

The Åland Islands Peace Institute and the Institute for Human Rights at Åbo Akademi University sent Heidi Öst to represent the Peace Institute at the fourth session of the UN Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Geneva 16 – 27.7.2007. The Peace Institute supports the process of elaboration of an Optional Protocol that would serve to strengthen the access to justice for victims of violations of economic, social and cultural rights across the world. This is Heidi Öst's report from the meeting.¹

Report from the fourth session of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Background

In 1966 the General Assembly of the United Nations agreed on the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the

¹ The unedited official report can be found at:
http://www.ohchr.org/english/bodies/hrcouncil/docs/6session/A_HRC_6_8_AUV.doc (as visited on 16 September 2007).

International Covenant on Civil and Political Rights (ICCPR). These two conventions contain largely the same rights declared in 1948 in the Universal Declaration of Human Rights (UDHR) and were drafted in order to make these rights legally binding upon the States that ratified the Covenants. The reason that the UDHR rights were divided into two separate instruments has to do mainly with the political polarization of the Cold War. While States with centrally planned economies favored economic, social and cultural rights, countries with market economies championed civil and political rights, and some States doubted whether economic, social and cultural rights could or should be made legally enforceable. The Cold War divide resulted in two separate Covenants, with differing language regarding the obligations undertaken by the State parties to the two Covenants² and two separate monitoring systems. While the ICCPR established the Human Rights Committee to receive and consider State reports, the monitoring of State reports under the ICESCR was left to the Economic and Social Council (ECOSOC). The First Optional Protocol to the ICCPR (ICCPR-OP1), adopted the same year, strengthened the monitoring system of that Covenant by introducing an individual communications procedure, which allowed individual victims of alleged violations of the rights contained in the Covenant to submit complaints to be considered by the Human Rights Committee.³ As a result, the Human Rights Committee has had the chance to develop jurisprudence regarding the rights set forth in the ICCPR and on a case-by-case basis clarified the practical content of those rights. The monitoring of the ICESCR has remained restricted to the consideration of State reports, with the Committee on Economic, Social and Cultural Rights (CESCR) being established by the ECOSOC for this task.⁴ An Optional Protocol would strengthen access to justice of victims of violations of the ICESCR rights

² Compare the scope of the obligations set forth in article 2 of the respective Covenants:

ICCPR Art. 2: “1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”

ICESCR Art. 2: “1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” See also the classical paper by Alston, P. and Quinn, G. “The Nature and Scope of States Parties’ Obligations under the ICESCR” *Human Rights Quarterly* 9 156 (1987), pp 156 – 229

³ Optional Protocol to the International Covenant on Civil and Political Rights, adopted 1966, entry into force 1976. Available at http://www.unhcr.ch/html/menu3/b/a_opt.htm (Accessed 12.08.2007)

⁴ ECOSOC resolution 1985/17 of

including the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12 (1)), education (Article 13), work (Article 6), food and freedom from hunger (Article 11 (1) and 11 (2)), and housing (Article 11 (1)), among others. The views of the CESCR on these complaints would have a significant impact in furthering the economic, social, and cultural rights of individuals and groups of individuals around the world.

The discussion on the need for an Optional Protocol to the ICESCR to strengthen the monitoring system for economic and social rights has a long history. Already in 1995 the CESCR presented a draft OP of its own, stressing the need for a communications procedure.⁵ In 2003, the Human Rights Council took a step towards remedying this gap when they extended and expanded the mandate of the Working Group on an Optional Protocol to the ICESCR, mandating the Chairperson to present a draft text that would be used as the basis for further discussions. The Chairperson's draft was made available in April 2007.⁶ It included a communications procedure emulating the existing communications procedure of the Human Rights Committee that safeguards the rights contained in the ICCPR. The draft OP also included provisions that would allow the CESCR to request interim measures of protection and to instigate an inquiry procedure in cases of grave and systematic violations. When the WG met in July 2007 for its fourth session, it was the first time States gathered to discuss the actual wording of the future OP.

