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*Perspectives on a New Complaint and Inquiry Procedure:
The Optional Protocol to the International Covenant on
Economic, Social and Cultural Rights*

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

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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-

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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 foodstuffs, 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 the 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 CESCRC 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 CESCR 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

TAKING DIGNITY SERIOUSLY – JUDICIAL REFLECTIONS ON THE OPTIONAL PROTOCOL TO THE ICESCR

BY PIUS LANGA*

Abstract: *There is a growing appreciation of the need for mechanisms to ensure greater protection for human rights, and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights provides some hope if it can be translated into a utility that is real and accessible to those that need it the most. This article considers the merit in adopting the Optional Protocol, the contribution of the South African judicial experience of enforcing and understanding social, economic and cultural rights and raises a few practical points which will hopefully strengthen, by some small measure, the supervisory capacity of the Committee tasked with handling the complaints.*

Keywords: *Optional Protocol, ICESCR, UN Committee on Economic, Social and Cultural Rights, South Africa, justiciability, human dignity.*

A. INTRODUCTION

There is a growing appreciation of the need for mechanisms to ensure greater protection for human rights. In considering the application and content of the optional protocol, I am mindful that the protection and advancement of human rights must not exist only in rhetoric but must ultimately translate into a utility that is real and accessible to those that need it the most. This historic instrument should be the subject of discussion and engagement and I hope. I hope also that the South African experience of grappling with the enforcement of social, economic and cultural rights will be of interest to jurists from the developed and developing nations alike and that it will enrich the on-going debates.

Economic, social and cultural rights “imply a commitment to social integration, solidarity and equality and... are indispensable for an individual’s dignity and the free development of their personality.”¹ Nearly forty years after the commencement of the International Covenant on Economic, Social and Cultural Rights (the ICESCR), we find ourselves on the threshold of

* (b. 1939) Chief Justice, Constitutional Court of South Africa. This article was reviewed independently by two referees.

¹ Jackbeth K. Mapulanga-Hulston: “Examining the Justiciability of Economic, Social and Cultural Rights” (2002) 6 *The International Journal of Human Rights*, pp. 29,34.

the coming into force of an optional protocol.² This mechanism will provide individuals or groups with a right to complain about violations of the ICESCR, to the Committee on Economic, Social and Cultural Rights (CESCR), once they have exhausted domestic remedies. It is a protocol that has not gone unchallenged or without complexity and controversy. As a testament to the protracted debate and complexities that have surrounded this issue, one need look no further than the elaborate and extensive contributions from scholars, jurists, academics, non-government organizations and government officials themselves that have analysed its merits and demerits, its practical constraints and practical necessities; its criticisms and praise; obstacles that still lie ahead and those that it has overcome.

My paper will encompass three issues: first, I will consider briefly the merit in adopting the draft Optional Protocol. I shall then proceed to consider the South African judicial experience of enforcing and understanding social, economic and cultural rights, as an example of how these rights can be interpreted to advance democratic and constitutional values. Finally, I raise a few practical points which will hopefully strengthen, by some small measure, the supervisory capacity of the Committee tasked with handling the complaints.

B. A NEED FOR AN OPTIONAL PROTOCOL?

In theory, the international community has affirmed that the protection of social, economic and cultural rights has equal status to the protection of civil and political rights. The enforcement mechanisms to address violations of the former have, however, not been as effective as those under the International Covenant on Civil and Political Rights (the ICCPR).³ The lack of a parallel development, particularly in the context of an individual complaints based system, has largely been due to the perception that socio-economic rights impose on state sovereignty; that they are not justiciable; and that there are practical obstacles to enforcement given the budgetary constraints of different States. On the other hand, we must be cognizant that we are increasingly finding ourselves in a globalised village characterized by a growing interconnectedness. Gross human rights violations are met with resistance from the international community. The civil, political, economic, social or cultural realities of one country can have a ripple effect on the realities of another country and pose a real threat to international peace and stability. The Optional Protocol is a culmination of the accumulated efforts by the international community to adopt a mechanism to realise the rights of all people and afford greater protection to the rights recognized in the ICESCR.

² International Covenant on Economic, Social and Cultural Rights, 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; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008)

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. On this point see 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.

Collectively, the rights protected in the Universal Declaration of Human Rights, together with the ICCPR and the ICESCR, can only be realised if the enforcement mechanisms are put in place to protect the basic rights of all people. These rights derive from the inherent dignity of every human being regardless of geographical location, sex, race, religion or creed and because every person is a “joint inheritor of all natural resources, powers, inventions and possibilities ... [and] is entitled, within the measure of these resources ... to the nourishment, covering and medical care needed to realize his full possibilities and mental development from birth to death.”⁴

There are still frequent occurrences of illiteracy, torture, discrimination, malnutrition, detention without trial, inequality and conditions of exacerbating poverty which merit action in the form of enforcement mechanisms to alleviate the plight of those that are suffering. The primary objective of human rights law has always been to protect weaker individuals from oppression by powerful groups, by giving those individuals ‘inalienable’ rights which ‘inhere’ in them as individuals.⁵ Through this mechanism, the Committee receiving the complaints will receive information on the nature of the complaint and ultimately gain insight into the challenges faced by the complainant and the extent of the limitations or perpetrations committed by the member State. This would enable the Committee to develop a jurisprudence that is sensitive to the global realities, which could provide a useful framework through which further complaints, concerning other member States, may be analysed and understood.⁶ I am optimistic that member State will take seriously their obligations to protect and properly enforce social, economic and cultural rights, knowing that their actions and decisions on the implementation of these rights, will be reviewed by a monitoring mechanism. Different courts across the world adopt diverse approaches to understanding the nature of the obligation to enforce social, economic and cultural rights. It is therefore useful to have progressive international instruments leading the development towards an increased protection of fundamental human rights. International instruments can assist the courts in understanding human rights and influence governments to legislate effectively to protect human rights.

C. THE SOUTH AFRICAN EXPERIENCE

In formulating the socio-economic rights provisions to be inserted in the South African Bill of Rights, the relevant stakeholders were mindful of not placing obligations on governments which could not be fulfilled. Incidentally, the wording of some of the constitutional rights mirrors the wording of article 2 of the ICESCR and qualifies the positive obligation on the State

⁴ Stephen James: *Universal Human Rights, Origins and Development (for a discussion of the Sankey Bill)* (New York: LFB Scholarly Publishing LLC, 2007) 145.

⁵ Paul Sieghart: “International human rights law: some current problems,” in Robert Blackburn and John Taylor (eds): *Human Rights for the 1990s: Legal, Political and Ethical Issues* (Great Britain: Mansell Publishing Limited, 1991) 38.

⁶ See also the discussion Erika De Wet: “Recent developments concerning the draft optional protocol” (1997) 13 *SAJHR* pp 514, 516.

to take “reasonable legislative and other measures within its available resources” and thereby introduces the concept of “progressive realisation.” The South African Constitution recognizes that human rights should be addressed holistically in order to effectively “promote substantive human welfare and self-realisation”,⁷ and indeed demonstrates an appreciation for the inter-connectedness between the social, economic and cultural cluster of rights and the civil and political cluster of rights and acknowledges that these two clusters must co-exist to maximize the commitment to upholding human rights. I agree that the principle of interdependency finds application at a normative and institutional level – our Constitution recognizes the equal value of both sets of rights and requires that the institutional arrangements should be perceived and experienced as equally effective.⁸

1. THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

There has been traditionally a widespread reluctance to afford courts any role in formulating judicial remedies to address socio-economic or cultural rights’ violations. The South African Constitution recognizes a range of rights which impose positive, negative and qualified duties on the State, and the courts are expressly mandated to adjudicate on these duties. The inclusion of economic, social and cultural rights in the Constitution marks a commitment to addressing the inequalities within society. The doctrine of separation of powers and the question of the institutional competence of judges to adjudicate on and review government economic policies have taken up much of the debate around the justiciability of these rights.

The concept of justiciability has two components: the practical or procedural component and the substantive component. The latter leads to the question whether the courts are competent to rule on a particular issue and what the effect of the ruling will be. The primary concern in the adjudication process should always be whether the court order will be effective in its remedy. In the context of social, economic and cultural rights adjudication, the remedial effect does not always create a tangible and immediate benefit, but often does create guidelines to assist governments in realizing their mandate. The jurisprudence of the Constitutional Court in this regard demonstrates how the Court has used the concept of reasonableness to align government action with the mandates of the Constitution. And it is notable that this principle is now included in the Optional Protocol itself as a guide to the Committee in how to assess complaints.

The South African jurisprudence in this context showcases a constitutional dialogue between the different branches of government, which furthers the democratic values of openness, responsiveness and accountability, and moves towards a re-conceptualisation of the doctrine of separation of powers. In the *Re Certification*⁹ judgment, the Constitutional Court addressed the objections to the inclusion of socio-economic rights in the Bill of Rights and held as follows: “[t]he fact that socio-economic rights will almost inevitably give rise to [bud-

⁷ See Sandra Liebenberg: “Socio-Economic Rights”, in Chaskelson et al (ed.): *Constitutional Law of South Africa* (1st ed., Juta, Loose-leaf binder, Revision Service 5, 1999) at 41-1.

⁸ *Ibid.*

⁹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

getary] implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.”¹⁰ While no mention was made of the court’s role in respect of positive duties, the court has developed a jurisprudence which has stressed the inter-connectedness between positive and negative duties and developed the concept of reasonableness to incorporate accountability, equality and a high level of justification for government actions.

In assessing reasonableness, the Court has emphasised that it will not prescribe particular policy choices to government: “A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.”¹¹ In making this evaluation, the Court looks to a number of factors, in particular whether the relevant measure is comprehensive, coherent, coordinated, appropriate financial and human resources have been made available, the measure is balanced and flexible and makes appropriate provision for short, medium and long-term needs, is reasonably conceived and implemented, is transparent and made known effectively to the public, and most crucially, those whose needs are most urgent must not be ignored by the measures aimed at achieving realization of the right.¹² The principle of reasonableness has also been applied in forced eviction cases which raise a range of negative and positive obligations. In *Port Elizabeth*, after noting the provision of the constitution that prohibits evictions without a court order, we went on to say that “a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.”¹³

2. GIVING CONTENT TO ‘VAGUENESS’

Socio-economic rights are often formulated in vague and open-ended terms which can hinder the ability of judges to say in express terms what the right requires or prohibits in a particular circumstance. In the case of *S v Makwanyane*¹⁴, O’Regan J recognized that “it is the responsibility of courts ... to develop the rights entrenched in the Constitution ... any minimum content which is attributable to a right may in subsequent cases be expanded and developed.”¹⁵ I agree with the view that the content of these rights is less clearly defined more because of

¹⁰ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 78.

¹¹ *Grootboom and Others v Government of the Republic of South Africa and Others* [2000] ZACC 14; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), para. 41.

¹² See generally Sandra Liebenberg: “South Africa: Adjudicating social rights under a transformative constitution”, in Malcolm Langford (ed.): *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008), 75, 85.

¹³ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), para. 28.

¹⁴ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC).

¹⁵ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) at para 325.

their exclusion from the realm of adjudication, than due to an inherent vagueness.¹⁶ Standard tools of interpretation are implemented to give content to the normative make-up of these rights. In interpreting the Bill of Rights, our courts are obliged to promote the underlying values of our constitutional democracy based on human dignity, equality and freedom. The Constitutional Court has adopted the approach that where the benefit in question is provided in a discriminatory manner, this results in an infringement of socio economic rights. For example, in the *TAC*¹⁷ case, where the government provided antiretroviral drugs only at certain points and not at all public hospitals, the Court ordered the government to remove such restrictions. This judgment was a vindication of the right to health care and equality.¹⁸

In the *Grootboom*¹⁹ case, Yacoob J recognized that the right of “access to adequate housing” means more than “bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these.”²⁰ The Preamble to our Constitution records our commitment to attaining social justice and a better quality of life for everyone. Courts must strive to achieve substantive equality, dignity and freedom. These concepts have infused the court’s approach in the application of these rights and in giving meaning to their content. It is clear that the courts have adopted reasonableness as a standard of review in rights adjudication – courts require state officials to justify its policies and initiatives. The reasons advanced are tested against the demands of the Constitution. The standard of reasonableness may still allow a court to recognize a minimum core in assessing the reasonableness of government action: it allows courts to recognize which services are urgent for the survival of vulnerable groups and places a strong duty of justification on state officials for a failure to act accordingly.

