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Toward an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

by Rochus Pronk

The Vienna Declaration and Program of Action adopted at the Vienna World Conference on Human Rights in 1993 states that "all human rights are universal, indivisible and interdependent and interrelated." The Program of action further contains an important paragraph in relation to the promotion of economic, social and cultural rights. It "encourages" the UN Commission on Human Rights, in cooperation with the UN Committee on Economic, Social and Cultural Rights (the Committee), to continue to examine the possibilities of developing optional protocols to the International Covenant on Economic, Social and Cultural Rights (ICESCR). In December 1994, Philip Alston, Chairman of the Committee, submitted a report entitled "Draft optional protocol providing for the consideration of communications." Article 2 of this Draft Optional Protocol gives any individual or group claiming to be a victim of a violation of any rights recognized in the ICESCR the right to submit a written communication to the Committee for examination.

Under Article 2 of the ICESCR State Parties agree to take steps to the maximum of their available resources, "with a

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view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means." In the past, this wording has generally been interpreted as an evolving program depending upon the goodwill and resources of states rather than an immediate binding legal obligation with regard to the rights in question. Under the current system of supervision, State Parties are only obliged to submit reports of measures adopted for transmission to the Economic and Social Council of the

United Nations. Nevertheless, with approximately one-fifth of the world's population still afflicted by poverty, hunger, disease, illiteracy and other kinds of economic and social insecurity, the time has perhaps come to strengthen the supervisory mechanism of the ICESCR. The Draft Optional Protocol that was submitted by Alston is a step in that direction.

Overcoming Political Resistance

Before the Alston proposal is adopted, however, there is the political problem of mustering the necessary support for an optional protocol to the ICESCR. As of December 31, 1992, sixty-seven states have ratified the Additional Protocol to the International Covenant on Civil and Political Rights, which provides a complaint mechanism for individuals in respect of violations of the Covenant. This is approximately half of the total number of States Parties to the International Covenant on Civil and Political Rights (ICCPR), indicating a reluctance on the part of states to accept individual complaint mechanisms. Moreover, governments may be less than willing to commit themselves to obligations that may involve considerable financial commitments. For example, Article 9 of the ICESCR establishes the right of everyone to social security. This right might require certain states to take positive action, for example allocating state funds to build up a comprehensive social security system, although they may be economically unwilling or unable to undertake such measures.

Regardless, at the heart of the political unwillingness to accept the right of individual complaints, with respect to economic, social and cultural rights, is the question of justiciability of these rights. Can a state be brought to justice for the policies that it has in the field of socio-economics? Can these socio-economic policies be narrowed down to individual rights, that can be judged on their merits? Any discussion on a draft optional protocol to the ICESCR answers this in the affirmative, and suggests that the old debate on the justiciability of these rights should not determine the adoption of a complaints mechanism. First, the idea of permitting complaints under an international procedure in relation to econom-

ic, social and cultural rights is in no way new or especially innovative given the precedents that exist within the ILO, UNESCO, the ECOSOC Resolution 1503 procedure, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (the Protocol of San Salvador of 1988), and proposals currently under consideration within the Council of Europe. Moreover, if the indivisibility, interdependence and interrelatedness of the civil and political rights and the social and economic rights is to be upheld, it is essential that a complaint procedure be established under the ICESCR, thereby redressing the imbalance that presently exists between the two instruments.

The experts agreed that none of the rights laid down in the Covenant should be excluded from the individual complaint mechanism.

A further argument against the possible political unwillingness to adopt an optional protocol to the ICESCR is that such an instrument, if similar to the Additional Protocol to the ICCPR, would not involve public determination of the issue on a judicial basis. Rather, it would be a mechanism through which individuals could expose alleged violations or breaches of the ICESCR, which would then be thoroughly investigated by the competent United Nations organs. The complaints procedure would result either in confidential communications with the State concerned, a friendly settlement, or in direct recommendations by the Committee aimed at remedying the violation and preventing its recurrence. States would be under an obligation to implement such recommendations. In the end, however, the State would retain ultimate control over what action to take in response to any views adopted by the Committee. Thus, there would be no real enforcement mechanism.

