

# EVOLUTION OR REVOLUTION? – EXTRAPOLATING FROM THE EXPERIENCE OF THE HUMAN RIGHTS COMMITTEE

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## A. INTRODUCTION

**Abstract:** *The Human Rights Committee's experience with an international complaints procedure provides a number of insights when considering the likely development of new Optional Protocol to its sister covenant, the ICESCR. Our starting point is the more political debates over the Optional Protocol to ICESCR and we extrapolate from the trajectory of the Human Rights Committee to try answer some of the questions raised in this discussion. We specifically discuss the institutionalist response to the justiciability debate that the Human Rights Committee arguably provides, the overlap between ICCPR and ICESCR in the Human Rights Committee's jurisprudence and whether a flood of complaints is likely to arise. We also comment on a number of approaches of the Human Rights Committee that perhaps should be avoided.*

**Keywords:** *Human Rights Committee, Optional Protocol, ICCPR, ICESCR, justiciability, flood of complaints, discrimination.*

The complaints procedure for the International Covenant on Civil and Political Rights (ICCPR) is a settled part of international human rights practice. Coming into force in 1976, the Optional Protocol to this Covenant has generated more than 1600 complaints and spawned no less than four scholarly commentaries.<sup>1</sup> This is not to claim that the Human Rights Committee has not escaped controversy. A number of decisions and general comments have

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<sup>1</sup> See Manfred Nowak: *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd Rev ed., Kehl, Engel 2005); Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: cases, materials, and commentary* (Oxford: Oxford University Press, 2004); Alex Conte, Scott Davidson and Richard Burchill, *Defining civil and political rights: the jurisprudence of the United Nations Human Rights Committee* (Aldershot: Ashgate, 2004); and Dominic McGoldrick, *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991). See also Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (Åbo: Institute for Human Rights, Åbo Akademi University, 2003). As regards the two key legal texts, the references are ICCPR, G.A. res.

attracted criticism for either being too progressive or too conservative.<sup>2</sup> Others have suggested significant reforms to improve the performance of the Committee so that it becomes “a significant actor in the universal human rights movement”.<sup>3</sup>

The Human Rights Committee’s experience over the last three decades provides a number of insights when considering the likely development of new Optional Protocol to its sister covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR). Obviously, the Human Rights Committee’s jurisprudence on admissibility and merits criteria is of relevance and this aspect is taken up in other articles in this Issue.<sup>4</sup> Our primary starting point instead is the political aspects of the debates over the Optional Protocol to ICESCR during which various predictions have been made over its possible development. Extrapolating from the trajectory of the Human Rights Committee may provide a realistic picture of the likely practice under of the Optional Protocol to ICESCR and assist States and others to consider whether States should ratify the Optional Protocol. The inquiry also indicates some ways in which the Committee can take a proactive response in the face of some of the inherent obstacles in and criticisms of the Optional Protocol. The Committee on Economic, Social and Cultural Rights (CESCR) might wish to avoid, though, some of the practices of the Human Rights Committee.

Developing such a comparative analysis of the practice of the two optional protocols in the coming years is also important as part of the ongoing debates on UN Treaty reform. Proposals for a unified human rights treaty body<sup>5</sup> or even an International Court of Human Rights<sup>6</sup> will be significantly affected, whether positively or negatively, by the manner in which the two optional protocols respectively continue and begin to develop.

This article takes up four specific aspects of the Human Rights Committee experience. First, we begin by asking what is the *real problem* with the justiciability of economic, social and cultural rights at the international level. We provide an institutionalist response based on the Human Rights Committee’s experience and some recommendations for the CESCR to emulate the code of conduct for membership. Second, the article examines the overlap between ICCPR and ICESCR in the Human Rights Committee’s jurisprudence, indicating both the interdependence of the Covenants as well as their respective differences. Third, we ask whether a possible flood of complaints could emerge and examine the ICCPR experience

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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 and Optional Protocol to the ICCPR, 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.

<sup>2</sup> See Scott Davidson, “Introduction”, in Conte, Davidson and Burchill, *ibid.*, 1.

<sup>3</sup> See 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 at 55.

<sup>4</sup> See opening article by Langford but also the analysis by Beth Simmons on impact of the Optional Protocol to the ICCPR. The references for the ICESCR and Optional Protocol to ICESCR are respectively 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 and GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008).

<sup>5</sup> Manfred Nowak: “The Need for a World Court of Human Rights”, (2007) 7 *Human Rights Law Review*, 259.

and tools. In a final section, we examine a number of critiques of the Human Rights Committee's performance and how CESCR should address such issues.

## B. WHAT'S THE MATTER WITH JUSTICIABILITY? – AN INSTITUTIONALIST RESPONSE

The debate on justiciability is not confined to economic, social and cultural rights. The support for the Optional Protocol to ICCPR was not unanimous during the 1950s and 1960s. Socialist states in particular opposed any form of international supervision of all categories of human rights. The Optional Protocol to ICCPR has been ratified by a considerable number of States (111 of 164 States Parties to the ICCPR as at 16 March 2009) but there are many who remain outside the system, notably the USA and China. In some domestic jurisdictions and in legal theory, there remains a lively debate on whether courts should have powers of judicial review over civil and political rights and the extent of such powers.<sup>7</sup>

