

CLOSING THE GAP? – AN INTRODUCTION TO THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

BY MALCOLM LANGFORD*

Abstract: *On 10 December 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This article introduces this new international complaints and inquiry procedure with a particular focus on its historical evolution, debates over justiciability, its provisions and some of the key interpretive issues that are likely to arise in practice. The article also introduces the other articles in this Special Issue and notes the likely way ahead on ratification of the protocol.*

Keywords: *United Nations, International Covenant on Economic Social and Cultural Rights, justiciability, complaint and inquiry procedure, admissibility and merits.*

A. MIND THE GAP

On 10 December 2008, the text of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted without a vote by the UN General Assembly.¹ The protocol provides for the right of individuals and groups of individuals to complain of violations of the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).² The authority to decide on the complaint (formally a “communica-

* (b. 1972) Research Fellow, Norwegian Centre for Human Rights, University of Oslo, and Director, Human Rights and Development Research Group, Faculty of Law, University of Oslo. Email: malcolm.langford@nchr.uio.no. I would like to sincerely thank the two reviewers, Catarina de Albuquerque and Claire Mahon for their very useful comments. In addition, Tara Smith was most helpful in the organising of a seminar on 6 October 2008 at the University of Oslo: *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Local and Global Perspectives on Norway's Position*. A number of the presentations at the seminar led to the articles in this Issue. Khulekani Moyo also kindly assisted in helping to edit many of the articles.

¹ GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008). For official records of the plenary session, see *Official Records*, 66th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 4.30pm.

² G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

tion”) is vested in the Committee on Economic, Social and Cultural Rights on the proviso that a complainant meets various admissibility criteria such as the exhaustion of domestic remedies. The Committee can also initiate inquiries when grave and systematic violations come to its notice. The protocol will be opened for signature on 10 September 2009.

The adjective “historic” can be unquestionably attached to the adoption of the protocol, although it’s detractors might limit the praise to a matter of symbolism. The ICESCR will now be on par with its sister treaty, the International Covenant on Civil and Political Rights (ICCPR).³ Both treaties were adopted by the General Assembly as far back as 1966 but an Optional Protocol for a complaints procedure was only appended to the latter. Navanethem Pillay, the UN High Commissioner for Human Rights, thus greeted the Optional Protocol to ICESCR by saying that it “is of singular importance ... closing a historic gap in human rights protection under the international system.”⁴

The date of adoption of the ICESCR protocol was equally heavy with significance. The timing was aligned with the 60th anniversary of the Universal Declaration of Human Rights, a factor that partly explains the late surge in efforts to complete the drafting of the protocol. The 1948 Universal Declaration of Human Rights included the full panoply of human rights; civil and political rights and economic, social and cultural rights. At that time, the General Assembly had instructed the then UN Commission on Human Rights to draft a single international human rights covenant⁵ but disagreements over economic, social and cultural rights and mediocre drafting progress⁶ led it to accepting the development of two separate covenants.⁷ Therefore, twinning the ICESCR and ICCPR with respective optional protocols was seen as a way of moving “closer to the unified vision of human rights of the Universal Declaration”.⁸ Indeed, the Acting President of the General Assembly introduced the text to the plenary saying that it “will break down the walls of division that history built and will unite once again what the Universal Declaration of Human Rights proclaimed as a sole body of human rights sixty years ago”.⁹

Such enthusiasm for the protocol is not necessarily universal amongst States. The consensus on adoption was not necessarily a current expression by all States that they would ratify the treaty. In November 2008, during the General Assembly’s Third Committee, many States presented their views on the final text of the protocol before it was sent to the plenary of the General Assembly for adoption. If we examine just two Nordic countries, we could not find a starker difference. The Finnish delegate stated that the protocol was a “great step towards full realization of all human rights” and that his country would sign it “at the earliest possible occa-

³ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

⁴ Statement by the High Commissioner for Human Rights, Ms. Navanethem Pillay, *Official Records*, 65th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 3pm.

⁵ GA Resolution 217 E(III) (10 December 1948), 3 UN GAOR, Resolutions Part I, at 71 (1948).

⁶ Matthew Craven: *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995), 9-20.

⁷ GA Resolution 543 (VI), (5 February 1952) UN GAOR, Resolutions Supp. (No. 20), at 36 (1952).

⁸ See Statement by the High Commissioner for Human Rights (note 4 above)

⁹ Statement by the Acting President in *Official Records*, 66th Plenary meeting (note 1 above) 1.

sion”.¹⁰ Denmark was of a wholly other view. According to their representative, “The majority of the rights in the Covenant did not carry immediate legal effect and, considering the vague nature of the rights and the principle of progressive realisation, Denmark believed that the majority of rights were insufficiently judiciable and less suited to form the basis of an individual complaints mechanism.”¹¹ Curiously though, on adoption of the protocol, States were given the opportunity to lodge formal ‘explanations of the vote’ but no States did so.¹²

These two Nordic perspectives provide an immediate insight into the historical debate on an Optional Protocol for ICESCR, a debate that stretches back to 1948 and has rumbled and reverberated in the more recent deliberations of the Working Group established with a mandate to consider and then draft a protocol. At its core, the dissension revolved around the questions of whether economic, social and cultural (ESC) rights were justiciable and if the international complaints procedure would produce any tangible benefits. We might then ask, what changed between 1948 and 2008. In essence, the weight of international opinion shifted. By 2002 it was clear that only a minority, albeit a vocal and organised one, actively opposed a protocol. Six years later, as we shall discuss below, a large number of States were sufficiently convinced to move out of the “neutral column” to support the protocol. Sceptical States such as the United States directly acknowledged this fact in the Third Committee, recognising “that a majority of countries supported the elaboration of such a protocol” and that it “would not block consensus.”¹³

The remainder of this introductory article presents the evolution of the protocol (Section B), debates on justiciability inside and outside of the UN (Section C), the protocol text and likely interpretive issues (Section D) and some of the issues that will arise on the way to ratification (Section E). Reference will also be made to other articles in this Special Issue that take up some of the issues in more detail.

B. THE BIRTH OF THE OPTIONAL PROTOCOL

It is customary to attribute the bifurcatory character of the two principal human rights treaties to Cold War divisions. This is certainly valid as concerns the decision to split the UDHR into two treaties. Many Western States were content with a minimum list of enforceable civil and political rights, the Eastern bloc supported economic, social and cultural rights while Latin American states called for a maximalist approach with a full pantheon of rights.¹⁴ Put in simple political terms, creating two treaties meant a majority could be found to champion both. However, the achievement of the rights in ICESCR was made subject to progressive realisa-

¹⁰ Press release, *Third Committee Recommends General Assembly Adoption of Optional Protocol to International Convention on Economic, Social and Cultural Rights*, Sixty-third General Assembly, Third Committee, 40 and 41st Meetings, GA/SHC/3938, p. 11.

¹¹ *Ibid.*: 9.

¹² See *Official Records*, 66th Plenary meeting (note 1 above) 1

¹³ *Third Committee Recommends General Assembly Adoption* (note 10 above), p. 8.

¹⁴ Howard Tolley: *The UN Commission on Human Rights* (Boulder: Westview Press, 1987), 21-2, cited in Craven (note 6 above), 17.

tion despite the call of Socialist States for it to be immediate. Moreover, while the ICCPR called for States to provide domestic judicial remedies, the equivalent provision of ICESCR vaguely refers to “legal and other measures”.

However, Dennis and Stewart amongst others before them are correct in puncturing the myth that the East-West divide directly accounted for the differing forms of supervision for each treaty.¹⁵ Socialist States strongly opposed the creation of any expert committee for the two treaties. The USA and some, but not all, Western states supported an expert committee for both covenants. The result was that an independent Human Rights Committee was created to oversee the ICCPR while oversight of the ICESCR was entrusted to the UN Economic and Social Council (ECOSOC), a body composed of States’ representatives. An unflattering evaluation of the monitoring performance by the latter resulted in an expert committee, the Committee on Economic, Social and Cultural Rights, being established in 1987 by an ECOSOC resolution.¹⁶

A similar pattern emerged with regard to complaints procedures. Socialist States maintained their opposition and only a few Western States were prepared to make the argument, leaving Latin American States in a clear minority. Some compromises were attempted. In 1954, France formally proposed that, despite the division of the Covenants, States could accept the jurisdiction of the Human Rights Committee to hear complaints on certain economic, social and cultural rights.¹⁷ Some rights could be justiciable immediately and others when they “become enforceable”.

