
Appendix No. 2
Joint Sign-On Statement
Send endorsements to berry@icj.org

JOINT SUBMISSION BY NON-GOVERNMENTAL ORGANISATIONS, HUMAN RIGHTS INSTITUTIONS AND CIVIL SOCIETY GROUPS PERTAINING TO THE DELIBERATIONS OF THE COMMISSION ON HUMAN RIGHTS, INTER-SESSIONAL WORKING GROUP ESTABLISHED TO CONSIDER OPTIONS REGARDING THE ELABORATION OF AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

February 2004

I. INTRODUCTION

The fifty-ninth session of the Commission on Human Rights established an inter-sessional open-ended working group mandated to *consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (hereinafter *ICESCR* or the *Covenant*). Motivated by a widespread concern for the protection and promotion of economic, social and cultural rights, the undersigned, in representation of non-governmental organisations, human rights institutions and civil society, submit the following views concerning the deliberations of the working group that will meet for its inaugural session in February 2004.

II. CONTEXT

Guided by principles enshrined in the *United Nations Universal Declaration of Human Rights*, it is clear that undivided State party adherence to the *Covenant* is of considerable importance in protecting and promoting economic, social and cultural rights. It is recognised that, through their ratification of the *Covenant*, States parties bear responsibility to ensure that economic, social and cultural rights are protected and promoted. The ensuing need to assist in the realisation of these rights, through the provision of a comprehensive international remedial mechanism to intervene during and/or adjudicate over *ICESCR* rights violations, is thus of paramount importance.

III. CRITICAL COMPONENTS OF AN OPTIONAL PROTOCOL TO THE *ICESCR*

The undersigned non-governmental organisations, human rights institutions and civil society representatives assert that the following critical components are essential for an Optional Protocol to the *ICESCR* to fulfil its potential as an effective mechanism through which economic, social and cultural rights may be protected and promoted:

(a) Comprehensive Scope

Gathering together representatives from over 170 States, the 1993 Vienna World Conference on Human Rights was unequivocal in confirming the universality, interdependence, indivisibility and interrelatedness of civil, cultural, economic, political and social rights. Given that the first Optional Protocol to the International Covenant on Civil and Political Rights, (hereinafter *ICCPR*), relates in a comprehensive manner to all of the rights embodied in that Covenant, not to adopt a similar approach in drafting an Optional Protocol to the *ICESCR* would be to directly challenge the universality, interdependence, indivisibility and interrelatedness of all human rights.¹ For this reason, an Optional Protocol to the *ICESCR* should clearly address *all* of the rights and State obligations enshrined in the *Covenant*.

(b) State Obligations to Respect, Protect and Fulfil *Covenant* Rights

As with the first Optional Protocol to the *ICCPR*, an Optional Protocol to the *ICESCR* should address both negative and positive State obligations associated with the realisation of *Covenant* rights. In particular, an Optional Protocol to the *ICESCR* should entertain complaints and empower an inquiry procedure where States parties violate their obligations to respect, protect and fulfil-facilitate/fulfil-provide *Covenant* rights.

The obligation to *respect* requires States parties to refrain from interfering with the enjoyment of *Covenant* enshrined economic, social and cultural rights. This is a negative obligation that mandates States parties to act in a way that does not violate economic, social and cultural rights and/or infringe on an individual's freedom to access these

¹ Arambulo, K., *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights, Theoretical and Procedural Aspects*, Intersentia, Antwerpen: 1999 at 235. See also van Hoof, F., "Discussion on the Draft Optional Protocols" in van Hoof, F. and Coomans, F., eds., *The Right to Complain About Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, Utrecht: 1995 at 212. See also See United Nations reference document E/C.12/1992/WP.9, paragraph 37. Following a comprehensive approach in drafting an Optional Protocol to the *ICESCR* would not preclude the institution of procedural safeguards that would ensure that the instrument is not abused. By way of example, while a comprehensive approach was utilised in drafting the first Optional Protocol to the *ICCPR*, in interpreting Article 1 of this Covenant, the United Nations Human Rights Committee instituted procedural safeguards so as to prevent the right to self-determination from being the subject of communications. See *Ominayak v. Canada*, Communication No. 167/1984, Official Records of the General Assembly, forty-fifth session, Supplement No. 40 (A/45/40), vol. II, annex IX, section A at 1-30.