However, what is fascinating is the degree of international consensus that has emerged on the justiciability of civil and political rights. During the drafting of the Optional Protocol to ICESCR, this was the starting point of State discourse. The key question was not the justiciability of human rights. Rather it was whether the international human rights architecture for civil and political rights and discrimination should be extended to economic, social and cultural rights. Henry Steiner attributes this phenomenon primarily to the work of adjudicatory bodies from the European Court of the Human Rights to the Human Rights Committee. In regard to the latter he notes:

[T]he Committee has transformed what was a novel and in some ways radical mandate into one that now appears conventional. As recently as fifty years ago, sober state officials from all parts of the world would have viewed the Committee's three principal activities as absurdly impractical, as too threatening to state sovereignty to be acceptable. Today many states continue to resist one or another of the Committee's requests or acts as unauthorized or as unjustifiably interfering in their affairs. But these now familiar activities are well instated and broadly viewed in the international community as unremarkable components of the human rights movement.<sup>8</sup>

This evolving internalisation of the normality of civil and political rights adjudication by many States suggests that the debate on justiciability may be strongly influenced by the degree of institutionalisation. As Craven has stated, "justiciability depends not upon the gen-

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<sup>6</sup> Martin Scheinin: "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Reform – Without Amending the Existing Treaties" (2006) 6 *Human Rights Law Review*, 131.

<sup>7</sup> See for example, Jeremy Waldron: "The Core of the Case Against Judicial Review" (2006) 115 *The Yale Law Journal*, 1346.

<sup>8</sup> Steiner (note 3 above), 18.

erality of the norm concerned, but rather on the authority of the body making the decision.”<sup>9</sup> A lack of adjudication mechanisms inevitably leads to a discussion on competing hypothetical and often extreme scenarios of how cases would be decided and allows easy claims that the norms lack the requisite precision for adjudication. This is not to deny the importance of debates over the judicialisation of human rights – they particularly help in identifying the contours of the appropriate adjudicatory reach.

The lack of adjudication mechanisms for economic, social and cultural rights has been identified as starving the law of the oxygen needed to develop a more coherent understanding of economic, social and cultural rights. In 1996, for example, Sandra Liebenberg commented,

It is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity ... The fact that the content of many social and economic rights is less well-defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature.<sup>10</sup>

Thus it has been the granting or acceptance of interpretive authority by courts and others that has been a principal factor in unleashing economic, social and cultural rights jurisprudence. The South African Constitutional Court thus described its task in straightforward legal terms: “Socio-economic rights are expressly included in the Bill of Rights” and the “question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.”<sup>11</sup>

Despite the evidence of social rights adjudication from other contexts, some fear that giving such authority to the CESCR would lead to expansive interpretations and the placing of unrealistic expectations upon States. Some argue that the CESCR has been too far-reaching in some general comments,<sup>12</sup> or insufficiently precise in concluding observations.<sup>13</sup> Without addressing here these specific cases, we would argue that the Optional Protocol to ICESCR is likely to have the opposite result. The most effective way to strengthen the Committee in its expertise and the quality of its decision-making is to *give it authority*. It is arguable that the

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<sup>9</sup> Matthew Craven: “The Domestic Application of the International Covenant on Economic, Social and Cultural Rights” (1993) XL *Netherlands International Law Review*, 389.

<sup>10</sup> Sandra Liebenberg: “Social and Economic Rights” in Matthew Chaskalson et al (eds.), *Constitutional Law of South Africa* (Cape Town; Juta 1996) 41-11.

<sup>11</sup> *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

<sup>12</sup> 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; Mary Dowell-Jones: *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden: Martinus Nijhoff Publishers 2004).

<sup>13</sup> See 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, Christian Tietje (eds) *Weltinnenrecht: Liber amicorum Jost Delbrück* (Berlin: Duncker and Humblot, 2005), 815.

stronger the procedure, the more likely that reasonable and balanced outcomes will result. Sociologically, one can posit in the case of the Committees that sensitivity increases with greater power. They tend to become more conscious of the impact of their results and the views of commentators and observers such as States who more closely scrutinise the decisions for their legal reasoning.

This is partly confirmed by recent empirical research in the field of socio-economic rights. Guari and Brinks found in their quantitative review of socio-economic rights cases in five countries that “courts remain pro-majoritarian actors. Their actions narrow the gap between widely shared social belief and incomplete or inchoate policy preferences on the part of government, or between the behaviour of private firms and expressed political commitments.”<sup>14</sup> Adjudicatory bodies thus tend to be slow to exercise expansive powers unless the executive and legislative branches of government are clearly failing in their roles and there is a clear and gross breach of obligations. One might well, says Steiner “observe a causal relationship between greater effectiveness and respect, and greater responsibility by states in selecting members.”<sup>15</sup>

The Human Rights Committee has nonetheless stirred controversy at times. Richard Burchill questions whether it illegitimately arrogated powers to itself in establishing a system of interim measures, which could be ordered before the admissibility and merits stages were dealt with. However, the situations in which they have been used have been rather exceptional – the temporary halting of expulsions and executions and the provision of medical treatment to prisoners.<sup>16</sup> Indeed, this innovation has been accepted internationally and explicitly included in more recent optional protocols including the ICSCR Optional Protocol.

