support for retaining the provision on friendly settlement in a less detailed format. However, some states wanted it to be in the rules of procedure or applicable only in relation to interstate disputes.
- There were concerns regarding the specification of “unreasonableness” or the “broad margin of appreciation” of states as the applicable standard of review of state compliance with the provisions of the ICESCR.
- A provision on interstate communications was considered acceptable since it is optional.
- There was less enthusiasm about an inquiry procedure, but some states were open to it as long as it remained optional and retained a high threshold in its application.
- A provision on international cooperation and assistance was generally accepted.
- The provision for the establishment of a fund remained controversial: some states welcomed it while others wanted an explicit reference to its voluntary nature, and yet others preferred not to have it in the optional protocol at all.
- There were various opinions on whether the optional protocol should explicitly prohibit or allow for reservations, or be silent on them.

A new revised draft of the optional protocol has since been prepared (UN doc A/HRC/8/WG.4/3 of 28 February 2008). It is worth noting that, in this new draft, the provision

The optional protocol to the ICESCR process has been discussed in previous issues of the *ESR Review*: 7(1) and 8(4).

on granting *amicus* standing to NGOs has been omitted despite the support it received, and there is a reference to the states’ margin of discretion as part of the standard of review, despite the concerns raised about making such an explicit reference.

The fifth session of the OEWG is crucial as it is a decision-making phase. It is hoped, as expressed by the chairperson and some delegates, that the negotiation process will be finalised in the second part of the fifth session, to be held from 31 March to 4 April 2008. To facilitate this, Portugal has agreed to organise informal consultations beforehand, with the aim of getting states to reach consensus on some of the outstanding issues.

It is also hoped that states will honour the 60th anniversary of the Universal Declaration of Human Rights by adopting an effective optional protocol to the ICESCR. In fact, some of the delegates pointed out that the anniversary was precisely the occasion for adopting such a protocol.

This summary was prepared by **Lilian Chenwi**, the coordinator of, and a senior researcher in, the Socio-Economic Rights Project.

The draft optional protocol prepared after the first part of the fifth session is available on http://www2.ohchr.org/english/issues/escr/docs/A_HRC_8_WG.4_3.doc.