The French initiative was opposed on the floor.¹⁸ Foreshadowing Denmark’s comment above, it was said for instance that there were insufficient criteria to determine compliance by States and “complaints relating to that covenant could only refer to insufficient programmes in the attainment of certain goals and it would be impossible for the committee to determine what rate of progress in any particular case should be.”¹⁹ The resistance was not limited to States. Matthew Craven points out, surprisingly perhaps, that the ILO claimed such a complaint procedure would overlap with their own while other specialised agencies vigorously argued that were better technically qualified to support implementation of the rights.²⁰ France withdrew its proposal without a vote.

Such paradoxical positions amongst States are not uncommon in international negotiations. Alston concludes, for example, that the United Nations human rights regime’s

¹⁵ Michael Dennis and David Stewart: “Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?” (2004) 98 *American Journal of International Law* 462.

¹⁶ See generally, Philip Alston: “The Committee on Economic, Social and Cultural Rights”, in Philip Alston (ed.): *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992) 473.

¹⁷ UN Doc. E/CN.4/L.338, 18 ESCOR, Supp (No. 7), UN Doc. E/2573, para. 216 (1954).

¹⁸ Craven (note 6 above) 35-36.

¹⁹ UN Doc. A/2929, 10 UN GAOR, C.3, Annexes (Ag. Item 28), Pt. II, at 124, para 41 (1955), cited in Craven, *ibid.*

²⁰ Craven (note 6 above) 35-36.

expansion has depended upon the effective exploitation of the opportunities which have arisen in any given situation from the prevailing mix of public pressures, the cohesiveness or disarray of the key geopolitical blocks, the power and number of the offending states and the international standing of their governments, and a variety of other, often rather specific and ephemeral, factors.²¹

In the present case, one can crudely divide State responses into sovereignty, substantive and procedural concerns. Some States are sceptical towards any form of international supervision. In this category, one could place the Socialist States during the Cold War and, in more contemporary times, the USA and many Asian and Middle Eastern States. For other States, substance appears to play a larger role. All five Nordic countries have ratified the Optional Protocols to ICCPR and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and accepted the complaint procedure for the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Currently, they are divided on the Optional Protocols to the Convention on the Rights of Persons with Disabilities and ICESCR. Norway and Denmark are the exceptions in not ratifying the former and the most vocal in indicating they will not ratify the Optional Protocol to ICESCR. Other countries such as Switzerland claim they are procedurally constrained by their constitution in which types of international supervision they can accept.²²

However, the complexity of the State responses during the 1950s and 1960s does not completely remove the Cold War scenario from the explanatory picture. It is simply impossible to test the converse. For instance, without Cold War divisions, a single treaty may have emerged and a supervisory mechanism along the lines of the French proposal could have well eventuated, as it largely did in the case of the Inter-American system.²³

Indeed, the issue of remedial enforcement of ESC rights never fully departed the international arena. In 1968, the International Conference on Human Rights urged Governments to focus “on developing and perfecting legal procedures for prevention of violations and defence of economic, social and cultural rights”.²⁴ The UN Secretary-General in a follow-up study noted the right to an effective remedy by the competent national tribunals applied “of course, also to economic, social and cultural rights”.²⁵ It went on to note that many of those rights were

²¹ Philip Alston: “Critical Appraisal of the UN Human Rights Regime” in Philip Alston (ed.): *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992) 1, 2.

²² See *Report of the Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, U.N. Doc. A/HRC/8/7, 6 May 2008, para. 239.

²³ See Tara Melish: “The Inter-American Court of Human Rights: Beyond Progressivity”, in Malcolm Langford (ed.): *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008), 409.

²⁴ Final Act of the International Conference on Human Rights, (United Nations publication, Sales No. E.68.SIV.2), resolution XXI, para. 6.) I am grateful to Philip Alston to pointing out this resolution and report.

²⁵ *Ibid.*, para. 157.

capable of being protected at the national level “by the ordinary courts” and that it was already the case in some States.²⁶

Renewed demands for an Optional Protocol to ICESCR itself coincided with the gradual renaissance of ESC rights from the late 1970s. In 1984, the possibility of a protocol was discussed at an international right to food conference.²⁷ While one presenter pessimistically concluded that “it is not to be expected that States will readily submit to a complaints procedure”,²⁸ FIAN, an international NGO that was to emerge from that conference, together with Habitat International Coalition, commenced a nascent campaign. Representatives of the two organisations prepared a draft optional protocol which they presented at the 1993 World Conference on Human Rights²⁹ together with advocacy pamphlets and submissions.³⁰

The first formal discussion of an Optional Protocol was initiated by the Committee on Economic, Social and Cultural Rights (CESCR) in 1990.³¹ It was encouraged in this direction by States at the 1993 World Conference on Human Rights³² and culminated in a report with a draft protocol being presented to the former UN Commission of Human Rights in 1996.³³ The CESCR strongly argued for a protocol on the grounds that it would better highlight “concrete and tangible issues”, provide a focused “framework for inquiry” and help realise ESC rights

²⁶ Ibid., para. 159.

²⁷ *The Right to Food: From Soft to Hard Law*, Woudschoten, University of Utrecht, 6 to 9 June 1984, co-hosted by the Netherlands Institute of Human Rights (SIM), the Norwegian Human Rights Project and Christian Michelsen Institute. G.J.H. van Hoof at the conference called explicitly for a Protocol: see, ‘The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views’, in Philip Alston, and Katarina Tomaševski (eds): *The Right to Food* (The Hague: Martinus Nijhoff, 1984), 97.

²⁸ G. Westerveen: “Towards a System for Supervising States’ Compliance with the Right to Food”, in Philip Alston, and Katarina Tomaševski (eds): *The Right to Food* (The Hague: Martinus Nijhoff, 1984), 119-134, at 127.

²⁹ (Draft) *Optional Protocol to the Covenant on Economic, Social and Cultural Rights*, FIAN and HIC May 1993. On file with author. Their draft resembled to some extent the Optional Protocol to ICCPR but included provisions for interim ‘injunctions’ and only included individuals who had “directly suffered breaches” or are “threatened” as such.

³⁰ E.g.: FIAN, *Why an OP to the ICESCR is needed as soon as possible*, Nov.1992; *FIAN Statement on OP to Prepcom IV of the World Conference on Human Rights*; and *Written submission of FIAN and HIC to the World Conference*, June 14-25, 1993, Vienna.

³¹ UN Doc. E/C.12/1991/Wp.2.

³² See Vienna Declaration and Programme of Action, A/CONF.157/23, para. 75 and discussion in Claire Mahon: “Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2008) 8 *Human Rights Law Review* 617.

³³ UN Doc. E/C.12/1996/CRP.2/Add.1. The report was distributed widely by the Commission for comments which are consolidated in UN Doc E/CN.4/1998/84.

since decisions would carry some weight even though they would be “non-binding”.³⁴ It was also believed it would “encourage governments to ensure more effective remedies are available” nationally and spur individuals and groups to formulate their demands for ESC rights more concretely.

In 2002, the delightfully titled “Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol” was created by the Commission to investigate the possibility of a protocol. It first met in 2004³⁵ and in 2006 was granted a mandate to start drafting.³⁶ The preceding years witnessed an emerging and influential NGO campaign at both international and national levels,³⁷ strong leadership by Portugal on the issue within the former Human Rights Commission and the commissioning of two reports by an independent expert by the Commission.³⁸

Dennis and Stewart characterised the actions of those pushing this process within the United Nations as being “dismissive of other viewpoints, and self-serving” and having a “build it and they will come” attitude.³⁹ They suggest the independent expert was pressured to be more supportive of a protocol in his second report and are critical of the Chairperson’s recommendation to proceed to drafting despite the 2004 meeting of the Working Group ending in what they saw as “disarray”.⁴⁰ The view is somewhat uncharitable. The proposal to proceed to drafting was repeatedly postponed from 2001 in an attempt by Portugal and supportive States to reach consensus. Indeed, some opposing States privately conceded that they knew the protocol would eventually materialise but the strategy was to delay the process as long as possible.⁴¹

The key issue that particularly dogged the early debates of the first Working Group was whether ESC rights were justiciable. However, at the first Working Group session there were

³⁴ UN Doc. A/CONF.157/PC/62/Add. 5, paras. 32-38. The Committee’s draft was subject to some scholarly debate and one workshop produced a slightly different draft. See Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 1999).

³⁵ Commission on Human Rights, Resolution 2002/24, para. 9(F).

³⁶ Human Rights Council, Resolution 1/3 (2006). For a detailed description of the Working Group process see Mahon (note 32 above).

³⁷ Earlier active NGOs included FIAN, HIC, International Commission of Jurists, COHRE and CERA. The campaign grew to include over the years to include a large number of international and national organisations. See generally <<http://www.opicescr-coalition.org/>>.