rights. Within this context, States parties must “respect the freedom of the individuals to take the necessary actions and use the necessary resources – alone or in association with others.”²

The obligation to *protect* requires States parties to prevent *ICESCR* rights abuses by third parties. In this, States parties must take “measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the infringement of his material resources.”³

The obligation to *fulfil* encompasses State party obligations to *facilitate* access to and/or *provide* for the full realisation of economic, social and cultural rights. This is a positive obligation. The obligation to *facilitate* requires States parties to pro-actively engage in activities that strengthen access to and the utilisation of resources and means to ensure the realisation of *Covenant* rights. The obligation to *provide* requires States to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction whenever they, for reasons beyond their control, are unable to realise these rights through the means at their disposal.⁴

State obligations under the Optional Protocol to the *ICESCR* must encompass both negative and positive obligations, thereby reinforcing the universality interrelatedness and indivisibility of all human rights. Such an approach would also serve as a reminder to the international community, through the *ICESCR*/Optional Protocol working group, of the importance it attaches to economic, social and cultural rights issues and seriousness with which it now responds to violations.

(c) An Optional Protocol Complaint's and Inquiry Procedure

Conceptualised as a complaint's mechanism and an inquiry procedure, an Optional Protocol to the *ICESCR* would possess the potential to significantly contribute towards the realisation of *Covenant* enshrined economic, social and cultural rights.

An Optional Protocol *complaint's mechanism* would provide individuals and groups with access to an international adjudicative procedure. Under this procedure, individuals and/or groups could communicate directly with the United Nations Committee on Economic, Social and Cultural Rights, (“the Committee”), to seek and obtain remedies for specific violations of rights contained in the *Covenant*.

An Optional Protocol's inquiry procedure would empower the Committee to initiate an investigation into particularly grave or systematic abuses of *Covenant* rights. An inquiry procedure would reinforce an Optional Protocol's complaints procedure as it would: (i)

² Asbjørn Eide, "Realisation of Social and Economic Rights. The Minimum Threshold Approach", International Commission of Jurists The Review 1989, Issue 43, 40, 1989, p. 43. See also Maastricht Guidelines on Violations of Economic Social and Cultural Rights, January 1997, para. 6.

³ *Ibid.*, (Eide) at 42.

⁴ *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6. See also Committee on Economic, Social and Cultural Rights, General Comment 12, United Nations document reference, E/C.12/1999/5, para. 15.

Open an avenue to address situations where individual/group communications could not adequately reflect the gravity or the systemic nature of violations of *Covenant* provisions; (ii) Allow grave and/or systematic *Covenant* violations to be investigated where individuals or groups were unable to utilise the complaint's mechanism for reasons including fear of reprisals; and (iii) Enable a more-timely response to grave and/or systematic violations of the provisions of the *Covenant*, and to continuing violations in particular.⁵

(d) Standing to Lodge an Optional Protocol Complaint

At a minimum, parties who possess the ability to initiate a complaint, (standing), under an Optional Protocol to the *ICESCR*, should include:

- (i) Individuals and group of individuals⁶ who have been victims of violations of *Covenant* rights by State parties;
- (ii) Representatives of individuals or groups of individuals empowered to initiate complaints *on behalf of* individual and collective victims.

The importance of expressly acknowledging the competence of representatives, particularly non-governmental organizations and national human rights institutions to launch complaints on behalf of individual and groups victims of *ICESCR* violations cannot be underestimated. Under existing instruments, complaints *on behalf of* individual and group victims have either been specifically included⁷ or such representative standing has been provided through adjudicative interpretation.⁸ The significance of allocating standing to such representatives is rooted in the fact that these

⁵ Inter-American Institute of Human Rights, *Optional Protocol, Convention on the Elimination of all Forms of Discrimination against Women*, Costa Rica: 2000 at 71-72. An Optional Protocol to the *ICESCR* inquiry procedure could be modelled after either Article 20 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Article 8 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women*, both of which authorise inquiry procedures in prescribed situations.