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Overview of the Draft Protocol

The receivability and admissibility requirements under the Alston proposal are identical to the requirements under the Additional Protocol to the ICCPR. Most important in this respect is the inadmissibility of anonymous communications. Unlike the Protocol to the ICCPR, however, the Alston Draft contains a specific provision for the request of "interim measures" to be taken by the state while the Committee is deciding upon the merits of the complaint "and as may be necessary to preserve the status quo or to avoid irreparable harm." The ICESCR Draft Protocol also contains a three month time limit within which the receiving state must respond to information received from the Committee. Further, in contrast to the ICCPR Protocol, the Alston Draft also states that the Committee may not only examine information made available to it by the author of the complaint and the State Party concerned, but also all other information obtained from other sources.

Where the Committee determines that a State Party has failed to give effect to its obligations under the ICESCR, the Committee may recommend that the State Party remedy any violation and prevent its recurrence, and State Parties "shall implement" any such recommendations. Similar to the ICCPR Protocol there is no mechanism to force states to comply with the recommendations. The Draft Protocol also provides for "follow up measures" through which the Committee can further encourage State Parties to give effect to its views and recommendations. Under these measures the Committee may invite a State Party to further discuss the measures the State Party has taken to give effect to the Committee's views or recommendations. Also, the Committee may invite State Parties concerned to include in their reports under Article 16 of the Covenant details of any measures taken in response to the Committee's views and recommendations. Finally the Committee is required to include in its annual report an account of the communications and the entire examination including the responses of the State Party to the views and recommendations of the Committee. The remaining provisions of the Draft Optional Protocol are identical to the Protocol Additional to the ICCPR.

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War Crimes Tribunal, continued from page 2

as imposing the same punishments for the same crimes, regardless of which side perpetrated the atrocity. "No side would be immune from prosecution," stated Goldstone.

"To talk about people who are accused of having committed multiple murders, rapes, and torture of many people as little fish, is demeaning to the victims."

Goldstone further acknowledged that it will be difficult to get all of those indicted before the Tribunal. He pointed out, however, that under Rule 61 of the Rules and Procedures of the Tribunal, a "super indictment" was available. This means that if an indicted defendant fails to appear, the prosecution could request that the indictment be confirmed by a panel of 3 judges. Once the indictment was confirmed, the accused would become an "international fugitive," an outlaw in almost every country in the world. Goldstone stated that the super-indictment could be enforced through the use of UN Security Council sanctions against any nation that shelters the accused. He also noted that any national leaders who might be indicted would eventually have to travel because of their responsibilities, and therefore would likely be arrested.

Secretary Shattuck, in his response, praised Goldstone and the Tribunal's work. He indicated that the United States would continue its commitment to the Tribunal's work, and noted that the U.S. government was the major advocate for the creation of the Tribunal. Shattuck also confirmed that the Clinton Administration was unwilling to trade impunity for peace during the peace process and stated that the Tribunal was part of an enterprise to create instruments of international accountability and the rule of law. He stressed that it is essential that the Yugoslavia and Rwanda Tribunals succeed in their tasks because this would send a message that the international community will not tolerate impunity.

In addressing the legal difficulties faced by the Tribunal, Professor Orentlicher indicated that this Tribunal would be expanding on the Nuremberg

trials in terms of the development of international law. In particular, the Tribunal would need to define crimes identified at Nuremberg, and to decide whether crimes committed during internal conflicts could be tried by an international tribunal. Orentlicher stated that the Nuremberg trials had the benefit of victors' justice which, despite weaknesses, ensured that the defendants were captured and brought before the court.

In his presentation, Tom Warrick discussed the continued financial problems plaguing the Tribunal and indicated that the Tribunal still lacked the funds necessary for the collection of sufficient evidence to try crimes against humanity. Warrick expressed disappointment with



(front row, left to right) Justice Richard Goldstone; Tom Warrick; Professor Diane Orentlicher; (back row) Professor Robert Goldman

Gabriel Eckstein

the general lack of logistical and financial support for the Tribunal by the international community, especially on the part of European governments.