Participation at the session

The attendance at the fourth session of the Open Ended Working Group was dominated by states from the group of Western European and Others Group, with 21 out of a total of 28 member states participating in the session. The Group of Latin American and Caribbean States and the Eastern European Group were fairly well represented with 12 and 7 states respectively present. Representation from the African Group and from the Asian Group was particularly low, with only 8 and 7 states respectively from each of these groups present.⁷ Civil society was represented through delegations from various NGOs in consultative status with ECOSOC, many of which were members of the NGO Coalition for the Optional Protocol.⁸

The NGO Coalition for the OP provides a focal point for NGOs at all levels who support the adoption of an OP to the ICESCR. The NGO Coalition was first mooted in 2001 and took a more concrete form at the 2003 ESCR-Net meeting in Chiang Mai. Members include international NGOs, regional networks, grassroots activists, community based organizations and individuals. The steering group of the NGO Coalition consists of representatives from Amnesty International (AI), the Centre on Housing Rights and Evictions (COHRE), ESCR-Net, Food First Information and Action Network (FIAN), International Commission of Jurists (ICJ), International Federation of Human Rights

⁵ UN Document E/CN.4/1997/105, 18 December 1996, Available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1997.105.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1997.105.En?Opendocument) (Accessed 20 August 2007)

⁶ UN Document A/HRC/6/WG.4/2, 23 April 2007, Available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/126/24/PDF/G0712624.pdf?OpenElement> (Accessed 20 August 2007)

⁷ The African Group and the Asian Group comprise of 53 states each. The Group of Latin American and Caribbean States has 33 member states, while the Eastern European Group has 23.

⁸ You can sign up to the NGO coalition as an individual member, or as an organization, on the NGO Coalition homepage at <http://www.opicescr-coalition.org/> (Accessed 9 September 2007)

Some of the NGO coalition members present were: Amnesty, Centre for Housing Rights and Evictions (COHRE), Food-First Information and Action Network (FIAN), International Commission of Jurists (ICJ), International Women's Rights Action Watch (IWRAW) Asia-Pacific.

League (FIDH), International Women's Rights Action Watch Asia-Pacific (IWRAW Asia-Pacific) and the Inter-American Platform of Human Rights, Democracy and Development (PIDHDD). In the steering group sit also in an individual capacity Bruce Porter and Magdalena Sepulveda.⁹

As an individual member of the NGO Coalition, I participated in the meetings of the Coalition, where strategy and progress was discussed, and information about different State's positions was exchanged. A paper on the initial position of the NGO Coalition had been produced prior to the session. As the session progressed, the NGO Coalition got together to discuss proposals that had been put forward by various States. The NGO Coalition also drafted some text of its own, which was then proposed to the floor and distributed among states. AI was represented by Duncan Wilson, economic, social and cultural rights coordinator. Several staff from the COHRE head quarter in Geneva were present, among them Jan-Erik Helenelund, who at the time was a visiting fellow at COHRE. Bruce Porter and Magdalena Sepulveda were also present throughout the whole session.

The issues discussed

The session commenced on a positive note. After an opening speech by High Commissioner Louise Arbour¹⁰, the delegations present complimented the work of the Chair in producing the draft Optional Protocol. The draft was welcomed by most as a good and solid basis on which to build. There was widespread acknowledgement of and commitment to the principle of the indivisibility and interdependence of Human Rights and the equal status that ESC rights enjoy with civil and political rights. It was observed that there is a general consensus among State Parties that the current mandate of the working group is supported and the drafting an Optional Protocol to the Covenant is the objective. Of course, there are still a few States who query the justiciability of ESC rights but they are audibly in the minority. The US made clear that it opposes the elaboration of an Optional Protocol. The WG proceeded in with turning its attention to the text of the Chairperson's draft OP. This report focuses on the key issues discussed during the session with respect to the various provisions in the draft OP.

COMMUNICATIONS PROCEDURE

Four main issues are of decisive importance for the future effectiveness of the communications procedure and received considerable attention during the WG. These were: (a) the *scope* of the communications procedure; (b) the *standing* before the Committee; (c) the inclusion of guidelines as to the *standard of review* the Committee should use to assess whether States have fulfilled their obligations; and (d) the *admissibility criteria*.

The issue of scope

The Chairperson's draft offered three options regarding the scope of the procedure.¹¹ Through a *comprehensive approach*, the communications procedure would be applicable

⁹ Bruce Porter is the director of the Social Rights Advocacy Centre in Canada. Professor Magdalena Sepulveda is the author of *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Antwerp: Intersentia) 2003

¹⁰ A written copy of the High Commissioner's speech is available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/BAB7C795CD5D6F23C125731B004C4E7B?opendocument> (Accessed 6 September 2007)

¹¹ Chairperson's proposed Article 2: "1. *Communications may be submitted by or on behalf of individuals or groups of individuals, subject to the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in [Parts II and III of] the Covenant by that State Party. Where a communication*

for all rights set forth in the Covenant, without exception. A *limited approach*, favoured by Turkey amongst others, would exclude Article 1 (the right of peoples to self-determination), which is to be found in Part I of the Covenant, from the communications procedure. Finally, the weakest communications procedure would result from the *à la carte approach*, whereby States can choose which rights they will allow individuals to submit communications under.