³⁸ See *Report of the Independent Expert on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Commission on Human Rights, Fifty Eight Session, Item 10 of the Provisional Agenda, UN Doc. E/CN.4/2002/57, 12 February 2002 and *Report of the Independent Expert on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Commission on Human Rights, Fifty Ninth Session, U.N. Doc. E/CN.4/2003/53.

³⁹ Dennis and Stewart (note 15 above) 475-476.

⁴⁰ *Ibid.*, 462.

⁴¹ Personal communication from representative of a State active in opposing the Protocol at the time, April 2001.

numerous presentations of national, regional and international experiences which partly deflated attempts to raise the issue as an automatic bar to proceeding to draft a protocol.⁴² The Chairperson of the Working Group has specifically pointed out the invaluable human rights education role played by NGOs in this regard.⁴³ Countries such as South Africa also presented their own national experience with courts in a favourable light. Moreover, the ILO and other specialised agencies were this time publicly supportive of an Optional Protocol. Other issues initially considered were whether the Committee should be the appropriate forum to hear complaints, whether duplication would possibly occur with other international bodies and what consideration should be given to the resource situation of developing countries. Issues such as standing and the inclusion of an inquiry procedure were also discussed.

In the second phase of the Working Group under the UN Human Rights Council, the focus shifted from broader discussions on these issues and the necessity for the protocol to its precise contours. At its first session, in June 2006, the Human Rights Council had decided to “extend the mandate of the Working Group for a period of two years in order to elaborate an optional protocol to the International Covenant on Economic, Social and Cultural Rights”. They requested the Chairperson-Rapporteur, Ms. Catarina de Albuquerque, to prepare “a first draft optional protocol ... to be used as a basis for the forthcoming negotiations”.⁴⁴

In July 2007, a draft Optional Protocol was presented to the Working Group by Catarina de Albuquerque.⁴⁵ The CESCR version of a protocol was not used as a basis for drafting but was produced with reference to other existing UN communications procedures. As some States were “allergic” to the CESCR draft, it allowed for a fresh way forward and increased the level of the support.⁴⁶ Consensus on a final and revised draft was achieved on 4 April 2008 although some States listed concerns and reserved full support. The draft was transmitted to the Human Rights Council, and slightly amended after a late objection by Pakistan as will be discussed below. It moved upwards to the General Assembly where it was adopted.

⁴² See *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, U.N. Doc. Geneva, U.N. Doc E/CN.4/2004/44 (2004), 23 February – 5 March 2004; *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session*, U.N.Doc. E/CN.4/2005/52 (2005) 10 February 2005; *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session* U.N. Doc. E/CN.4/2006/47 (2006) 14 March 2006.

⁴³ Comments made at *Citizenship in an Enlarged Europe: the contribution of Economic, Social and Cultural Rights*, 10-12 April 2008, New University of Lisbon.

⁴⁴ Human Rights Council, Resolution 1/3, Open-ended working group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights.

⁴⁵ See *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Fourth Session, Geneva, UN Doc. A/HRC/6/WG.4/2 (2007) 23 April 2007.

⁴⁶ Communication from Catarina de Albuquerque.

C. FOUR JUSTICIABILITY DEBATES

Before examining the text of the protocol, it is important to sketch out some of the substance of the rhetorical wrestle over an Optional Protocol to ICESCR within the United Nations. To some degree, the nature of the debate changed little in sixty years although some objections clearly lost their force while new ones were created. The four common objections to the Optional Protocol largely, but not completely, resembled those of the broader debate on the justiciability. ESC rights adjudication has been traditionally questioned on the grounds that the rights are too vague and require positive action and that it raises concerns of democratic illegitimacy, institutional incompetence and a lot of effort being exerted by litigants for little instrumental benefit. This Section analyses the drafting debates through the lenses of these four debates. It is certainly not meant to be conclusive though of the justiciability discussion in legal and political theory and justiciability also represents a recurrent theme in this Special Issue, particularly in the articles by Chief Justice Pius Langa and Bruce Porter and in the debate between Stein Evju and Inge Lorange Backer.

Before proceeding one should mention a ‘trial balloon’ of an argument that was proffered by Michael Dennis and David Stewart in 2004. They suggested that the creation of the Working Group to draft the Optional Protocol was, in essence, illegitimate as it amounted to an effective revision of the Covenant. After an exhaustive oversight of the debates in the 1950s and 1960s in the UN, and some statements by some States and the first session of the Working Group, they conclude:

A complaint mechanism for economic, social and cultural rights was specifically rejected, and there was markedly little support for parallel oversight and supervisory provisions between the two prospective covenants. They would have the international community overlook the reasons for those decisions and, in effect, rewrite the relevant provisions of the ICESCR.⁴⁷

However, in the next sentence they immediately qualify this conclusion noting that there is, “no reason why the international community cannot now reconsider the matter”.⁴⁸ Indeed, in international law, States are given remarkable latitude to develop new treaties and standards bounded perhaps only by the UN Charter and general principles of international law, and the Vienna Convention of the Law of Treaties gives marginal weight to the *travaux préparatoire* in interpreting treaties. One would also think that previously colonised States should be given some opportunity to assist in the development of international law, particularly those which have ratified the ICESCR.

1. IMPRECISE AND POSITIVE NORMS

ESC rights have been traditionally viewed as suffering from the character flaws of vagueness and being limited to positive action, depriving them thus of the features needed for adjudica-

⁴⁷ Dennis and Stewart (note 15 above), 489.

⁴⁸ *Ibid.*

tion. These arguments seemed to be particularly compelling amongst many delegates when they rejected the French proposal for complaints concerning the ICESCR to be directed to the Human Rights Committee. The claim of *vagueness* has emphasised both the brevity of the articulation of the rights but also their programmatic as opposed to legal nature. The idea that the rights are limited to positive and thus non-reviewable action is frequently linked to the notion that civil and political rights represent the reverse. As Seymour Rubin puts it, “when one discusses civil and political rights, one is generally talking about *restraints* on governmental action, not *prescriptions* for such action ... [it] is easier to tell governments that they shall not throw persons in jail without a fair trial than they shall guarantee even a minimal but sufficient standard of living.”⁴⁹

In the first session of the Working Group in 2004, the competing views on this aspect of justiciability amongst States was evident from the opening paragraphs of the Chairperson’s report:

Some delegations believed that the provisions of the Covenant were insufficiently clear to lend themselves to a complaints procedures or to be justiciable. Other delegations referred to national and regional legislation and case law, arguing that experience shows that the vagueness of legal provisions of the Covenant can be clarified by courts. Some delegations stated that action by the legislature is sometimes necessary in order to clarify the scope of obligations. Several delegations underlined that States parties have an immediate obligation to take prompt and effective measures towards the implementation of the rights covered by the Covenant.⁵⁰

However, Martin Scheinin’s thesis that this aspect of the justiciability debate now represents a ‘quiet echo’ is partly borne out by the subsequent debates in the Working Group. Many States and NGO representatives were active in the discussion, providing examples of domestic and international jurisprudence indicating how the rights had been adjudicated in practice.⁵¹ It was also pointed out that the cases and the Committee’s General Comments revealed that the rights carried negative-like obligations.⁵² These include refraining from action that would restrict individual freedom to realise the rights (a so-called obligation of respect) or

⁴⁹ Seymour Rubin, *Economic and Social Rights and the New International Economic Order*, Address Before the American Society of International Law (on file with the American University International Law and Policy) quoted in Herman Schwarz: “Do Economic and Social Rights Belong in a Constitution?” (1995) 10 *American University Journal of International Law and Policy* 1233, 1233 (emphasis in original).

⁵⁰ Report of the open-ended working on its first session (note 42 above) para. 23.

⁵¹ The UN Office of the High Commissioner and various NGOs also produced briefing papers providing summaries of cases. *Selection of case law on economic, social and cultural rights: background paper prepared by the Secretariat*, U.N. Doc E/CN.4/2005/WG.23/CRP.1, *Information provided by non-governmental organizations: written submission presented by the Centre on Housing Rights and Evictions (COHRE)*, U.N. Doc E/CN.4/2005/WG.23/CRP.2; *Information provided by non-governmental organizations*: U.N. Doc. E/CN.4/2005/WG.23/CRP.3

⁵² Report of the working group on its first session (note 42 above) para. 23.

deliberate measures that reduce the level of realisation of the rights (principle of non-retrogression). A number of ICESCR articles also contain this negative orientation such as Article 8 on trade union freedoms and Article 10 on protection of children. The Chairperson also pointed out that civil and political rights often required positive action for their effective realisation⁵³ and civil and political rights have been relied on to advance socio-economic rights claims (e.g. positive rights to housing in some circumstances under Article 8 of the European Convention on Human Rights).