3. THE FALLACY OF THE DISTINCTION

The disparity in protection between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, perhaps has its foundation in the manner in which these rights are enforced. The traditional understanding is that civil and political rights are more easily protected and enforceable by the courts because they involve a negative obliga-

¹⁶ Liebenberg, note 7 above, at 41-11.

¹⁷ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

¹⁸ In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*, the Constitutional Court’s (CC) directly addressed the constitutional prohibition on unfair discrimination and the right of everyone to have access to social assistance. Justice Mokgoro, examining the arguments from both parties, concluded for the Court that: “In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.” 2004 (6) BCLR 569 (CC), para. 82.

¹⁹ *Grootboom* (note 11 above).

²⁰ *Ibid.*, at para 35.

tion on the State whereas socio-economic rights are largely dependent on the ability of the State to provide certain basic amenities through welfare systems and subject to resource and budgetary considerations. This traditional categorization of human rights is a fallacy more than it is real and underlies the reluctance to recognizing binding human rights law commitments and must be abandoned. I agree that such an approach “draws a bright line around a cluster of concepts: duties of restraint are attached to freedom protecting civil and political rights while positive duties attach to equality-promoting socio-economic rights. The former are justiciable and the latter aspirational.”²¹

To this may be added the idea that civil and political rights are more easily secured by legislation whereas economic, social and cultural rights need legislation, government commitment and the means to translate into fruition.²² However, the difficulty that comes with implementation does not justify relegating these rights to Utopian ideals – the impediments to implementation should not lead us to accept that there is clear distinction between the two groups of rights, but rather that there is a clear interrelationship between the two. This traditional understanding is perhaps misunderstood or simply exaggerated: there is an interaction between civil and political rights and economic, social and cultural rights and both clusters of rights need to be recognized for one to fully feel and appreciate that inherent worth and dignity of being a human being. For instance, freedom of expression or association is of little consequence if one is starving and malnourished.²³

Furthermore, these two sets of rights cannot be distinguished by the duties that arise from them. Both sets can give rise to negative duties to refrain from interfering with their exercise and positive duties to protect and promote their exercise. Thus, the civil and political right to life may be interpreted to give rise to a positive duty on the State to take steps to promote and protect life by providing emergency healthcare. The civil and political right to a fair trial may be interpreted to give rise to a positive duty to provide legal representation to indigent persons. Concomitantly, the socio-economic right of access to housing can be interpreted to oblige the State to refrain from arbitrary evictions. This overlap exposes as a fallacy the standard refrain that socio economic rights have budgetary implications because they place positive duties on governments or state officials.

This issue has been the subject of debate for many years and will continue to be so. I make these observations simply to decry the misplaced protestation to the optional protocol on grounds that we should stay away from placing positive obligations on the State. The application and enforcement of these rights has been a challenging task for the courts. The courts are not directly elected by society and neither have they the expertise to set government budgets to determine how much money will be allocated to the fulfilment of particular rights, but the courts do have a mandate to hold governments accountable to the Constitution. The courts are

²¹ Sandra Fredman: *Human Rights Transformed: positive rights and positive duties* (Oxford: Oxford University Press, 2008), 66.

²² See for example the discussion by Jack Donnelly: *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press 1989), 32-8.

²³ The point was also made by Yacoob J in the *Grootboom* case as follows: “There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.” See note 15, at para 23.

cognizant of the fact that these rights must be realised progressively and within the States' available resources.

D. THE WAY FORWARD

I have tried to offer the South African experience as evidence of the feasibility and practicality of enforcing economic, social and cultural rights in domestic courts. Let us now examine some of the possible implications for the Committee under the optional protocol.

1. THE ROLE OF REASONABLENESS, DIGNITY AND EQUALITY

The principles of dignity and equality may be useful tools at the disposal of the Committee and they should permeate their recommendations to State parties to uphold and enforce socio, economic and cultural rights. If the State is going to provide a socio-economic benefit or impose a socio-economic burden, it must do so in a non-discriminatory manner. In considering the appropriate means of enforcing these rights, it seems that there is a balance that needs to be struck between the goal and the means to achieve that goal. The measures set in place by government must work towards the expeditious realisation of these rights but the availability of resources is an important factor in assessing the reasonableness of government action.²⁴ The action of States Parties must be reasonable – it must treat the vulnerable with care and respect and it must be aimed at ensuring a benefit to those that are most needy.

2. THE ROLE OF THE COMMITTEE

It is important for members of the Committee to recognize that they do not constitute a court of law and that their findings will not have the effect of a legal order as such. It is crucial to first understand the nature and scope of the authority vested in them. Members of the Committee must be mindful that although they are an independently elected international body and therefore not directly accountable to a particular electorate, they still have a crucial role to play in bringing government action in line with the rights which they undertook to uphold and protect and developing their own 'jurisprudence'. It would be crucial to have members of the Committee that are qualified with the necessary skills that have the capacity to come up with creative solutions to secure compliance. Economic, social and cultural rights are notoriously understood to be more vague than civil and political rights (although the later can be equally vague) and it will therefore be necessary to give content to these concepts. At the same time, the Committee must be aware of the extent of the States parties' obligations – to respect, protect and promote – the progressive realization of rights within the States' available resources so that they know which standards to apply in reviewing state conduct.

²⁴ *Ibid.*, at para 46.

3. A MINIMUM CORE OBLIGATION?

It is clear from general comments by the CESCR on the interpretation and application of the ICESCR that it considers that States parties are bound to fulfil a minimum core obligation, in the context of socio-economic rights, to ensure at the very least, minimal essential levels.²⁵ For the Committee then, the qualification that States must take steps to progressively realise economic, social and cultural rights within their available resources does not seem to mean that a State can escape liability simply by saying that it had no resources to act but that it is nevertheless committed to the progressive realisation of such rights. The State party must show that it has taken every effort and used the available resources to provide a basic level of services. The Optional Protocol is silent on a minimum core obligation. There are difficulties with identifying the minimum core obligation – it is context specific and depends on the information that is placed before the Committee. The minimum core obligation should be determined by considering the needs of the most vulnerable group in a particular society that are entitled to the protection of the rights in issue²⁶ and the threshold of human dignity and equality should further inform the need for minimum levels of services.

4. PROVIDING REASONS FOR AN INADMISSIBLE COMPLAINT?

One thing to consider is how the Committee will respond to complaints that are inadmissible or fall outside of the jurisdiction of the Committee's powers or fail to disclose at least a prima facie case that should be considered. I agree that the Committee should not adopt too formalistic and technical an approach in analyzing a complaint, but it must also decide whether it will disclose its reasoning in dismissing certain complaints off-hand. It may be useful to offer complainants a brief explanation.

5. TRANSPARENCY IN DEALING WITH COMPLAINTS

The legitimacy of the Committee will largely depend on the manner in which it deals with complaints. Whilst it does not have the status of a court of law, it may be useful to apply the principles of openness and accountability to the process of assessing complaints. The process must be transparent and the Committee must clearly state its reasons for adopting a particular conclusion. Particularly where the process is on-going and there is a series of recommendations and communication between the Committee and the relevant State party on its actions, this dialogue must be transparent and involve all parties to the complaint.

E. CONCLUSION

There is a link between the enforcement and protections of economic, social and cultural

²⁵ 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).

²⁶ Grootboom (note 11 above) at para. 31

rights and the development of a State. The development of a State is dependent on the development of the people within its borders which in turn is dependent on the effective enforcement of economic, social and cultural rights.²⁷ The development and progress of a country is measured by its provision of housing, its education system, the standard of living which individuals experience, its health care programmes etc – so the advancement of economic, social and cultural rights has a direct bearing on the development progress.

The law is often the only instrument that victims of human rights abuses have at their disposal and the quality of such an instrument will largely depend on the effectiveness and proficiency of monitoring bodies who have to enforce and protect those rights. Indeed States parties have an international responsibility and commitment to the promotion of human rights. There have been intensified efforts in some parts of the world towards cultivating a human rights discourse. We must subscribe to the understanding that human rights must be defended against abuse and the international community must stand as a collective in recognizing the basic human rights of all people and continue to create the mechanisms that will result in an unprecedented recognition and protection of these rights. At times these rights are taken for granted and we fail to appreciate the practical impact of the right to vote, the right to education, the right to freedom of assembly – to those that have been deprived and denied these rights, their application and protection are indeed a matter of crucial importance and their significance should not be underestimated.

²⁷ See Mashood A. Baderin and Robert McCorquodale: “The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development” in Baderin, M.A. and McCorquodale, R. (eds): *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, New York 1997)17.

THE REASONABLENESS OF ARTICLE 8(4) – ADJUDICATING CLAIMS FROM THE MARGINS

BY BRUCE PORTER*

Abstract: *Reviewing the background debates and the drafting process behind the inclusion of a reasonableness standard in the Optional Protocol, this article argues that the reasonableness review that is contemplated in Article 8(4) must be guided by the right to effective adjudication and remedies for all ESC rights claimants. The drafting history shows that proposals for providing for an automatic “broad margin of discretion” in these cases or requiring a finding of “unreasonableness” were rejected in order to hold fast to the principle of adjudication that is inclusive of the claims of the most disadvantaged individuals and groups. The Article does recognize, however, that effective adjudication presupposes a recognition of institutional limits and appropriate roles. Ensuring access to effective remedies for claimants challenging the “entitlement system failures” leading to poverty and homelessness will require innovative approaches and remedial options that draw on and enhance the capacities of various actors, including adjudicative bodies, governments, claimant groups and human rights institutions.*

Keywords: *Effective remedies, reasonableness, margin of discretion, poverty, justiciability of ESC rights.*

A. INTRODUCTION

8(4). 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 set forth in the Covenant.

In an aptly titled article “Human Rights Made Whole”,¹ Louise Arbour, as the High Commissioner for Human Rights at the time, celebrated the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol)² at the

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¹ Louise Arbour, “Human Rights Made Whole” in Policy Innovations, (Carnegie Council, July 8, 2008) online at <http://www.policyinnovations.org/ideas/commentary/data/000068> (visited 6 March 2009).

² GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008).

UN Human Rights Council. She described it as a retrieval and renewal of the unified vision of the Universal Declaration of Human Rights. The protocol, in her view, redresses the unequal status that has been accorded the adjudication and remedy of human rights claims to “freedom from want”.³ By institutionalising an equal right to adjudication and remedy to violations of the right to adequate food, housing, healthcare or education, the Optional Protocol “can make a real difference to those who are often left to languish at the margins of society, and are denied their economic, social, and cultural rights, such as access to adequate nutrition, health services, housing, and education.”⁴

Whether the vision of a truly unified approach to human rights that is fully inclusive of claimants affirming the right to freedom from want, is actually realised through the Optional Protocol will largely depend on how its Article 8(4) is interpreted and applied. This will, in turn, inform and be informed by the way in which the principle of reasonableness review of substantive social rights claims evolves at other treaty monitoring bodies, in regional systems and in domestic law. The concept of reasonableness is a double edged sword. It can be used by adjudicative bodies and courts to justify a virtually unlimited “margin of discretion” to states’ socio-economic policies and hence to deny adequate adjudication of or effective remedies for substantive social rights claims. Alternatively, it can be used to rise to the challenge presented by genuine rights claims that go to the systemic causes of poverty and exclusion. The adoption of the Optional Protocol is the first step in the project of making human rights whole. The interpretation and application of the reasonableness standard in Article 8(4) in light of the overall principle of inclusive and effective adjudication will constitute the ongoing work.

In this article I suggest that when interpreted in light of its drafting history and situated in the context of the problem that the Optional Protocol was intended to address, Article 8(4) offers a solid foundation for the unified vision of human rights that Justice Arbour describes. Those who advance rights claims related to dignity, security and freedom from poverty, claiming access to adequate housing, healthcare or education are no longer to be denied access to adjudication or remedies. The fact that there may be multiple causes of poverty and a broad range of remedial options can no longer justify adjudicative acquiescence to serious and widespread violations of fundamental human rights. The focus of the reasonableness review mandated in Article 8(4) is to ensure compliance with the Covenant and the protection of human rights values.