All of the panelists at the event recognized the daunting nature of the task faced by the Tribunal. At the same time,

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they also emphasized the need for the Tribunal to succeed in its efforts to bring justice to the worn-torn region that was once Yugoslavia, not only for the sake of the people of Bosnia and Croatia, but also for the future security of the international community as a whole. ☺

Canada, continued from page 3

Some Canadian policy decisions over the past five years have also raised concerns in the human rights community. For example, non-governmental organizations, like the Inter-Church Committee on Human Rights in Latin America, criticized the Canadian government's decision to restore full bilateral aid to Peru in January 1994 in the face of what they saw as the absence of clear improvements in human rights and democratic development in that country. Canada was also

A Canadian Parliamentary Committee has proposed that Canada's armed forces specialize in peacekeeping operations and that regional organizations like the OAS play a role in such operations.

criticized for declining to accept more of the Haitian refugees intercepted by the United States and ultimately detained in Guantanamo Bay in 1994, while indigenous leaders like Nobel Peace Prize winner Rigoberta Menchu charge that Canada and other OAS Member-States have been "intransigent" on indigenous peo-

ples' rights and in strengthening links between the indigenous cultures of North and South America.

Canada's Future Role in the OAS

Numerous suggestions have been offered as to how Canada could play a more effective role in the OAS in the future. Human rights advocates like Holly Burkhalter, Washington Director of Human Rights Watch, have urged Canada, the United States, and Mexico to ratify the American Convention on Human Rights and to agree to be bound by the decisions of the Inter-American Court of Human Rights, in order to "provide victims of human rights abuses in all three countries with impartial, independent legal machinery to which they could apply when domestic remedies to correct human rights abuses are lacking." Further, environmental law specialists like Stephen Kass and Jean McCarroll with the New York law firm of Carter, Ledyard & Milburn suggest that Canada and its NAFTA partners will face pressure from the environmental community in the Americas to link any efforts to create a "Free Trade Area of the Americas" with "meaningful commitments to environmental protection throughout the hemisphere." Finally, a Canadian Parliamentary Committee has proposed that Canada's armed forces specialize in

peacekeeping operations and that regional organizations like the OAS play a role in such operations. While groups like Toronto's Canada-Caribbean-Central America Policy Alternatives (CAPA) have supported the idea of OAS participation in UN peacekeeping operations, CAPA has cautioned that the OAS should not undertake peacekeeping missions on its own, explaining that "participation of Latin American officers in UN organized missions in Central America has clearly revealed the questionable capacity of Latin officers to maintain the norms of impartiality under which peacekeepers must function."

This cursory overview of Canada's role in the OAS suggests that although Canada's participation in some areas of the Organization could be improved, it has made significant contributions to the OAS since its admission as a full member. As Peter Hakim, President of the Inter-American Dialogue in Washington, recently concluded, "Canada cannot single-handedly reshape inter-American relations. It can, however, make a decisive contribution on several issues by firmly taking the initiative, by pressing its ideas, and by consistently making good sense." ☉

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Utrecht Expert Meeting

In January 1995, an Expert Meeting on the adoption of the Alston Draft Protocol was organized by the Netherlands Institute of Human Rights at the University of Utrecht. Professors Upendra Baxi and Claudio Grossman, both of the Washington College of Law, attended this meeting. Professor Baxi explains that proposals were made to improve the Alston Draft so that the right to submit communications would be broadened and the rules of procedure would be further elaborated. At the meeting, there also was a proposal to exclude Article 1 of the ICESCR, which sets out the right to self-determination, from the complaints procedure subject matter. Some participants at the meeting believed that this was in the interest of attracting States to sign on to the Protocol. Professor Baxi argued that although this might have been a compelling reason for excluding the article, particularly since the issue of self-determination in the present state of

world affairs is a problematic one, "it would be wrong for an Optional Protocol to rupture the unity of the rights laid down in the ICESCR." After considerable discussion, the experts agreed that none

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of the rights laid down in the Covenant should be excluded from the individual complaint mechanism. Professor Baxi believes that the Committee will have to create its own jurisprudence through which the meaning of the rights laid

down in the ICESCR will then be further developed.

First, however, the Optional Protocol remains to be finalized and states have to be convinced that an individual complaints mechanism is in the interest of promoting economic, social and cultural rights. According to Professor Baxi, though, all states that endorsed the commitments made at the Social Summit in Copenhagen this past March have thereby bound themselves politically to sign and ratify a protocol granting individuals the right to complain about social and economic human rights violations.

Finally, the ICCPR Optional Protocol has resulted in a significant body of case law that, in turn, has engendered international respect for the United Nations Human Rights Committee. This precedent serves as another incentive to proceed toward an optional protocol to the ICESCR. ☉