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Prof. Dr. Christine Kaufmann

**Progress at the Front: The Draft Optional Protocol to  
the International Covenant on Economic, Social and  
Cultural Rights**

*By Claire Mahon*

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# Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Claire Mahon\*

## Abstract

The two-decade-long campaign for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) is nearing success. The drafting of the Optional Protocol has been completed, and the Human Rights Council approved the text on 18 June 2008. It is now hoped that the draft OP-ICESCR will finally be adopted by the General Assembly in late 2008, heralding the beginning of a new era in relation to access to international remedies for violations of economic, social and cultural rights (ESC rights). The draft OP-ICESCR establishes a new quasi-judicial function for the Committee on Economic, Social and Cultural Rights (the Committee), allowing it to receive communications from individuals and groups of individuals alleging violations of any of the ESC rights set forth in the ICESCR. It also establishes, *inter alia*, an inquiry procedure, provides for interim measures to be ordered and establishes a trust fund for the realisation of ESC rights. Some of the contents of its provisions and the procedures it establishes are unique in comparison with other treaty body complaints procedures, and others mirror closely existing provisions in similar protocols and conventions. This article overviews the draft OP-ICESCR,

\*Joint Co-ordinator, Project on Economic, Social and Cultural Rights, Academy of International Humanitarian Law and Human Rights, Geneva, Switzerland; Adjunct Clinical Professor of Law, University of Michigan Law School (claire.mahon@graduateinstitute.ch). The author is completing her doctorate on the OP-ICESCR at the Graduate Institute of International and Development Studies. She has attended all sessions of the Open-Ended Working Group on the OP-ICESCR and formerly represented the International Commission of Jurists on the Steering Committee of the NGO Coalition for an OP-ICESCR.

outlining its background and genesis, and detailing some of its most contentious provisions, including the scope of the OP-ICESCR, its *locus standi* and admissibility provisions, the criteria to be applied by the Committee in its review of the merits and particularly debated issues such as how to take into account the need for international cooperation and assistance. The article then proposes some preliminary assessments regarding the potential success and impact of this important new mechanism.

## 1. Introduction

The debate on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) has been labelled the new ‘front line’ in the long running war between civil and political rights and economic, social and cultural rights (ESC rights).<sup>1</sup> Finally, it appears that there is progress at the front as the drafting of the Optional Protocol has been completed, and the Human Rights Council approved the text on 18 June 2008.<sup>2</sup> Now all that remains is its adoption by the General Assembly,<sup>3</sup> followed by a signing ceremony which is planned for March 2009 in Geneva.<sup>4</sup> Presuming the text is adopted, a new mechanism will be added to our universal human rights system, allowing victims of violations of ESC rights to submit a communication to the Committee on Economic, Social and Cultural Rights (the Committee), and providing the Committee with the power to adjudicate these complaints and issue views and recommendations for remedy and redress. The High Commissioner for Human Rights has remarked that this progress is ‘a milestone in the history of the universal human rights system’, one which ‘will mark a high point of the gradual trend towards a greater recognition of the indivisibility and interrelatedness of all human rights.’<sup>5</sup>

The OP-ICESCR has been a long time coming, yet those who have not been closely following the lengthy campaign for universal justiciability of ESC rights may be surprised that the drafting process itself was relatively short. While some may trace the OP-ICESCR’s origins to the original decision to

1 de Schutter, ‘Le Protocol facultatif au pacte international relatif aux droits économiques, sociaux et culturels’, (2006) 1 *Revue Belge de Droit International* 8.

2 Human Rights Council Res. 8/2, 18 June 2008, A/HRC/8/L.2/Rev.1/Corr.1 Annex.

3 At the time of writing, the text of the OP-ICESCR had been transmitted to the Third Committee of the General Assembly where it is expected it will be considered in October 2008 and, following that, the plenary of the General Assembly for final adoption later in 2008.

4 *Supra* n. 2 at para. 2.

5 Statement by Ms Louise Arbour, High Commissioner for Human Rights to the Open-Ended Working Group on OP-ICESCR, Fifth session, 31 March 2008.

separate the two covenants in the 1950s,<sup>6</sup> the real push for this mechanism began nearly two decades ago with an initiative taken by the Committee. But the Open-Ended Working Group on the OP-ICESCR was only granted a mandate to draft this instrument in 2006,<sup>7</sup> and it began to consider a first draft in July 2007, finalising its text on 4 April 2008. The speed of this process is consistent with that for other recently adopted instruments, such as the Optional Protocol to the Convention on All Forms of Discrimination Against Women (OP-CEDAW),<sup>8</sup> which was adopted after three years of drafting negotiations,<sup>9</sup> and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD),<sup>10</sup> which was concluded after several years of discussion about a monitoring mechanism but only two days of formal negotiations on the text of the OP-CRPD.<sup>11</sup> The recent negotiations on the OP-ICESCR were accompanied in their final stages by a sense of urgency—there has been a great desire to finalise this instrument in early 2008 so that its adoption could coincide with the 60th anniversary of the Universal Declaration of Human Rights 1948 (UDHR).<sup>12</sup> Indeed, this provides an opportune point in the history of human rights to end the long-standing controversy over the hierarchy between ESC rights and civil and political rights, and to reinforce the earlier Vienna Declaration commitments regarding the interdependence and indivisibility of all human rights.<sup>13</sup>

As the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)<sup>14</sup> is one of only two of the core human rights treaties not

6 Ngoy Lumbu, *L'Instauration du mecanisme de communications individuelles devant le Comite des droits economiques, sociaux et culturels: une contribution à l'étude des voies et moyens additionnels pour une mise en oeuvre efficace du pacte international relatif à ces droits* (Unpublished PhD thesis, Université catholique de Louvain Faculté de Droit, 2007).

7 Human Rights Council Res. 1/3, Open-Ended Working Group on OP-ICESCR, 29 June 2006, at para. 2.

8 Adopted by General Assembly Res. 54/4 6 October 1999, A/RES/54/4, and opened for signature on 10 December 1999, entry into force 22 December 2000.

9 Sullivan, 'Commentary on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women' in Inter American Institute of Human Rights, *Optional Protocol: Convention on the Elimination of All Forms of Discrimination against Women* (San José: IAIHR, 2000) and International Women's Rights Action Watch Asia Pacific, *Our Rights Are Not Optional! Advocating for the implementation of the CEDAW Convention through its Optional Protocol: A Resource Guide* (Kuala Lumpur: IWRAP Asia Pacific, 2005).

10 Adopted by General Assembly Res. A/61/611, 13 December 2006, A/RES/61/106, and opened for signature on 30 March 2007, entry into force 3 May 2008.

11 Final report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/61/611, 6 December 2006. See further Kayess and French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', (2008) 8 *Human Rights Law Review* 1.

12 See, for example, Fifth report of the Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol, 6 May 2008, A/HRC/8/7 at para. 7 (Fifth Working Group Session Report).

13 Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

14 993 UNTS 3.

accompanied by an individual communications procedure,<sup>15</sup> there were many examples to draw upon when it came to drafting a new Optional Protocol.<sup>16</sup> The Chairperson of the OP-ICESCR had explained that, where possible, she intended to use agreed language from other similar texts,<sup>17</sup> and available best practice from other UN human rights complaints mechanisms, in order to draft an instrument that was both consistent and progressive, thus reflecting the important advancements in human rights law and practice since the drafting of the first treaty body complaints mechanism, the First Optional Protocol<sup>18</sup> to the International Covenant on Civil and Political Rights 1966 (OP1-ICCPR).<sup>19</sup> It is not yet clear, however, how successful this has been, and whether the new OP-ICESCR will prove to be, as hoped for by the High Commissioner for Human Rights and many others, a mechanism that truly will improve access to remedies and relief for victims of violations of ESC rights.

While there is much to analyse in terms of the potential future impact of this new instrument and the legal implications of the various drafting decisions, this article is restricted in scope. Its purpose is to outline for readers some of the key aspects of the OP-ICESCR and some points of controversy that arose in the drafting process, and to make some limited preliminary comments regarding early assessments of this instrument. It does not seek to exhaustively address all aspects of the OP-ICESCR, the Working Group's deliberations, the arguments for and against an Optional Protocol or the history behind the campaign.<sup>20</sup> The necessary examination of the effectiveness and full analysis

15 The Committee on the Rights of the Child, which monitors implementation of the Convention on the Rights of the Child 1989, 1577 UTS 3 (CRC), is the other body that does not, yet, have a mandate to receive individual communications from alleged victims.

16 Other individual complaints procedures are established by the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR) through its first Optional Protocol (OP1-ICCPR); the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD—Article 14); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85 (CAT—Article 22); the Convention on the Elimination of all Forms of Discrimination against Women 1979, 1249 UNTS 13 (CEDAW) through its Optional Protocol; the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990, GA Res. 45/158, 18 December 1990, A/RES/45/158 (MWC—Article 76); and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD).

17 Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina de Albuquerque, 23 April 2007, A/HRC/6/WG.4/2, at 2.

18 999 UNTS 302.

19 999 UNTS 171.

20 See instead, *inter alia*, Alston, 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant' in Eide, Asbjørn and Elgesen (eds), *The Future of Human Rights Protection in a Changing World: Essays in Honour of Torkel Opsahl* (Oslo: Norwegian University Press, 1992) 79; Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become a Reality?', (1996) 2 *University of California Davis Journal of International Law and Policy* 1 at 111–36; Dennis and Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Right to Food, Water,

of the potential future impact of this new instrument, and the mechanism it has created, must be left for another day.