The reasonableness review contemplated by 8(4) does acknowledge, however, that the kinds of substantive social rights claims that address systemic inequality, poverty and destitution present different types of challenges to adjudicative bodies. While the Committee on Economic, Social and Cultural Rights (CESCR) is directed by Article 8(4) not to shy away from adjudicating these critical claims, it is at the same time directed not to lose sight of the fact that its role is to focus on compliance with the ICESCR and on the fundamental values it protects. The CESCR will not, under the reasonableness review that is endorsed in Article

³ Louise Arbour, “Freedom from Want – From Charity to Entitlement,” LaFontaine-Baldwin Lecture 2005, available at <http://www.lafontaine-baldwin.com/speeches/2005/>. (visited 2 april 2009).

⁴ Ibid.

8(4), impose its own policy choices when other choices may be available and preferred as a means to ensure compliance with the ICESCR. It will not confuse its role with that of the respondent government or other institutions better placed to design and craft appropriate policies and programs. The envisioned review will encourage an openness to a wide array of remedial options and engagement with relevant actors in the implementation of Covenant rights. New forms of institutional relationships among adjudicative bodies, governments, rights claimants and human rights institutions will respect institutional limits at the same time as implementing and affirming the right to effective remedies.

The reasonableness review contemplated by Article 8(4) recognises that the right to effective remedies relies on, rather than undermines, the recognition of appropriate institutional roles and limitations. Its success will hinge on developing new approaches to adjudication and remedy to overcome the challenges of increasing poverty and destitution in rich and poor countries alike, and the widespread violations of economic, social and cultural (ESC) rights that have resulted, drawing on and enhancing the capacities of the various actors, rather than overstepping them, or confusing roles.

B. AFFIRMING THE PRINCIPLE OF SUBSTANTIVE EQUALITY OF ACCESS TO ADJUDICATION AND REMEDY FOR ESC RIGHTS CLAIMANTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ now has an optional complaints procedure that is at least the equivalent to the procedure that has been in place under the International Covenant on Civil and Political Rights (ICCPR) for forty years.⁶ This formal equality does not in itself, however, remedy the historic substantive inequality that has denied hearings or remedies to those who would claim the right to freedom from want. Substantive equality requires a recognition that to realise an equal right to effective remedies for all ESC rights, adjudication may have to meet different needs and develop new approaches. The critical question is thus not simply whether there is a parallel complaints procedure under the ICESCR, but whether ESC rights claims will be effectively and fairly adjudicated under the new Optional Protocol. The question is particularly compelling for those who have historically been denied access to adjudication to challenge poverty, homelessness, hunger, or freedom from want.

Rights claims that require resource allocation, positive legislative measures, or time within which the State may implement the legislation, and programs or policies necessary to remedy the violation are not, of course, new. There is no clear dividing line between ESC rights and civil and political rights and there is no distinct category of rights that will be adjudicated⁷ under the Optional Protocol which was previously entirely excluded from adjudication. In

⁵ 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.

⁶ 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.

⁷ Craig Scott: "Reaching Beyond (Without Abandoning) the Category of Economic, Social and Cultural Rights", (1999) 21(3) *Human Rights Quarterly*, 633.

the Elements Paper prepared by the Chairperson of the Open Ended Working Group on an Optional Protocol to the ICESCR (Working Group) in November, 2005, a number of examples of cases were provided to show that resource allocation issues have often been dealt with in the context of civil and political rights claims, including communications under the Optional Protocol to the ICCPR.⁸

The recognition of the right to adjudication and remedy for ESC rights claims and the “unified vision” referred to by Justice Arbour is intricately linked to a deeper understanding of the concept of substantive equality of disadvantaged groups and of the interdependence and indivisibility of civil and political and ESC rights. As will be discussed below, the convergence of the right to equality and non-discrimination with the economic, social and cultural rights of persons with disabilities in the new International Convention on the Rights of Persons with Disabilities (ICRPD)⁹ exemplifies the new reality of convergent paradigms of rights and remedies and the importance of the standard of reasonableness in reviewing the right to positive measures in light of available resources in the context of both equality rights and ESC rights.

Some claims under the Optional Protocol will be framed as rights claims which could equally have been framed as alleged violations of the right to non-discrimination or the right to life under the ICCPR, as violations of rights under the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁰ or under the ICRPD. It will be difficult to identify any claims from vulnerable groups suffering violations of ESC rights that could not also be framed as non-discrimination claims under another human rights treaty. The Committee on Economic, Social and Cultural Rights (CESCR) thus will not be sailing in entirely uncharted waters in adjudicating claims to positive measures or in the consideration of reasonable limitations related to available resources. It is not a brand new standard of review for a new category of rights claims: the reasonableness standard that is alluded to in 8(4) is one which emerges from a convergence of civil and political rights with ESC rights jurisprudence.

Nevertheless, in assessing the import of the Optional Protocol in general, and of Article 8(4) in particular, it is appropriate to acknowledge that what is most significant and potentially transformative about the Optional Protocol is that it affirms in no uncertain terms that rights claims related to positive measures described in Article 2(1) of the Covenant are to be adjudicated rather than being dismissed as being beyond the proper scope of adjudication. Rights claims alleging failures to take positive measures, “to the maximum of available resources” and “by all appropriate means including particularly the adoption of legislative measures”, as required under Article 2(1), may be similar in form to claims to positive meas-

⁸ U.N. E/CN.4/2006/WG.23/2 30 November 2005 Section IV A. “An optional protocol and domestic decisions on resource allocation.” See in particular the discussion of the case of *Mukong v. Cameroon* Communication No. 458/1991, decision adopted on 21 July 1994 (CCPR/C/51/D/458/1991).

⁹ 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.

¹⁰ 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.

ures under other treaties or within civil and political rights frameworks.¹¹ But the language of Article 2(1) is unique in its acknowledgement of the temporal dimension of fulfilment, the relation to available resources and the necessity of the adoption of legislative measures to fulfil Covenant rights. All of these aspects of substantive ESC rights claims must now be dealt with in an appropriate adjudicative context, assigning remedial roles beyond the competence of an adjudicative body to appropriate actors without compromising the principle of the right to adjudication and remedy of violations of human rights.

Article 8(4) makes it clear that the unique wording of Article 2(1) of the ICESCR and the different types of challenges associated with substantive, positive rights claims under the ICESCR are not to be used as a basis for denying effective adjudication and remedy. States' obligations are subject to the limitations of available resources and progressive fulfilment over time. The solution to a violation may not be a singular remedy, but may entail a range of possible options. These challenges may be more characteristic of a range of ESC rights claims than of more traditional civil and political rights claims, but they are not to be invoked as a basis for denying effective adjudication and remedy.

In other words, the import of the Optional Protocol and of Article 8(4) is precisely as Justice Arbour describes it. It is not an expansion of adjudication to new categories of rights but rather the affirmation of a principle of substantive equality for those whose rights were previously denied fair hearings and effective remedies by inappropriate and discriminatory limits imposed on the adjudicative function. It aspires to correct a systemic exclusion or under-representation of rights claims from the margins, from those suffering from poverty or destitution. It is an affirmation of a principle of equal right to adjudication and remedy, and a rejection of a restrictive paradigm of rights adjudication that fails to adequately hear or address substantive ESC rights claims.

C. THE DRAFTING HISTORY OF 8(4): THE REJECTION OF MARGIN OF DISCRETION IN FAVOUR OF SUBSTANTIVE COMPLIANCE WITHIN A RANGE OF POLICY CHOICES

The decision to include Article 8(4) in the Optional Protocol, and the crafting of its particular wording, needs to be understood as a response to the broader debate about the justiciability of ESC rights and the scope of the Optional Protocol. At the first meeting of the Working Group, it became clear that a complaints procedure for the ICESCR could become the opposite of what proponents of this mechanism were hoping for. Rather than affirming the right to effective remedies for all victims of violations of ESC rights, a significant number of the participating States seemed to view the adoption of an Optional Protocol as an opportunity to do the

¹¹ Article 2(1) of the ICESCR states that: "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."

opposite – to affirm that certain categories or components of ESC rights ought to be exempt from adjudication or remedy. The discussion of the issue of justiciability at the first meeting in 2004 provided clear evidence of the risks ahead:

In the exchange of views on the question of justiciability, different views were expressed on whether the proposed optional protocol should cover all substantive articles of the Covenant or only a selection of these. Some delegations expressed doubts as to whether all economic, social and cultural rights were equally justiciable. ... Several delegations referred to the tripartite typology of obligations, according to which States parties have an obligation to respect, protect and fulfil economic, social and cultural rights. Some delegations expressed doubts as to whether a failure to “fulfil” and “take steps to the maximum of available resources” could reasonably constitute a violation. A number of delegations suggested that an “à la carte” approach might be appropriate as it would allow each State to select only those rights that are already justiciable under domestic legislation. Other delegations favoured a limited approach whereby only a selected number of provisions of ICESCR would be covered by an optional protocol.

66. Other delegations favoured a comprehensive approach arguing that an optional protocol should cover all substantive rights contained in the Covenant.¹²

It was often asserted during the debates that the Optional Protocol is a procedural instrument and should not alter the substance of the protections afforded by the ICESCR. Yet the intricate relationship between the right to a remedy and the substance of a right itself made it difficult to separate these two issues. Attempts by some States to distinguish between justiciable and non-justiciable components of the Covenant were often, in fact, disguised attempts to import into the Optional Protocol the very inequalities between civil and political and ESC rights which this mechanism had the potential to remedy. Proposals for “a la carte” options, through which States could pick those rights or components of the Covenant that they agreed to be justiciable, proposals to limit complaints to allegations of discrimination in relation to the enjoyment of Covenant rights, or to particularly egregious violations of minimum core obligations, akin to right to life violations under the ICCPR, were examples of the kinds of selective approaches that, if accepted, would have dismembered the unified vision of human rights and actually served to deny claimants of substantive ESC rights access to effective remedies.

As the deliberations of the Working Group continued into the second and third years, the unprecedented nature and serious implications of any attempt to distinguish between justiciable and non-justiciable components of the Covenant became clearer. A majority of states began to express support for the comprehensive approach to the scope of the Optional Protocol to cover all rights and components of rights. It was at this stage of the process that the focus of debates shifted to the standard of review to be applied to communications relating to positive measures and resource allocation under Article 2(1). States such as Canada, the U.K.

¹² *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 E/CN.4/2004/44 (2004), 23 February – 5 March 2004, paras 65-66.

Australia, Poland, China and the United States that had previously sought to exclude substantive rights claims related to article 2(1) obligations from the scope of the Optional Protocol began instead to advocate for a clarification of the standard of review for the adjudication of such claims. In particular, they advocated for the inclusion of a reference to “a broad margin of appreciation” to be accorded to states in assessing whether obligations under article 2(1) had been met and for a further reduction in the standard of review through a substitution of a standard of “unreasonableness” for a standard of “reasonableness”.¹³ The effect of these proposals would have been to incorporate into the text of the Optional Protocol the kind of excessive acquiescence to socio-economic decision-making that had denied adjudication to many ESC rights claims in domestic jurisdictions, and to transfer the onus onto claimants to establish that decisions or policies were unreasonable in their formulation or design. The vision of adjudication focused on compliance and fulfilment of rights would be lost.

While the intentions of these States may have been somewhat suspect, they argued with some persuasiveness that it was appropriate to provide, within the text of the Optional Protocol, some guidance as to the standard of review that ought to be applied in cases relating to resource allocation and broad socio-economic policy design. They noted that the Optional Protocol would institute a new adjudicative relationship between the CESCR and State parties, with a new “third party” added to the mix – a rights claimant. Because of the newness of this relationship, particularly as it would apply to the unique provisions of Article 2(1) of the ICESCR, it was argued that it would benefit from some clarification, at least about the standard of review that would be applied in the adjudication of communications alleging failure to comply with positive obligations under Article 2(1).