For representatives of the NGO Coalition on an Optional Protocol (the NGO coalition), lobbying against an *à la carte* approach was seen as a (if not *the*) priority. The UK asserted that they would like to see an opt-out or an opt-in clause, allowing States to choose to which rights in the Covenant the complaints procedure may apply. This suggestion was welcomed by other states hostile towards the protocol, among others Denmark, Italy, Sweden, Switzerland, Turkey and the US. While the *à la carte* approach has a precedent in the European Social Charter, it is unprecedented in the UN system. Several states and members of the NGO coalition for an Optional Protocol warned of the danger that an opt-out clause would signal that states may opt-out from certain rights, thereby undermining the whole notion of the interdependence and indivisibility of all human rights.¹² The African Group heavily opposed an *à la carte* approach, as did members of the GRULAC, Belgium, Finland, France, Portugal and others. Some countries, in particular Egypt on the behalf of the African Group, expressed their desire to use reservations in order to limit the scope of duties, so long as those reservations do not contradict with the spirit and purpose of the ICESCR. Egypt on behalf of the African Group stated that this does not mean excluding rights as would an opt-out clause and that it should not be possible if a reservation had not been made in the Covenant.

The issue of standing

According to Article 2 of the chairperson's draft, standing should be given for communications submitted "*by or on the behalf of individuals or groups of individuals*". It was discussed to what extent the consent of victims should be required. Several delegations favoured requiring the express consent of the victim or victims.¹³ The NGO coalition, however, made a strong intervention drawing attention to cases where it may be impracticable, due to the sheer number of victims, to gain express consent of all victims.¹⁴ It may also be undesirable, if there is a need to protect the integrity of the victim(s). On these grounds, the NGO coalition wanted an exception to the consent requirement to be included allowing representatives to bring communications on behalf of the victims without their consent if they can justify why they are acting on the victim's behalf.¹⁵ It

is submitted on behalf of individuals or groups of individuals, this shall be with their consent. [2. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee to consider individual communications under certain provisions of articles 2 (1) and 6 to 15 of the Covenant.]"

¹² Bruce Porter of the NGO coalition warned that it is the integrity of the whole UN Human Rights that is at stake if an opt-out clause would be allowed.

¹³ This was suggested by China, as well as by Egypt on the behalf of the African Group, and supported by France and others. Egypt however clarified that express consent would not necessarily mean that all the victims' signatures would be required. Also, Egypt qualified its statement by saying that communications on the behalf of groups of individuals would not necessarily require express consent.

¹⁴ The representative of the International Commission of Jurists referred here to the case of SERAC v. Nigeria before the African Commission on Human Rights. He was later accused of trying to speak on the behalf of the Ogoni people by the Nigerian delegation, who considered it unacceptable of the representative of ICJ to cast in doubt the integrity of Nigeria.

¹⁵ The NGO coalition was supported in loosening the requirement for consent by the following States: Portugal, Belgium, Bolivia, Brazil, Chile, Finland, Mexico, the Netherlands, South Africa, Switzerland, Uruguay. (This is not an exclusive list)

was also pointed out that it would seem inappropriate to exclude from consideration by the CESCR certain cases simply because they were brought by an organization acting in a legitimate public interest, when public interest litigation is permitted in many domestic jurisdictions.¹⁶

The issue of inclusion of a 'standard of review'

Part II of the Covenant sets out the obligations undertaken by the State parties. As mentioned above, the language regarding the obligations differs between the ICCPR and the ICESCR. According to Article 2 (1) of the ICESCR, State parties undertake to:

“take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

In its General Comment 3¹⁷, the CESCR has elaborated upon the meaning of Article 2 (1). While a procedural protocol should not change the obligations flowing from the original Covenant, many States felt there was a need to include some guidelines on how the Committee should assess whether States have fulfilled their obligations under Article 2 (1).