*Kennedy v. Trinidad & Tobago* is one decision which has attracted some critical attention. The London-based Privy Council, the highest judicial body for Trinidad and Tobago, ruled that delay of an execution by more than five years after a conviction amounted to inhumane treatment.<sup>17</sup> Trinidad & Tobago momentarily denounced the Optional Protocol to ICCPR and re-acceded with a reservation to the protocol that excluded those with a death sentence from using the procedure. This was on the basis that the Committee was unable to deal with a complaint from registration to decision within eight months. The Human Rights Committee decided that such a reservation defeated the object and purpose of the protocol and ruled it invalid:

[T]he Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this

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<sup>14</sup> V. Gauri and D. Brinks (eds): *Courting Social Justice* (New York: Cambridge University Press, 2008).

<sup>15</sup> Henry Steiner (note 3 above), 42.

<sup>16</sup> See Nowak (note 1 above), 849.

<sup>17</sup> Communication No 845/1999: *Trinidad and Tobago*. 31/12/99, CCPR/C/67/D/845/1999. (Jurisprudence).

reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol.<sup>18</sup>

Four dissenting members though argued that such discrimination was “reasonable and objective” since Trinidad & Tobago was caught by the Privy Council judgment, even if the Human Rights Committee did not agree with the five year rule. Moreover, they argued, if the reservation did defeat the object and purpose of the Optional Protocol, then the re-accession by the State was not valid since the “reserving state’s agreement to becoming a party to the Covenant is *dependent* on the acceptability of the reservation.” Trinidad & Tobago, following Jamaica’s example, then withdrew from the protocol. The case is obviously a ‘hard’ case but the Committee’s decision can be arguably seen as reasonable given that the Committee was doing its best to deal with the cases expeditiously, usually found violations, and often five years had expired before a case even reached the Committee. The question in effect was whether the Committee should accept the rather drastic consequences of the Privy Council decision and the Committee declined to create special circumstances for the State in this case. In essence, it left it to the State to choose whether it was a party to the protocol or not, instead of expelling a State that formally still was a party.

In another instance, one could certainly question the Committee for excessive conservatism. This was the Human Rights Committee’s conscious, active but perhaps outdated withdrawal from the field of the right to strike. Article 22 of the ICCPR on freedom of assembly explicitly includes “the right to form and join trade unions for the protection of his interests” and paragraph 3 refers to International Labour Organisation Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize, which has been interpreted to include the right to strike.<sup>19</sup> Despite this overlap, the Human Rights Committee in *J.B. et al. v Canada* interpreted Article 22 as not affording protection to the right to strike and partly based itself on the fact that Article 8 of the ICESCR explicitly refers to the right to strike.<sup>20</sup> Subsequent concluding observations of the Human Rights Committee emanating from the reporting procedure appear to reverse that decision.<sup>21</sup>

Nonetheless, despite the controversy of a number of decisions, in the case of the Human Rights Committee, it seems to have been proactive in ensuring that its personnel could rise to the demands of quality and independence. It developed a self-imposed rule that only professors or judges should be appointed to its ranks as one way of ensuring it is sufficiently independent and can provide credible and legitimate review and decisions. In October 1997, an internal “code of conduct” was adopted by the Committee which was meant to exclude members with incompatible functions.<sup>22</sup> Paragraph 9 states:

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<sup>18</sup> *Ibid.*, para 6.7.

<sup>19</sup> ILO, *Freedom of Association – Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edition (Geneva: ILO, 1996), 77.

<sup>20</sup> HR Comm. Case no. 118/1982 (18 July 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 151 (1986).

<sup>21</sup> See *Concluding Observations on Chile*, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 25.

<sup>22</sup> U.N. Doc. CCPR/C/61/GUI. The Guidelines can be found in Annex III to the 1998 Annual report of the Committee (U.N. Doc. A/53/40). [http://www.unhchr.ch/tbs/doc.nsf/0/119097c7a5d817fc802566ce004fe417/\\$FILE/N9826810.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/119097c7a5d817fc802566ce004fe417/$FILE/N9826810.pdf).

The appearance of impartiality of members of the Committee should not be affected by their connection with Governments. They should abstain from engaging in any functions or activities which may appear to be not readily reconcilable with the obligations of an independent expert under the Covenant. Members should abstain from participation in any political body of the United Nations or of any other intergovernmental organization concerned with human rights. They should also abstain from acting as experts, consultants or counsels for any Government in a matter that might come up for consideration before the Committee.

At that time, the last serving diplomat on the Human Rights Committee was Danilo Turk and he resigned after the first year of his term, in July 1998. However, there has been some backsliding with the new Egyptian member Fathalla and the Peruvian member Perez Sanchez-Cerro, both serving ambassadors, and the Algerian member Lazhari is a senator.

The Optional Protocol to ICESCR may encourage a similar process in the CESCR in terms of concentrating its mind on the quality of its work. The drafting of the Optional Protocol seems to have sobered the Committee for example on its minimum core obligations test and it recently reinstated the defence of lack of resources for States in such situations, which it had removed in General Comments 13 and 14 in 2002.<sup>23</sup> And given the discussion over the quality of some of the members, it could be time to develop a code of conduct to send a message to States and some sitting members that they must be independent of their governments. States could assist this process further by strengthening the Committee in terms of capacity and resources. This would enhance the Committee's ability and time to render good decisions and to become an attractive place for highly qualified members.