A number of questions regarding the standard of review were put to the representative of the CESCR attending the Working Group Sessions. In response to these queries, and once the Human Rights Council had mandated the Working Group to negotiate a text of the Optional Protocol, the CESCR adopted a statement “to clarify how it might consider States Parties’ obligations under article 2(1) in the context of an individual communications procedure.”¹⁴ With respect to the reference to the maximum of available resources, the CESCR described in its statement a relatively rigorous standard of review:

The “availability of resources”, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect

¹³ 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, Geneva, U.N. Doc E/CN.4/2006/47 para. 92.

¹⁴ *Statement by the Committee: An evaluation of the obligation to take steps to the “Maximum of available resources” under an optional protocol to the Covenant* U.N. Doc. E/C.12/2007/1 (2007) 10 May 2007, para. 3

the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.¹⁵

The CESCR then suggested that the standard of review it would adopt would assess the reasonableness of steps taken. The CESCR proceeded to list a number of possible factors it would consider in assessing whether steps taken had been reasonable, including:

- (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
- (b) whether the State party exercised its discretion in a non-discriminatory and non arbitrary manner;
- (c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;
- (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;
- (e) the time frame in which the steps were taken;
- (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.¹⁶

The CESCR also stated that it would place a high priority on "transparent and participatory decision-making at the national level"¹⁷ and, "To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances."¹⁸

The criteria outlined by the CESCR with respect to the standard of reasonableness suggested a strong commitment to the principle of effective remedies. The considerations listed were compatible with similar standards that had emerged in domestic jurisprudence. A reasonableness standard had been the basis on which the South African Constitutional Court had affirmed the justiciability of the duty to progressively realise ESC rights in the *Grootboom* case¹⁹ and in subsequent jurisprudence, with a similar emphasis on the protection of vulnerable groups and compatibility of decision-making with broader human rights values. Similar standards of reasonableness are being applied to positive equality rights claims, such as claims to reasonable accommodation of disabilities, in both domestic and international law. In fact, at a similar time, the language of reasonableness was adopted within the text of the

¹⁵ Ibid., para. 4.

¹⁶ Ibid., para. 8.

¹⁷ Ibid., para. 11.

¹⁸ Ibid., para. 11.

¹⁹ *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) at para 44.

ICRPD, where, for the first time in an international treaty, it had been clearly stated that a failure to adopt reasonable measures of accommodation itself constitutes discrimination.²⁰

While the reasonableness standard had considerably less resonance for States from the Group of Latin American and Caribbean Countries and other civil law jurisdictions, the value of adopting a principle which increased comfort levels for common law jurisdictions was recognised. Eventually there emerged within the Working Group a consensus in favour of the inclusion of a reference to reasonableness that included States on both sides of the ‘justiciability divide’. For sceptical States, reasonableness review was seen as a way of preventing inappropriate or unnecessary incursions into policy choices or resource allocation decisions. For States supportive of a comprehensive and effective Optional Protocol, a reference to reasonableness was seen as affirming a standard of review that had been proven effective at the domestic level, ensuring that all aspects of obligations under Article 2(1) were to be subject to effective review and adjudication under the Optional Protocol.

The lurking unresolved issue, however, was the reference in the Committee’s Statement to the European doctrine of “margin of appreciation.” Although common in European jurisprudence, the concept has rarely been invoked within the UN treaty body system, and is contained in no U.N. treaties. Moreover, it was strongly associated in common law jurisdictions such as Canada and the U.K. with the systemic abdications of any effective adjudicative role for courts or quasi-judicial bodies in relation to substantive ESC rights claims addressing poverty. Sceptical states led by the U.S., Canada and the U.K. took up the issue of the margin of appreciation or margin of discretion at the third session of the Working Group.²¹ There were concerns among many, and particularly among civil society organizations working on ESC rights in domestic law, however, that including an unprecedented reference to this doctrine in a new treaty dealing with the adjudication of ESC rights could be taken as authorising the forms of judicial acquiescence to ESC rights violations that the Optional Protocol was intended to correct.

²⁰ International Convention on the Rights of Persons with Disabilities, Article 2.

”Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

”Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

²¹ *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, Geneva, U.N. Doc E/CN.4/2006/47 paras, 92, 95, 130.

D. THE EVOLUTION OF THE TEXT OF 8(4)

In the first draft text prepared by the Chairperson for the fourth session of the Working Group in July 2007, the text of Article 8(4) incorporated the reasonableness standard but made no reference to a margin of discretion or margin of appreciation. It remained as close as possible to the text of article 2(1):

When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, 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.²²

In response to this draft, sceptical States launched a concerted effort to include a reference to “a broad margin of appreciation” and moreover advocated replacing the reference to assessing the reasonableness of the steps taken with a requirement that the Committee consider whether the steps taken had been “unreasonable”.²³ Other States and NGOs expressed concerns about these proposals.²⁴ Both the proposal for replacing a reasonableness standard with “unreasonableness” and for including a reference to a margin of appreciation were included in square brackets in the subsequent draft of 8(4) stating that “In its assessment, the Committee shall take into account the [broad] margin of appreciation of the State party to determine the optimum use of its resources.”²⁵

The issue remained unresolved at the end of the fourth session in August 2007. Proposals for replacing a reasonableness standard with a requirement that the Committee make a finding of “unreasonableness” were met with considerable alarm from supportive States and were not included in the subsequent draft. At the suggestion of France, the term ‘margin of appreciation’ was changed to ‘margin of discretion’ in the draft text that was prepared for the Open Ended Working Group at its fifth and last session in April, 2008. That draft had the whole of Article 8(4) in square brackets as follows:

When examining a communication under the present Protocol, the Committee shall consider, where relevant, the reasonableness of the steps taken by a State Party in conformi-

²² *Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights Prepared by the Chairperson-Rapporteur, Catarina de Albuquerque (23 April 2007)* U.N. A/HRC/6/WG.4/2 Annex 1 Article 8(4).

²³ *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 (Geneva 16-27 July 2007)* U.N. A/HRC/6/8 paras 95-98, 153.

²⁴ *Ibid.*, para. 100.

²⁵ *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Prepared by the Chairperson-Rapporteur, Catarina de Albuquerque (24 December 2007)* U.N. A/HRC/8/WG.4/2 Annex 1 Article 8(4).

ty with article 2, paragraph 1, of the Covenant. In doing so, the Committee will respect a margin of discretion of a State Party to determine the appropriateness of policy measures as long as they are consistent with the provisions of the Covenant.²⁶

A subsequent redrafting distributed just prior to the session, omitted any reference to margin of discretion, stating in a revised proposal for 8(4) that “the Committee shall consider, where relevant, the reasonableness and appropriateness of the steps taken by a State Party in accordance with article 2, paragraph 1, of the Covenant.”

There was little support at the April 2008 session of the Working Group for the inclusion of the term “appropriateness” and considerable opposition was mounted, again by sceptical States, to the removal of the reference to a margin of discretion. The debate over the text of Article 8(4) continued until the final day of the Fifth Session.

At the end of the day, the central issue in the forty years of resistance to the drafting and adoption of an Optional Protocol to the ICESCR and the focus of debate at the Working Group about scope of coverage and the standard of review, came down to the final negotiations around the wording of article 8(4).

On the second to last day of the session, the United States’ representative stated again that a reference to margin of discretion or to a broad margin of discretion was needed in order to provide an assurance that, where there were different ways of complying with the CESCR, the Committee would not substitute its own policy preference for those of the State party. This position was supported by a significant number of other States – enough to undermine any attempt to reach consensus on referring the text to the Human Rights Council. The NGO Coalition responded by saying that the principle described by the US delegate was one with which everyone agreed, but one which is central to the reasonableness standard. They argued that a reference to a margin of discretion, on the other hand, is often applied in a very different way so as to undermine the very accountability to the substantive obligations within the Covenant that is the purpose of adopting an Optional Protocol to ICESCR in the first place.

In informal discussions compromise wording was sought that would describe the principle that where a number of different options are in compliance with the ICESCR, the Committee ought to leave the choice among those policy options to States. Eventually, wording was taken from the *Grootboom* decision of the South African Constitutional Court, where that Court first described its approach to reasonableness review in relation to the right of access to adequate housing in Article 26 of the South African Constitution.²⁷

The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means. The programme must be capable of facilitating the realisation of the right.

²⁶ Ibid.

²⁷ Article 26(1) of the South African Constitution states that “Everyone has the right to have access to adequate housing.” Article 26(2) states that “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to *recognise that a wide range of possible measures could be adopted by the state to meet its obligations*. [emphasis added]

Modelling new text on the above wording the Chair then presented the wording that was accepted by consensus for referral to the Human Rights Council:

8(4). 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 set forth in the Covenant.

E. THE REASONABLENESS STANDARD OF ARTICLE 8(4): WHAT IT MEANS

The substitution of the reference to “a range of possible measures for the implementation of the rights set forth in the Covenant” in the final version of Article 8(4) for the previous reference to a margin of discretion is significant for its interpretation. The reference point in Article 8(4) is now compliance with the Covenant and the implementation of the Covenant through “a range of possible policy measures”. Those States seeking an assurance that the Committee would not overstep its competence or authority by itself choosing among alternative means of achieving compliance received that assurance in the amended text. However, those advocating the unprecedented incorporation of a reference to margin of discretion in relation to a particular category of ESC rights claims – hoping to direct the Committee to compromise on the right to effective remedies in situations where the State’s resource allocation or socio-economic policy decisions are at issue, did not receive support. There is no suggestion in the adopted wording of Article 8(4) that a reasonableness standard authorises or permits any denial of adjudication or remedy to any class of rights claimant or category of claim for the reason that the State is better placed to make policy choices or to allocate resources. What is recognised, however, is that the implementation of ESC rights is not simple and will rarely involve a singular policy option. There will, in most cases, be a range of measures and a multiplicity of choices available. Remedies will often need to recommend a process through which compliance can be achieved, rather than recommending the precise details of the solution.

The incorporation of wording from the *Grootboom* judgment suggests, as does the drafting history, that just as the South African Constitutional Court has incorporated jurisprudence

from the CESCRC into its own domestic jurisprudence, so has South African jurisprudence now informed the text of an international human rights instrument. There are a number of aspects of the reasonableness standard affirmed in the *Grootboom* decision which should, in turn, inform the interpretation and application of Article 8(4) of the Optional Protocol.

Importantly, the *Grootboom* standard of reasonableness affirms the centrality of human rights values of dignity and equality in any assessment of reasonableness. According to the Constitutional Court, it is human rights values rather than quantitative norms which must ultimately guide a court determining whether the policy choices made by governments are consistent with human rights obligations:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.²⁸

A second principle affirmed in the *Grootboom* judgment is that the assessment of reasonableness in the ESC rights context is results based, not focused on intent. “Policies and programmes must be reasonable both in their conception and their implementation.”²⁹ As Sandra Liebenberg notes, reasonableness review attempts to respect the institutional roles of both courts and governments without compromising the right to a remedy by ensuring a contextual standard of review informed by a contextual analysis of institutional roles, the interest at stake and the situation of the claimant group in society:

In many respects, reasonableness review provides the courts with a flexible and context-sensitive basis for evaluating socio-economic rights claims. It allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. At the same time, it subjects governments’ choices to the requirements of reasonableness, inclusiveness and particularly the threshold requirement that all programmes must provide short-term measures of relief for those whose circumstances are urgent and intolerable. Reasonableness review enables courts to adjust the stringency of its review standard, informed by factors such as the position of the claimant group in society, the nature of the resource or service claimed and the impact of the denial of access to the ser-

²⁸ *Grootboom* (note 19 above), at para 44.

²⁹ *Ibid.*, at para. 42. Further features of reasonable measures include requirements that they be comprehensive, coherent and co-ordinated; properly resourced; provide for short, medium and long-term needs; and publicly transparent. See Sandra Liebenberg: “Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate” in Stu Woolman & Michael Bishop (eds): *Constitutional Conversations* (Pretoria University Law Press: Pretoria, 2008) 303, 324.