## 2. Background

The finalisation of the text of the OP-ICESCR is the result of over 18 years of work on the part of ESC rights advocates, including government representatives, the non-governmental community and international experts such as members of the Committee, the former Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) and various Special Rapporteurs. The campaign for an OP-ICESCR began in earnest in the early 1990s when the Committee and the Sub-Commission began to make recommendations to Member States and the Commission about the desirability of such a mechanism.<sup>21</sup>

In its sixth session in 1990, the Committee commenced discussions on the desirability of a draft Optional Protocol, and these discussions continued until its 15th session in 1996.<sup>22</sup> At the Committee's request, then Committee member Philip Alston reported four times on the topic.<sup>23</sup> The Committee adopted an analytical paper for the 1993 World Conference on Human Rights, in which it expressed strong support for the development of an Optional Protocol which would extend its functions to include hearing individual

Housing and Health?', (2004) 98 *American Journal of International Law* 462; Porter, 'The Right to be Heard: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – What's at Stake', (2005) 11 *Human Rights Tribune* 3 at 40; de Schutter, 'Le Protocole Facultative au Pacte International Relatif aux Droits Économiques, Sociaux et Culturels', (2006) 1 *Revue Belge de Droit International* 1; Tomuschat, 'An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?' in Dicke *et al.* (eds), *Weltinnenrecht - Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot; Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel, 2005) 815; and Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights', (2003) 21 *Netherlands Quarterly of Human Rights* 423.

21 See further, Vandenhole, *supra* n. 20. The Sub-Commission on the Promotion and Protection of Human Rights became involved in the deliberations concerning the OP-ICESCR in 1992 when Mr Danilo Türk, the Special Rapporteur of the Sub-Commission on the realization of ESR rights, expressly recommended its elaboration: The Realization of Economic, Social and Cultural Rights, Final report submitted by Mr Danilo Türk, 3 July 1992, E/CN.4/Sub.2/1992/16, at para. 211. It continued to address the issue in its resolutions, for example, calling in 1996 for the elaboration of an OP-ICESCR (Res. 1996/13), in 2000 suggesting the establishment of an Open-ended Working Group (Res. 2000/9), and in 2001 and 2002 urging the Commission on Human Rights to mandate a working group to draft a text (Res. 2002/14 and 2003/19).

22 See E/1992/23—E/C.12/1991/4, at paras 360–6 and E/CN.4/1997/105, at para. 2.

23 E/C.12/1991/WP.2 of 25 October 1991; E/C.12/1992/WP.9 of 27 November 1992; E/C.12/1994/12 of 9 November 1994; and E/C.12/1996/CRP.2/Add.1.

complaints about violations of the ICESCR.<sup>24</sup> The Vienna Programme of Action took up this idea, and encouraged the Commission on Human Rights to cooperate with the Committee to continue examining the question of an Optional Protocol.<sup>25</sup> Subsequently, the Commission on Human Rights considered the matter for the first time in 1994, and, after taking note of the steps taken by the Committee, the Commission requested it to submit a report at the Commission's 51st session.<sup>26</sup> Accordingly, after an initial progress report,<sup>27</sup> the Committee continued its work,<sup>28</sup> and produced a draft Optional Protocol and a report analysing the issues to be examined by the Commission on Human Rights at its 53rd session in 1997.<sup>29</sup> The length of debate at the Committee level reflected the fact that not all members were in agreement about the need for an Optional Protocol, or about the content of any proposed protocol.<sup>30</sup>

For three years, the Commission on Human Rights issued requests to States, intergovernmental organisations and non-governmental organisations (NGOs) to submit comments on the Committee's draft.<sup>31</sup> Although only a disappointingly small number of States responded to these continued requests, the responses received were overwhelmingly in favour of an Optional Protocol: 11 of 14 States responded positively towards the proposal, as did numerous UN bodies and intergovernmental organisations, along with NGOs.<sup>32</sup> These comments were compiled in annual reports to the Commission on Human Rights,<sup>33</sup> and in the final report the secretariat included suggested options for

24 Contribution of the Committee on Economic, Social and Cultural Rights to the World Conference on Human Rights, 26 March 1993, A/CONE.157/PC/62/Add.5, Annex I at para. 18 and Annex II.

25 Vienna Declaration and Program of Action, A/CONE.157/23, at para. 75.

26 Commission on Human Rights Res. 1994/20 on the question of the realization in all countries of the ESR rights contained in the Universal Declaration of Human Rights and in the ICESCR, and study of special problems which the developing countries face in their efforts to achieve these human rights, 1 March 1994, E/CN.4/RES/1994/20.

27 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretary-General, 5 February 1996, E/CN.4/1996/96. This progress report was welcomed by the Commission on Human Rights in Res. 1996/11, 11 April 1996, E/CN.4/RES/1996/11, at para. 5.

28 E/C.12/1996/SR. 44–49 and 54.

29 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretary-General, 18 December 1996, E/CN.4/1997/105.

30 See, in particular, the comments of Mr Grissa in the Committee's summary records, for example, 2 December 1997, E/C.12/1996/SR.42.

31 See E/CN.4/RES/1997/104, E/CN.4/RES/1998/33 and E/CN.4/RES/1999/25.

32 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights, 14 January 2000, E/CN.4/2000/49, at para. 32(c).

33 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the Secretary-General, 16 January 1998, E/CN.4/1998/84; Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the Secretary-General, 16 March 1998, E/CN.4/1998/84 Add.1; Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretariat, 7 January 1999, E/CN.4/1999/112; Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretariat, 4 March 1999, E/CN.4/1999/

how to progress the discussions.<sup>34</sup> After this, an independent expert was appointed in 2001 to examine the question of the draft Optional Protocol.<sup>35</sup> Professor Hatem Kotrane presented two reports to the Commission on Human Rights supporting the drafting of an Optional Protocol.<sup>36</sup> In his reports, he attempted to address questions such as: who would be entitled to utilise the proposed complaints procedure? Which organ would be competent to assess complaints under the proposed protocol? Which ICESCR rights should be included in a complaints procedure? Who should be the subject of complaints under the mechanism? And what remedial actions could be taken to remedy violations?<sup>37</sup> He recommended that the Commission on Human Rights establish a working group to consider an Optional Protocol.

While the Commission on Human Rights had resolved in 2002 to establish 'an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol,'<sup>38</sup> it was not until its 59th session in 2003 that the Commission requested the Open-Ended Working Group on the OP-ICESCR to meet.<sup>39</sup> The Working Group met for its first session from 23 February to 5 March 2004, under the direction of the Portuguese Chairperson, Catarina de Albuquerque. The Working Group's mandate provided initially for just one meeting, which was dominated by discussions regarding the general justiciability of ESC rights.<sup>40</sup> Deciding that the issues raised required further deliberation, the Commission on Human Rights extended the mandate of the Working Group in 2004 for a further two years.<sup>41</sup>

From 10 to 20 January 2005, the Working Group's second session debated how to progress the consideration of the proposed content of an optional protocol, deciding that in order to ensure greater focus in future sessions, it would

112 Add.1; and Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights, 14 January 2000, E/CN.4/2000/49.

34 Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Report of the High Commissioner for Human Rights, 14 January 2000, E/CN.4/2000/49, at para. 32.

35 Commission on Human Rights Res. 2001/30, 20 April 2001, E/CN.4/RES/2001/30.

36 First report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 12 February 2002, E/CN.4/2002/57; second report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 13 January 2003, E/CN.4/2003/53; Corrigendum to the second report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 3 April 2003, E/CN.4/2003/53/Corr.1; and second Corrigendum to the second report of the independent expert on the question of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 7 April 2003, E/CN.4/2003/53/Corr.2.

37 *Ibid.*

38 Commission on Human Rights Res. 2002/24, 22 April 2002, E/CN.4/RES/2002/24 at para. 9(f).

39 Commission on Human Rights Res. 2003/18, 22 April 2003, E/CN.4/RES/2003/18.

40 See the first report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an OP-ICESCR on its First session, 15 March 2004, E/CN.4/2004/44.

41 Commission on Human Rights Res. 2004/29, 16 April 2004, E/CN.4/RES/2004/29.



request the Chairperson to prepare a report containing elements for an Optional Protocol.<sup>42</sup> This ‘Elements Paper’<sup>43</sup> allowed the third Working Group session (held from 6 to 16 February 2006) to discuss the main aspects of a communications procedure and other possible mechanisms such as an inquiry procedure and inter-State complaints.<sup>44</sup> Although several delegations continued to remind the Working Group that discussions on the contents of the Elements Paper did not constitute the start of negotiations on a text for an OP-ICESCR, it was clear that these provided a head-start to the drafting process.<sup>45</sup> The Elements Paper also explained the consequences of not pursuing an Optional Protocol, stating ‘the option of no optional protocol... suggests that... while civil and political rights are very explicitly spelled out, economic, social and cultural rights are essentially vague or aspirational’.<sup>46</sup> Guided by the discussions on the Elements Paper, the outcome of the third Working Group session was that many delegations expressed their readiness to begin drafting.<sup>47</sup>

At its first session in 2006, the new Human Rights Council extended and amended the mandate of the Working Group, directing it to start negotiating the text of an Optional Protocol, and providing a two year timeframe.<sup>48</sup> The Human Rights Council further requested the Chairperson

to prepare, taking into account all views expressed during the sessions of the Working Group on, *inter alia*, the scope and application of an optional protocol, a first draft optional protocol, which includes draft provisions corresponding to the various main approaches outlined in her analytical paper, to be used as a basis for the forthcoming negotiations.<sup>49</sup>

The fourth Working Group session, held from 16 to 27 July 2007, considered the Chairperson’s first draft Optional Protocol and her Explanatory Memorandum.<sup>50</sup> Her draft Optional Protocol included a number of possible

42 Second report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol, 10 February 2005, E/CN.4.2005/52 welcomed by Commission on Human Rights Res. E/CN.4/RES/2005/22, 15 April 2005, at para. 14.