⁶ Nowak, M., "The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" in International Commission of Jurists, *The Review: Economic, Social and Cultural Rights and the Role of Lawyers*, France: 1995 at 160. Limiting standing/ability to initiate complaints under an Optional Protocol to the *ICESCR* to individuals would be to prevent to deprive all groups and legal entities including trade unions, educative associations, social groups and cultural minorities from the benefits associated with this instrument.

⁷ Providing standing to individuals and organisations to initiate complaints *on behalf of* individual and group victims of State party *ICESCR* rights violations follows the precedents of Article 2 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* which states "Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent", Article 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 77 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

⁸ *Supra* (Arambulo), note 1 at 223, 233-4. Through the practice of the United Nations Human Rights Committee, communications submitted *on behalf of* victims of State party *ICCPR* violations have been accepted.

types of communications play an essential role in initiating international complaint's procedures, particularly where victims face the risk of ill-treatment or other retaliation for directly engaging in the process.⁹

(e) State Party Reservations Under an Optional Protocol

Precluding reservations to the Optional Protocol¹⁰ to the ICESCR would represent a significant commitment by States parties which ratify the Protocol, to uphold the integrity of internationally recognised economic, social and cultural rights. Excluding the use of reservations would be appropriate as:

- (i) The *raison d'être* of an Optional Protocol would be to assist people in realising their economic, social and cultural rights as enshrined in the *ICESCR*. As a tool to both complement and strengthen the *Covenant*, to allow State party reservations to an Optional Protocol would be to undermine its potential as a tool for the full realisation of economic, social and cultural rights;
- (ii) An Optional Protocol would by its very nature be optional and as such, reservations that curtailed its applicability would be unnecessary;
- (iii) An Optional Protocol would be a procedural instrument as it would neither introduce new nor expand present economic, social and cultural rights obligations that States parties accepted through their ratification of the *Covenant*. An Optional Protocol would thus merely serve as a means through which States parties would be encouraged to realise existing *ICESCR* obligations.
- (iv) An effective Optional Protocol must recognise the indivisible and interdependent relationship amongst all *Covenant* rights. To allow States parties to individually select the *ICESCR* rights subject to an Optional Protocol strike at the core this relationship and the instruments ability to protect and promote *Covenant* rights. Such a selective approach would open the door to arguments as to the hierarchy of and inequality between economic, social and cultural rights, thereby encroaching upon the universality, interdependence, indivisibility and interrelatedness of all human rights.¹¹ Further, permitting the selection of economic, social and cultural rights subject to the Optional Protocol mechanisms would risk that some States parties would enhance their international prestige, through ratification, while restricting the instrument's substantive application;

⁹ *Supra* note 3 at 43. See also *supra* note 4 at 161.

¹⁰ Article 17 of the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* explicitly states "No reservations to this Protocol may be permitted"

¹¹ The United Nations Division for the Advancement of Women Department of Economic and Social Affairs, *The Convention on the Elimination of All Forms of Discrimination Against Women, The Optional Protocol: Text and Materials*, United Nations: 2000, at 49-50. See also *supra*, note 3 at 98-99. See also *supra* note 1 at 236.

- (v) State party concerns that might prompt reservations with regard to specific aspects of an Optional Protocol procedure could be accommodated through the provisions of the instrument itself.

IV. THE DRAFTING OF AN OPTIONAL PROTOCOL TO THE *ICESCR*: AVAILABLE RESOURCES

In considering options regarding the elaboration of an Optional Protocol to the *ICESCR*, the undersigned urge the open-ended working group to recommend the drafting of an Optional Protocol text to the 60th session of the Commission on Human Rights as conceptual issues related to this procedure have received a thorough analysis from a wide variety of sources that include:

