

Towards the adoption of the international complaints mechanism for enforcing socio-economic rights under the ICESCR

Over the years, there has been increasing support for an international complaints mechanism for socio-economic rights.

The discussion on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) to create such a mechanism started as early as 1990. In 2003, an Open-Ended Working Group (OEWG) on an optional protocol to the ICESCR was established. Its mandate was subsequently extended in 2006, to facilitate the drafting of the optional protocol. The OEWG has held five sessions (in 2004, 2005, 2006, 2007 and 2008) during which it discussed various drafts. The second part of its fifth session, held from 31 March to 4 April 2008 in Geneva, marked the completion of the OEWG's mandate.

At the end of the second part of the fifth session, on 4 April 2008, states approved by consensus the draft optional protocol to the ICESCR and transmitted it to the Human Rights Council (HRC) for further consideration.

On 18 June 2008, at the end of its eighth session, the HRC adopted by consensus the optional protocol (UN doc.A/HRC/8/L.2/Rev.1/corr.1 (2008)). The HRC recommended that the UN General Assembly adopts and opens for signature, ratification and accession the optional protocol, at a signing ceremony in Geneva in March 2009.

Selected provisions of the optional protocol

Scope and standing

Article 2 sets out who can submit communications and the

scope of the optional protocol. Communications can be submitted by individuals, groups of individuals or other persons on their behalf. Such a communication must relate to a violation of any of the economic, social and cultural rights set forth in the ICESCR.

Admissibility

Under article 3, the Committee on Economic, Social and Cultural Rights (the Committee) can only consider a communication after all available domestic remedies have been exhausted, except where the application of such remedies is unreasonably prolonged. 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" has been deleted. 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 [article 3(2)(a)]. Article 3 elaborates other grounds on which a communication may be declared inadmissible.

Communications not revealing a clear disadvantage

A novel addition is article 4, which gives the Committee discretion to, if necessary, "decline to consider a communication where it does not

The optional protocol to the ICESCR process has been discussed in previous issues of the *ESR Review*: 7(1), 8(4) and 9(1).

reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance". The inclusion of this provision was proposed by the United Kingdom (UK), supported by Australia, Canada, Denmark, Ireland, Japan, New Zealand, Norway, Poland, Sweden and the United States (US).

Interim measures

Under article 5, the Committee may ask a state party to a communication to give "urgent consideration" to a request to take interim measures "as may be necessary in exceptional circumstances" to avoid possible irreparable harm to the victim(s) of the alleged violation. This has to be done at any time after the receipt of a communication and before the final determination on the merits.

At the second part of the fifth session of the OEWG, a proposal by Norway and Sweden that the obligation of states parties to provide interim measures should be voluntary was rejected and not incorporated in the optional protocol.

Transmission of a communication

Article 6 deals with the transmission of a communication to the attention of the state party concerned, unless the communication is considered

inadmissible without reference to the state party. The receiving state party has to respond in writing within six months [article 6(2)].

Friendly settlement

Article 7 deals with friendly settlement. It requires the Committee to “make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant”. A friendly settlement agreement closes consideration of a communication under the protocol [article 7(2)].

Examination of communications

Article 8 deals with the examination of communications. The relevant documentation that the Committee may consult when examining a communication are those emanating from other United Nations (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 [article 8(3)]. In addition, the standard of review in socio-economic rights cases is that of reasonableness. Article 8(4) reads:

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.

Follow-up of the views of the Committee

Article 9 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 the 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 the ICESCR [article 9(3)].

Interstate communications

Under article 10, the Committee is mandated to receive and consider communications from states parties. It should be noted that the interstate procedure is an “opt-in” one, as states parties have to declare that they recognise the competence of the Committee in this regard before the procedure can be applied against them.

Inquiry procedure

Articles 11 and 12 make provision for an inquiry procedure. Similar to the interstate procedure, the inquiry procedure is an “opt-in” one. Like the state complaints procedure, a state party has to declare that it recognises the inquiry procedure before it can be applied against the state concerned [article 11(1)]. This procedure will enable the Committee to respond to “grave or systematic violations” of the economic, social and cultural rights set forth in the ICESCR.