43 Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical paper by the Chairperson Rapporteur, Catarina de Albuquerque, 30 November 2005, E/CN.4/2006/WG.23/2 (Elements Paper).

44 Third report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol, 14 March 2006, E/CN.4/2006/47 (Third Working Group Session Report).

45 Ibid.

46 Elements Paper, *supra* n. 43 at para. 60(d).

47 The GRULAC States expressed a desire to start drafting an OP-ICESCR, along with Azerbaijan, Belgium, Croatia, Finland, Italy, Iran, Portugal, Slovenia, Timor Leste and Turkey: Third Working Group Session Report, *supra* n. 44.

48 Human Rights Council Res. 1/3, 29 June 2006, at para. 2.

49 Ibid. at para. 2.

50 Fourth report of the Open-Ended Working Group on an Optional Protocol, 30 August 2006, A/HRC/6/8 (Fourth Working Group Session Report); Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina de Albuquerque, 23 April 2007, A/HRC/6/WG.4/2 (containing the Explanatory Memorandum) (Chair’s First Draft).

options in bracketed text, as ‘in some cases . . . it was not possible to account for all main views in one provision.’<sup>51</sup> The fourth Working Group session was the first opportunity to discuss, Article by Article, the draft OP-ICESCR, and deepen the discussions regarding, *inter alia*, whether the text would establish both individual *and* collective complaint mechanisms, whether it would include an inquiry procedure, the criteria to be used by the Committee in examining communications, the admissibility criteria for communications, and how international assistance and cooperation would be addressed.<sup>52</sup>

After the reading of the first draft Optional Protocol and the resulting discussions, the Chairperson prepared a first revised draft Optional Protocol, which included many of the proposals for amendments and new inclusions that had been made by delegates at the fourth Working Group session.<sup>53</sup> In order to better facilitate discussions and the need to seek instructions from capitals, the fifth session of the Working Group was divided into two separate week-long sessions. The first revised draft was considered during the first week, from 4 to 8 February 2008, where, despite a thorough review of the entire text, key points of controversy continued to prevent consensus forming on the main provisions. These unresolved drafting issues included standing, scope (i.e. the identity of the rights to be subject to the complaints procedure), criteria for review, reservations and international cooperation and assistance. After this first week of discussions on the revised text, the Chairperson prepared a second revised draft Optional Protocol,<sup>54</sup> which was used as the basis for the negotiations held during the second part of the fifth Working Group session, held from 31 March to 4 April 2008.<sup>55</sup> In addition, after a series of informal consultations with Working Group delegations in Geneva during 25–28 February 2008, the Chairperson prepared a short paper containing additional drafting proposals regarding some Articles of the draft OP-ICESCR.<sup>56</sup> These new suggestions addressed further issues of admissibility, interim measures, criteria for review by the Committee and new proposals for a trust fund to address the issue of international cooperation and assistance.

The final week of Working Group negotiations focused on addressing these main points of divergence. After numerous informal consultations, a compromise package proposal was discussed by the regional groups towards the end of the week, and finally agreement was reached. On the morning of 4 April

51 ‘Chair’s First Draft’, *ibid.* at para. 2.

52 Fourth Working Group Session Report, *supra* n. 50.

53 Revised Draft OP-ICESCR, prepared by the Chairperson/Rapporteur, Catarina de Albuquerque, 24 December 2007, A/HRC/8/WG.4/2 (First Revised Draft).

54 Revised Draft OP-ICESCR, Letter from the Chairperson/Rapporteur, Catarina de Albuquerque, to the members of the Open-Ended Working Group on an OP-ICESCR, 28 February 2008, A/HRC/8/WG.4/3 (the second revised draft is contained in the annex to this letter) (Second Revised Draft).

55 Fifth Working Group Session Report, *supra* n. 12.

56 Drafting proposals for the OP-ICESCR by the Chairperson-Rapporteur of the Open-Ended Working Group, 25 March 2008.

2008, the Open-Ended Working Group decided, by consensus, to transmit the text of the Optional Protocol to the Human Rights Council for approval.<sup>57</sup> Despite the hard work to ensure an instrument that would attract broad support, participants at the final afternoon of the Working Group witnessed many delegations making statements to explain that their support for the transmission of the text to the Council was not (yet) to be considered as endorsement of the text itself.<sup>58</sup> Particular disagreements over the scope of the draft OP-ICESCR and the exclusion of Part I (the right to self-determination) from the complaints procedure were amongst the concerns some delegations had regarding the compromise text.

The draft OP-ICESCR was then forwarded to the Human Rights Council for consideration during its eighth session in June 2008, at which time controversy regarding the lack of reference to Part I of ICESCR (the right to self-determination) led some States to insist in informal consultations that amendments to the text would be required.<sup>59</sup> While others strenuously argued against opening up the text for further revisions outside of the Working Group format,<sup>60</sup> and some encouraged alternative wording in a pre-ambular paragraph as a solution, it became clear that to not incorporate the concerns of those troubled by the exclusion of Part I would spell disaster at that late stage. Portugal, along with the co-sponsors of the resolution, agreed to 'correct' the scope of the Protocol but insisted that no more amendments would be considered. The revised text did not explicitly include Part I within the scope of the OP-ICESCR, but reference to Parts I, II and III were replaced by more generic (and arguably very vague) wording, specifying that complaints could be brought before the Committee in relation to 'any of the economic, social and cultural rights set forth in the Covenant'.<sup>61</sup>

The revised text was finally approved without a vote by the members of the Human Rights Council on 18 June 2008,<sup>62</sup> although, again, at least one State expressly reserved its position until such time as the final decision was ready to be taken by the General Assembly.<sup>63</sup> The draft has now been submitted to the Third Committee of the General Assembly, which will discuss the matter in October 2008. It is hoped the text will then be adopted by the plenary of the General Assembly, and it is expected that this will happen on or before 10

57 The final text of the OP-ICESCR is contained in Annex 1 to the Human Rights Council Res. A/HRC/8/2, 18 June 2008.

58 The United States, India, Denmark, the Netherlands, Japan, Canada, Poland, Norway, Sweden, New Zealand, German, Pakistan, the United Kingdom, China, Indonesia and Iran: Fifth Working Group Session Report, *supra* n. 12 at Part VI, paras 211–55.

59 In particular, this charge was led by Pakistan and Algeria, along with Palestine and Syria: International Service for Human Rights, 'Human Rights Council, 8th Session, Session Overview, 2–18 June 2008' in *Human Rights Monitor Series* (Geneva: ISHR, 2008) at 21.

60 Canada, the United Kingdom, Australia and Denmark, *ibid*.

61 Article 2, OP-ICESCR.

62 *Supra* n. 2.

63 The United Kingdom.

December, in celebration of Human Rights Day and in time for the 60th anniversary of the UDHR.

It is, however, by no means certain that the text will remain as agreed in the Working Group, nor that it will be adopted at the General Assembly. The scars from the process of adopting the Declaration on the Rights of Indigenous Peoples are still raw,<sup>64</sup> preventing many from being overly confident that the OP-ICESCR will obtain a mere rubber stamp in New York. Yet while the process is far from over, the long journey towards creating the possibility of access to a universal remedy for violations of ESC rights is nearing its end. Advocates hope that the variety of compromises included in the text, and the deals brokered to get to this point, will ensure that no delegations are sufficiently winners or losers, and thus no one has enough incentive to open the text up for further negotiation. This, however, remains to be seen.

Before addressing the key substantive points of the draft Optional Protocol, it is important to note the value of the various meetings and consultations conducted in parallel with the intergovernmental processes in Geneva. These events, often involving a range of international experts, NGO representatives and government delegates, helped progress the discussions in the Working Group sessions, providing fora in which decision makers could debate issues and discuss concerns in depth, thus contributing to the overall speed of the negotiation process in the formal sessions. For example, the informal process of drafting an Optional Protocol began in January 1995 when a group of experts met in Utrecht to review the Committee's early drafting attempts and produced an alternative protocol.<sup>65</sup> Following this, the International Commission of Jurists (ICJ), an NGO which had been one of those behind the campaign for an OP-ICESCR, convened meetings on a regular basis on the topic, starting with a joint consultation with the Office of the High Commissioner for Human Rights on the topic of the justiciability of ESC rights in 2001,<sup>66</sup> and followed by subsequent meetings in collaboration with

64 In November 2006, members of the Third Committee of the UN General Assembly rejected the strongly drafted Declaration on the Rights of Indigenous Peoples, although this instrument had previously been approved by the Human Rights Council on 29 June 2006. Those involved in blocking the adoption of the draft Declaration at the 60th Session of the General Assembly were Australia, Canada, New Zealand, the United States of America, Botswana and Namibia. The draft Declaration was finally adopted a year later, on 13 September 2007.