- (i) The abundant experience and jurisprudence of national, regional and international bodies/instruments that employ adjudicative/inquiry procedures related to violations of economic, social and cultural rights. Reference may be made to the United Nations Human Rights Committee, the European Court of Human Rights, the European Committee on Social Rights, the *African Charter on Human and Peoples' Rights*, the *San Salvador Protocol*, (Inter-American Commission jurisprudence and country reports), the Optional Protocol to the *Covenant on the Elimination of Discrimination against Women*, the United Nations Educational, Scientific and Cultural Organization Complaint's Procedure, the International Labour Organisation Committee on the Freedom of Association and an abundance of national jurisprudence;
- (ii) A plethora of national and international and civil society conferences and instruments that have clarified the nature and scope of economic, social and cultural rights and States parties obligations under the *ICESCR*. Amongst these, the Declaration of Delhi (1959), the Law of Lagos (1961), the Limburg Principles on the Implementation of the *ICESCR* (1986), the World Conference on Human Rights (1993), the World Summit for Social Development (1995), the Bangalore Plan of Action (1995), the Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights (1996) and United Nations/International Commission of Jurists' conferences on the Optional Protocol and economic, social and cultural rights, (1999, 2000, 2001, 2002 and 2003), amongst numerous others, may be instructive;
- (iii) General Comments from the Committee that have clarified the nature and scope of States parties *Covenant* obligations and *ICESCR* rights including: international technical assistance measures; the nature of States parties obligations under article 2; the right to adequate housing; the economic, social and cultural rights of persons with disabilities and of older persons; the right to adequate housing, (forced evictions); the relationship between economic sanctions and respect for economic, social and cultural rights; the domestic application of the Covenant; the role of national human rights institutions in the protection of economic, social and cultural rights; plans of action for primary education; the right to adequate food;

- the right to education; the right to the highest attainable standard of health; and the right to water;
- (iv) Committee discussions, summary records, studies and reports that have provided further clarification concerning the nature and scope of economic, social and cultural rights as they relate to an Optional Protocol to the *ICESCR* and in particular its work on a draft Optional Protocol and related issues, (E/C.12/1996/SR.44-49 and 54), (E/C.12/1996/CRP.2/Add.1), (E/C.12/1994/12), (E/CN.4/1997/105), (E/1993/22), and (E/C.12/1992/WP.9),
 - (v) The draft Optional Protocol to the *ICESCR* prepared by the Committee for consideration by the United Nations Commission on Human Rights, (E/CN.4/1997/105); and
 - (vi) Other sources that have further clarified conceptual issues related to an Optional Protocol to the *ICESCR* including: the experience of numerous United Nations Special Rapporteurs engaged in various aspects of economic, social and cultural rights;¹² the experience of the United Nations working group under which the Optional Protocol to the *Convention on the Elimination of all Forms of Discrimination against Women* was created; two reports from the independent expert appointed by the Commission on Human Rights, (resolution 2001/30), to examine the question of a draft Optional Protocol to the *ICESCR*; and the vast amount of doctrine concerning an Optional Protocol and economic, social and cultural rights issues.¹³

Given that conceptual issues related to an Optional Protocol to the *ICESCR* have received a thorough analysis from a wide variety of sources, the open-ended working group should utilise the above listed wealth of resources as a primary basis point from which the text of an Optional Protocol to the *ICESCR* may be drafted.

(V) THE DRAFTING OF AN OPTIONAL PROTOCOL TO THE *ICESCR*: TIMING CONSIDERATIONS

In conducting its deliberations, the *ICESCR*/Optional Protocol working group should bear in mind the Commission on Human Rights decision of 26 April 2000, (E/CN.4/2000/112), which endorsed that working group,

(m)andates should always offer a clear prospect of an increased level of human rights protection and promotion, (and that), (i)n creating any standard-setting working group, the Commission should consider a specific time-frame within which the group would be called upon to complete its task. ...(i)n most instances, the established time-frame should not in principle exceed five years.

¹² For example, housing, education, food and development.

¹³ See the work of P. Alston, K. Arambulo, M. Craven, A. Eide, D. Harris, P. Hunt, S. Liebenberg, B. Porter, E. Riedel, M. Scheinin and F. van Hoof, to name but a few.

Learning from the experiences of other processes that have led to the establishment of other Optional Protocols, the *ICESCR*/Optional Protocol working group should adopt a pragmatic yet determined approach towards the completion of its mandate.

PLEASE SEND ENDORSEMENTS OF THE JOINT
STATEMENT TO EDWIN BERRY, AT THE ICJ:
berry@icj.org