Protection measures

Article 13 requires a state party 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”.

International assistance and cooperation and the fund

Initially, the provision on international cooperation and assistance and the provision on the fund were dealt with in separate articles, but the draft protocol has now merged them, notwithstanding objections from Australia, Algeria, Belgium, Canada, Denmark, Egypt (on behalf of the Africa group), Japan, Sweden, the UK and the US.

Article 14 requires the 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. However, this can only be done with the consent of the state party concerned [article 14(1)].

At the second part of the fifth session of the OEWSG, the creation of the fund continued to be one of the most controversial issues. Australia, Canada, Sweden and the UK stated that the fund should not be created by means of the optional protocol. However, article 14(3) makes provision for the establishment of a fund to provide

expert and technical assistance to States 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.

In terms of this provision, states are the direct beneficiaries of the fund. In earlier drafts, victims were also beneficiaries.

Historical milestones of the optional protocol process

1990 – The Committee on Economic, Social and Cultural Rights started discussing the possibility of drafting an optional protocol to the ICESCR.

1993 – The World Conference on Human Rights adopted the Vienna Declaration and Programme of Action (UN doc. A/Conf.157/23). The declaration affirmed that “all human rights are universal, indivisible and interdependent and inter-related” and went on to declare that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”. It encouraged “the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights”.

1996 – The Committee on Economic, Social and Cultural Rights finalised a draft optional protocol that was presented for consideration to the Commission on Human Rights (CHR) in 1997 (UN doc. E/CN.4/1997/105). In its decision 1997/104 of 3 April 1997, the CHR requested the Secretary-General to transmit the text of the draft optional protocol to states and intergovernmental and non-governmental organisations for their comments for submission to the CHR. Only a handful of states submitted comments.

2001 – The UN High Commissioner for Human Rights organised, in cooperation 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 the ICESCR. (The report on the workshop is contained in UN document E/CN.4/2001/62/Add.2.) The same year, the CHR decided to nominate an independent expert on the question of a draft optional protocol to the ICESCR (CHR Resolution 2001/30).

2002 – Mr Hatem Kotrane, the independent expert, submitted his first report recommending the adoption of an optional protocol to the ICESCR (UN document E/CN.4/2002/57). The CHR renewed his mandate to allow him to study in greater depth the nature and the scope of states parties’ obligations under the ICESCR, the question of the justiciability of economic, social and cultural rights, and finally the question of the benefits and practicability of a complaint mechanism under the ICESCR and the issue of complementarity between different mechanisms (CHR Resolution 2002/24). The Commission also decided that a working group “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights” would be established.

2004 – First session of the Open-Ended Working Group.

2005 – Second session of the Open-Ended Working Group.

2006 – Third session of the Open-Ended Working Group. In addition, the mandate of the working group was renewed by consensus during the first session of the Human Rights Council (HRC) for a further two years so that it could draft the optional protocol to the ICESCR.

2007 – Fourth session of the Open-Ended Working Group. Presentation and discussion of the first draft optional protocol to the ICESCR prepared by the chairperson-rapporteur.

2008 – Fifth session of the Open-Ended Working Group, held in two parts. Presentation and discussion of subsequent drafts. At the end of the second part, the working group agreed by consensus to transmit the draft optional protocol to the HRC for its consideration.

– HRC adopts by consensus the optional protocol; and recommends that the General Assembly adopts it as well, and open it for signature, ratification and accession at a signing ceremony in Geneva in March 2009.

Source: <http://www.escr-net.org> (with amendments)

Conclusion

Once formally adopted by the UN General Assembly, the optional protocol will offer victims of socio-economic rights violations a new avenue for claiming these rights at the international level. In a nutshell, it will promote the better implementation of socio-economic rights. However, its full potential will not be realised unless states display the political will to implement the views and recommendations of the Committee.

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

For more information on the optional protocol see <http://www.opicescr-coalition.org>.