A more nuanced form of opposition came from those who argued that one could not ignore the different express wording of the ICCPR and ICESCR even if there were no sharp dividing lines between the two sets of rights. Article 2(1) of ICESCR states:

Each State Party to the present Covenant 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Some States in the Working Group thus noted that ESC rights were ‘less absolute’ than civil and political rights.⁵⁴ Dennis and Stewart in their commentary on the Working Group discussions, “do not reject out of hand the notion that some social and economic rights may be domestically justiciable” but emphasise the ICESCR creates “contextual, contingent and continuing obligations” unlike the ICCPR’s articles which are written in “precise terms.”⁵⁵

The problem with this perspective is that it appears to project a presumption of non-legality onto a legal text. The CESCR has instead adopted a rather straightforward approach to the wording of this article even while acknowledging the differences with the ICCPR.⁵⁶ In the Committee’s words, “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken ... Such steps should be deliberate, concrete and targeted”.⁵⁷ One might also note that Article 2(1) of the ICCPR places a positive obligation on States to ensure the rights and the Human Rights Committee has called on States parties to take various positive steps. The CESCR did however introduce one interpretative device which sought to make the obligations more precise. In General Comment No. 3 they

⁵³ See *Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical Paper by the Chairperson-Rapporteur, Catarina de Albuquerque*, U.N. Doc. E/CN.4/WG.23/2paras. 37-38.

⁵⁴ Dennis and Stewart (note 15 above) 475-476.

⁵⁵ *Ibid.*, 476.-They also note that the ICCPR rights provide that ‘everyone shall have the right’ to each fundamental freedom” while the ICESCR generally provides that States parties recognise the right of everyone” to each enumerated goal which consistent with the idea of progressive realisation”

⁵⁶ Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties’ obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991).

⁵⁷ *Ibid.*, para. 2.

placed the burden on a State to justify the failure to reach a minimum core level of the rights if it claimed, for example, it lacked adequate resources.⁵⁸ The interpretation is not wholly innovative if one considers that immediate realisation of a minimum core of some rights is expressly recognised.⁵⁹

This reasoning by the Committee was referred to by many States during the Optional Protocol discussion and some Optional Protocol-sceptics such as Christian Tomuschat have praised these jurisprudential developments. Tomuschat, however, questions how an *individual* complaints mechanism could make these obligations justiciable. With regard to the right to work in Article 6 he concludes that

It is incumbent on [on States] ... to take steps which activate the economy so that job opportunities may arise for everyone desirous of finding employment. ... but the general obligation is not owed specifically to every individual. ... Judicial protection against State action is generally confined to measures which adversely affect a person individually. General political measures which have repercussions on all citizens alike, are not subject to judicial review.⁶⁰

The question is not unreasonably posed but it disregards growing adjudicatory practices in which State policies are reviewed for their adequacy or reasonableness. Various state courts in the United States have found that education quality and financing policies were inadequate vis-à-vis state constitutions containing the right to education, the South African Constitutional Court uses a test of reasonableness while the Colombian Constitutional Court analyses

⁵⁸ “[A] State party in which any significant number of individuals is deprived of essential food-stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. (Ibid., para. 10.) In two later General Comments, the Committee appeared to make this minimum core test completely independent of the level of resources - non-derogable obligations. This was critiqued, quite rightly, by Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden: Martinus Nijhoff Publishers 2004). See also Dennis and Stewart (note 15 above). The Committee has recently shifted back to its original contextualised position. See *An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an Optional Protocol*, Statement, UN Doc. E/C.12/2007/1 (2007); and *General Comment No. 19, The Right to Social Security (article 9)*, (Thirty-ninth Session, 2007) E/C.12/GC/19 (2007).

⁵⁹ Article 13, for example, requires the immediate realisation of free primary education for all as part of the right to education.

⁶⁰ Christian Tomuschat: “An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights”, in Klaus Dicke, Stephan Hobe, Karl-Ulrich Meyn, Anne Peters, Eibe Riedel, Hans-Joachim Schütz and Christian Tietje (eds): *Weltinnenrecht: Liber amicorum Jost Delbrück* (Berlin: Duncker and Humblot, 2005), 815, 828.

whether there has been an ‘unconstitutional state of affairs’ on account of systematic and widespread violations of a number of constitutional rights.⁶¹ In *Autism-Europe v France*, the European Social Rights Committee adopted similar tests even though in the two European Social Charters the obligations are rather immediate:

[W]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.⁶²

In his article in this Special Issue, Porter argues that these criteria, particularly from South Africa, helped shape the adoption of the final reasonableness test in Article 8(4) of the Optional Protocol.

2. LEGITIMACY

The most enduring argument in the field of human rights adjudication has possibly been that such review lacks legitimacy. While adjudication of civil and political rights has become ‘commonplace’ in many democracies and developed significantly at the regional levels, there are some who still hold to a firm view that it is nonetheless inappropriate under particular conditions. For example, Jeremy Waldron states that that ‘rights-based judicial review of legislation is “inappropriate for reasonably democratic societies whose main problems is not their legislative institutions are dysfunctional but that their members disagree about rights”’.⁶³ Other commentators are only hostile to social rights adjudication, with the assumption being that judicial determination of spending and policy priorities is a particular threat to doctrines of separation of powers between the courts and the executive and legislature at the national level.⁶⁴

The idea that democracy is threatened by human rights adjudication in general, and social rights in particular, has been much debated in political science and legal theory and will not be covered in depth here. Supporters of social rights adjudication particularly point out that it can *support* traditional parliamentary democracy (e.g., ensuring voters are sufficiently educated

⁶¹ See Malcolm Langford: ‘From practice to theory: the justiciability of social rights’, in Langford (note 23 above), 3.

⁶² *Autism-Europe v. France* Complaint No. 13/2002, Decision on the Merits, para. 53.

⁶³ Jeremy Waldron: “The Core of the Case Against Judicial Review” 115 (2006) *The Yale Law Journal* 1346, 1406. Responses include Dimitrios Kyritsis: “Representation and Waldron’s Objection to Judicial Review” 26 (2006) *Oxford Journal of Legal Studies*, 733 and A Kavanagh: “Participation and Judicial Review: A Reply to Jeremy Waldron” 22 (2003) *Law and Philosophy* 451.

⁶⁴ See for example, E.W. Vierdag: “The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights” IX (1978) *Netherlands Yearbook of International Law* 69.

and well-nourished to actually participate in political processes) and *complement* parliamentary democracy by giving political space to those individuals groups regularly and systematically excluded from politics due to the weakness of majoritarianism.⁶⁵ The legal response is that adjudicators play a review not policy-making role. Although the borders between every branch of government are inevitably blurred to some extent as the German Federal Constitutional Court acknowledged.⁶⁶

In the Working Group, the debate on this issue was significant in the earlier sessions. The report of the first session notes that, “The concern was expressed that a complaints procedure might unduly interfere in the democratic process and national policy-making with regard to political, economic, and budgetary priorities”.⁶⁷ Some sceptical States though had recognised the rights as justiciable at the national level and thus framed their opposition in more sovereignistic terms: “the main question is not whether economic, social and cultural rights were justiciable, but whether an international human rights committee was the appropriate body to adjudicate upon these rights or if their interpretation should be left to adjudication at the national level”.⁶⁸

Other States responded to these arguments on both legal and moral grounds. Some argued that “States always enjoy a margin of discretion in deciding on the means for implementing their obligations” and that the Committee had shown a “balanced approach” in its general comments and recommendations under the State reporting procedure. Others emphasised the importance of having international review, that “human rights were not merely a domestic issue and that recommendations of international treaty monitoring bodies did not constitute undue interference even if these had implications domestically”.⁶⁹

Many States also raised questions as to what criteria should be used in addressing issues such as resource allocation.⁷⁰ In the second session of the Working Group, this topic was taken up in some detail as members of the Working Group questioned a member of the Committee who was present. One example of many in the report reads, “The representative of Ghana expressed concern that fees introduced in order to finance maintenance of school facilities or as part of a national strategy aimed at increasing the number of students could be interpreted by the Committee as violating article 13. Mr Riedel noted that States would bear the burden of proof to justify that such steps were not retrogressive”.⁷¹

⁶⁵ For an overview, see Cecil Fabre: *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press 2000). Waldron, concedes, for example that judicial review of legislation might be appropriate when a society has ‘discrete and insular minorities’ who are excluded from political processes. This captures this situation of racial minorities for example but not necessarily women or people living in poverty who may be more disparate but systematically disempowered nonetheless. A casual observation of social rights adjudication reveals it tends to be most practiced in countries with high levels of social inequality.