65 Coomans and van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights – SIM Special No. 18: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Utrecht: The Netherlands Institute of Human Rights, 1995). See further the comprehensive analysis of the Committee's draft and the Utrecht draft in: Arambulo, supra n. 20.

66 See, <http://www.unhchr.ch/html/menu2/escrworkshop.htm> [last accessed 27 September 2008]. See also, further expert seminars convened by the ICJ: Report of the Roundtable on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, hosted by the International Commission of Jurists, 30 November 2001, available at: <http://www.icj.org/IMG/pdf/doc-55.pdf> [last accessed 27 September 2008]; Report of the Expert's

the Republic of Croatia in 2003,<sup>67</sup> and the Government of Portugal in 2003.<sup>68</sup> The French Ministry of Foreign Affairs coordinated a High Level Expert Seminar on the topic in September 2005,<sup>69</sup> and various consultations were convened in Latin America throughout the years of the Working Group sessions, as well as an African Regional Consultation in Cairo in early 2008. These were just some of many examples. The Chairperson also convened a series of expert consultations in Lisbon to discuss drafting questions.

Each of these meetings and consultations provided much needed further opportunities for governments, civil society and UN experts to discuss and debate the issues involved in drafting this new complaints mechanism. These events were complemented by discourse in the academic world, where consideration was also given to the merits of an Optional Protocol.<sup>70</sup> After such a busy two decades of meetings, discussions, reports and consultations, it was a vast relief to those involved to see that once the decision to commence drafting had been agreed upon, the process progressed relatively promptly.

### 3. Overview of the Draft Optional Protocol

The draft Optional Protocol to the ICESCR establishes a new quasi-judicial function for the Committee (preambular paragraph 6 and Article 1).<sup>71</sup> It provides for a communications (complaints) procedure for ‘individuals and groups of individuals’ who claim to be victims of violations of any of the ESC rights contained in the ICESCR: it is therefore considered comprehensive in scope. Complaints can be brought against any State Party to the Optional Protocol, but can only be brought by or on behalf of victims who are ‘under the jurisdiction’ of a State Party (Article 2). Similarly to the OP-CEDAW,<sup>72</sup>

Roundtable Concerning Issues Central to the Proposed OP-ICESCR, hosted by the International Commission of Jurists, 26 and 27 September 2002, available at: <http://www.icj.org/IMG/pdf/doc-61.pdf> [last accessed 27 September 2008].

67 Report of the International Conference on Economic, Social and Cultural Rights, hosted by the Republic of Croatia and the International Commission of Jurists, 3 February 2004, E/CN.4/2004/WG.23/CRP.2.

68 Report of the European Roundtable on Economic, Social and Cultural Rights, hosted by the Government of Portugal and the International Commission of Jurists, 4 January 2005, E/CN.4/2005/WG.23/CRP.3.

69 ‘Ministère français des Affaires étrangères’, *The Spirit of Nantes: Economic, Social and Cultural Rights for All Citizens*, (Paris: Charles Léopold Mayer Foundation, 2005).

70 See *supra* n. 20.

71 During the Working Group sessions and other meetings, consideration was given to whether the Committee on Economic, Social and Cultural Rights is indeed the appropriate body, especially given its legal status as an ECOSOC mandated body and not a true treaty body. References to these discussions can be found in all the reports of the Working Group sessions, and in Scheinin, ‘The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties’, (2006) 6 *Human Rights Law Review* 131.

72 Article 2, OP-CEDAW.

a complaint can be brought under the OP-ICESCR on behalf of an individual or group victim only with consent, unless the author can justify acting without this consent (Article 2). As is consistent with all such procedures, complaints can only be brought if domestic remedies have been exhausted (Article 3(1)), and if the same matter has not been or is not already being, examined by another procedure of international investigation or settlement (Article 3(2)(c)).

Like the OP-CEDAW,<sup>73</sup> express provision has been made in the OP-ICESCR for the possibility of interim measures 'to avoid possible irreparable damage to the victim or victims of the alleged violations' (Article 5).<sup>74</sup> When it comes to considering the merits of the case, the Committee will do this in closed meetings (Article 8(2)), in light of all the documentation brought before it (Article 8(1)) and in doing so it 'may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned' (Article 8(3)). Having examined a communication, the Committee shall transmit its non-legally binding 'views on the communication, together with its recommendations, if any, to the parties concerned' (Article 9(1)).

Besides the individual complaints procedure, the other key feature of the OP-ICESCR is an inquiry procedure, enabling the Committee to investigate if it receives 'reliable information indicating grave or systematic violations by a State Party of the rights set forth in Parts II and III of the Covenant' (Article 11 (2)). This inquiry procedure is applicable on an 'opt in' basis i.e. a State has to expressly declare that it recognises the competence of the Committee before the inquiry procedure can be invoked (Article 11 (1)). The OP-ICESCR also includes an inter-State complaints procedure, similar to other mechanisms (Article 10).<sup>75</sup>

While many of these standard provisions mirror others in the texts establishing the existing complaints procedures, there are a number of aspects of this new mechanism that mark its divergence from the norm.

The major concession to the concern that the Covenant obligation in respect of ESC rights is formulated differently to that in treaties on many other rights, through the inclusion of the principle of progressive realisation and the

73 Article 5(1), OP-CEDAW.

74 The rules of procedure and practice of the Human Rights Committee, the Committee against Torture, and the Committee on the Elimination of Racial Discrimination, also all allow for interim measures.

75 The First Optional Protocol to the International Covenant on Civil and Political Rights (OP1-ICCPR), the ICERD, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT) and the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990, GA Res. 45/158, 18 December 1990, A/RES/45/158 (MWC) all include inter-State procedures.

reference to ‘available resources’ in Article 2(1) of the ICESCR,<sup>76</sup> was reflected in Article 8(4). This provision guides the Committee when examining communications to ‘consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant’ and in doing so, to ‘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’ (Article 8(4)).

The OP-ICESCR also differs from other UN complaints procedures by including a provision allowing the Committee some discretion as to whether to consider all of the claims brought before it. Article 4 states: ‘The Committee may, 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.’

Further, Article 14 of the OP-ICESCR establishes a trust fund, with the aim of ‘providing 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’ (Article 14(3)). The intention behind the trust fund is to contribute ‘to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol’ (Article 14(3)).

For the first time, a formal follow-up procedure has been expressly included in the text of an optional protocol, building on the existing practice of the other treaty bodies.<sup>77</sup> Article 9 provides that within six months, States Parties shall submit written responses to the Committee detailing the action they have taken in response to the Committee’s views and recommendations. In addition, the OP-ICESCR includes a friendly settlement provision, borrowing from the practice of the Inter-American Commission on Human Rights,<sup>78</sup> and the European Court of Human Rights.<sup>79</sup>

#### 4. Contentious Aspects of the Draft Optional Protocol

Many contentious issues were discussed during the OP-ICESCR negotiations, but five aspects in particular caused the most debate and consternation. These were: whether the mechanism would allow governments to pick and choose the rights the Committee had the competence to adjudicate (the *à la carte* approach) or would instead comprehensively encompass all rights

76 Article 2(1), ICESCR reads: ‘Each state party . . . 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 realisation of the (Covenant rights) . . .’

77 See further, Elements Paper, *supra* n. 43 at paras 20 and 1.

78 Article 48(1)(f), American Convention on Human Rights.

79 Article 38(1)(b), European Convention on Human Rights.

under the ICESCR; who would have standing to bring complaints under the protocol and whether NGO generated complaints or other collective complaints would be permissible; the admissibility criteria to be applied; and the criteria the Committee should apply when examining complaints; and how to include an appropriate reference to the fact that international cooperation and assistance is for many countries a necessary enabler for the full realisation of ESC rights. These topics were raised repeatedly throughout the five years of Working Group sessions, and were particularly addressed in the Chairperson's Elements Paper. During the reading of the first draft OP-ICESCR, it became clear that these would be the areas of most significant divergence in the positions of delegations, and thus the second week of the fourth Working Group session was dedicated to addressing some of these concerns in detail. The fifth session was able to progress by approving many provisions on other matters, but the discussions on these more contentious aspects showed that a package encompassing moderately acceptable compromises on all of them would be the only way to succeed in obtaining agreement on any one of them.

### A. Scope

One of the main priorities for many human rights advocates has always been to ensure an OP-ICESCR would be comprehensive in scope, so that complaints could be brought to the Committee in relation to all of the rights in the ICESCR, as well as all levels of State obligations, including the duties to respect, protect and fulfil ESC rights.<sup>80</sup> The possibility that States could exclude some rights or levels of obligations through either opting in or out of rights which could be selected *à la carte* was formally left on the table until the very end of negotiations, although from early sessions of the Working Group it had been apparent that the majority of States were in favour of a comprehensive mechanism.<sup>81</sup> Support from two of the main regional groups, the African Group and the Group of Latin American and Caribbean (GRULAC) States, helped guarantee the numbers for a comprehensive approach.

In her first draft, the Chairperson included both possibilities, also including in Article 2(1) a further bracketed option to restrict communications to

80 NGOs had insisted upon this as one of the 'minimum criteria' for an OP-ICESCR: see statements by, *inter alia*, the NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the NGO Coalition), the International Federation for Human Rights (FIDH), Amnesty International, the International Commission of Jurists (ICJ), the FoodFirst Information and Action Network (FIAN) and the International Network for Economic, Social and Cultural Rights (ESCR-Net), available at: [www.opicescr-coalition.org](http://www.opicescr-coalition.org). [last accessed 27 September 2008].