### C. INTERRELATED RIGHTS

As there is no watertight division between different categories of human rights and no significant overlap between the two Covenants, the Optional Protocol to ICESCR may not be such a big step as many imagine. The ICCPR is not a treaty on economic, social and cultural rights, but neither is it a treaty solely on civil and political rights. With the ICESCR, it shares a common Article 1 on self-determination and number of overlapping rights: articles 18 (freedom of thought, conscience and religion, including in the domain of education), 22 (freedom of association, including the right to join and form trade unions) and 27 (minority rights, including the right to enjoy one's own culture). In addition, the freestanding non-discrimination provision in Article 26 has opened up possibilities for claims related to many economic, social and cultural rights. Furthermore, important dimensions of these rights have been articulated and adjudicated through other provisions of the ICCPR, such as Article 6 on the right to life, Article 7 on the prohibition against torture and other inhuman treatment, Article 10 on the treatment of detainees and Article 17 on the right to privacy, family and home.

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<sup>23</sup> 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).

We shall principally concentrate on Article 26 which is generally known as the principal opening for economic and social rights claims within the ICCPR.<sup>24</sup> It states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In contrast to many other human rights treaties, the provision does not prohibit discrimination merely in the enjoyment of rights otherwise protected under the treaty but *any* discrimination. This was firmly established in 1987 in a number of cases from the Netherlands. In *Zwaan-de Vries*<sup>25</sup> and *Broeks*,<sup>26</sup> a violation of Article 26 was found when a married woman was entitled to unemployment benefits only if she proved she was the breadwinner of the family; neither unmarried women nor married or unmarried men were bound to meet this condition. Before finding that the denial of unemployment benefits to Mrs Zwaan-de Vries amounted to discrimination on the basis of sex,<sup>27</sup> the Committee confirmed the freestanding nature of Article 26 and concluded it was applicable to discrimination in the field of social and economic rights. It found that the discussions recorded in the *travaux préparatoires* of the ICCPR were “inconclusive” and the “ordinary meaning” of each element of the article meant that Article 26 was concerned with the obligations imposed on States in regard to their legislation and not only in the areas covered by the other ICCPR rights.

It qualified its conclusion, though, by stating that the obligation was limited to discrimination. The State must ensure that legislation prohibits discrimination but there is no duty with regard to the content of legislation, such as enacting laws to provide social security. While these carefully formulated arguments built a position that the Committee has since maintained, it has embraced substantive equality in theory at least. General Comment No. 18 provides that Article 26 envisions “affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”. What is

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<sup>24</sup> For a full overview of socio-economic cases before the Committee, see Martin Scheinin: “Human Rights Committee: Not Only a Committee on Civil and Political Rights”, in Malcolm Langford (ed.): *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008), 540.

<sup>25</sup> HR Comm. Case no. 182/1984, *Zwaan-de Vries v. the Netherlands*, UN Doc CCPR/29/D/182/1984.

<sup>26</sup> HR Comm. Case no. 172/1984 *Broeks v. the Netherlands*, UN Doc. CCPR/C/29/D/172/1984. In a third Dutch case at the time, no discrimination was found in relation to social benefits since the differentiation was between married and unmarried couples as the decision to marry or not to marry lay entirely with the cohabiting persons. HR Comm. Case no. 180/1984 *L.G. Danning v. the Netherlands*, admissibility decision 25 October 1985, UN Doc. Supp. No. 40 (A/42/40)AT 151(1987).

<sup>27</sup> *Zwaan-de Vries* (note 25 above), para. 15.

not yet clear is whether this “perpetuated discrimination” includes socio-economic inequalities.<sup>28</sup>

In the subsequent case of *Gueye et al. v. France*,<sup>29</sup> which involved 743 retired soldiers of Senegalese nationality as complainants, the Human Rights Committee established that Article 26 had extraterritorial applicability in the sense that persons affected by the laws of a State party could claim protection under the provision although physically situated abroad. Holding that nationality fell under ‘other status’ as a prohibited ground of discrimination, the Committee concluded that France had violated Article 26 by providing different pension benefits for retired soldiers of its armed forces, depending on whether they were French citizens or not. A later case of *van Oord* indicates that bilateral treaties based on reciprocity between States may justify certain differences in pension entitlements although the case of *Karakurt*, which was about the eligibility of non-EU nationals to workers’ councils, shows though that the force of the reciprocity argument has its limits.<sup>30</sup>

In some of its more recent cases, the Committee has explicitly confirmed that indirect discrimination is prohibited under Article 26. In *Althammer*, they stated that “the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate” would constitute discrimination if “the detrimental effects of a rule or decision exclusively or disproportionately affect persons” as characterised by one of the prohibited grounds of discrimination and it was not based on objective and reasonable criteria.<sup>31</sup> In this case, the conditions for indirect discrimination were held to be absent but were found present in *Derksen and Bakker*.<sup>32</sup> Ms Derksen had been cohabiting with Mr Bakker but, after the latter’s death, was denied a survivor’s pension for their daughter Katja Bakker. Although the Netherlands had through legislation remedied the unequal treatment of children born within and outside marriage in respect of pension benefits, the change affected only children who were born after the entry into force of the new law. The Committee concluded “that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds”.<sup>33</sup> The case could have conceivably been seen to directly discriminate on the basis of “birth” but the Committee viewed it as a case of unequal outcomes of a seemingly neutral provision.

In another stream of jurisprudence, the Human Rights Committee held that while the ICCPR does not require the recognition of same-sex unions as ‘marriage’,<sup>34</sup> sexual orienta-

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<sup>28</sup> Human Rights Committee, *General Comment No. 18 (27)*, reproduced in UN document HRI/GEN/1/Rev.8/Add.1 (2006), para 10.