⁶⁶ *Klauss* case (30 BverfGE I, 1970).

⁶⁷ Report of the working group on its first session (note 41 above) para. 22.

⁶⁸ *Ibid.*, para. 65.

⁶⁹ *Ibid.*, para. 22.

⁷⁰ *Ibid.*, para. 57.

⁷¹ Report of the working group on its second session (note 41 above) para. 22.

By the third session, the focus increasingly shifted to the contours of a possible protocol and away from broader debates over legitimacy. While some States such as Poland continued to raise questions of legitimacy others such as United Kingdom, Canada and Norway began twinning their concerns with concrete proposals for criteria to be inserted in the Optional Protocol,⁷² which will be taken up in Section D below.

3. INSTITUTIONAL COMPETENCE

A third objection to ESC rights adjudication is that it is not an institutionally competent forum for dealing with social questions. Adjudicators lack the requisite expertise and information and the judicial form constrains them from resolving the competing policy considerations and polycentric consequences that would flow from their decisions.⁷³ The responses in the literature and jurisprudence to this challenge have included arguing that adjudication plays a role in bringing information into the public domain that may not be traditionally available to legislature⁷⁴ and that methods are available to increase the level of specialist expertise and ensure provision of additional information.⁷⁵ On polycentric consequences some have pointed out that this is a feature of adjudication in general, including in commercial and taxation law.⁷⁶ Some courts have resolved this issue with clearer tests for violations and use of flexible remedies.⁷⁷

This institutional aspect of the justiciability debate featured less in the general debates. Only one State in the opening session directly addressed the issue of information for example, noting “it would be difficult for a Geneva-based treaty monitoring body to acquire a complete and adequate understanding of the local context”.⁷⁸ It was said in reply that it was up to the Satte to provide sufficient information.⁷⁹ Paradoxically, perhaps because of insufficient discussion on this theme, sceptical States such as Canada campaigned for provisions in the Optional Protocol that would limit the amount of information the Committee could receive.

On the question of the Committee’s expertise, States tended not to raise this issue in the sessions. This may have been because they viewed the Committee as having the requisite

⁷² Report of the working group on its third session (note 41 above) para. 92.

⁷³ See for example, Donald Horowitz: *The Courts and Social Policy* (Washington D.C.: Brookings Institution 1977). See also Lon Fuller: “The Forms and Limits of Adjudication” 92 (1978-1979) *Harvard Law Review* 353.

⁷⁴ Craig Scott and Patrick Macklem: “Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution” 141 (1992) *University of Pennsylvania Law Review*, 1.

⁷⁵ E.g. use of expert witnesses, amicus curiae submissions, specialist fact-finding bodies).

⁷⁶ Jeff A. King: “The Pervasiveness of Polycentricity” (2008) *Public Law* 101.

⁷⁷ As an example of the latter, the Canadian Supreme Court in *Eldridge v British Columbia* stated “A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system.” (1997) 3 S.C.R. 324, para. 96.

⁷⁸ Report of the working group on its first session (note 41 above) para. 63.

⁷⁹ *Ibid.* Para. 64.

expertise or it was impolite or impolitic to raise the question. The issue seemed to be raised occasionally and more informally in discussions between States and NGOs and appeared more prominently in some academic critiques of the Working Group. For instance, Dennis and Stewart are critical of some of the Committee's General Comments, although one of the jurisprudential principles they target, has since been changed. Tomuschat on the other hand says the Committee "excelled in drafting General Comments". But, after citing a number of concluding observations which he characterises as having "pretorian brevity" he concludes that "the actual application of these benchmarks ... must be called a blatant failure" and that such "a body is totally lost when confronted with the task".⁸⁰

Tomuschat's critique is not new and it has some justification but it misses the mark. As argued elsewhere, one must be careful in selectively choosing concluding observations as the Committee has been quite detailed and precise in some.⁸¹ The key question is whether the brevity of some concluding observations is a result of the lack of alternative information a Committee receives (for some countries more than 30 NGOs submit information; for other States, none) or a lack of a capacity to engage with the material by the particular rapporteur assigned to draft the first set of concluding observations. The real concern on capacity should not be the Committee's inability to engage with social questions from a legal perspective but rather the ability of *all* the Committee members to engage. In this Special Issue, Scheinin and myself argue that the Committee should follow the Human Rights Committee and adopt an internal code of conduct that makes it more difficult for States to appoint current politicians or sitting ambassadors.

One legal polycentric question was raised though. Would adding another international complaint procedure result in conflicting decisions, fragmenting further international law?⁸² A representative of the International Labour Organisation however noted that thus far there had been no discrepancies between the ILO Conventions and the ICESCR in practice,⁸³ and both UNESCO and ILO referred to a "long-standing practice of cooperation between their respective agencies".⁸⁴ While some States echoed these arguments other argued for realistic expectations noting that some conflict was inevitable pointing toward civil and political rights jurisprudence.⁸⁵

4. UTILITARIAN BENEFITS

One of the curious aspects of the justiciability debate is that when it shifts from theoretical concerns to practical benefits, the arguments dramatically change gears.⁸⁶ Opponents of

⁸⁰ Tomuschat (note 60 above) 832.

⁸¹ Malcolm Langford and Jeff A. King: "Committee on Economic, Social and Cultural Rights: Past, Present and Future" in Langford (note 23 above), 477, at 503-4.

⁸² Report of the working group on its first session (note 42 above) paras. 38, 48 and 74.

⁸³ *Ibid.*, 69.

⁸⁴ Report of the working group on its second session (note 42 above) para. 29.

⁸⁵ Report of the working group on its first session (note 42 above) para. 74.

⁸⁶ For an overview of literature seeking to measure the impact of social rights litigation, see Langford (note 61 above), 37-43.

justiciability downplay the power of adjudicatory bodies, the same power they had previously raised as a threat to democracy. The reverse can happen with supporters. The debates over the Optional Protocol were no exception and also raised the additional question of the impact an ‘international’ remedy and treaty as opposed to a national one.

The potential benefits of the Optional Protocol were the subject of significant discussion at the opening session of the Working Group. States pointed to a range of benefits and it is notable that they were predominantly what one would call ‘indirect’ in contributing to the realisation of the Covenant rights – i.e., the Optional Protocol would spur other necessary activities. It was said that a

complaints mechanism would: encourage States parties to ensure more effective local remedies; promote the development of international jurisprudence, which would in turn promote the development of domestic jurisprudence on economic, social and cultural rights; strengthen international accountability; enable the adjudicating body to study concrete cases and thus enable it to create a more concise jurisprudence.⁸⁷

Others noted that it would also provide ‘a remedy for victims of violations of those rights’.⁸⁸

A range of arguments against its consequential value were put in response. Some expressed “concern over the cost of an additional human rights procedure in light of the overstretched resources of the United Nations” and that it “could have a negative impact on the ability of the Committee to undertake its existing functions”.⁸⁹ Others suggested that other efforts might be more fruitful such as improving respect for ESC rights in other existing procedures or placing international emphasis on improving strengthening national mechanisms. Some said complaints would be mostly brought against countries most respectful of human rights.

The most persistent critique or query was whether the protocol would result in duplication with the underlying concern that there was a “proliferation of mechanisms under human rights treaties”.⁹⁰ However, the ILO and UNESCO representatives at the Working Group noted the strong complementarity of such a mechanism – a significant reversal from the position of most specialised agencies during the drafting of ICESCR. The ILO representative said for example that there is “no individual complaints mechanism within the ILO framework”, which is particularly significant given that in many developing countries the majority of workers, particularly those in the formal economy, are not organised. Other States argued that none of the existing mechanisms “addressed the provisions in a comprehensive way, and that they are limited either by subject matter, geographic scope or the groups of individuals with standing to bring a complaint.”⁹¹

⁸⁷ Report of the working group on its first session (note 42 above) para. 23.

⁸⁸ *Ibid.*, para. 70.

⁸⁹ *Ibid.* para. 71.

⁹⁰ *Ibid.* paras. 71, 74.

⁹¹ *Ibid.* para. 73.

Debates on the benefits of the Optional Protocol receded in the Working Group as focused discussions on the text got underway. But the question of likely benefits will presumably dominate some national discussions over ratification. Charting a consistent middle way through the impact debate is no easy task and Beth Simmons in this Special Issue takes up the challenge and seeks to provide a measured assessment, with quantitative backing, of the ‘value added’ of the Optional Protocol.