81 Belgium, Bolivia, Brazil, Burkina Faso, Chile, Ecuador, Egypt (on behalf of the African Group), Ethiopia, Finland, France, Guatemala, Italy, Liechtenstein, Mexico, Nigeria, Norway, Peru, Portugal, Senegal, Slovenia, South Africa, Spain, Sweden, Uruguay and Venezuela were amongst those States to express support for the comprehensive approach: Fourth Working Group Session Report, supra n. 50 at para. 33.



Parts II and III (but not Part I, which, as noted, covers the right to self-determination) of the ICESCR. The report of the fourth session of the Working Group summarises well the key concerns regarding an *à la carte* approach: it ‘would establish a hierarchy among human rights, disregard the interrelatedness of Covenant provisions, amend the substance of the Covenant, 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.’<sup>82</sup> Indeed, the OP-ICESCR would have been unique among the UN human rights instruments if it had allowed for some rights to be singled out for justiciability but not others.

For the Russian Federation in particular, the primary concern in terms of the selection of rights to be covered by the Protocol was excluding claims on the basis of violations of the right to self-determination (as contained in Article 1 of the ICESCR). For some States in favour of an *à la carte* approach, the opportunity to exclude Part I of the ICESCR from consideration was an acceptable compromise,<sup>83</sup> and for some it appeared to be consistent with their understanding of a comprehensive approach,<sup>84</sup> as they did not necessarily consider self-determination to be an individually enforceable right under a completely comprehensive model anyway. The Working Group agreed on a ‘limited comprehensive’ scope, which provided that claims could be brought for violations of all rights contained in Parts II and III of ICESCR.

Although this compromise seemed acceptable at the Working Group, in the informal discussions at the Human Rights Council two months later, some States took particular exception to this aspect, refusing to accept the exclusion of Part I, and claiming that this would undermine the indivisibility of all human rights, and signal a step backwards in terms of universal protection.<sup>85</sup> In the end, the ‘limited comprehensive’ approach did not survive the back room negotiations. The text was amended to allow for complaints regarding violations of ‘any of the economic, social and cultural rights set forth in the Covenant’ (Article 2). The decision to amend the previously agreed language, ‘in the margins of [the] Human Rights Council’,<sup>86</sup> was highly contested, both

82 Fourth Working Group Session Report, *supra* n. 50 at para. 33.

83 The United Kingdom, Australia, Greece, India, Morocco, Russia and the United States: Fourth Working Group Session Report, *supra* n. 50 at para. 36.

84 Egypt, *ibid.* at para. 35.

85 The President of the Committee on Economic, Social and Cultural Rights, Philippe Texier, supported this view that the exclusion of Part I and reference solely to Parts II and III would breach the notion of indivisibility of all human rights: Letter from Philip Texier to Catarina de Albuquerque (in French only), 19 May 2008, available at: <http://www2.ohchr.org/english/issues/escr/docs/LetterCatarina190508.pdf> [last accessed 25 August 2008].

86 Statement by the representative of the United Kingdom to the Human Rights Council during the ‘explanation after the vote’ on Res. 8/2, 18 June 2008, available on the Human Rights Council extranet, at <http://portal.ohchr.org/portal/page/portal/HRCExtranet> [last accessed 27 September 2008].

in informal discussions and then in statements made to the plenary of the Council once the OP-ICESCR had been approved.<sup>87</sup> While the process of renegotiating a careful compromise beyond the Working Group was the key problem for many States at the Human Rights Council, a potentially more serious concern remains in terms of the future interpretation of the OP-ICESCR and the vague nature of the new wording. Some see the ability to bring complaints regarding 'any of the economic, social and cultural rights set forth in the Covenant' as a more comprehensive possibility than restrictions based on Parts II and III. Yet, some States made a point of clarifying that their interpretation of the amended provision, and the ICESCR, was that the right to self-determination by itself 'could not be invoked to trigger a complaint'.<sup>88</sup>

In its original decision on this matter, the Working Group was influenced not just by political expediency in its desire to exclude Part I, but also by the affirmations by the representative of the Committee that it would adopt an approach consistent with the Human Rights Committee (HRC), which for some reinforced a belief that inclusion of Part I would be redundant. The HRC has long maintained that it has no competence to hear claims regarding stand-alone violations of this right.<sup>89</sup> However, the HRC has in fact sustained the relevance of the right to self-determination in relation to other rights, and thus ensured its continued applicability in the HRC's complaint procedure, and its ability to adjudicate cases involving violations of the right to self-determination in conjunction with violations of other rights.<sup>90</sup> The exclusion of the right of self-determination from the scope of the Committee's review when considering complaints under the individuals and groups of individuals communications procedure and the inquiry procedure therefore risked being major retrogression in the legal protection of human rights.

## B. Standing

The effectiveness of any adjudicatory mechanism rests, in a large part, on its *locus standi* provisions. The Chairperson's first draft OP-ICESCR took a broad approach to this, providing standing for both 'individuals and groups of individuals' and collective complaints.<sup>91</sup> The inclusion of both individuals and groups of individuals is not particularly new—the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)

87 International Service for Human Rights, *supra* n. 59.

88 The United Kingdom, Turkey, Canada, Australia and Switzerland, *ibid.*

89 See, for example, *Ominayak (Lubicon Lake Band) v Canada* (167/1984), CCPR/C/38/D/167/1984 (1990) at para. 32.1; *E.P. et al. v Colombia* (318/1988), CCPR/C/39/D/318/1988 (1990) at para. 8.2; and *A.B. et al. v Italy* (413/1990), CCPR/C/40/D/413/1990 (1991) at para. 3.2.

90 See, for example, *Diergaardt et al. v Namibia* (760/1997), CCPR/C/69/D/760/1996 (2000); 8 IHRR 46 (2001) at para. 10.3.

91 Collective complaints were provided for in Article 3 of the Chair's First Draft, *supra* n. 50.

and OP-CEDAW expressly provide standing for groups of individuals, as do the rules of procedure for the HRC.<sup>92</sup> This was generally supported, as was the importance of the role national and international NGOs play in submitting communications on behalf of victims.<sup>93</sup> However, the final text does not grant standing to NGOs to file communications in their own right: they may do so only on behalf of individuals or groups of individuals claiming to be victims. An attempt to restrict NGO involvement to only those organisations with ECOSOC consultative status was defeated after concerns were raised by Belgium, Brazil, Ecuador, Ethiopia, Mexico and the NGO Coalition.<sup>94</sup>

The option of collective complaints, provided for in Article 3 of the Chairperson's first draft OP-ICESCR, raised some consternation. For European States, this possibility was somewhat familiar, as under the European Social Charter, ESC rights complaints may be brought by registered NGOs or trade unions as collective complaints.<sup>95</sup> Yet the concept received lukewarm support at the Working Group.<sup>96</sup> Many States were against the idea.<sup>97</sup> Despite warnings from Portugal that some of the rights in the ICESCR are collective rights,<sup>98</sup> and thus potentially only enforceable under an OP-ICESCR that encompasses collective complaints, the proposed Article 3 on collective communications was deleted. It will be for the Committee to decide whether a trade union may be regarded as a 'group of individuals' with standing to bring claims concerning trade union rights under Article 8.

From the perspective of human rights law and practice, another interesting aspect of the negotiations regarding standing was the proposal to allow the Committee to grant *amicus* standing to NGOs and National Human Rights Institutions (NHRIs).<sup>99</sup> There was some discussion about how the usual language of *amicus curiae* would not be appropriate for a quasi-judicial body (a matter easily resolved by alternative wording), and how formalised such a possibility needed to be, including whether it was more appropriate for inclusion in the rules of procedure rather than the instrument itself. A small number of States were disinclined to include an express *amicus* possibility,

92 See further the analysis of this in the Elements Paper, *supra* n. 43 at para. 10.

93 Belgium, Mexico, Norway, Spain and the NGO Coalition: Fourth Working Group Session Report, *supra* n. 44 at paras 44 and 54.

94 Fourth Working Group Session Report, *supra* n. 44 at para. 54.

95 Optional Protocol to the European Social Charter 1995.

96 In the lead-up to the third session, the following States had expressed interest in collective communications: Ethiopia (on behalf of the African Group), the Netherlands, Canada, Finland, Mexico and Portugal. Later, it was also supported by the ICJ and FIDH: Fourth Working Group Session Report, *supra* n. 50 at para. 56.

97 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.

98 Article 8(1)(b) and (c) of ICESCR.

99 Proposed as Article 1 *bis*. See further, Fifth Working Group Session Report, *supra* n. 12 at para. 42.

stating that third party participation rights were already provided for.<sup>100</sup> A lack of express precedent in other similar optional protocols was also cited as reason for its non-inclusion,<sup>101</sup> although it appears the door is still open to address the matter either through the rules of procedure or Committee practice. If pursued, thought will need to be given to the separation of the consideration of admissibility and merits, in order to facilitate the participation of third parties not already involved in the case. Presumably, documentation from NGOs and NHRIs may be consulted by the Committee under Article 8(3).