³⁰ Liebenberg, *ibid.*, 321-22.

vice or resource in question on the claimant group.³⁰

F. MEETING THE CHALLENGES OF REASONABLENESS REVIEW

A challenge within the model of reasonableness review that has been raised in South Africa is that it may at times fail to give adequate weight to the perspective and voice of rights claimants and their communities in the application of human rights norms to particular contexts and in the implementation of appropriate remedies. Marisus Pieterse has raised important concerns that “the current formulation [by the South African Constitutional Court] of the reasonableness approach appears to divert the bulk of the dialogue over the meaning of socio-economic rights to the political process, to silence the voices of certain vital participants to the dialogue and to restrict the judicial role in the overarching societal discussion over the means and ends of transformation.” Pieterse has joined with Sandra Liebenberg in calling for a “more principled and systematic interpretation of the content of the various socio-economic rights, the values at stake in particular cases and the impact of the denial of access to these rights on the complainant group.”³¹ It will be important, in interpreting and applying Article 8(4) of the OP-ICESCR, therefore, to ensure that the voice and perspective of the rights claimants are adequately heard, and that appropriate remedies are fashioned so as to address the context and needs from which their claims have been advanced. It will be important to ensure that the claimants of ESC rights are not simply treated as triggers for reviews of the reasonableness of programs or policies, with no reference back to fundamental right to effective remedies that is the underlying principle of the Optional Protocol.

Standards of reasonableness under the OP-ICESCR must also be allowed to interact with the emerging standards of reasonableness elsewhere, such as under the new ICRPD and its Optional Protocol. Reasonable accommodation of disability is a very contextual and individualized approach to reasonableness review which may provide a useful framework to ensure reasonableness review of rights claims under the Optional Protocol to ICESCR is also framed around individual dignity and equality, not confused with abstract policy review disconnected from rights claiming.

The “range of possible policy measures for the implementation of ESC rights”, referred to in Article 8(4) should also be interpreted as an acknowledgement of the multiplicity of actors and entitlements which may be involved in allegations of violations of ESC rights. Amartya Sen has shown how “entitlements system failures” leading to hunger, homelessness and other violations of ESC cannot be explained as shortages of resources.³² They are usually the result of the interaction of a number of factors, including legal entitlement systems as well as State action and inaction and often private actors as well. The entitlement system failures behind the most serious violations of ESC rights are not problems which lend themselves to the identification of singular acts or violations or simple remedial orders. Nevertheless,

³¹ Pieterse (note 31 below).

³² Amartya Sen: *Poverty and Famines: An Essay on Entitlement and Deprivation* (New York: Oxford University Press, 1981).

and, as Pieterse suggests, the role of individual entitlement claims may be critical in developing a transformative human rights framework capable of challenging and remedying these broader entitlement system failures.³³

If the claims from the margins of society to adequate food, housing or healthcare are to be adequately adjudicated and remedied under the new Optional Protocol, the CESCR will have to apply Article 8(4) in light of the purpose of the protocol. The guiding principle of reasonableness review should be the right to adjudication and effective remedies for ESC rights claimants, with a particular focus on the claims advanced by marginalised and disadvantaged groups. Rather than compromising the right to adjudication and remedy in any way because of institutional roles or limitations, Article 8(4) suggests that the CESCR ought to focus instead on determining how the unique challenges of ESC rights adjudication can be finessed. The Committee may have to create procedures that are new to treaty bodies, in order, for example, to hear the evidence of rights claimants, access independent experts, or hear from NGO interveners. Where a range of possible policy measures are available for the implementation of Covenant rights, remedial recommendations may focus on implementing accountable and participatory processes through which choices can be exercised and remedies implemented in a manner which includes rights claimants and affected constituencies in a meaningful role.

The Optional Protocol revitalizes an older vision of a unified system of human rights and effective remedies. But there is much that is very new and challenging about it. It is a project which, to be successful, will require commitments from a range of actors – States, claimants, and the CESCR alike.

³³ Marius Pieterse: “On ‘Dialogue’, ‘Translation’ and ‘Voice’: Reply to Sandra Liebenberg” in Stu Woolman & Michael Bishop (eds) *Constitutional Conversations* (Pretoria University Law Press: Pretoria, 2008) at 33. See also Marius Pieterse: “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” (2004) 26(4) *Human Rights Quarterly* 882. It is encouraging that commentators such as Pieterse and Liebenberg are now emphasizing the importance of recognizing the role of individual entitlement claims without affirming the concept of “minimum core content.” I have noted elsewhere that the “minimum core” concept is too simplistic and formalized to support the kind of value-focused adjudication that I believe is promoted in Article 8(4). Further, it may provoke excessively precise remedial interventions by adjudicative bodies. Proposals for including references to “minimum core content” in the Optional Protocol did not receive broad support, so I would expect that the CESCR will not emphasize this concept into its jurisprudence under the new Optional Protocol. See Bruce Porter: “The Crisis in ESC Rights and Strategies for Addressing It” in John Squires, Bret Thiele and Malcolm Langford (eds.): *Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Sydney: University of South Wales Press 2005), 48

ARE EXTRA-TERRITORIAL OBLIGATIONS REVIEWABLE UNDER THE OPTIONAL PROTOCOL TO THE ICESCR?

BY CHRISTIAN COURTIS* AND MAGDALENA SEPÚLVEDA**

Abstract: *This article discusses the possibility of employing the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights to bring claims involving the alleged violation of extra-territorial obligations of economic, social and cultural rights. Although the Optional Protocol explicitly restricts the making of individual complaints to those within a State's jurisdiction, it does not eliminate the possibility of extra-territorial complaints under either the inter-state complaint or, particularly, the inquiry procedures. In some cases, individuals could also bring claims if they could demonstrate that the effective jurisdiction of a State party extended beyond its borders.*

Keywords: *Extra-territorial obligations, jurisdiction, Optional Protocol, economic, social and cultural rights.*

A. INTRODUCTION

This article discusses the possibility of employing the recently adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol)¹ to bring to the consideration of the Committee on Economic, Social and Cultural Rights (CESCR) claims involving the alleged violation of extra-territorial obligations grounded in the International Covenant on Economic, Social and Cultural Rights (ICESCR).² The first section canvasses the arguments supporting the contention that the ICESCR enshrines extra-territorial obligations. The second section reviews each of the mechanisms provided by the Optional Protocol, and analyses to what extent they allow the Committee to deal with extra-territorial obligations. Finally, we offer some conclusions.

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¹ GA Res. 832, UN GAOR, 63rd Session, U.N. Doc A/RES/63/117 (2008).

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.

B. EXTRA-TERRITORIAL OBLIGATIONS IN THE ICESCR

There are two significant grounds on which it can be argued that the ICESCR does not contain territorial limitations in its obligations, and thus also enshrines extra-territorial obligations for State parties.

First, there is *an absence of any mention of territorial or jurisdictional limitations in article 2(1)*, which describes the general obligations that apply to all of the rights of the Covenant. Article 2(1) of the ICESCR is usually considered a key clause in the Covenant, given that it includes the concepts of “progressive realization” and the obligation to adopt measures “to the maximum of the available resources”. Article 2(1) is often compared to article 2(1) of the International Covenant on Civil and Political Rights (ICCPR),³ to underscore the alleged “different nature” of civil and political rights on the one hand, and economic, social and cultural (ESC) rights on the other. Indeed, it is important to point out that the contrast between the respective articles 2(1) is often highlighted as a proof that the drafters of both Covenants, which were conceived, discussed and adopted simultaneously, believed that the different sets of rights provided for in each instrument responded to distinctly separate models. While these assertions are no longer sustainable they will not be discussed here.⁴ However, it is safe to say that an important difference between article 2(1) of the ICESCR and article 2(1) of the ICCPR lies in the different language regarding their territorial scope. While article 2(1) of the ICCPR

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 The wording of Article 2(1) ICESCR differs significantly from the wording adopted in Article 2(1) of the ICCPR, which establishes the obligation of each State Party ‘to respect and to ensure’ the rights recognised therein. However, despite the intention of the drafters, nowadays it is well established that all human rights impose a variety of obligations, which have been identified as different levels or layers in the ‘tripartite typology’ of States’ obligations. The duties to ‘respect’ and to ‘ensure’ under Article 2(1) ICCPR imply not only the obligation to abstain from interfering in the individual’s freedoms, but also the duty to take the positive actions necessary to ensure those rights. Therefore, there is no sharp distinction between the two wordings as to the “nature” of the obligations imposed.

⁵ See ICCPR, Article 2.1: “Each State Party to the present Covenant undertakes to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (emphasis added). As a too literal interpretation would have limited the protection of the Covenant, the Human Rights Committee interprets this provision as “within its territory or subject to its jurisdiction.” In the Human Rights Committee’s words: “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” See CCPR/C/21/Rev.1/Add.13(General Comments), para 10.

contains an express reference to the territory and jurisdiction of the State party,⁵ there is no such mention in article 2(1) of the ICESCR.⁶

Second, apart from the absence of any reference in article 2(1) of the ICESCR to territorial or jurisdictional limitations of its application, there is a reference in the article to *international assistance and cooperation as a means to achieve the full realisation of the rights provided by the Covenant*.⁷ Such references are not made in the equivalent provision of the ICCPR. Moreover, the reference in articles 2(1) of the ICESCR to international cooperation and assistance are not isolated: similar references are in fact repeated throughout the instrument.⁸

These elements offer the basis to conclude that the ICESCR, conceived as a whole, is an instrument where the full realisation of the rights that it recognises is not exclusively a function of the action or inaction of States parties in isolation, but also of the interaction between States. Thus, the Covenant includes extra-territorial dimensions: when ratifying it, States parties have also agreed to participate in the realisation of economic, social and cultural rights beyond their borders. Thus, there are persuasive textual elements in the ICESCR to conclude that extra-territorial obligations can be derived from it.

C. EXTRA-TERRITORIAL OBLIGATIONS AND THE OPTIONAL PROTOCOL

The ICESCR did not allow, however, its monitoring body⁹ to consider alleged violations in specific case situations, in contrast to the ICCPR, which was supplemented by an Optional Protocol providing for a communications mechanism since its adoption.¹⁰ This historical gap was bridged by the adoption of the Optional Protocol in December 2008. However, let us analyse whether the different mechanisms provided for in the Optional Protocol – communi-

⁶ PIDESC, article 2.1: “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.”

⁷ Magdalena Sepulveda Carmona: “The obligations of ‘international assistance and cooperation’ under the International Covenant on Economic Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8”, 13(1) 2009 *The International Journal of Human Rights*, 86-109.

⁸ Besides article 2.1, see, for example, articles 11(2), 15(4), 22 and 23.

⁹ The UN Economic and Social Council, according to the text of the ICESCR. The ECOSOC delegated this function by establishing a Committee on Economic, Social and Cultural Rights, through ECOSOC Resolution 1985/17 of 28 May 1985.

¹⁰ The first additional Protocol to the ICCPR establishes the competence of the Human Rights Committee to deal with individual petitions was adopted and entered into force at the same time as the Covenant. Optional Protocol to the International Covenant on Civil and Political Rights, 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.

cations presented by victims or groups of victims, inter-state communications and inquiries – offer room for the CESCRC to consider situations where allegations of violation extra-territorial obligations are raised.

1. COMMUNICATIONS

Article 2 of the Optional Protocol provides as follows:

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. (emphasis added)

While the text of the Optional Protocol reflects the language of similar instruments,¹¹ in fact it has failed to take into consideration the different wording of the ICESCR in relation with other human rights instruments. As we pointed out before, article 2(1) of the ICESCR does not make any reference to territorial or jurisdictional limits to its application, and in fact makes express reference to international assistance and cooperation. There was thus no justification to include a jurisdictional limitation in the text of the Optional Protocol, when the ICESCR does not make any reference to such limitations and, on the contrary, makes clear that ESC rights obligations have international (and thus extra-territorial) dimensions.