It is also important to ask as Claire Mahon does, “what is the framework for some form of assessment, lest we continue along the road of proliferation without giving due thought to their added value”.⁹² She suggests that one could take the number of States ratifying as a guide to the degree of likely impact although she cautions about using this measure in the short-run at least. Beth Simmons in this Issue examines the potential neighbourhood effect that can develop if countries beginning to ratify, suggesting that ratification will hinge on key States in different regions ratifying. Mahon also suggests examining in the future whether the protocol complements existing mechanisms in terms of developing new adjudicative space and whether victims will actually be able to effectively access and utilise the procedures, noting that the bar may have been set too high as we discuss below.

To this list, could be added whether the Optional Protocol does contribute to the development of more effective local remedies. In Europe, this has arguably been one of the key contributions of the European Convention on Human Rights but in the case of the European Committee on Social Rights, with lesser powers, the evidence is only emerging, although anecdotal evidence suggests some States have shifted policies and practices while others have not, partly due to the weakness of the procedure.⁹³ One can also examine the actual impact of particular decisions, although this requires a proper methodology attuned to investigating the various impacts that can occur in the shadow of litigation and an assessment of the direct and indirect benefits in the light of other available options.

D. AN OVERVIEW OF THE TEXT AND KEY INTERPRETIVE ISSUES

Article 1 of the Optional Protocol explicitly recognises the competence of CESCR to hear complaints concerning State parties to the Covenant⁹⁴ and the content of the protocol largely mirrors recent complaints procedure created for other international human rights treaties. There are, however, some significant differences. This Section outlines a number of key aspects of the protocol with a focus on the scope of the procedure, admissibility criteria, interim measures, the merits and remedies phase and the inquiry and inter-State procedures.

⁹² Mahon (note 32 above), 27.

⁹³ See Langford (note 23 above).

⁹⁴ See the third article in this Issue on the debate over the Committee’s legal authority.

1. SCOPE OF THE PROCEDURE

Article 2 sets out what violations may be invoked:

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.

Interestingly, this wording corresponds to the Optional Protocol to CEDAW, and to a large extent the First Optional Protocol to the ICCPR,⁹⁵ but it was only after some tortuous negotiations along the way in three areas.

First, earlier drafts included a collective communications procedure which permitted international non-governmental organisations with ECOSOC consultative status to submit communications, and allowed States parties to declare that certain national organisations had the right to submit collective communications against it.⁹⁶ This restrictive approach drew a sharp response from a number of States, particularly from Africa and the Americas where some of the regional procedures are more liberal. The revised draft permitted all NGOs with “relevant expertise and interest” to submit complaints “where appropriate”. However, it did not curry favour with a sufficient number of States and informal negotiations seemed to have tipped the Chair’s hand.⁹⁷ She reported that deletion was justified by “the lack of any clear support”, that the collective complaints procedure was “foreign” outside the European regional context and that “groups of individuals” can submit communications in any case.⁹⁸

Secondly, the scope of the complaints in Article 2 was heavily bracketed during the drafting. From the inception of the original Working Group in 2004, various participants had proposed ways of slicing and dicing the Covenant rights and obligations for the purposes of the protocol. The so-called “a la carte” approach called for States to be able to opt-in or out of selected rights in Part III of the Covenant.⁹⁹ Others proposed restricting the justiciable State obligations to Article 2(2) and Article 3, guarantees of non-discrimination and gender equality. This last proposal found favour with Christian Tomuschat as a best case scenario, something that could be lived with if a protocol was adopted.¹⁰⁰ African States supported including

⁹⁵ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

⁹⁶ *Draft Optional Protocol* (note 45 above), 5.

⁹⁷ See respectively *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc A/HRC/8/WG.4/2 (2007), 24 December 2007, 7; *Report of the Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session*, U.N. Doc A/HRC/6/8 (2007), 30 August 2007, paras. 11 and 18.

⁹⁸ See *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc A/HRC/8/WG.4/2, para. 12.

⁹⁹ The European Social Charter model was often cited in support, as it contains an opt-in procedure.

¹⁰⁰ Tomuschat (note 60 above).

only the obligations of “respect” and “protect” developed by the CESCR. These duties require States not to interfere with the rights and ensure private actors do not do likewise, and this approach would avoid the seemingly resource-intensive obligation to fulfil.

Over time, an emerging majority of States began to favour a comprehensive coverage and it was settled in April 2008 at the final Working Group session.¹⁰¹ This approach was partly “evidence-based” given the many presentations that demonstrated that a wider range of the Covenant obligations and rights¹⁰² had been adjudicated in various national and regional jurisdictions. There was also a concern that an “a la carte” approach could lead to a hierarchy of rights and obligations. Claims of indivisibility of rights would ring hollow as the ICCPR Optional Protocol permitted no such flexibility.

The decision may have some ramifications for some States as to whether to ratify or not.¹⁰³ However, as the text of the Optional Protocol is assessed for possible ratification, it is important to remember that the final text was the product of compromise. Shuttlecock diplomacy and informal sessions reigned supreme in the final drafting sessions as a series of trade-offs across the protocol were developed in order to satisfy other concerns of sceptical States.

The final issue of contention was the right to self-determination. Despite NGO pleas for inclusion, it was systematically excluded from the Working Group’s text. After the draft was transmitted by the Working Group to the Council, Pakistan proposed the inclusion of the right. Speculation was rife as to its intentions since such a step could make ratification difficult for some States, given the customary concerns it could support secession by indigenous or minority groups. In June 2008 a compromise was hashed out and the procedure was to include “all” ESC rights in the Covenant.¹⁰⁴ This wording conceivably brings the socio-economic dimensions of right to self-determination under the remit of the procedure. It presumably excludes the civil and political dimensions such as any right to secede. Thus, one of the key decisions the CESCR will face in the near future is whether to entertain ESC rights complaints directly under Article 1. The possibility is somewhat remote given that the Human Rights Committee found that peoples’ rights could not be adjudicated under a procedure restricted to “individuals” or “groups of individuals”.¹⁰⁵ This decision was referred to and supported by the United Kingdom in the Third Committee in November 2008.¹⁰⁶

¹⁰¹ See *Report of the Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, U.N. Doc. A/HRC/8/7, 6 May 2008.

¹⁰² These include the right to work, various labour rights, the right to social security, rights of families and children and the rights to an adequate standard of living, health, education and cultural participation.

¹⁰³ Turkey for instance has warned it might affect their decision. See *Third Committee Recommends General Assembly Adoption* (note 10 above) 12.

¹⁰⁴ For a deeper discussion, see Mahon (note 32 above), 16-17.

¹⁰⁵ HR Comm. Case no. 167/1984, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

¹⁰⁶ *Third Committee Recommends General Assembly Adoption* (note 10 above) 9.

One aspect of the text that received less consideration, as Sepúlveda and Curtis argue in this Issue, is the restriction of complaints to those individuals and groups of individuals under the “jurisdiction of the State party”, a limitation not found in the actual text of the ICESCR. They investigate to what extent extra-territorial claims can be addressed under the individual complaints procedure but also, and particularly, the inquiry and inter-state procedures, which are to be discussed below.

2. ADMISSIBILITY

Within the international human rights system, the admissibility criteria for the ICESCR Optional Protocol represent a watershed in terms of stringency. While the content largely resembles the recent pattern of optional protocols to international human treaties, there are a number of novel features.

Turning first to the criteria, Article 3 states that a communication will be inadmissible if:

- all available domestic remedies have not been exhausted unless they are unreasonably prolonged
- it is not submitted within one year after the exhaustion of domestic remedies unless the author can demonstrate that it had not been possible to submit the communication within that time limit.
- the facts of the case occurred prior to the entry into force of the protocol for the State Party and did not continue after that date
- the same matter has already been examined or has been or is being examined under another procedure of international investigation or settlement
- it is incompatible with the provisions of the Covenant
- it is manifestly ill-founded, not sufficiently substantiated or exclusively based on mass media reports
- it is anonymous or not in writing.

The requirement to exhaust domestic remedies in Article 3(1) is qualified in two respects: “all available” domestic remedies must be attempted and their application must not be “unreasonably prolonged”. In the Working Group, the UK suggested that “available” be specified to include “judicial, administrative and other remedies”¹⁰⁷ on the basis “that there may be different options” for realising ESC rights.¹⁰⁸ This phraseology was not taken up, but the UK pressed the point in the General Assembly, suggesting that it was implicit in the text. Whether the CESCR will take the cue is difficult to know. Manfred Nowak has summarised the meaning of the “available” remedies in the context of the ICCPR Optional Protocol as follows:

Taking into account the primary importance of judicial remedies expressed in Article 2(3)(b) of the Covenant, the term ‘all available domestic remedies’ refers in the first place to judicial remedies. The effectiveness of the remedy also depends on the nature of the

¹⁰⁷ Report of the Open-Ended Working Group, 30 August 2007 (note 42) para. 60.