The African Group put forward a proposal to include a paragraph on the standard of review to be employed by the Committee under Article 2 of the OP. In this proposal, the AG proposed that the committee should focus in principle on failures of States to protect or respect the rights contained in the Covenant and only where and as required assess the reasonableness of steps taken by a State party in conformity with the obligations under Article 2 (1) of the Covenant.¹⁸ In the Chairperson's draft, Article 8 (4) gave some direction as to the standard of review to be employed by the Committee in cases involving obligations under Article 2 (1) of the Covenant.¹⁹ The Chairperson's draft suggested that the Committee should assess the reasonableness of the steps taken by the State party to implement the Covenant rights. A number of States welcomed this proposal, acknowledging that they were familiar with the idea of a reasonableness review from their domestic systems. Other States however (Norway and Sweden among others) positioned themselves more hesitant, asking for more information about how such a

¹⁶ The representative for the NGO coalition referred to the Treatment Action Campaign case before the South African Constitutional Court, in which a number of civil society organization working in the area brought the case, and court found it more efficient to give standing to the civil society organizations rather than individual victims.

¹⁷ CESCR General Comment 3, Available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

(Accessed 20 August 2007)

¹⁸ The African Group proposal for an Article 2 (bis):

“When examining communications under the present protocol the committee shall:

- 1. focus in principle on allegations of violations concerning the failure of a state party to the present protocol to respect or protect the rights set forth in chapters II and III of the covenant.*
- 2. address where and as required the reasonableness of the steps taken by the state party in conformity with the provisions with article 2(1) of the covenant in relation to the subject matter of a communication under examination.”*

¹⁹ Chairperson's proposed Article 8 (4):

“4. When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”

review is usually conducted. The NGO coalition requested that the Committee should also assess the effectiveness of steps taken. Several States however put forward proposals that came close to amending the original obligations. For example, the US suggested that the Committee in assessing the unreasonableness of steps taken must lend the State a broad margin of appreciation in determining the optimum use of their resources²⁰, though such a broad margin is not accorded to the States in the Covenant.

Admissibility criteria

The admissibility criteria²¹ proposed by the Chairperson included a 6 months time limit. Several States expressed the view that this time limit is too short. South Africa proposed that three years would be a more reasonable limit. Another option that South Africa could accept was to require the communication to be submitted “*within a reasonable time*”, which would leave it up to the Committee to assess what time period could be considered reasonable. The UK suggested that to the requirement to exhaust all domestic remedies should be added a requirement to exhaust all regional remedies. This proposal received strong opposition from Belgium, Italy, South Africa and others.

INTERIM MEASURES

Article 5 as drafted by the Chairperson stated:

“At any time after the receipt of a communication, the Committee may request the State party concerned to take such measures of interim protection as may be necessary to avoid possible irreparable damage to the victim of the alleged violation, when the risk of such damage is sufficiently substantiated.”

Several States wished that a provision should be included to clarify that a request of interim measures would in no way prejudice the decision on admissibility or merits of the

²⁰ The US proposal for Article 8 (4): *“When examining Communications under the present Protocol concerning Art. 2, para.1 of the Covenant, the Committee will assess whether the steps taken by the State party, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, were unreasonable. In making this assessment, the Committee shall respect the broad margin of appreciation of the State Party to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others, and the Committee shall be mindful not to substitute its judgment for decisions properly taken by States in accordance with the rule of law and internationally recognized human rights obligations.”*

²¹ The admissibility criteria in Article 4 of the draft OP:

“1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2. The Committee shall declare a communication inadmissible where:

(a) It is not submitted within six months after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit;

(b) 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 the facts can be shown to amount to a violation of the Covenant after that date;

(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(d) It is incompatible with the provisions of the Covenant;

(e) It is manifestly ill-founded or not sufficiently substantiated;

(f) It is an abuse of the right to submit a communication;

(g) It is anonymous or not in writing.”

communication.²² The idea of a power to request interim measures received broad support and was opposed only by a few States (Japan, Russia and the UK).

INQUIRY PROCEDURE

The idea of an inquiry procedure, as provided for in Article 10 and 11 of the draft OP²³, divided the WG. Whereas France, Germany, Portugal, Spain, Senegal, Burkina Faso, Chile and others welcomed such a procedure, many States expressed hesitation or outright opposition.²⁴ In the Chairperson's draft, Article 20 of the draft OP²⁵ makes the

²² Such a provision is included in the OP to the Convention on the Elimination on All Forms of Discrimination against Women, to which many delegations referred. CEDAW-OP Article 5 states: "*1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation. 2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.*"

²³ Article 10 of the draft OP:

"1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of the rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

4. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

5. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

6. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report."

Article 11 of the draft OP:

"1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 10 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 10, paragraph 5, invite the State Party concerned to inform it of the measures taken in response to such an inquiry."

