



Two Essential Provisions for the Rules of Procedure to the OP-ICESCR

The OP-ICESCR Coalition has provided general recommendations for Rules of Procedure addressing a wide range of provision. These were outlined in the paper [Considerations of the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure](#), presented to the CESCR last year, and discussed informally at a luncheon meeting with most of the Committee members.

It has been suggested that we might direct Committee members to a couple of our central areas of concern. The following two recommendations are particularly critical, as they address the two most important **unique features of the OP-ICESCR**:

- i) the discretionary provision for deciding, where necessary, not to consider communications that do not reveal a clear disadvantage (article 4), and
- ii) the authority to consider information submitted by third parties, as authorized under article 8(1).

Article 4: Communications Not Revealing a Clear Disadvantage

Article 4 was included in the OP-ICESCR in order to address the concern of some states that the Committee could at some point be faced with an impossibly heavy caseload, and therefore might need a means to decline to consider certain cases. By clarifying the discretionary nature of the provision (“**may** decline to consider a communication”) and ensuring that it is only to be applied “if necessary” the OEWG set an intentionally high bar for the application of article 4.

The OEWG did not want the provisions of Article 4 to be applied to all communications as a new or additional admissibility requirement. Therefore, the “clear disadvantage provision” was added to the OP as a separate article, and rather than as a further enumerated ground of admissibility under Article 3.

Human rights violations, including those arising from breaches of ICESCR obligations, presumptively give rise to a “clear disadvantage” to victims. It is therefore unnecessary to inquire as a matter of course whether a violation has created clear disadvantage;

Recommendation re Article 4

The Rules should state that Article 4 is only to be invoked exceptionally. It should not be treated as an additional admissibility requirement. Article 4 should be applied only where the Committee has deemed it necessary as a means of addressing an excessive number of communications. An author should not, in the normal procedure, be required or asked to justify a communication by showing a clear disadvantage. Such evidence should only be required in response to a specific request by the Committee to both parties.

Article 8 (1) Third Party Submissions on the Merits

The most critical issue to be addressed in the OP Rules is the design of an effective and efficient procedure for the receipt of third party submissions. The provision for third party submissions in 8(1) is unique to the OP-ICESCR. Every other OP in the UN system restricts submissions to “the parties”, ie. the petitioner(s) and the respondent State Party. The CESCR in its own draft OP recommended that this restriction be eliminated from the OP-ICESCR and the majority of state delegations to the Open Ended Working Group agreed. A restriction of submissions to those submitted by the parties was included by the Chair in her first draft of the OP-ICESCR, It was, however, removed from subsequent drafts in order to facilitate third party submissions. No specific procedures for amicus were included in the OP. The OEWG believed that the Committee was best situated to develop its own rules for the receipt and consideration of information submitted by third parties.

The unique language of 8(1) of the OP-ICESCR reflects the unique mandate of the CESCR under article 8(4), Requiring the Committee to assess the reasonableness of measures taken means that it must have access to a broader range of information than would be required in more traditional civil rights claims. In domestic and regional bodies, amicus or third party submissions are recognized as absolutely essential to a thorough consideration ESC rights claims. Such procedures will be essential to ensure the integrity, effectiveness and fairness of the Committee’s consideration of ESC rights claims under the OP.

Recommendations:

i) The Rules should follow the wording of the OP and clarify that the Committee will consider relevant information submitted by third parties.

ii) Admissibility decisions should be reported prior to the consideration of the merits: Rendering and reporting admissibility decisions separately from decisions on the merits, and reporting findings of admissibility as well as findings of inadmissibility, ensures more efficiency and fairness and access to a more balanced jurisprudence. In addition, a summary of the subject matter of admissible communications will be available publicly in advance of the decision on the merits. This will allow qualified third parties with relevant expertise and information to be made aware of the case, and to make submissions.

iii) The Rules should provide for disclosure of all documentation submitted by third parties to the petitioner and the State Party.