¹⁰⁸ *Ibid.*

alleged violation. In other words, if the alleged offence is particularly serious ... purely administrative and disciplinary remedies cannot be considered adequate and effective.... The author is not however required to make use of pure pleas for clemency or pardon, parliamentary petitions, supervisory complaints, applications to an ombudsman or department of corrections, as well other remedies that, in view of the circumstances of the case, appear ineffective or without any reasonable prospect of success.¹⁰⁹

On first reading, such a statement could provide some support for the UK position. Nowak partly bases the strong preference for exhaustion of judicial remedies on the explicit obligation upon States to provide judicial remedies. However, the CESCR has indicated in a number of General Comments the importance of judicial remedies “to ensure that the State’s conduct is consistent with its obligations under the Covenant”.¹¹⁰ More pertinently, it is questionable whether a complainant should be expected to exhaust the political options such as those catalogued and excluded by Nowak. The point of the Optional Protocol is to provide a quasi-judicial remedy. The issue might though be of relevance at the remedial stage. Roach and Budlender have noted that adjudicators tend to impose stricter remedies where governments exhibit a lack of good faith or inability to realise human rights.¹¹¹ Evidence of previous attempts by the complainant to obtain “political remedies” may therefore tilt the CESCR in favour of stronger remedial recommendations.

Of possibly more import were three other drafting decisions. First, the Working Group excised an additional and common exception to the domestic remedies rule. Under the procedures for Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹¹² the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (ICRPD)¹¹³ and Convention Against Torture (CAT),¹¹⁴ a complainant is not expected to seek remedies which “are unlikely to bring effective relief”. This clause was deleted from the draft ICESCR Optional Protocol, pegging the test to the ICCPR which contained no such exception. The effect could be significant if complainants are expected to take their chances with more speculative domestic remedies. Since the degree of domestic remedial protection for ESC rights in some jurisdictions is limited, questions may arise as to how much complainants must attempt to push the envelope. Should

¹⁰⁹ Manfred Nowak: *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd Revised Edition, Kehl: N.P. Engel Publisher, 2005) 886-887.

¹¹⁰ Committee on Economic, Social and Cultural Rights, *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 14.

¹¹¹ Kent Roach and Geoff Budlender: “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable” (2005) 122 *South African Law Journal* 325.

¹¹² G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

¹¹³ G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008.

¹¹⁴ G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

they attempt to bring cases that require for the implication of ESC rights and obligations from their constitutional civil and political rights? Such an approach has been adopted in South Asian countries but rejected in other jurisdictions such as Ireland. If the CESCR turns to the jurisprudence of the Human Rights Committee the impact may, however, not be so great. The latter has interpreted exhaustion of domestic remedies to be those which are reasonably effective. In *Patiño v. Panama* they held “an applicant must make use of all judicial or administrative avenues that offer him a *reasonable prospect of redress*”.¹¹⁵ Indeed, the decision to delete it was accompanied by references to the Human Rights Committee’s jurisprudence from some States and the Office for the UN High Commissioner for Human Rights.

Secondly, the ICESCR Optional Protocol is seminal in the international human rights domain by including a time limit (one year) for submitting complaints upon exhaustion of domestic remedies unless the author can demonstrate that it had not been possible to submit before the deadline. While longer than the six month cut-off for the European Court of Human Rights, many claims could be excluded on this basis. As to the application of the rule, the European Court of Human Rights has approached it as follows:

Time starts running from the day after the applicant became aware of the act or decision of which he or she complains. Where domestic remedies have been completed, this is usually the hearing at which final domestic judgment is delivered, but where no domestic remedies are available, the six-month period runs from the date of the act alleged to constitute the violation of the Convention.¹¹⁶

It is likely that the CESCR, like the European Court, would allow cases of “continuing violations” to fall outside such a rule. Indeed, the “continuing violations” rule is also a generally accepted exception to exclusion of cases which derive from facts that occurred before entry into force of a procedure for a State.¹¹⁷ In such instances, cases concerning positive obligations tend to be better protected since the essential “facts” (a lack of action) continue.¹¹⁸ However, cases strictly confined to negative obligations (e.g. restitution or compensation for a forced eviction) or some retrogressive acts may be more likely to fall foul of the rule.

Paradoxically, it might be victims in those States without domestic remedies who may be at most risk of faltering on this threshold. Victims and their legal representatives are more likely to be more aware of international legal options after taking a case to an apex domestic court for instance. Awareness-raising concerning the Optional Protocol is thus likely to be critical if the procedure is to be effective and used.

A third restrictive feature was the late inclusion of Article 4. It complements the mandatory admissibility criteria with a negatively-oriented discretion. The CESCR is empowered to

¹¹⁵ Communication No. 437/1990, U.N. Doc. CCPR/C/52/D/437/1990 (1994). Emphasis added.

¹¹⁶ Clare Ovey and Robin White: *Jacobs and White, The European Convention on Human Rights* (4th ed., Oxford, Oxford University Press), 487.

¹¹⁷ This rule is explicitly incorporated in article 3(2) of the Optional Protocol.

¹¹⁸ *Moldovan and others v. Romania* (no. 2); application no. 41138/98 and 64320/01, judgment dated 12 July 2005.

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.” The provision was championed by Canada, United Kingdom and Poland and some NGOS as a valve for the Committee to control what some feared could be a flood of frivolous or undeserving cases. The possible operation of this clause and the debate over its usage are taken up by Scheinin and myself in a later article in this Special Issue.

3. INTERIM MEASURES

The Human Rights Committee developed a practice of asking States to undertake interim measures in cases where there may be “irreparable damage” to the author; the request for such measures can precede the admissibility and merits decision and has included by this demands to halt expulsions and executions and provide medical treatment to prisoners.¹¹⁹ While controversial at the time, the interim measures procedure has now been elevated into the texts of more recently drafted international complaints procedures. The Optional Protocol to ICESCR is no exception and Article 5 is potentially important in a number of areas of economic and social rights. These include destruction of livelihoods, forced evictions, sudden retrogressive measures or lack of immediate reasonable action that could expose complaints to serious denial of their rights such as homelessness, destitution and exposure to disease.

While the initial draft resembled the text of optional protocols to CEDAW and ICRPD, the United Kingdom proposed that such measures be expressly limited to “exceptional circumstances”. Other States suggested explicitly requiring the CESCR to take “into account the availability of resources” and Poland amongst others asked that the complaint be first declared admissible. There was additionally a late Norwegian proposal to include the phrase, “bearing in mind the voluntary nature of such requests”. The demand was spawned by an earlier case before the Committee Against Torture, in which the interim measure request to Norway to halt to deportation was said by this Committee to be legally binding.¹²⁰

The Norwegian proposal found little support on the floor. Half of the States that spoke in response affirmed that interim measures were legally binding; the other half pointed out that the Optional Protocol was a quasi-judicial measure and that the decisions were therefore not legally binding. These apparently contradictory views point in essence to different aspects of the procedure: adjudication and legal effect. The Human Rights Committee has attempted to affirm this divide by indicating that its views “represent an authoritative determination” but it “is not, as such, a judicial body” even though “the views issued exhibit some important characteristics of a judicial decision”.¹²¹ The eventual compromise after informal negotiations was that the UK proposal was adopted and the interim measures are to be only ordered in exceptional circumstances.

¹¹⁹ See Nowak (note 109 above), 849.

¹²⁰ See *Mr. Nadeem Ahmad Dar v. Norway*, Communication No. 249/2004, U.N. Doc. CAT/C/38/D/249/2004 (2007).

¹²¹ General Comment No. 33, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc CCPR/C/GC/33 (2008), 5 November 2008.

4. ASSESSMENT ON THE MERITS AND REMEDIES

Article 8 sets out how the Committee is required to assess complaints. The first three subparagraphs are procedural in nature. The Committee is to examine communications in closed meetings in the light of “all documentation submitted” to it. The CESCR has the right to consult third parties to obtain documentation, such as that emanating from various UN institutions and other international and regional organizations.