<sup>29</sup> HR Comm. Case no. 196/1985 *Gueye et al. v. France*, UN Doc. CCPR/C/735/D/196/1985(1989).

<sup>30</sup> HR Comm. Case no. 658/1995 *Jacob and Jantina Hendrika van Oord v. The Netherlands*, decision on admissibility adopted 23 July 1997, UN Doc CCPR/C/60/D/658/1995 pp. 311–316. HR Comm. Case no. 965/2000, *Mümtaz Karakurt v. Austria*, UN Doc CCPR/C/74/D/D/965/2000(2002).

<sup>31</sup> HR Comm. Case no. 998/2001 *Rupert Althammer et al. v. Austria*, UN Doc CCPR/C/78/D/998/2001(2003), para 10.2.

<sup>32</sup> HR Comm. Case no. 976/2001, *Derksen and Bakker v. the Netherlands*, UN Doc. CCPR/C/80/D/976/2001 (2004).

<sup>33</sup> *Derksen and Bakker v. the Netherlands* (n. 31 above), para. 9.3.

<sup>34</sup> HR Comm. Case no. 902/1999 *Juliet Joslin et al. v. New Zealand*, UN Doc. A/57/40 at 214(2002).

tion has been held to be a prohibited ground of discrimination under either ‘sex’ or ‘other status’.<sup>35</sup> *Young v. Australia* involved the denial of a survivor’s pension to a same-sex partner of a war veteran<sup>36</sup> and the Committee found a violation on the basis that the “State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction” (para. 10.4). In 2008, Australia amended the legislation to comply with the ruling.

Other discrimination cases have addressed education, property<sup>37</sup> and sanitation rights.<sup>38</sup> Taking the first example, in *Waldman v. Canada*,<sup>39</sup> Jewish parents challenged the provision of public funding to Roman Catholic schools but not other religious schools under the Education Act of the province of Ontario. While the Supreme Court of Canada had acknowledged the policy was discriminatory, it held that the policy was constitutionally protected due to the compromises made during the drafting of the Canadian constitution in 1867 to protect the Roman Catholic minority in Ontario.<sup>40</sup> The Human Rights Committee found that there was no contemporary reason for the distinction since the “material before the Committee [did] not show that members of the Roman Catholic community or any identifiable section of that community [were] now in a disadvantaged position compared to those members of the Jewish community that [wished] to secure the education of their children in religious schools.”<sup>41</sup>

The above discrimination cases indicate not only the overlap between the Covenants but provide relevant jurisprudence for the Optional Protocol to ICESCR. Indeed, the CESCR has already borrowed the test of reasonable and objective criteria and the distinction between direct and indirect discrimination from the Human Rights Committee in its draft General Comment on non-discrimination and could arguably add extra-territoriality in its analysis.<sup>42</sup> Moreover, the Human Rights Committee in some of its recent cases related to property restitution, has not necessarily required that the author demonstrates different treatment compared

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<sup>35</sup> HR Comm. Case no. 941/2000, *Edward Young v Australia*, UN Doc. CCPR/C/78/D/941/2000.

<sup>36</sup> *Ibid.*

<sup>37</sup> Czech restitution law which required citizenship and permanent residence was held discriminatory. *Simunek et al. v. the Czech Republic*, HR Comm. Case no. 516/1992 UN Doc. CCPR/C/72/D/857/1999. See, however, also, *Adam v. the Czech Republic*, HR Comm. Case no. 586/1994, UN Doc CCPR/C/57/D/586/1994(1996) and *Drobek v. Slovakia*, HR Case no. 643/1995, UN Doc. CCPR/C/60/D/643/1995.

<sup>38</sup> In *Pohl et al. V. Austria* HR Comm. Case no. 1160/2003, UN Doc. CCPR/C/81/D/1160/2003 (2004), a complaint regarding different charges for sewage treatment in rural and municipal zones of Salzburg was found to be admissible but ultimately the distinctions were found to be based on reasonable and objective grounds, so there was no violation.

<sup>39</sup> HR Comm. Case no. 694/1996, *Waldman v. Canada*, admissibility and merits decision 3 November 1999, (1999) U.N. Doc. CCPR/C/D/694/1996 (1999).

<sup>40</sup> Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148.

<sup>41</sup> Para. 10.5.

<sup>42</sup> See *Draft General Comment No. 20, Non-Discrimination and Economic, Social and Cultural Rights* (art. 2, para. 2), U.N. Doc. E/C.12/GC/20/CRP.2, 9 September 2008.

to a comparator. In the case of *Pezoldova*,<sup>43</sup> the violation was found because of the arbitrary way in which Czech authorities had denied the complainant access to documents, frustrating her access to an effective remedy for restitution. Arbitrariness is thus a form of discrimination, even in the absence of a comparator.<sup>44</sup> The approach comes close to the idea of a lack of reasonableness or proportionality which has often been at the heart of the CESCR General Comments and statements and is included in Article 8(4) of the Optional Protocol to ICESCR as the test for determining whether there is a violation.