### C. Admissibility

Many delegations at the Working Group were in favour of relying upon previously accepted wording from other human rights instruments when it came to specifying aspects of admissibility criteria such as the exhaustion of domestic remedies, the exclusion of ill-founded and anonymous complaints, and the question of time limits on the lodging of claims. Nonetheless, there was debate for several years over how to precisely formulate the rule requiring exhaustion of domestic remedies. After early calls to insert an additional requirement to exhaust regional remedies were rejected,<sup>102</sup> the negotiations centred around the second sentence in the former Article 4(1)—the requirement that available domestic remedies have to be exhausted ‘shall not be the rule where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief’. Burkina Faso, Canada, China, Ecuador, Egypt (on behalf of the African Group), Poland and the United States wanted the phrase ‘unlikely to bring effective relief’ deleted.<sup>103</sup> This bid was successful, despite the insistence by others that the wording was agreed language from the OP-CEDAW, OP-CRPD, CAT and the MWC.<sup>104</sup> At least one delegation reminded the Working Group that the exhaustion of domestic remedies requirement does not apply when no such remedies exist at the national level.<sup>105</sup>

The discussion about admissibility was the opportunity for delegates to also raise traditional concerns that a complaints procedure would ‘open the floodgates’ to hundreds or thousands of complaints regarding violations of ESC rights. In the first and second sessions of the Working Group, there had seemed to be (an unfounded or at least unproven) correlation being made between the fact that there are many millions of people living in poverty and

100 See further, Fourth Working Group Session Report, *supra* n. 50 at para. 41.

101 *Ibid.*

102 Originally raised by Egypt, later taken up as a suggestion by the United Kingdom, and dropped before being included in any drafting: Fourth Working Group Session Report, *supra* n. 50 at para. 62.

103 Fourth Working Group Session Report, *supra* n. 50 at para. 59 and Fifth Working Group Session Report, *supra* n. 12 at para. 49.

104 Fifth Working Group Session Report, *supra* n. 12 at para. 49.

105 *Ibid.*

deprivation, and the possibility or likelihood that such circumstances would give rise to the lodging of an individual complaint. In the first week of the fifth session of the Working Group, Canada, New Zealand and the United Kingdom proposed addressing this potential overload through the inclusion of new wording referring to the Committee's discretion to consider a case on the basis of whether the victim was likely to suffer some 'significant disadvantage', or unless the communication raised a 'serious issue of general importance'.<sup>106</sup> Again, this proposal was attractive to some of the European governments, as it echoed familiar recent proposals to reform the procedures and thereby reduce the caseload of the European Court of Human Rights.<sup>107</sup> Yet there was significant opposition to pre-emptively including such a provision, as it 'would seem to imply that some violations could be considered insignificant, which [is] unacceptable'.<sup>108</sup> Other wording was suggested, including a need to show 'clear detriment', until it was decided to settle on 'clear disadvantage'. This phrase currently lacks legal content, and so it will be interesting to see how, if at all, it is interpreted by the Committee.

#### *D. Criteria for Review*

Article 8(4) of the draft OP-ICESCR 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.

States such as the United States of America and Canada had long argued in the Working Group that the progressive nature of ESC rights and the 'available resources' limitation recognised in the Contracting Parties' basic obligations in Article 2(1) of the Covenant, made justiciability difficult, if not impossible, at the universal level. Additionally, other States, if not denying the possibility, had nonetheless raised serious concerns about how the Committee would approach cases involving questions on resource allocation and assessments of the sufficiency of steps taken by the Government to realise the rights.<sup>109</sup> At various formal and informal sessions, the Committee's representative at the Working Group, Professor Eibe Riedel, was questioned about what approach he foresaw the Committee adopting. Concerns about the Committee's potential over-involvement in policy setting prompted a desire to curtail this through

106 Fifth Working Group Session Report, *supra* n. 12 at para. 59.

107 See the admissibility requirement proposed by Article 12, Protocol 14 to the European Convention on Human Rights.

108 Fifth Working Group Session Report, *supra* n. 12 at para. 59.

109 In particular, Canada, the United Kingdom and Australia.

the inclusion of criteria in the text of the OP-ICESCR, which would guide the Committee as to the standard it was to apply when undertaking its consideration of the merits of the claim.

Thus, discussions began in the fourth Working Group session about an explicit requirement that the Committee grant to the State a margin of appreciation, and the inclusion of a 'reasonableness' standard, both contained in Article 8(4) of the Chairperson's initial draft.<sup>110</sup> There were strong objections to such inclusions, in particular the margin of appreciation doctrine.<sup>111</sup> The reasonableness standard, influenced by the South African Constitutional Court's jurisprudence on ESC rights which relies strongly on this standard of review,<sup>112</sup> was cautiously supported by NGOs, with the proposal that it be coupled with 'effectiveness', while the Chair later suggested 'reasonableness and appropriateness' would be more useful.<sup>113</sup> Some delegates, mainly those less familiar with the English common law legal system, were reluctant to use reasonableness as a standard for review,<sup>114</sup> despite the proposals from the United Kingdom that an explanatory annex be included to define the concept.<sup>115</sup> Some preferred a mandatory application of the margin of appreciation doctrine to alleviate their concerns, with Canada, Denmark, Greece, the Netherlands, New Zealand, Norway, Sweden, Turkey and the United Kingdom additionally requesting that qualifiers such as 'broad' or 'wide' be included in order to further entrench the State's discretionary powers.<sup>116</sup> The proposal was criticised as an attempt to import an European principle into international law<sup>117</sup>—as although the margin of appreciation doctrine is relatively well established at the European Court of Human Rights,<sup>118</sup> it has not been codified, least of all in an international instrument.

110 Supported by Belgium, Chile, Finland, Germany, Mexico, the Netherlands, Portugal, Slovenia and Spain at the Fourth Working Group Session and Australia, Austria, Germany, Greece, the Netherlands, New Zealand, Slovenia and Sweden at the Fifth session: Fourth Working Group Session Report, supra n. 50 at para. 94 and Fifth Working Group Session Report, supra n. 12 at para. 88.

111 The removal of the words 'margin of appreciation' was requested by Argentina, Bangladesh, Belgium, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation, Sri Lanka and the NGO Coalition for an OP-ICESCR: Fifth Working Group Session Report, supra n. 12 at paras 11, 91, 169 and 171.

112 See *The Government of the Republic of South Africa and others v Irene Grootboom and others* [2001] (1) SA 46 (CC).

113 Fifth Working Group Session Report, supra n. 12 at para. 168.

114 Azerbaijan, Denmark, Nigeria, Norway and Russia expressed their objection at the Fourth Working Group Session, and Ecuador, Egypt (on behalf of the African Group), Guatemala, India, Liechtenstein, Mexico, Peru, Sri Lanka and the NGO Coalition for an OP-ICESCR asked for its deletion at the Fifth Working Group: Fourth Working Group Session Report, supra n. 50 at para. 94; and Fifth Working Group Session Report, supra n. 12 at para. 88.

115 Fourth Working Group Session Report, supra n. 50 at para. 94 and Fifth Working Group Session Report, supra n. 12 at para. 88.

116 Fifth Working Group Session Report, supra n. 12 at para. 91.

117 Ibid. at para. 171.

118 Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002).

What resulted from these discussions in Article 8(4) was a moderate compromise: the inclusion of the criteria of ‘reasonableness’, but no mention of a need to apply a margin of appreciation. Although no explicit margin of appreciation is included, States are still granted discretion through the application of the second sentence of Article 8(4).

### *E. International Cooperation and Assistance*

How to reflect the crucial role of ‘international assistance and cooperation’, as enshrined in Article 2(1) of ICESCR, was always going to be one of the most difficult aspects of the OP-ICESCR to draft. Many delegates, especially those from the African Group and GRULAC States, highlighted the potential for international cooperation to be a ‘tool to ensure a better implementation of economic, social and cultural rights in general, and of the Committee’s views and recommendations in particular’.<sup>119</sup> The Chairperson, in her first draft, had drawn upon the example of the wording of Article 22 of the ICESCR and Article 45(3) of the Convention on the Rights of the Child, to include a provision (Article 13 in the Chair’s first draft) enabling the Committee to transmit its views and requests for technical cooperation directly to the relevant agencies ‘so that the agencies and programmes in question could identify tangible international measures to assist a State in need’.<sup>120</sup>

The Chairperson had also incorporated a second provision, on the suggestion from Egypt (on behalf of the African Group), to establish a special voluntary fund which would support States facing serious resource constraints in their efforts to guarantee ESC rights and better enable them to implement the recommendations of the Committee. This provision (formerly Article 14) was based on the example of similar funds existing under the Optional Protocol to the Convention Against Torture (OP-CAT) and the Rome Statute of the International Criminal Court.<sup>121</sup> It was, however, not supported by many Western States, including Australia, Belgium, Denmark, France, Liechtenstein, the Netherlands, New Zealand, Sweden, Switzerland, the United Kingdom and the United States. The language referring to the voluntary nature of the fund was dropped, amidst, on the one hand, arguments that any obligatory fund would be impossible to support, and, on the other, reminders that the inclusion of international cooperation and assistance in Article 2(1) of the ICESCR entailed corollary duties.<sup>122</sup> Yet, without the express requirement that the fund be established by obligatory contributions, it is voluntary in nature.