²⁴ States that opposed the inclusion of provisions on an inquiry procedure included China, UK, US and the African Group.

²⁵ Article 20 of the draft OP:

"1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 10 and 11.

2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General."

inquiry procedure optional and given the lack of consensus on this issue, it is likely a provision allowing States that ratify the draft OP to opt-out from the inquiry procedure is likely to be retained.

INTERNATIONAL ASSISTANCE AND CO-OPERATION + THE SPECIAL FUND

Even more divisive than the issue of an inquiry procedure, was the issue of international assistance and co-operation (Article 13) and the proposal to establish a new special fund for this purpose (Article 14).²⁶ The African Group insisted that the Covenant included a legal obligation to provide international assistance wanted the OP to recognise this. The representative from Ethiopia said that States have a joint and an individual responsibility under the Covenant.²⁷ Egypt, on the behalf of the African Group, proposed that the word ‘voluntary’ should be struck out before the word contributions in Article 14. The African Group got support from China, Belarus and a few others, while many European States did not welcome their suggestions. In fact, many of the so-called developed States strongly opposed the idea that there is a collective obligation arising from the Covenant.²⁸ While some States simply opposed the setting up of a fund on this ground, other donor States commented that they did not see the need for a setting up a new fund and suggested channelling funds from existing mechanism instead. Australia warned that even if a fund would be set up, it was likely to be strapped for resources as donor countries could not be forced to make contributions.

The position of the Nordic countries: a divided region

DENMARK

The Danish delegation referred on several occasions to the different nature of economic, social and cultural rights as an excuse for not including certain procedures in the OP. Denmark positioned itself sceptical of an inquiry procedure and of enabling the

²⁶ Article 13 of the draft OP:

“The Committee shall transmit, as it may consider appropriate, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State party’s observations and suggestions, if any, on these views or recommendations. The Committee may also bring to the attention of such bodies any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.”

Article 14 of the draft OP:

“1. To support the implementation of recommendations on remedies of the Committee under any of the procedures set forth in the present Protocol, and for the benefit of victims of violations of the Covenant, a special fund shall be set up by decision of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to provide economic assistance, when requested, to States parties that lack the financial means to implement effective remedies.

2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.”

²⁷ The example given by the Ethiopian representative to illustrate what he meant by shared responsibility was that of an international embargo that may have a negative impact on the right to health. According to the Ethiopian delegate, States parties participating sanctioning the embargo may violate the right to health.

²⁸ This opposition is not new. Interpretations of the meaning of phrase in Article 2 (1) of the Covenant on international cooperation have diverged ever since the Covenant was concluded. See Alston, P. and Quinn, G. “The Nature and Scope of States Parties’ Obligations under the ICESCR” *Human Rights Quarterly* 9 156 (1987), pp 186 – 192

Committee to request for interim measures in the face of a potential violation. Regarding the scope of a potential communications procedure, Denmark stated that it would prefer an opt-out clause that would be applicable only for the substantive rights in the Covenant (i.e. rights included in Part III). Denmark is not supportive of the idea to establish a special fund. According to the Danish delegation, there is a need to include a possibility for States to make reservations to the OP, in order to enable as many States as possible to ratify the OP. On the issue of standard of review, Denmark supported the idea of mandating the Committee to test the unreasonableness rather than the reasonableness of steps taken and of expressly including a reference to the States' margin of appreciation.

FINLAND

The Finnish delegation participated actively and constructively in the discussions. Finland has also assisted the process towards an Optional Protocol outside the Working Group, by arranging a European expert seminar on the topic in 2006.²⁹ Finland supported the elaboration of an OP as an important step to strengthen protection and implementation of economic, social and cultural rights. Regarding scope of the communications procedure, Finland spoke against an *à la carte* approach and for an inclusion of all rights in Part II and III of the Covenant. On the question of standing, Finland supported the idea that communications could be submitted on behalf of individuals as well as groups of individuals. Finland also welcomed the idea of a collective communications procedure as a complement to the individual communications procedure, stating that the idea should be given further consideration. With respect to the binding nature of interim measures, Finland pointed out that international law is developing towards the conclusion that a failure to comply with interim measures is considered a violation. The Finnish delegation also raised an important question regarding interim measures, enquiring if interim measure would require States only to abstain from acting, or if the Committee could also request a State party to undertake positive action to prevent a violation of the Convention. Regarding the inclusion of a 'standard of review', Finland preferred the wording of the Chairperson's draft, but suggested an inclusion of a possibility of oral hearings may be desirable. Finland also supported the provisions on an inquiry procedure and on international co-operation and assistance and the establishment of a special fund, as drafted by the Chairperson.