Nevertheless, the text has included this limitation, so the submission of communications is restricted to individuals or groups of individuals *under the jurisdiction* of the State party against which a violation of the ICESCR is alleged. The meaning of the phrase ‘under the jurisdiction’ raises a number of complex arguments about the relationship between territory and jurisdiction. In the *Report of the 2nd Conference of the ETO Consortium*, Sigrun Skogly posits that the two notions are not indivisible; a failure to recognise the inherent differences between jurisdiction and territory limits the effectiveness and universality of human rights.¹² Indeed, the notion that jurisdiction must be separated from and not confined by territory alone has garnered support from the European Court of Human Rights and the UN Human Rights Committee with respect to human rights violations by police, diplomatic personnel, and foreign security services for example.¹³ The latter, for example, has held that the reference in

¹¹ See, for example, Optional Protocol *ibid.*, Article 1; CERD, 660 U.N.T.S. 195, entered into force Jan. 4 1969, Article 14; CAT, 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, Article 22.1; OP-CEDAW, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* Dec. 22, 2000, article 2; CMW, U.N. Doc. A/RES/45/158, article 77.1; First OP-CRPD, G.A. Res. 61/106, Annex II, U.N. GAOR, 61st Sess., Supp. No. 49, at 80, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008 Article 1.1.

¹² *Report of the 2nd Conference of the ETO Consortium*, FIAN International, Heidelberg, September 26-27, 2008.

¹³ Fons Coomans and Menno Kamminga (eds.): *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2004).

Article 1 of the Optional Protocol to ICCPR to “individuals subject to its jurisdiction” is “not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”¹⁴ International law also recognises the imperative of a State to comply with human rights obligations while participating in armed conflict in a foreign territory not under the State’s control.

With respect to ICESCR obligations, the argument that a State party has jurisdiction beyond its own territory has been implicitly developed in the jurisprudence of the CESCR. The Committee has consistently maintained that jurisdiction includes any territory over which a State party has geographical, functional or personal jurisdiction, including dependent territories¹⁵ and territories where a State has *de facto* control.¹⁶ Moreover, the Committee has suggested that a State party may have jurisdiction over nationals of a State party residing in another territory when the negative fulfilment of a Convention obligation results in violations within the State party’s territory.¹⁷

However, the extent of the extra-territorial jurisdiction of States regarding ESC rights is far from having a solid grounding under international law. In the absence of a specific act by a State to recognise jurisdiction on subjects operating or deeds occurring beyond its borders – when, for example, a statute allows its courts to consider cases for violations committed outside its territory – there is no generally accepted presumption in favour of State jurisdiction beyond its own territory. Consequently, under the Optional Protocol petitioners will bear the burden of proof in establishing that a violation occurring outside a State’s territory occurs *de jure* within the State’s jurisdiction.

Little attention was paid to the issue during the sessions of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.¹⁸ States that participated in this Working Group were not eager to be innovative on this matter – either because of the inclination to follow agreed language, or because of fear of opening up unprecedented possibilities. Thus, claims involving extra-territorial violations of the ICESCR cannot be addressed validly under the communications procedure, unless a clear demonstration that a State party has jurisdiction beyond its territory is provided. However, as we will see, extra-territorial violations could be addressed either through inter-state communications or through the inquiry procedure.

¹⁴ HR Comm. Case no. 52/1979, *Delia Saldias de Lopez v. Uruguay*, UN Doc. CCPR/C/OP/1 at 88 (1984), para. 12.2.

¹⁵ *Concluding Observations on the Netherlands* U.N. Doc. E/1999/22 para. 194.

¹⁶ *Concluding Observations on Israel* U.N. Doc. E/1999/22 para. 232.

¹⁷ *Concluding Observations on Sri Lanka* U.N. Doc. E/1999/22 para. 77.

¹⁸ The Working Group held a total of five sessions: 2004 (23 February - 5 March), 2005 (10-20 January), 2006 (6-16 February), 2007 (16-27 July) and 2008. The fifth and final session in 2008 took place in Geneva from 4-8 February (first part) and from 31 March to 4 April (second part).

2. INTER-STATE COMMUNICATIONS

According to Article 10.1 of the OP-ICESCR

A State Party to the present Protocol may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party *is not fulfilling its obligations under the Covenant*. (emphasis added)

As is clear from the text, and in contrast with article 2 of the Optional Protocol, there is no reference to the jurisdiction or territory of the State.¹⁹ As the ICESCR includes international obligations, non-compliance with these extra-territorial obligations can thus be subject to inter-state communications. In fact, the use of inter-state communications might be sufficiently adequate here, because a State may be in a better position to represent the interests of those individuals whose rights were breached by the action or omission of another State party to the ICESCR. Moreover, when the alleged violation committed by a State party affects the rights of individuals under the jurisdiction of another State party, the latter's sovereign interest might also be affected. Accordingly, the submission of the communication can be justified both by the interest of the right-holders and by the interest of the complaining State.²⁰

However, the employment of inter-state communications may pose some obstacles as an effective remedy to redress the violations of the ESC rights of individuals affected by the extra-territorial activity of a State party.

First, victims are not in a position to require the filing of a communication, which is left to the discretion of the State. Should the State decide that it is not convenient to submit a communication, victims will have no other remedy available, and the violation will remain unpunished. Moreover, even if a communication is submitted by the State, victims cannot be sure that the case is framed in a way that represents their interests or their voice properly.

¹⁹ The text of the Optional Protocol follows closely the wording of articles 41.1 of the ICCPR and 21(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 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.

²⁰ A similar argument, *mutatis mutandi*, can be derived from the Vienna Convention on Consular Relations of 24 April 1963: a State party has an interest of protecting the rights of its own nationals when they are under the jurisdiction of another State, and that justifies the resort to inter-state complaints. For a specific case illustrating this point, see International Court of Justice, *case of Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, 31 March 2004. See also Inter-American Court of Human Rights, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16. In the case of the employment of inter-state communications of the Optional Protocol in the case of extra-territorial violations of the ICESCR, the interest of the State is that of protecting the rights of persons under its own jurisdiction affected by the action or omission of another State party.

Second, even though they are provided for in many human rights instruments,²¹ inter-state communications have been scarcely used by States.²² This fact surely reflects States' reluctance to submit complaints against other States on human rights issues. Diplomatic and political considerations, the possibility of eliciting reprisals and the existence of other interests at stake may prevent a State from confronting another State party through the submission of a communication before a human rights body. Thus, the redress of victims of extra-territorial violations of the ICESCR may be compromised by other State interests. However, the fact that the protection mechanism has been infrequently used with respect to other human rights instruments provides no justification for diminishing the protection ESC rights. Nevertheless, during the sessions of the Working Group, some States expressed their preference for the inter-state communications procedure to be excluded from the Optional Protocol.²³

Third, in order to allow inter-state communications, article 11(1) of the Optional Protocol requires State parties to declare that they recognise the competence of the Committee to receive and consider them. This applies both to a State's capacity to submit communications and to be the subject of other States parties' complaints.²⁴ That is, the Optional Protocol sets up an *opt-in* system in regard to inter-state communications. This may pose additional difficulties: the opt-in system may discourage States from accepting the competence of the Committee in this regard,²⁵ and the need for both States – the one submitting the communi-

²¹ The possibility to lodge complaints against another State party is contemplated in, several human rights instruments at the United Nations and regional level, such as in Article 41 ICCPR; Article 11 CAT; Article 11 CERD; Article 33 ECHR(ETS 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which *entered into force* on 21 September 1970, 20 December 1971 and 1 January 1990 respectively ; Article 45 ACHR, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978 ; and Article 54 ACHPR, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 .

²² The European mechanism is the only inter-state mechanism that has been employed several times (more than 20 times), most recently in 2001 (*Cyprus v. Turkey*, Application no. 25781/94 May 10, 2001). The possibility of an inter-state complaint under the ICCPR has not yet been resorted to by any State.

²³ For example, the Netherlands expressed doubt as to whether an inter-state complaints mechanism was compatible with the notion that international cooperation should be based on genuine dialogue, partnerships and technical cooperation programmes. 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 third session*, Economic and Social Council, UN. Doc E/CN.4/2006/47 (2006), 14 March 2006.

²⁴ The European mechanism is the only inter-state mechanism that has been employed several times although the Court has delivered judgments in three cases. The most recent was in 2001 (Eur. Ct. HR, *Cyprus v. Turkey*, Application no. 25781/94 May 10, 2001). In March 2007, Georgia lodged a complaint against Russia.

²⁵ The experience under other human rights treaties shows that many states have not recognised the competence of the supervisory bodies to receive inter-state complaints. We should note that the inter-state procedure under the CERD, the European Convention and the African Charter is mandatory: it does not require any special authorisation for a State party to be able to bring inter-state complaints.

cation and the one to which the communications makes reference – to have made that declaration will make it difficult for many cases to be brought to the attention of the Committee.

3. INQUIRY PROCEDURE

Article 11.2 of the Optional Protocol reads as follows:

If the Committee receives reliable information *indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant*, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned. (emphasis added)

The wording used to describe the requirements for the initiation of the inquiry procedure does not make reference to territorial or jurisdictional limitations:²⁶ it refers to grave or systematic violations of *any of the economic, social and cultural rights set forth in the Covenant*, without exclusion. The formula includes, therefore, those violations that have an extra-territorial effect – that is, those affecting the rights of individuals beyond the State party's territory or jurisdiction. Thus, the inquiry mechanism could be employed to call the attention of the Committee to issues regarding extra-territorial violations of the economic, social and cultural rights set forth by the ICESCR.

There could be some advantages in favour of the inquiry procedure *vis-à-vis* inter-state complaints: it is not necessary to count on a State to bring information to the Committee, meaning that victims, group of victims, non-governmental organisations and other stakeholders can do so, and even if the information comes from a State, it does not need to be a State party to the ICESCR or to the Optional Protocol; nor must it make any declaration about the inquiry procedure. More generally, the inquiry has the advantage of offering a means of addressing situations in which individual communications do not adequately reflect the systematic nature of a widespread violation of rights. This type of mechanism also addresses situations in which individuals or groups are unable to submit communications due to practical constraints or fear of reprisals.²⁷

On the other hand, there are also some limitations to the possibility of employing the inquiry procedure in the case of extra-territorial violations of the ICESCR. First, the threshold is higher: not every violation of the obligations of the Covenant would allow the Commit-

²⁶ The text of the Optional Protocol follows closely the wording of Article 20.1 of CAT, and especially Article 8(1) of the Optional Protocol to CEDAW and Article 6(1) of the Optional Protocol to CPRD.

²⁷ See D. Sullivan: Commentary on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women”, in: *Optional Protocol to the International Convention on the Elimination of All Forms of Discrimination against Women*, (IIDH 2000) 71.

tee to engage in an inquiry, but only *grave and systematic violations*.²⁸ This threshold may leave aside relevant cases of extra-territorial violations of economic, social and cultural rights which are not sufficiently grave and systematic.

Moreover, as it is the case with inter-state communications, in order for the Committee to be allowed to receive and consider information and decide if an inquiry mechanism should be initiated, the State subject to the complaint must have made a specific declaration recognising this competence in the Committee: another example of the *opt-in* approach. The need for a specific declaration makes it more cumbersome for States to be subjected to the inquiry procedure, as a mere omission will mean a rejection of this possibility, while in order to accept the procedure a supplementary positive step is needed.

4. INTERNATIONAL ASSISTANCE AND COOPERATION IN THE OPTIONAL PROTOCOL

Finally, paragraphs 1 and 2 of article 14 of the OP-ICESCR provide:

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party's observations and suggestions, if any, on these views or recommendations.
2. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.

These provisions presuppose an existing communication or inquiry, so do not present any implications for the criteria to present complaints or to open inquiries. However, the article offers some room for the Committee to transmit its views or recommendations to UN bodies that may have had some participation in the relevant situation. The Committee on Economic, Social and Cultural Rights has constantly asserted in its General Comments the responsibility of actors other than State parties, such as international financial institutions. Therefore, there may be some space for the Committee, with the consent of the State party concerned, to transmit its views or recommendations concerning the participation of UN-related non-state actors in the facts considered under the communication or inquiry.

²⁸ See, however, Article 4 of the ICESCR, which grants the Committee some discretion to declare communications inadmissible: "The Committee 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" (emphasis added). The threshold for the inquiry procedure is, nevertheless, obviously higher.