However, there are some important differences between the two Covenants in the field of discrimination. The Human Rights Committee has been relatively clear in its decisions, but not as clear in its general comments, that there is no positive obligation in Article 26 to establish legislation on a specific matter. This also conceivably opens up for the possibility for 'equalising down' whereby social programmes or spending could be cut to remove the offending discrimination. In *Waldman*, the Committee seemed open to the solution of cutting funding to the Roman Catholic schools in order to remedy the discrimination. The possibility of equalising down is much more difficult to accept where economic, social and cultural rights are part of the justiciable package, as the South African jurisprudence shows.<sup>45</sup>

Beyond discrimination, the Human Rights Committee has articulated a number of obligations with socio-economic characteristics although their reach is not as far as full-bodied economic and social rights. The Human Rights Committee has addressed as violations of either Article 7 (prohibition against torture or other inhuman treatment) or Article 10 (humane treatment of detainees) measures such as the deliberate denial to a detainee of medically assessed treatment and medication,<sup>46</sup> destruction of a prisoner's medication,<sup>47</sup> the denial to a prisoner of his medical records,<sup>48</sup> as well as the removal of a schizophrenic person to a country where he would not get appropriate treatment and medication.<sup>49</sup> The Human Rights Committee has also applied Article 27 and the notion of culture for the protection of a traditional or otherwise typical way of life of an indigenous people or other distinctive community, including the *material* basis for their lifestyle.<sup>50</sup> This was also expressed in the General Com-

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<sup>43</sup> HR Comm. Case no. 757/1997, *Alzbeta Pezoldova v. The Czech Republic*, UN Doc. CCPR/C/75/D/757/1997 (2002).

<sup>44</sup> In the case of *Des Fours Walderode*, a violation of Article 26 was found due to the enactment of a law with retroactive effect, frustrating the author's ongoing restitution proceedings. *Karel Des Fours Walderode v. the Czech Republic* (Communication No. 747/1997), Views of 30 October 2001.

<sup>45</sup> See *Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development*, 2004 (6) BCLR 569 (CC).

<sup>46</sup> HR Comm. Case no. 527/1993, *Uton Lewis v. Jamaica* UN Doc. CCPR/C/57/D/527/1993 (1996).

<sup>47</sup> HR Comm. Case no. 775/1997, *Christopher Brown v. Jamaica*, UN Doc. CCPR/C/65/D/775/1997(1999).

<sup>48</sup> HR Comm. Case no. 726/1996 *Alexander Zheludkov v. Ukraine*, UN Doc. CCPR/C/75/D/726/1996(2002).

<sup>49</sup> HR Comm. Case no. 900/1999, *C. v. Australia*, UN Doc. CCPR/C/76/D/900/1999 (2002).

<sup>50</sup> See HR Comm. Case no. 671/1995 *Länsman v. Finland (No. 2)* UN Doc. CCPR/C/58/D/671/1995 (1996); HR Comm. Case no. 511/1992 *Ilmari Länsman et al. v. Finland*, UN Doc. CCPR/C/52/D/511/1992 (1994).

ment on Article 27, where the Committee where the Committee observed that “that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” and that the “enjoyment of those rights may require positive legal measures of protection and measures to ensure ... effective participation”.<sup>51</sup>

It should also be said that the ICESCR Optional Protocol may complement areas of civil and political rights – a similar dynamic has emerged in the European human rights system. This is most likely in the area of trade union rights, conscientious objection and rights of the child. In one instance, this will be due to the Human Rights Committee’s conscious and active but perhaps outdated withdrawal from the field of the right to strike.<sup>52</sup>

#### D. A FLOOD, STREAM OR TRICKLE OF COMPLAINTS?

In the drafting of the optional protocol to ICESCR, one commonly expressed fear was the potential flood of complaints. Those European countries with a sceptical position towards the optional protocol usually and frequently cite the experience of the European Court of Human Rights which currently receives about 50,000 complaints a year and has almost 100,000 pending cases.<sup>53</sup> Choosing the European Court as a comparator is comparing apples and oranges. The Court has the full judicial powers which obviously makes it attractive to complainants, and the inclusion of the right to property in the European Convention has opened the mechanism to the field of corporate law.<sup>54</sup> Similarly, there are procedures at the Inter-American and African level which can sometimes give complainants an option as to where they complain. A better place to look is the experience of the international quasi-judicial bodies such as the Human Rights Committee. Since 23 March 1976, when the ICCPR optional protocol came into force – a period of more than three decades – a total of 1,613 cases have been registered, which indicates that the number of total complaints in historical perspective has achieved some level of significance but remains extremely modest in comparison with the European Court of Human Rights.<sup>55</sup> In terms of the decisions themselves, just over half of the cases have been decided if we exclude withdrawn cases, with 242 cases being ruled inadmissible, 125 containing a finding of no violation, while in 480 cases a violation of a right was found by the Committee. The percentages are shown in Figure 1.

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<sup>51</sup> Human Rights Committee General Comment No. 23 (50), reproduced in UN document HRI/GEN/1/Rev.8/Add.1 (2006), para. 7.

<sup>52</sup> See discussion above at notes 17 to 19.

<sup>53</sup> European Court of Human Rights, Annual Report 2008 (Provisional Edition, January 2009), available at [www.echr.coe.int/echr/](http://www.echr.coe.int/echr/).

<sup>54</sup> See Marius Emberland: *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: University Press, Oxford, 2006).

<sup>55</sup> As at 6 October 2008.