NORWAY

The Norwegian delegation supported the comprehensive approach and contributed constructively to the discussions. Regarding the issue of standing, Norway shared the opinion of many other delegations that allegations of 'unsatisfactory application' would be better addressed through the reporting system than through a collective complaints procedure. Norway made clear it would have difficulties supporting the UK proposal to require an exhaustion of regional mechanisms as part of the admissibility criteria for the communications procedure. On the issue of 'standard of review', Norway expressed some uncertainty about the term reasonableness, and asked Professor Riedel of the CESCR to clarify this concept. Professor Riedel pointed out that the standard of assessing reasonableness that the Committee has developed involves assessing whether steps taken have been concrete and deliberative. Regarding the proposals put forward on Article 8 (4), Norway revealed its preference not to refer expressly in the OP to the tri-partite typology of obligations (respect, protect and fulfil). Nevertheless, Norway expressed satisfaction with the change made to the proposal from the African Group in the second week, which treated all the levels of obligations equally.

²⁹ Homepage of the Finnish Foreign Ministry

<http://formin.finland.fi/public/default.aspx?nodeid=31373&contentlan=3&culture=sv-FI> (Accessed 5 September 2007)

SWEDEN

The Swedish delegation expressed considerable hesitation regarding the drafting of an OP, stating that it was not yet convinced an OP would be the best way to implement economic and social rights. Regarding the communications procedure, Sweden also questioned whether such a procedure would be effective. If indeed such a procedure would be included, then Sweden favored the *à la carte* approach, claiming that it would be difficult to reach an agreement on the communications procedure without including an opt-out clause. Sweden also wanted to further limit the scope of the communications procedure by allowing it to be used only in special cases of gross or significant violations and by striking out the possibility of collective communications. According to the Swedish delegation, the inquiry procedure would be a better way than a collective communications procedure of addressing alleged unsatisfactory applications of any rights contained in the Covenant. Regarding the issue of 'standard of review', Sweden expressed some uncertainty about the concept of 'reasonableness' and welcomed further consideration of the Polish proposal to make the Committee test whether steps taken have been *unreasonable*, while allowing the State parties a "broad margin of appreciation".

ICELAND

No statement.

Conclusion and recommendations

All the statements of the participating delegations were recorded and included in a final report, which will serve as the basis for a new draft that will be discussed in the next session of the WG. The WG is scheduled to hold two one-week sessions in 2008, one in January and one in April. Members of the NGO coalition stressed the need for NGOs and stakeholders to put pressure on policy-makers so as to ensure a comprehensive and effective OP can be concluded.

The Nordic region is clearly divided, with Finland and Norway broadly supportive of the elaboration of an OP and the proposed communications procedure, while Denmark and Sweden, somewhat surprisingly to many, are among the most reluctant and obstructive participants in the WG. It is important that civil society organisations and individuals urge the Danish and Swedish policy-makers to re-examine their controversial position, which according to representatives from the NGO coalition, may risk undermining the coherence and integrity of the whole UN human rights system. It is difficult to understand why these Nordic countries, with a reputation and history of support for the welfare system, harbour such a negative attitude to the idea of a new human rights mechanism that would strengthen the access to justice for victims of economic, social and cultural rights violations across the world.³⁰

ACRONYMS

AI Amnesty International

³⁰ In order to get some idea of the background to this divide, see Scheinin, M. "Protection of Economic, Social and Cultural Rights in Finland – A Rights-Based Variant of the Welfare State?" in Scheinin, M. (ed.) *The Welfare State and Constitutionalism in the Nordic Countries* (Phonix-Trykkeriet A/S: Århus) 2001, Ch. 9, 245 – 286

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COHRE	Centre on Housing Rights and Evictions
ECOSOC	UN Economic and Social Council
ESCR-Net	International Network for Economic, Social and Cultural Rights
FIAN	Food First Information and Action Network
FIDH	International Federation of Human Rights League
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	First Optional Protocol to the ICCPR
ICJ	International Commission of Jurists
IWRAW	International Women's Rights Action Watch
NGO	Non-Governmental Organization
OP	Optional Protocol to the ICESCR
PIDHDD	Inter-American Platform of Human Rights, Democracy and Development
WG	Open-Ended Working Group on an Optional Protocol to the ICESCR
UDHR	Universal Declaration on Human Rights