While such non-state actors are not, by any means, respondents in the communications procedure, the views or recommendations transmitted by the Committee may help to highlight the role that those actors outside a States' territory could have played in the situation, and even include specific recommendations about remedial action. This can offer the complainants and the Committee an avenue to pinpoint the outcome of the action of international financial institutions in particular on the enjoyment of the rights provided by the ICESCR in a State party, and thus could be relevant to capturing some aspects of extra-territorial violations.

D. CONCLUSION

In consideration of both the absence of any territorial or jurisdictional limitation in ICESCR and the positive requirement for States to exercise international cooperation and assistance in the fulfilment of ICESCR obligations, the extra-territorial nature of ICESCR obligations is clear. The Optional Protocol provides a number of potential opportunities to enforce compliance with these obligations. Although the OP explicitly restricts the making of individual complaints to those within a State's jurisdiction, it does not eliminate the possibility of extra-territorial complaints under either the inter-state complaint or inquiry procedures. In some cases, individuals could also bring claims if they could demonstrate that the effective jurisdiction of a State party extended beyond its borders.

The inter-state complaint or inquiry procedures particularly allow for the articulation of complaints of violations of extra-territorial obligations before the CESCR. Of course, both procedures entail a number of limitations and hurdles to be overcome, particularly with regard to the 'opt-in' provisions of the OP. Nevertheless, the mechanisms could constitute the first steps towards the effective enforcement of extra-territorial obligations under ICESCR. In particular, considering that inter-state complaint mechanisms are seldom used, the inquiry procedure might prove to be the best mechanism to supervise compliance with the extra-territorial obligations under the ICESCR.

SHOULD STATES RATIFY? – PROCESS AND CONSEQUENCES OF THE OPTIONAL PROTOCOL TO THE ICESCR

BY BETH A. SIMMONS*

Abstract: *Proponents and opponents of ratification of the ICESCR's Optional Protocol have both exaggerated the consequences of giving individuals a "private right of standing" before the Committee on Economic Social and Cultural Rights. But this article argues that, on balance, ratification should be encouraged. Individuals will bring new and urgent issues to the international agenda, and the dialog will help to encourage a better sense of States' international legal obligations under the treaty. The consequences for ESC rights are likely to be modestly positive, if outcomes under the Optional Protocol of the ICCPR are any guide. Even States that already respect ESC rights in their domestic law should ratify, because there is a tendency, judging by the ratification behaviour relating to similar agreements, for States to emulate ratification practices of other States in their region. Ratification will neither end deprivation nor damage the credibility of the international legal system. It will be a modest step forward in consensus-formation of the meaning of ESC rights, which in turn is a positive step toward their ultimate provision.*

Keywords: *Human rights, economic social and cultural rights, ICESCR, justiciability, Human Rights Committee, impact.*

A. INTRODUCTION

Three billion people live on less than \$2.50 per day.¹ Another billion live in the "information age" unable to sign their name or read.² About half of humanity – some 2.6 billion people – does not have access to basic sanitation. From these facts, it is hard to tell that we live in a world in which economic rights have been defined as human rights and enshrined in international law for over 60 years. It is also hard to tell from these facts that 86 per cent of the States in the world have ratified one or more international covenant that recognizes each of their own

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¹ See World Development Indicators, 2008 located at <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:21725423~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (visited 5 March 2009).

² UNICEF's 1999 *State of the World's Children* Report located at <http://www.unicef.org/sowc99/> (visited 9 March 2009).

citizens is “entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”³ That there is a disconnect between the principle that human beings have a right to satisfy basic human needs and reality is a gross understatement.

The Optional Protocol to the International Covenant of Economic, Social and Cultural Rights purports to address these basic human rights. On the 60th anniversary of the Universal Declaration of Human Rights (and some 42 years after passage of a similar provision for civil and political rights), the United Nations General Assembly adopted language giving individuals the right to submit complaints of treaty violations by a State Party to the Committee on Economic, Social and Cultural Rights for their official view. The protocol gives individuals a “right of standing” before the Committee. Within some limits defined in the protocol, individuals would be able – if their State agrees – to ask the Committee for its view on whether their State has violated the ICESCR.

But *should States ratify?* Yes, on balance, they should. The agreement will not produce miracles for the world’s deprived, but it does give them a limited opportunity to hold their political leaders accountable for their actions (and inaction) relating to social, economic, and cultural rights. Proponents and opponents of ratification have both exaggerated the consequences of this treaty. It will neither make a serious dent in the statistics cited in the opening paragraph, nor will it constitute a “threat to the integrity of the treaty system”.⁴ It may encourage some governments to take economic, social and cultural rights into account in their developmental and social planning. Governments who have ratified the ICESCR presumptively should be willing to accept review of their policies if their own citizens complain they are not living up to their treaty obligations. Those governments who already take these rights seriously should ratify as a model to encourage others to follow suit. On balance, States should accept enhanced accountability by giving the Committee the authority to render views on individuals’ complaints.

This essay develops *consequentialist* arguments for ratifying the ICESCR. First, ratification may well help clarify an important obligation that States have under international law: what constitutes a violation of the ICESCR. Legal clarity arguably improves implementation and compliance. Second, the availability of an individual complaint mechanism may have positive consequences – at the margins – for rights realization. My argument here is not strictly legal; it is social and political. New evidence on human rights treaty effects suggests that ratification of agreements has consequences in domestic politics, mobilizing publics to view their rights and roles in new ways, focusing and legitimating demands, and creating new pos-

³ See especially Article 22 of the Universal Declaration on Human Rights, G.A. res. 217A(III), U.N. Doc. A/810AT 71(1948).

⁴ Michael Dennis and David P 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, quoting from Phillip Alston and Gerard Quinn: “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, (1987) 9(2) *Human Rights Quarterly*, 156.

sibilities for domestic coalitions.⁵ Furthermore, what little evidence we have on mechanisms for an individual right of complaint internationally does seem to suggest that these mechanisms are associated with rights improvements; at least, I will show, this has been the case with the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). While we need to be cautious in interpreting the evidence, and especially inferring an ironclad causal relationship, the possibility that an individual right of standing before a body of experts helps improve rights outcomes on average provides a strong rationale for ratification. Third and finally, States should ratify because it will encourage others to do so. Ratification of international legal agreements is, to some extent, “contagious”. I will demonstrate this effect with respect to the individual complaint mechanisms of three other human rights treaties. States tend to ratify optional protocols when their neighbouring peers do so. Modest peer pressure will in time encourage others to ratify and broaden the access of individuals to an authoritative interpretation of their economic, social and cultural rights. These are all good reasons, on balance, for States to ratify the Optional Protocol passed by consensus by the General Assembly in December 2008.

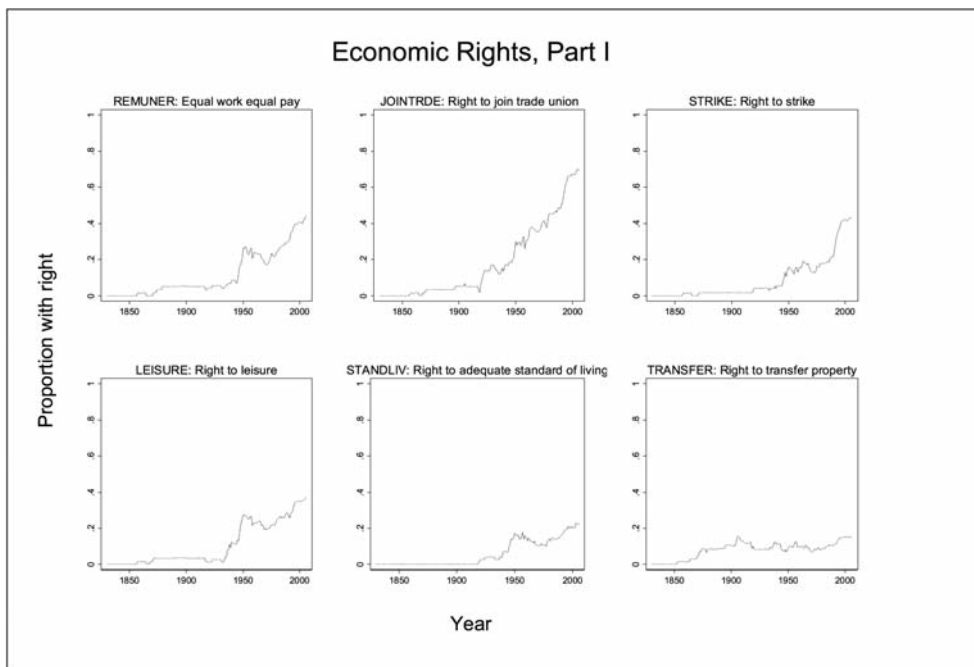
B. ENHANCING LEGAL CLARITY: FROM ABSTRACT PRINCIPLES TO CONCRETE CASES

Economic and social rights have been part of the legal landscape for quite some time, yet there is still a good deal of uncertainty about their boundaries and when and how they might be enforced. A small fraction of the existing constitutions prior to the 1950s had provisions for equal pay for equal work, a right to join a trade union and to strike, a right to rest and leisure, and a right to an adequate standard of living (see Figure 1). An even smaller proportion contained a right to shelter, and various provisions relating to a right to health care (see Figure 2). Moreover, thirty-three States’ constitutions directly and explicitly incorporate the UDHR into their basic law;⁶ while five countries’ constitutions explicitly incorporate the ICESCR.⁷ It is interesting to note that the proportion of national constitutions containing economic and social rights has increased shortly after the international adoption of a major convention. This

⁵ Beth Simmons: *Mobilizing for Human Rights: International Law in Domestic Politics*. (New York: Cambridge University Press, 2009).

⁶ Afghanistan, 1977, 2004; Andorra, 1993; Angola, 1975; Benin, 1979; Bosnia/Herzegovina, 1995; Burkina Faso (Upper Volta), 1960, 1991; Burundi, 1974, 1992, 2004; Cambodia (Kampuchea), 1972, 1993; Cape Verde, 1980; Central African Republic, 1981, 1994, 2004; Chad, 1962; Congo, 1992; Congo, Democratic Republic of (Zaire), 1964, 1978, 2003, 2005; Cote D’Ivoire, 2000; Djibouti, 1977; Equatorial Guinea, 1968, 1991; Gabon, 1991; Guinea, 1990; Madagascar (Malagasy), 1992, 1998; Mali, 1974, 1992; Mauritania, 1961, 1978; Moldova, 1994; Mozambique, 2004; Nicaragua, 1987; Niger, 1996, 1999; Peru, 1993; Romania, 1991; Rwanda, 1962, 2003; Senegal, 1963; Somalia, 1960; Togo, 1992; Yemen (Arab Republic of Yemen), 1991.

⁷ Nicaragua, 1987, Burundi, 1992; Central African Republic, 1994 and 2004; Bosnia Herzegovina, 1995; Rwanda, 2003.



is especially true in the late 1940s – as well as the mid-1960s – again, coinciding closely with the adoption and opening for signature of the ICESCR. The post-Cold War wave of constitution-drafting in Latin America and Eastern Europe also saw an increase in the adoption of domestic ESC rights. A few countries in Asia and Africa – notably, Indonesia and South Africa – adopted some similar constitutional provisions as well (Figure 2).