The Revised Draft Optional Protocol of December 2007 expressly allowed the Committee to receive *amicus curiae* interventions. Although this text was not included in a further revision in March 2008, neither was Canada’s proposal to restrict the CESCR to documentation received from the parties to the dispute, as it stands in the ICCPR Optional Protocol. It is thus arguable that the final text of the protocol thus allows the CESCR to develop rules of procedure for *amicus* briefs. One practical problem is that potential *amici* may face difficulties in accessing the key documents submitted by the parties – they are generally not made publicly available. It is a familiar problem, ironically enough, in bilateral investment arbitration which has been heavily criticised by human rights advocates. If one party makes the documents available, more likely in ICESCR than investment cases, then *amicus* submissions could be more effectively drafted. If CESCR examines admissibility and merits criteria at the same time, however, then the possibilities for *amicus* intervention is more restricted as Claire Mahon argues.¹²²

One should also note that the restriction to written documentation may imply that the Committee cannot host oral hearings, an interpretation also made by the Human Rights Committee. Henry Steiner argues though that there is nothing explicitly stopping oral hearings.¹²³ They could help the Committee better *understand* a case even if the decision does not rely on the oral submissions and debate. The European Committee on Social Rights, for example, has selectively used oral hearings in cases of significant importance.

A greater part of the debate on Article 8 was if and how the Committee should be guided in assessing complaints. It was here that the justiciability debate had most resonance. Key concerns from some States were that the Committee might dictate certain policy choices or make unrealistic demands on States’ limited resources. A range of proposals were made which included directing the Committee to give States a “broad margin of appreciation” in deciding upon policy choices, to declare violations only in cases where a State acted “unreasonably” or use criteria such as “reasonableness” or repeating the “appropriateness” test from the Covenant. Some other suggestions included making reference to a States’ available resources or that only gross violations are adjudicated.

The curious aspect of these proposals was that the Committee’s own general comments and practice were often ignored. This experience is debated more fully elsewhere in this issue but, briefly put, Matthew Craven has noted that in determining whether measures are “appropriate” under Article 2(1), the Committee employs a type of “margin of discretion” doctrine

¹²² Mahon (note 32 above), 19.

¹²³ Henry J. Steiner: ‘Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?’, in Philip Alston and James Crawford (eds): *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 15.

although it retains a residual power to “assess whether or not the measures taken were the most appropriate in the circumstances”.¹²⁴ This is more lax than the Human Rights Committee which has rejected the doctrine.¹²⁵ The Committee has also outlined the types of broad steps it expects to be taken such as development and implementation of plans of action, reviewing legislation, monitoring etc. As regards the use of maximum available resources, most commentators conclude it has taken a fairly contextualised approach in its specific country conclusion but there is a legitimate debate over some of General Comments from 2000 to 2002.¹²⁶

When confronted with these CESCRC doctrines during the drafting process, the response of some States was that they required legal certainty. In a slightly unusual move, the Committee agreed to the request to provide such guidance as to future adjudication. It issued a Statement which largely sets out how it would measure compliance in that context. It repeats earlier standards (particularly on minimum core and retrogressive measures) but for the first time introduces the adjective “reasonable”,¹²⁷ possibly influenced by the discussion of this concept in the Working Group itself.

The eventual compromise proposed by the Chair was to include the reasonableness test and to note State discretion in policy choices. “Reasonableness” was able to galvanise diverse support with the final Working Group report listing Australia, Bangladesh, Belgium, Greece, Japan, Norway, the UK and USA as supporting the compromise¹²⁸ and, in this Issue, Bruce Porter explores the potential application of this test in practice. Article 8(4) now provides that

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.

With regard to remedies, there is no separate provision but Article 9 makes reference to the Committee submitting recommendations to States in connections with its views. The State Party has six months to respond in writing including providing “information on any action taken in the light of the views and recommendations”. Any further requests from the Committee are to be taken up in the State reporting procedure.

The only additional post-complaint procedure is in Article 14. Developing countries, particularly the Africa Group, had premised their support for the Optional Protocol on some acknowledgment of international obligations of development cooperation and assistance. The eventual compromise was Article 14. With the consent of the State Party, the Committee can

¹²⁴ Craven (note 6 above) 116.

¹²⁵ *Länsmän v Finland (No. 2)* (Communication No. 671/1995), Views of 30 October 1996, para. 10.5

¹²⁶ See discussion in note 58 above.

¹²⁷ *An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an Optional Protocol*, Statement, UN Doc. E/C.12/2007/1 (2007).

¹²⁸ *Report of the Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, U.N. Doc. A/HRC/8/7, 6 May 2008, para. 170.

transmit to various UN institutions its views or recommendations that indicate a need for technical advice or assistance. The Committee may also raise with these bodies “the advisability of international measures likely to contribute to assisting” the State achieve progress. This could potentially include advising international institutions to desist from certain actions. Third, a UN trust fund is to be established “with a view to providing expert and technical assistance to States Parties”. In the drafting of this article, some developed States expressed concerns over the fund on the basis that it would “duplicate existing funds” and would “send a wrong signal that non-compliance with the Covenant rights could be justified by a lack of international assistance”.¹²⁹ Article 14(4) thus states that its provisions are “without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.”

5. INQUIRY AND INTER-STATE PROCEDURE

In addition to the complaints procedure, the Optional Protocol contains two other mechanisms. An Inter-State complaints procedure is set out in Article 10. It is an opt-in procedure and thus only applies if both the State complaining and defending have made a similar declaration under Article 10. Article 11 establishes an inquiry procedure under which the CESCR may investigate a situation in a State Party if it receives “reliable information indicating grave or systematic violations”. However, a visit to the territory of the State is premised upon consent. Such an inquiry procedure is much needed. Given the number of intractable and systemic violations that have been uncovered during the State reporting procedure, it should allow the CESCR to make better and focused recommendations.

There was division over the inclusion of this inquiry procedure. African States such as Egypt, Nigeria and Angola were most vocal in their opposition. The key concerns were that the inquiry procedure would overlap with the work of Special Rapporteurs, information received could be anonymous and the choice of criteria which would be used to determine gross and systematic violations.¹³⁰ Other States supported or had no clear position, and it appeared many fell into the latter category. The initial draft had a compulsory inquiry procedure upon ratification but Egypt and others pointed out that there was an opt-in mechanism for the inter-State procedure. The Chairperson’s response was to transform it into an opt-out procedure. After further pressure, she produced a final draft containing an opt-in procedure.

6. CONCLUSION

To conclude, the resolution of the ambiguities in the text will become clear once the CESCR begins to receive complaints. These uncertainties are not particularly novel – they are the inevitable result of any negotiation process. Given the Committee’s conduct during the drafting process, it is unlikely that there will be many surprises but it will be interesting to see

¹²⁹ Ibid. para. 125.

¹³⁰ See, for example, *Report of the Open-Ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, U.N. Doc. E/Cn.4/2006/47, 14 March 2006, para 73.

which “direction” it takes – how it will “set the tone” and communicate its vision and approach.

E. CONCLUSION – THE POLITICS OF RATIFICATION

The Optional Protocol will be opened for signature on 10 September 2009 and a signing ceremony is planned for later this year. In this Issue, Beth Simmons takes up the general question of whether States should ratify human rights treaties and examines the Optional Protocol in this case. Stein Evju and Inge Lorange Backer specifically debate whether Norway, which became more sceptical towards the end of the drafting process, should ratify the Protocol. Martin Scheinin and myself examine whether States should be particularly afraid given the experience of the Human Rights Committee.

In some countries, the debate over ratification is largely a *fait accompli*. A decision has been made to ratify the Optional Protocol or not. In other countries, the debate is alive or the decision postponed in order to see how the protocol develops. The eventual decisions will most likely depend on the campaigns by various actors within and outside governments for ratification. There is no uniform pattern to the likely debates that will emerge in each country. As discussed earlier, substantive concerns such as justiciability may loom large, while for others it may be sovereignty or procedural issues. In many States it may come down to political alignments in the bureaucracy. Departments responsible for finance and labour can often be more sceptical than say foreign affairs or children’s affairs. Poland, for example, even sent a representative of the labour ministry to the negotiations.

In the case of Germany there were some dramatic shifts as these groups waxed and waned in influence during the Working Groups. In 2005, three departmental directors organised to shift the country’s position on the protocol, from warmly positive to mostly negative. A concerted response by other ministries, a parliamentary committee and NGOs led to a reversal, although it seems to have also been facilitated by the departure of these directors from their position. In other States such as Portugal these inter-departmental divisions appeared to have been addressed in the ratification of earlier regional treaties on social rights. Portugal turned its loss in the first case before the European Committee on Social Rights into an international virtue – frequently speaking of how the Committee’s findings on child labour led to concrete and effective change.

The magnitude and timing of ratification of the Optional Protocol is thus unknown and dependent on a wide range of factors. Temporal uncertainty is, however, no stranger to the Optional Protocol. The Optional Protocol’s inception phase could be seen as rather protracted (1948–2003) while its delivery was rather short (2004–2008). However, one can hope that it brings greater legal certainty at the international level to an area which has been charged more by debate than by practice