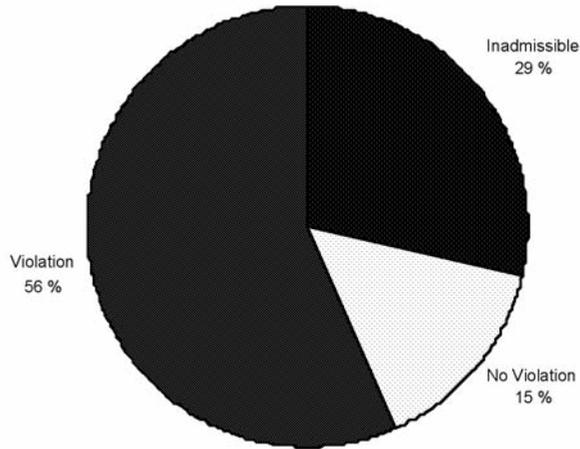


FIGURE 1. DECISIONS BY HUMAN RIGHTS COMMITTEE

In the case of Article 26, which has a greater socio-economic content as discussed, the figures are not significantly different. There have been 126 decided cases under Article 26 which accounts for 14.9 per cent of the total. Moreover, the number of complaints found inadmissible or with no violation is also much higher.

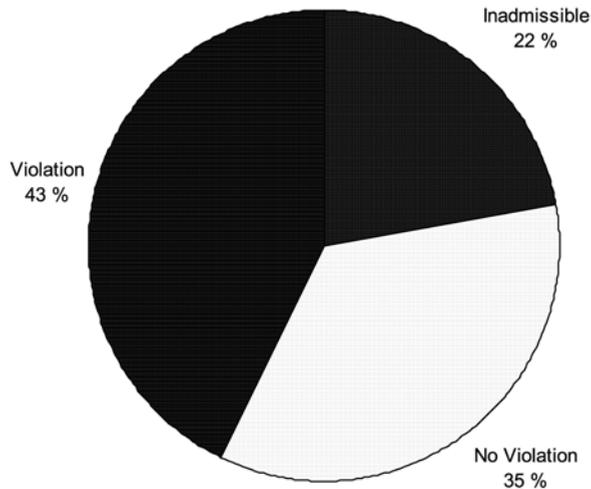


FIGURE 2. DECISIONS ON ARTICLE 26 BY HUMAN RIGHTS COMMITTEE

Part of the reason for this numerical modesty lies in the strict admissibility requirements in Articles 2, 3 and 5 of the ICCPR Optional Protocol. The complainant must be a victim of an alleged violation of the ICCPR and prove that domestic remedies have been exhausted, that the communication is not an abuse of the right of submission and that the same matter is not

being examined under another procedure of international investigation or settlement. Moreover the Committee has interpreted Article 2 of the Optional Protocol to ICCPR to require that a complaint must be sufficiently substantiated before being admitted. It also dismisses as incompatible with the ICCPR cases falling under earlier decided case law where no violation was found.

The ICESCR Optional Protocol not only contains all of the admissibility requirements of its ICCPR cousin but expressly adds two other requirements. First, and perhaps most significantly, cases must be “submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit” (Article 2(a) OP). This temporal requirement is likely to have a choking effect on claims in countries where the new Optional Protocol is not well known or promoted.<sup>56</sup>

Secondly, the CESCR “may, if necessary, 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” (Article 4 Optional Protocol). The provision was supported by some States and some NGOs as a valve for the Committee to control what some feared could be a flood of frivolous or undeserving cases. Indeed, one commentator has called for the Human Rights Committee to use such a procedure in order to have more time to write longer views and expound its reasoning.<sup>57</sup> This provision was attacked by a number of NGOs and national human rights institutions on the basis that it could lead to the dismissal of worthy complaints. For example, IRAW Asia-Pacific argued that due to historical assumptions, some violations of women’s rights might not be considered a significant disadvantage. Thus it would be advantageous to let cases move automatically to the merits stage where the actual impact could be properly interrogated.<sup>58</sup>

The importance of taking a cautious approach to declining to consider communications without ‘clear disadvantage’ is perhaps well illustrated by *Länsman v. Finland* cases decided by the Human Rights Committee. No violation at the merits stage was found due to lack of evidence that the mining and logging activities had yet damaged Sami’s traditional ways of fishing and hunting. However, the Committee used the opportunity to signal to the State that significant harm in this area could amount to a violation and this decision led to a round of domestic cases that were decided on this basis. The wisdom of deciding the case is perhaps evidenced by the fact that it had significant impact at the domestic level with a stricter review of consultation processes by Finnish domestic courts.<sup>59</sup>

The CESCR thus has some flexibility in controlling the number of complaints through this provision should there be a significant flood of cases. This leads us to a broader consider-

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<sup>56</sup> See discussion in opening article of this Special Issue.

<sup>57</sup> See Steiner (note 3 above).

<sup>58</sup> Oral Submission to the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session, 30 March 2008.

<sup>59</sup> See Martin Scheinin, “Covenant on Civil and Political Rights Limits Mining Activities in Sami Homelands. Finnish Supreme Administrative Court Overrules 109 Mining Claims”, available at: <<http://arkisto.sll.fi/tiedotus/kaivokset+saam/samirights.html>>.

ation. Should a flood of complaints eventuate, in a greater number than so far before the Human Rights Committee, there are two paths that could be followed. The first is for the Committee to take a stricter view of its procedure and use Article 4 to allow it to maintain its processes within its available time resources and focus on the most serious cases. A second approach is external and would an increase in the level of resources to the Committee. This might involve increasing the sitting time of the CESCR beyond six weeks a year or providing additional support to a sub-committee that drafts decisions under the Optional Protocol.

