



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

THE EVOLUTION OF AN OPTIONAL PROTOCOL COMPLAINTS MECHANISM UNDER THE ICESCR

Introduction

1. The International Commission of Jurists, (hereinafter ICJ), welcomes the decisions of the fifty-ninth and sixtieth sessions of the Commission on Human Rights that mandated an open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, (Res. 2003/18 and Res. 2004/29). In the view of the ICJ, the issue of an optional protocol is now properly before a political body as it will be capable of thoroughly considering this proposed international instrument. Such working group deliberations will naturally build on the considerable efforts of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and the United Nations Committee on Economic, Social and Cultural Rights, (hereinafter Committee), that previously studied the various questions and modalities associated with the drafting of an optional protocol text. In the view of the ICJ, the working group, as a matter of priority, should proceed with drafting the substantive provisions of an optional protocol.

The Consideration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the Committee

2. In 1990, the Committee commenced discussions concerning the preparation of an optional protocol, an issue that came under formal consideration by the Committee from its 1990 sixth session through its 1996 fifteenth session.¹ Throughout this period, the basis for extensive discussions within the Committee were facilitated by four separate reports, prepared at the Committee's request, by Mr. Philip Alston, (E/C.12/1991/WP.2, E/C.12/1992/WP.9, E/C.12/1994/12, and E/C.12/1996/CRP.2/Add.1).

3. At its seventh session the Committee adopted a consolidated "analytical paper" which it submitted to the World Conference on Human Rights. Through this paper the Committee strongly supported the development of an optional protocol, (A/CONF.157/PC/62/Add.5, annex III, para. 18 and annex II).

4. A 1997 report, (E/CN.4/1997/105, annex), reflected the collective outcome of Committee optional protocol discussions and included an in-depth consideration on a specific set of draft optional protocol proposals.² The final result of these discussions included a Committee prepared draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights. Further, the report provided an analysis of optional protocol issues that merited examination by the Commission on Human Rights.

¹ See E/1992/23 - E/C.12/1991/4, paras. 360-366 and E/CN.4/1997/105, para 2.

² See E/C.12/1994/SR.42, 45 and 56; E/C.12/1995/SR.5 and 50; E/C.12/1996/SR.19 and 20; and E/C.12/1996/SR.42-49 and 54).

The Consideration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the Commission on Human Rights

5. In 1994, the Commission on Human Rights took note of the "steps taken by the Committee ... for the drafting of an optional protocol... and invite[d] the Committee to report thereon to the Commission...."³ During its 1996 fifty-second session, the Commission on Human Rights welcomed the optional protocol progress report (E/CN.4/1996/96) issued by the Committee.⁴

6. The Committee continued and concluded its consideration of a draft optional protocol at its fifteenth session (E/C.12/1996/SR.44-49 and 54). The report of the Committee, including the Committee prepared draft optional protocol (E/CN.4/1997/105, annex), was submitted to and considered by the Commission on Human Rights at its 1997 fifty-third session. Subsequently, on three separate occasions,⁵ the Commission on Human Rights requested States, intergovernmental and non-governmental organisations to submit comments on this proposed international instrument. On the basis of these requests, comments were received from a limited number of States, intergovernmental and non-governmental organisations, (E/CN.4/1998/84 and Add.1, E/CN.4/1999/112 and Add.1 and E/CN.4/2000/49).

7. Through resolution 2001/30, the Commission on Human Rights appointed an independent expert to examine the question of the draft optional protocol. The appointed expert, Professor Hatem Kotrane, submitted his first (E/CN.4/2002/57) of two reports to the 2002 58th session of the Commission on Human Rights. Through this report, the independent expert report supported the drafting of an optional protocol text.

8. The 2002 fifty-eighth session of the Commission on Human Rights decided to renew the mandate of the independent expert and establish, at its fifty-ninth session, an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol, (Res. 2002/24).

9. At the 2003 fifty-ninth session of the Commission on Human Rights, the Independent Expert delivered his second report, (E/CN.4/2003/53), affirming the justiciability of economic, social and cultural rights while offering further support for the development of an optional protocol text. Through resolution E/CN.4/RES/2003/18, the Commission on Human Rights, requested the open-ended working group to meet for a period of 10 working days, prior to the sixtieth session of the Commission, with a view to considering options regarding the elaboration of an optional protocol.

10. The 2004 sixtieth session of the Commission on Human Rights adopted resolution E/CN.4/RES/2004/29 in which it decided to continue the mandate of the open-ended working group for a further two years. In the view of the ICJ, the current mandate of the working group is not a progressive mandate, in that it does not specifically require the working group to move promptly towards drafting an Optional Protocol. Rather, the mandate merely requires the working group to consider options regarding the elaboration of an optional protocol to ICESCR. In the ICJ's view, such a mandate is insufficient and undermines the need for the consideration of these issues to progress on a more practical level.

³ E/CN.4/RES/1994/20, para. 6.

⁴ E/CN.4/RES/1996/11, para. 12.

⁵ E/CN.4/RES/1997/104, E/CN.4/RES/1998/33 and E/CN.4/RES/1999/25.

The Consideration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by the Sub-Commission on Prevention of Discrimination and Protection of Minorities

10. In 1992, the Sub-Commission on the Promotion and Protection of Human Rights became involved in the deliberations concerning an optional protocol to the International Covenant on Economic, Social and Cultural Rights when the adoption of this instrument was expressly recommended by Mr. Danilo Türk, the Special Rapporteur of the Sub-Commission on the realization of economic, social and cultural rights, (E/CN.4/Sub.2/1992/16, para. 211).

11. Through resolution 1996/13, the Sub-Commission called for the elaboration of an optional protocol. Subsequently, the Sub-Commission suggested that the Commission on Human Rights establish an open-ended working group entrusted with the further study of a draft optional protocol, (Res. 2000/9). Further, in 2001, the Sub-Commission urged the Commission on Human Rights to give high priority to the consideration of a draft optional protocol (Res. 2001/6). Through resolution 2002/14, the 2002 Sub-Commission further urged the Commission on Human Rights, at its fifty-ninth session to mandate the open-ended working group to proceed with the drafting of the substantive text of an optional protocol.

12. The 2003 Sub-Commission adopted a resolution that urged the Commission on Human Rights, at its sixtieth session, to mandate the open-ended working group to proceed with drafting the substantive text of an optional protocol. Further, the Sub-Commission urged the open-ended working group to draft an optional protocol that would be comprehensive while providing for individual, representative and collective complaints and that the instrument should be conceptualised as both a complaints mechanism and an injury procedure that should preclude State party reservations.

Conclusion

13. In the view of the ICJ, the issue of an optional protocol to the International Covenant on Economic, Social and Cultural Rights is properly before the United Nations working group set to convene its second session in 2005 as this body will be capable of thoroughly considering this proposed international instrument. Such deliberations will naturally build on the considerable efforts of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights and the Committee itself that previously studied the various questions and modalities associated with the drafting of an optional protocol text, as well as the progress achieved at the inaugural working group session in 2004.

14. In the view of the ICJ, the working group, as a matter of priority, should proceed with drafting the substantive provisions of an optional protocol.