119 Explanatory Memorandum, *supra* n. 50 at para. 35.

120 *Ibid.*

121 See, for example, Article 26, OP-CAT.

122 Fourth Working Group Session Report, *supra* n. 50 at paras 164 and 165.

In the fourth and fifth Working Group sessions, these two draft provisions (which were eventually merged into one, now Article 14) were much discussed, with debate over whether the Committee or the State should be specified as the party requesting the assistance, and how victims could be the beneficiaries of the trust fund either as direct recipients of funding to remedy their violation, or through receiving assistance to bring claims under the OP-ICESCR.<sup>123</sup> Criticism was levelled at a fund directed towards providing financial 'rewards' to human rights violators through creating a direct link between violations and access to funding.<sup>124</sup> As one of the pivotal aspects of the compromise package position, the final decision was made to include the provision establishing a trust fund; access to the fund by victims was excluded (Article 14(3)).

## 5. Other Key Aspects of the Draft Optional Protocol

Outlined above are some of the key controversial aspects of the OP-ICESCR, but these were no means the only areas of discussion and divergence of opinion. Numerous other aspects of the OP-ICESCR and the surrounding negotiations deserve consideration, although it is not possible to sufficiently explore these in this article. For example, one of the issues which arose for the first time in the reading of the first draft, and continued to be problematic until the last week of discussions, was the wording of the preamble, in particular whether or not the grounds of discrimination should be expressly stated. The Chair's initial proposal was to note, in preambular paragraph 2, that 'the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind'. At the fourth Working Group session Egypt (on behalf of the African Group) proposed that the final words in the Chair's draft sentence be replaced by the list of grounds of discrimination contained in Article 2 of the UDHR.<sup>125</sup> Others objected,<sup>126</sup> insisting that the wording in the Chair's draft better reflected the progressions in human rights that had occurred since 1948: the elephant in the room being discrimination on the grounds of sexual orientation and gender identity. Egypt won with its determination to see the UDHR grounds spelt out, although as this list is non-exhaustive it does not comprehensively exclude other forms

123 *Ibid.* at para. 168 and Fifth Working Group Session Report, *supra* n. 12 at paras 117, 184 and 191–4.

124 Fifth Working Group Session Report, *ibid.* at para. 114.

125 Fourth Working Group Session Report, *supra* n. 50 at para. 21.

126 Argentina, Mexico, Portugal, Spain, Switzerland and the United Kingdom: Fourth Working Group Session Report, *supra* n. 50 at para. 21. At the Fifth Working Group Session, Belgium, Canada, Chile, Costa Rica, Ecuador, Finland, France, Haiti, the Islamic Republic of Iran, Mexico, Poland and the NGO Group had added their voices in favour of the more general wording in the Chair's draft: Fifth Working Group Session Report, *supra* n. 12 at para. 17.



of discrimination from being considered. It was, however, a lost opportunity to reaffirm the language of the most recent human rights treaty, the Convention on the Rights of Persons with Disabilities (CRPD), which recognises an entitlement to rights ‘without distinction of any kind’.<sup>127</sup>

Another interesting debate occurred around the question of whether to allow reservations, or specifically exclude this possibility, or leave the matter unspoken in the OP-ICESCR. While the last option was the one eventually agreed, long debates preceded this decision. On the one hand NGOs and others argued that a provision allowing for reservations would be akin to introducing an ‘à la carte approach’ via the back door, and many States strenuously opposed allowing reservations for a procedural instrument.<sup>128</sup> Yet some delegations, such as that of Denmark, considered that an express provision allowing for reservations would better enable global ratification.<sup>129</sup> Again, a compromise was made, and the opportunity to affirm the incompatibility of reservations with such an instrument, as had been done in the OP-CEDAW,<sup>130</sup> was lost. It will now be up to the Committee to take a view about the validity of a respondent State’s reservation so that it can apply the OP-ICESCR in a particular case, although, in accordance with the law of treaties, the final decision as to whether a reservation is consistent with the ‘object and purpose’ of the OP-ICESCR, and hence valid, will rest with the Contracting States.

Despite the somewhat traditional approaches taken to the preamble and the question of reservations, the OP-ICESCR does reflect some of the more progressive aspects of other universal human rights instruments. It provides for interim measures to be requested if a victim faces possible ‘irreparable damage’ (Article 5). The inclusion of this in the text of the Optional Protocol itself is consistent with OP-CEDAW’s similar provision, and is an improvement upon the way in which the HRC, the Committee against Torture and the Committee on the Elimination of Racial Discrimination must rely on their rules of procedure for the authority to order such measures. Such a measure had been staunchly supported by NGOs and States who considered that ‘[t]he function of interim measures to prevent irreparable harm was of such importance that the matter should not be deferred to the Committee’s rules of procedure.’<sup>131</sup> A potentially retrogressive proposal from Norway that the voluntary nature of such requests be made clear in the wording of the

127 Preambular at para. 2, OP-CRPD.

128 Argentina, Belgium, Chile, Finland, Germany, Mexico, Portugal, South Africa and Venezuela: Fourth Working Group Session Report, supra n. 50 at para. 140.

129 Ibid. at para. 139.

130 Article 17, OP-CEDAW.

131 Supporters of the inclusion of an interim measures provision included Argentina, Belgium, Brazil, Chile, Ecuador, France, Finland, Liechtenstein, Mexico, Peru, Portugal, Spain, Uruguay, Venezuela, Poland, South Africa, Uruguay, Amnesty International, ESCR-Net, FIAN and the ICJ: Fourth Working Group Session Report, supra n. 50 at para. 67.

provision was rejected.<sup>132</sup> A proposal to limit the use of interim measures to 'exceptional circumstances' was, however, agreed.<sup>133</sup>

The OP-ICESCR also expressly provides for an inquiry procedure, expanding the Committee's functions even further. The inclusion of an inquiry procedure in the Chairperson's draft had prompted debate about the need for the Committee to have such a function given that the UN Special Procedures also have the possibility of investigating potential ESC rights violations. Thanks to the support of Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa, Sweden and the NGO Coalition, amongst others, the mechanism was retained, despite opposition from Australia, China, Egypt, India, Russia and the United States.<sup>134</sup> Those in favour noted the importance of a mechanism that could be used by individuals and groups facing difficulties in accessing the individual communication procedure or facing danger of reprisal.<sup>135</sup> The chief question then became whether the procedure should be 'opt-in' or 'opt-out'. A similar procedure established under the OP-CEDAW allows States to 'opt-out', and the Convention Against Torture provides the possibility for States to enter a reservation declaring they do not recognise the competence of the Committee in relation to the inquiry function (Article 20). Despite these precedents for 'opt-out' procedures, the OP-ICESCR adopts an 'opt-in' method, providing in Article 11(1) that '[a] State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee' to conduct an inquiry if it 'receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant' (Article 11(2)). Thus the mechanism, although included, will require positive support by States in order to be of any use.

Finally, it may surprise some readers to see that Article 10 contains an inter-State complaints procedure, mirroring the provisions in the OPI-ICCPR, ICERD, CAT and CMW,<sup>136</sup> all of which remain unused to date. There had been some discussion at the various Working Group sessions about the efficacy of

132 Fifth Working Group Session Report, *supra* n. 12 at para. 160. The HRC has taken the view that failure to comply with its interim measures are 'grave breaches' of a state's obligations under the OPI-ICCPR to permit the consideration of communications: *Piandiong v Philippines* (869/99), CCPR/C/70/D/869/1999 (2000); 8 IHRR 349 (2001).

133 This had been suggested by the Chairperson and supported by Argentina, Bangladesh, Brazil, Canada, Denmark, Egypt, France, Germany, Greece, Japan, Mexico, the Netherlands, Portugal, Spain, Sweden, the United Kingdom and the United States, although it was considered redundant by Finland, Switzerland, Amnesty International, ICJ and the NGO Coalition: Fifth Working Group Session Report, *ibid.* at para. 158.

134 Fourth Working Group Session Report, *supra* n. 50 at para. 111.

135 *Ibid.*

136 Article 21, CAT and Article 76, MWC.

including a provision that had remained unused in similar instruments.<sup>137</sup> The Chairperson suggested that the Working Group

consider the extent to which an inter-State procedure might be a means by which a treaty body could provide its good offices in order to seek a friendly solution between States having made an appropriate declaration to accept such an instrument, [for example] in relation to concerns over international cooperation and assistance.<sup>138</sup>

This approach reflects anecdotal reports that, although no claims have been progressed through the inter-State complaints procedures established by other instruments, their mere existence provided useful tools for international diplomacy. In the ensuing discussions at the Working Group, some States confirmed that such a procedure had proved to be useful in the regional human rights systems.<sup>139</sup>

The inclusion of this provision is indeed a positive retention, as not only does it ensure that for the sake of any potential future unification of the treaty body communications procedures there is no significant gap when it comes to inter-State justiciability of human rights, but also it leaves open the door for possible developments in international jurisprudence in this regard. We are entering an era where inter-State dispute settlement mechanisms are increasingly being used to settle matters relating to human rights. For example, the International Court of Justice has decided its first contentious case on human rights issues, *DRC v Uganda*,<sup>140</sup> and issued its first Advisory Opinion commenting on human rights obligations specifically related to ESC rights and the ICESCR, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>141</sup> It is also soon to hear the first request for the provisional measures in a case brought specifically on the grounds of alleged violations of a human rights treaty, in proceedings filed by Georgia against Russia.<sup>142</sup> In short, these developments show us that the inter-State complaints procedures of the UN treaty bodies may not

137 For instance, in the Fourth Working Group Session, China, Ecuador, Ethiopia, Japan, Norway and the United Kingdom suggested it be deleted, some expressly on the basis that similar procedures had remained unused: Fourth Working Group Session Report, supra n. 50 at para. 109.