Another way to increase the level of resources is to consider anew the need for a different system such as a unified and more resourced treaty body that meets more regularly (whether by merging the two treaty bodies, Human Rights Committee and CESCR, together, or all nine human rights treaty bodies) or by establishing an international court of human rights. While these solutions were not included in the current wave of UN human rights reform, they remain under discussion and the Optional Protocol to ICESCR may contribute to that movement forward, perhaps particularly with an initial step of consolidating CESCR and the Human Rights Committee into a single body.

### E. SOME THINGS TO AVOID?

As discussed, the Human Rights Committee has not only generated some controversy for being too ‘progressive’ at times but some commentators have lamented its failure to play a more pro-active role. One particular criticism, which is more technical in nature, is that the anaemic form of the Committee’s decision-making has denied it the opportunity to have wider impact of the understanding and promotion of civil and political rights. Steiner argues that the Committee’s

considerations in reaching a decision remain covert, secreted within formal opinions that merely state rather than argue towards conclusions. In so acting, the Committee wastes a unique opportunity to make the ICCPR a better known, more significant and persuasive instrument, and thereby add strength to the universal human rights movement.<sup>60</sup>

He calls for more introductions that make the judgments more accessible and expansive reasoning such as made by regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, which is one reason they may be better known. And it is notable that the majority of judges in these regional courts come from civil law jurisdictions which are not commonly known for such approaches to judgments.

The importance of expounding legal reasoning is even more heightened in the case of economic, social and cultural rights given there has been comparatively less jurisprudence. And the field has been strongly influenced by judicial bodies which take up this challenge. The few judgments of the South African Constitutional Court have had considerable global effect in comparison to which the Colombian and Argentinean jurisprudence is more extru-

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<sup>60</sup> Steiner (note 3 above).

sive and wide-ranging. This is partly due to the former being in English, but the method of reasoning is regularly commented upon and has led to a number of high profile legal scholars changing their position on the justiciability of economic, social and cultural rights.

Therefore, echoing Chief Justice Pius Langa in this Issue, one could call upon the Committee to be bolder in their decisions and provide more in-depth reasoning. The early decisions of the Committee will face particularly strong international scrutiny by both jurists and further States considering whether to ratify the Optional Protocol. However, such an approach may mean that it is more difficult to reach decisions by consensus, a factor some attribute to the brevity of the Human Rights Committee's decisions. Sacrificing consensus may, however, be a good price to pay for quality.

This recommendation of greater openness could be extended to other areas. The Human Rights Committee has a peculiar habit of not referring to the decisions of any other adjudicatory body – either international or domestic. The European Court of Human Rights has similar tendencies but the Inter-American Court of Human Rights is not so prickly, happily quoting other jurisprudence. Given concerns about the growing fragmentation of public international law, including within international human rights law, it is important to create the dialogue between the various branches and see jurisprudence in a common direction in order to provide both greater legal certainty and openness to new approaches. Such an approach would also help create a national and international dialogue. Scott and Alston, for instance, have called for greater transnational 'judicial dialogue' that would lead towards clearer consensus, particularly the interpretation of international human rights.<sup>61</sup>

## F. CONCLUSION

The ICCPR Optional Protocol has given rise to the most voluminous and most sophisticated procedure within the UN human rights treaty bodies for dealing with individual complaints of human rights violations. Despite many shortcomings of the system, including limited annual meeting time of the Human Rights Committee, abysmal secretariat resources and the absence of oral hearings, the evolution of the Committee's case law has been a success story. Within three decades it has contributed to making civil and political adjudication a more routine than exceptional matter. It is the institutional existence of an adversarial complaint mechanism coupled with the judicial or quasi-judicial approach taken by the Human Rights Committee that has given rise to a constantly accumulating body of case law that adds flesh and blood to the text of the ICCPR, making it a living instrument and assisting governments, national courts, NGOs and all interested parties in obtaining a proper understanding of the ICCPR provisions and their interpretation.

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<sup>61</sup> Craig Scott and Philip Alston: "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's Legacy and Grootboom's Promise*", (2000) 16 *South African Journal on Human Rights* 206. See also Anne-Marie Slaughter: "A Typology of Transjudicial Communication" (1994-5) 29(1) *University of Richmond Law Review* 99.

Thus, emphasis on the professional qualifications and full independence of CESCR members will be key to enabling the CESCR to develop a complaint mechanism that is principled, well founded in the provisions of the ICESCR and its Optional Protocol and foreseeable as to the outcomes. The Committee could well emulate an internal Code of Conduct that will send a strong signal to States about their nomination practices to membership of the Committee. Obviously, the complaints procedure will produce decisions that open new dimensions to the understanding of specific CESCR provisions. But as long as such dynamic interpretation has a solid basis in the actual treaty provisions, it is a strong reason for opting for the procedure, rather than for hesitation. Providing fuller and expansive reasoning will also contribute to this process, and this is one area where the CESCR should perhaps take lessons from the Human Rights Committee.

The experience of the Human Rights Committee, or of other UN human rights treaty bodies already entrusted with a complaints mechanism, does not justify any fears as to the numerical volume of cases to be expected under the ICESCR Optional Protocol. Instead of a flood of complaints, we can perhaps expect a steady stream; a limited number of cases that will give a new life to the ICESCR and constitute a new step in affirming the equal status of all human rights and making them into 'real rights', that is, tools for empowerment and justice.