138 Elements Paper, supra n. 43 at para. 34.

139 Fourth Working Group Session Report, supra n. 50 at para. 109.

140 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of the International Court of Justice, 19 December 2005.

141 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the International Court of Justice, 9 July 2004.

142 See further, the press releases of the International Court of Justice, 'Georgia submits a Request for the indication of provisional measures', 14 August 2008, and 'Georgia institutes proceedings against Russia for violations of the Convention on the Elimination of All Forms of Racial Discrimination', 12 August 2008, available at: <http://www.icj-cij.org/docket/files/140/14661.pdf> and <http://www.icj-cij.org/docket/files/140/14659.pdf> respectively [last accessed 24 August 2008].

remain idle forever, and thus it is forward-thinking (if probably somewhat unintentionally on the part of most Working Group members) to include such a traditional provision in relation to ESC rights.

## **6. Preliminary Assessments of Potential Successes and Impacts**

If the OP-ICESCR text is adopted by the General Assembly, hopefully later this year, it will enter into force three months after the tenth State has ratified or acceded to the instrument (Article 18). Given the speed with which the OP-CPRD entered into force, and the broad support for the OP-ICESCR expressed by many delegations, one can only hope that the OP-ICESCR's final steps towards implementation will also be fast and smooth. What will remain a longer term task for the human rights community is gathering an accurate picture as to whether the campaign for access to justice for victims of ESC rights violations has truly been enhanced through the adoption of this mechanism. It will take time, after the eventual adoption of the OP-ICESCR, to assess whether the mechanism really does 'ensure effective protection for victims of violations of economic, social and cultural rights', as the Chairperson and others hope it will.<sup>143</sup> Thus, it could be reasonably argued that any assessment of the potential impact of this mechanism is, at this stage, likely to be little more than premature hypothesising. Yet, it is nonetheless important to begin to establish a framework for some form of assessment, lest we continue along the road of proliferation of international mechanisms without giving due thought to their added value.

There are several ways in which such assessments could be structured. For example, we could take the number of States ratifying the OP-ICESCR as a guide to the success of the mechanism and what degree of impact it will have upon ratifying States, and more broadly. Many have taken this approach towards the Convention on the Protection of the Rights of Migrant Workers and their Families, claiming that as this instrument has a relatively small number of signatories, and those few that have ratified are representative of migrant exporting States, rather than receiving States, this instrument is one of the 'weakest' in the UN armoury. Yet migrant workers advocates claim it is one of the strongest, based on the tough wording of the Convention and the refusal of negotiators to weaken textual protections. They are less concerned about what the short-term number of ratifying parties means for the 'success' of the Convention, and more concerned about the longer term consequences of developing progressive international human rights law and establishing a body that can clearly adjudicate well articulated rights.

143 Fifth Working Group Session Report, *supra* n. 12 at para. 3.

On this basis, does the OP-ICESCR look set to be celebrated or ignored? It could be said that the last minute decision to make the Optional Protocol comprehensive in scope saved it from accusations of being an overly weak text, although some provisions could still have been stronger (see comments above regarding the role of NGOs as one example). It is difficult to say at this point how successful the ratification campaign will be: despite the widespread support from the GRULAC States and the African Group and assurances from many during the drafting processes that they are eager to ratify, will some States get cold feet and decide they are not ready to subject themselves to adjudication? Will some, perhaps rightly, claim that they do not have the domestic remedies in place to make entering into an Optional Protocol a desirable short-term policy option?

The back room critique by some diplomats from developed countries has been that this Optional Protocol risks being one which is only ratified by developing countries wishing to access the trust fund, who will claim lack of resources as mitigating circumstances in relation to all and any complaint raised against them. Developed States are reluctant to be the only ones held accountable under such a mechanism, which they see as carrying a risk of imposing higher standards upon rich countries. Hence, the push by countries like Australia and New Zealand to promote inclusion of wording referring to a 'wide margin of appreciation' for government decisions on resource allocations: they claimed this would make the Protocol more 'ratifiable' by their governments, and therefore a more 'effective' instrument overall. It will be interesting to see if the result of Article 8's government-friendly references to standards of reasonableness and State discretion in adopting 'a range of possible policy measures' heightens the willingness of States to sign on, or whether this admirable concern for the long-term efficiency of the mechanism was a smoke-screen for watering down the Committee's power to intervene.

While the level of acceptance may not provide a full indication as to the potential impact that this instrument may have, some minimum level of ratifications will be necessary to bring it into operation and ensure the Committee can begin receiving complaints. However, when it comes to particular aspects of the OP-ICESCR, the success of the instrument may be variable. For instance, in addition to ratification of the primary (optional) instrument, States are further requested to expressly give the Committee competence to conduct inquiries. The success of the inquiry procedure will therefore be dependant first on the forthcoming nature of this consent, and perhaps only subsequently will broader impacts become visible and relevant.

Taking a more comprehensive comparative analysis approach, one could assess the OP-ICESCR on the basis of how it compares with other human rights petitions mechanisms. Does it create more or less adjudicative space for victims? Does it add to the mechanisms that already exist, and fill gaps in the system, or is it purely duplicative of what is already out there? Do the

provisions of the OP-ICESCR reflect progression or retrogression in international human rights law and practice, or do they risk repeating exactly the same mistakes or raising the same problems that we see in other similar treaty body complaints procedures or regional adjudicatory mechanisms? Does the OP-ICESCR consolidate best-practice, or reject it? Although, not all aspects of the Optional Protocol stand up as examples of best-practice in the UN human rights system, as other complaints procedures are more progressive in some aspects, the OP-ICESCR does not fare too badly by comparison. For example, the express provision of interim measures is a positive development following on from the example of the OP-CEDAW, although the 'opt in' nature of the inquiry procedure is retrogressive when compared with the OP-CEDAW.

Another framework for analysis could be an assessment of whether or not the OP-ICESCR, in its final drafted form, has the capacity, on a textual basis, to fully realise the intended goals of the project. For instance, if one of the benefits promoted during the long-running campaign for an OP-ICESCR was that the Optional Protocol would provide a forum for victims to seek redress for violations of ESC rights, does the text of the OP-ICESCR adequately and appropriately facilitate this goal? Do the admissibility criteria and standing provisions sufficiently allow victims of violations to access the forum, or do they amount to barriers to justice? Do the criteria for review of a claim and the standard to be applied when reviewing the merits adequately allow the Committee to adjudicate violations, or is the margin of appreciation too skewed towards responding States? Is the OP-ICESCR as worded an instrument that will enable the Committee to fulfil the goals that proponents of an OP-ICESCR set out to achieve, such as creating a body of jurisprudence that will further enable interpretation and implementation of ESC rights globally? Will the OP-ICESCR actually contribute to progress the realisation of ESC rights? Likewise, is the text appropriately framed to address the concerns and critiques that had been levelled at the idea of an adjudicatory mechanism on ESC rights? For instance, does it adequately take into account the difficulty of fulfilling ESC rights for developing countries, or properly respect the parliamentary sovereignty of governments elected to make tough decisions about spending on social policies?

Some of these questions can already be answered, although all will require further elaboration and assessment as the mechanism begins operation. For example, in relation to the concern about the difficulty for developing countries, it appeared in the negotiations that even many of its proponents see the trust fund as little more than window dressing, and have accepted that due to its voluntary nature, it is quite likely it may never come into practical operation. On the question of the contribution the OP-ICESCR makes to the realisation of ESC rights, as referred to earlier, the former High Commissioner Ms Louise Arbour has articulated how the mere fact that such an instrument has been agreed and an adjudicatory mechanism now exists can be seen as a step towards ending the hierarchy of rights and setting us on track to enhance

global jurisprudence on ESC rights issues.<sup>144</sup> On a more technical level, the deliberate exclusion of *locus standi* for NGOs to directly bring claims (without the requirement they act ‘on behalf of’ victims) can be seen as a failure when it comes to creating a mechanism that has the best chance of being one that will provide access to justice. Most victims of ESC rights are those who would already struggle to access domestic remedies, if such remedies are available, let alone international remedies. To rule out the possibility for NGOs, who are usually the entities who bridge the gap between grass roots human rights violations and international redress mechanisms, to directly bring cases to the Committee means only those victims with the resources and awareness to file a petition, and the willingness to be named as complainants, will have the opportunity to access the complaints procedure.

Applying this functional analysis approach, the preliminary assessment is again mixed, and serves as little more than a reminder that the task of evaluating our newest human rights instrument requires more examination and more time to see how it will work once the finely drafted provisions are put into practice and interpreted.

## 7. Preliminary Conclusions

The anticipated adoption of this new instrument may not solve all of the problems that have plagued the international human rights community for decades when it comes to ESC rights. It is difficult to assess yet whether the OP-ICESCR will enhance the coherence of the human rights system in its treatment of rights, or whether the drafting decisions the Chairperson and the Working Group members have made along the way will ultimately hinder this process in various ways. For human rights advocates waiting and hoping for the final adoption of the text at the end of this year and its subsequent entry into force, the next step is not only to consider what impact this new mechanism can have, but also how best to maximise its potential through initial attempts at developing jurisprudence. The draft OP-ICESCR represents a significant move forward, but time will tell whether or not it will signal the real end of the war between civil and political rights and ESC rights.

144 Supra n. 5.