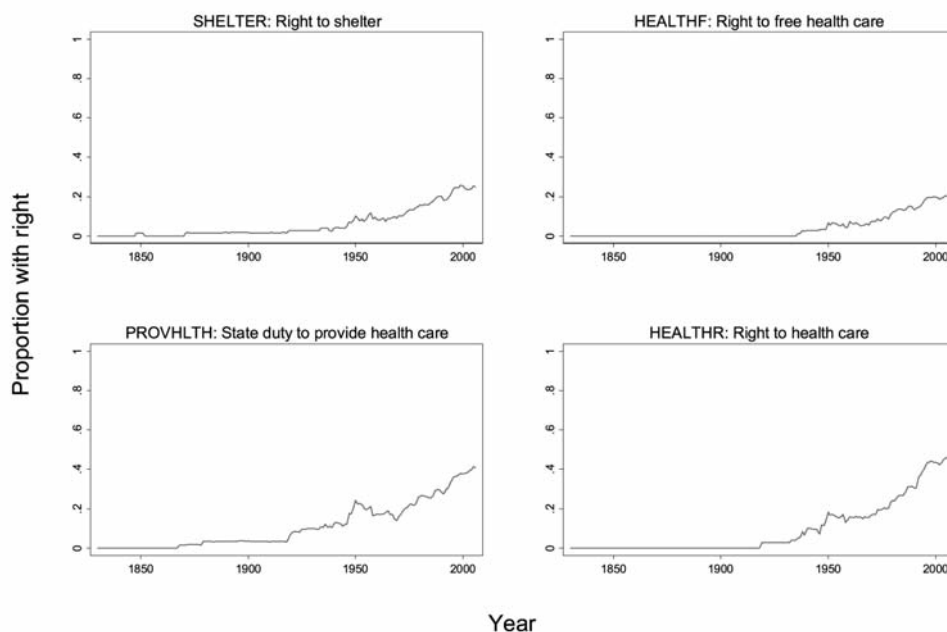
Many countries are starting to come to grips with the exact nature of the rights and obligations their international and domestic laws entail. In many developing countries, national human rights commissions have been quite active in interpreting the nature of economic and social rights. Katarina Tomasevski estimates that 44.5 per cent of the caseload of Indonesia’s Human Rights Commission in 2001 was classified as “violations of the right to welfare”.⁸ The inclusion of social rights – to housing and healthcare for example – in the South African constitution has led to litigation in that country that has been moderately successful and demonstrates the plausibility of enforcing these rights in a court of law.⁹

Governments and stakeholders alike have a strong interest in clear understandings about the nature of their obligations under the ICESCR. The reporting system has been helpful in

⁸ Katarina Tomasevski: “Strengthening Pro-Poor Law: Legal Enforcement of Economic and Social Rights.” Located at http://www.odi.org.uk/rights/Publications/Rights%20Meeting%20Series%20Publication%202006/chapter2_screen.pdf.

⁹ Marius Pieterse: “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” (2004) 26 *Human Rights Quarterly* 882. See also chapter by Pius Langa in this Issue.

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this respect, but it has been driven primarily by the agenda of the Committee and the States Parties. As is well-known, States are sometimes late with their reports and often not sufficiently self-critical in their reporting.¹⁰ The submission of shadow reports is helpful, but there is still a risk that these periodic assessments become ritualized and formulaic. Allowing *individuals* to lodge complaints can be an important part of the process of gradually coming to a clearer understanding about what social and economic rights entail and what constitutes a good faith effort on the part of States Parties to comply with their international legal obligations. The individual complaints mechanism is an important complement to the dialogue between the oversight committee and each state party.

First, individual complaints require the discussion of rights to move from abstract principles to concrete cases. It is difficult to define in the abstract what constitutes steps taken “to the maximum of [each State party’s] available resources”¹¹ without a concrete instance of what is “available” and what a reasonable “maximum” might be. But in the limited set of cases in which concrete allegations have been litigated in national courts, some progress on these issues has been made. In South Africa, concrete cases have led to rulings that the constitutional right to housing does not mean housing on demand, but rather a reasonable program to ensure emergency housing relief. Decisions taken by the Constitutional Court have held that

¹⁰ See Anne F. Bayefsky: “The UN Human Rights Treaty System: Universality at the Crossroads” located at <http://www.yorku.ca/hrights>.

¹¹ Paragraph 4 of the Preamble to the Optional Protocol to the ICESCR, GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008) (Optional Protocol or OP)

reasonable programs must take into account specific resource limitations.¹² Discussion of cases brought by individuals has largely vindicated the position that social and economic rights are justiciable,¹³ though cases must be carefully crafted and expectations managed.

Second, the individual complaint mechanism is an important form of civil society empowerment. It is a way to help interpret the law through the lives and experiences of living individuals. As an *inductive means* to understand the concerns of human beings, this process brings their issues to the table. More than any other source of policy review, the individual complaint process empowers the individual to name the particular deficiency and thereby help to set the agenda for addressing it. As a complement to State reporting, individual complaints could well put issues on the table that the back-and-forth between States and experts has neglected.

Third, allowing individuals to register their complaints with the Committee could very well encourage the development and use of *domestic* mechanisms to deal with citizen complaints. Article 3 of the OP stipulates that “The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted.”¹⁴ In some cases, public officials may decide to improve access to domestic remedies – whether through the courts, ombudsmen procedures, or alternative forms of dispute resolution. In any case, the necessity to exhaust domestic remedies will require individuals and groups to become much more informed about their State, their rights, and the interaction between the two. In many cases, they will learn about the *limits as well as the possibilities* for demanding attention to economic and social rights in their domestic context.

As a consequence, the right of individuals to complain to the Committee is likely to contribute to a clearer consensus on the meaning of the obligations contained in the ICESCR. Dealing inductively with cases as they arise in concrete circumstances – after exhausting domestic remedies – will contribute to the clarity of the rules over time. The legitimacy of that consensus will be enhanced by the Committee’s willingness to adopt local perspectives, to understand local constraints, and to appreciate (as the Optional Protocol requires) that there are multiple paths to the fulfilment of the treaty’s obligations. Often, individuals will discover that they just do not have a case; their government is in fact fulfilling its obligations or at least making a good faith effort to do so. This is as it should be. Citizens will not only get a lesson on empowerment, they will also be educated in the limits of their claims as well. Ratification of the Optional Protocol could therefore contribute to what a growing literature terms “transnational legal processes” in which interactions at multiple levels lead to norm internalization that in turn facilitates international law compliance generally.¹⁵

¹² *Government of the Republic of South Africa v. Grootboom*, 11 BCLR 1169 (CC) (2000). See the discussion for example in Cass Sunstein: *Designing Democracy: What Constitutions Do* (Oxford: New York: Oxford University Press 2001).

¹³ See for example (note 9 above) and Kristine Yigen: “Enforcing Social Justice: Economic and Social Rights in South Africa” 2000 4(2) *International Journal of Human Rights* 13.

¹⁴ See Article 3(1) of the Optional Protocol.

¹⁵ See Hongju Harold Koh: “How Is International Human Rights Law Enforced?” (1999) 74 (4) *Indiana Law Journal* 1397; Anne-Marie Slaughter: *A New World Order* (Princeton, N.J.: Princeton University Press 2004).

A number of sceptics, of course, do not think the OP holds such promise.¹⁶ Some view the individual complaint mechanism as yet another example of the over-judicialization of human rights,¹⁷ which is especially inappropriate, they argue, for economic and social rights. They worry that litigation is not the answer to serious developmental issues, maintain that economic and social rights are not justiciable, and believe that the right of individuals to complain would divert attention and resources from the real problems governments face.

It is patently obvious that no mechanism for complaining can compensate for severe resource constraints, corrupt and inefficient governments, or ill-conceived developmental plans. No one – not even the Optional Protocol’s most ardent supporters – would suggest otherwise. But crucially, the OP is a policy *complement*, not a *substitute*, for programmes that address dire economic needs and social inequality. Furthermore, the idea that this agreement constitutes an example of over-legalization is mistaken. The characterization of some commentators to the contrary notwithstanding,¹⁸ the OP is not a judicial or a litigatory mechanism in a strict sense.¹⁹ The Committee is not a “court”, and the procedures described in the OP are not designed to take a “strict violationist”²⁰ approach to the ICESCR. The Committee is empowered to receive and consider “communications”,²¹ not charges. If the Committee considers under exceptional circumstances that victims may suffer irreparable damage before it can consider the situation, it “requests”²² the State to take interim measures; it does not issue injunctions. Communications are to be transmitted “confidentially”²³ to the State Party and discussed in “closed meetings”,²⁴ in contrast to public accusations and proceedings in a trial setting. The State Party responds to the communication with “clarifying” statements, not a defence brief. Most importantly, the idea is to settle the complaint amicably, “with a view to reaching a friendly settlement”²⁵ – not explicitly to find guilt or to punish an offender. The Committee follows up its discussions by transmitting its “views” and “recommendations”, if any, to the parties concerned.²⁶ It does not render a verdict. At the end of the day, the State Par-

¹⁶ For a good summary of these and related concerns, see Dennis and Stewart, (note 4 above).

¹⁷ See Laurence R Helfer: “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes” (2002) 102 *Columbia Law Review* 1832.

¹⁸ See in particular Dennis and Stewart (note 4 above).

¹⁹ Some legal scholars have identified an individual right of complaint as a key ingredient in rendering any quasi-adjudicative institution more “court like”. See Laurence R. Helfer and Anne-Marie Slaughter: “Toward a Theory of Effective Supranational Adjudication”, (1997) 107(2) *Yale Law Journal* 107 273. This certainly need not be the case, however, and the OP to the ICESCR is designed to avoid the trappings of judicialization.

²⁰ This term is used by Dennis and Stewart (note 4 above).

²¹ See note 11 above, Article 1(1).

²² *Ibid.*, Article 5(1).

²³ *Ibid.*, Article 6(1).

²⁴ *Ibid.*, Article 8(1).

²⁵ *Ibid.*, Article 7.

²⁶ *Ibid.*, Article 9(1).

ty concerned is not fined or imprisoned. The extent of its obligation is to “give due consideration to the views of the Committee” and provide a written response within six months.²⁷ That’s all. And yet, opponents of the OP worry about “overreaching legal positivism”²⁸ and frame the entire project as one of ambitious judicialization. Perhaps to the chagrin of some NGOs, States Parties were quite careful *not* to create a court on “violationist” premises to render verdicts on the violation of economic, social and cultural rights.

With this in mind, we should clear away some misunderstandings. The protocol does not substitute the decision of an international court for local legislative decision making. External enforcement (since there is none) will not undermine these rights’ stature and acceptability. “Litigation” will not crowd out other approaches, since the process of communication outlined in the protocol is not designed to supplant local approaches to local economic and social issues, but rather to complement them. The idea that the optional protocol represents over-legalization run amok is a contorted caricature of the protocol.

Once we correctly understand that we are not in the world of litigation, but instead in the world of communication and persuasion, many of the arguments against ratification of the Optional Protocol lose their bite. The whole debate over the justiciability of the progressive realization of rights is far less ominous when the purpose is dialogue and persuasion rather than “strict violationism”. The concerns that standards for compliance with the ICESCR are not currently very precise²⁹ miss the point that improving shared understandings of these standards is what the individual complaints process is designed to do, in a non-litigious mode. Nor is the debate over the justiciability of economic/social rights versus civil/political rights – urgent, perhaps, in the domestic context – of central importance in the decision to ratify the OP.³⁰ Hundreds of pages have been written about whether the ICESCR will now be expected to be implemented immediately and in toto, on pain of the Committee’s “view” that a State Party has failed to do so. Instead, the individual complaint process can and ought to focus on what constitutes *reasonable progress* in implementing these rights.³¹

²⁷ Ibid., Article 9(2).

²⁸ See Dennis and Stewart 2004 (note 4 above).

²⁹ Ibid.

³⁰ The debate is well encapsulated in a recent pair of articles. See James L. Cavallaro and Emily J. Schaffer: “Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas” (2004-2005) 56 *Hastings Law Journal*, who argue that there are fundamental differences between these clusters of rights that should inform the framing of litigation, and Tara J. Melish: “Rethinking The ‘Less as More’ Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas” (2006) 39 *New York University Journal of International Law & Politics* 171, who argues that such distinctions can actually be counterproductive to the advancement of human rights.

³¹ This seems to be the approach of the Constitutional Court in South Africa, for example, in the Grootboom case, where the court required reasonable programs with careful attention to limited budgets. *Government of the Republic of South Africa v. Grootboom*, 11 BCLR 1169 (CC) (2000).

The focus on litigiousness has obscured an important aspect of individual complaints to the international community: these complaints can complement and support broader domestic social movements to prod governments to change public policies and priorities. The most important consequences of significant cases will not so much be the formal findings, but the inspiration the case provides to groups, coalitions, and social movements to press an issue forward on multiple fronts. Indeed, far from being an alternative to “legitimate political processes”,³² the publicity surrounding individual complaints can be used to bolster them. A finding that the government has not lived up to its obligations would add at least a bit of weight to people’s demands that their government take economic and social deprivation and discrimination seriously. It could certainly be useful for framing demands to governments and legislatures. These cases should provide inputs into domestic political processes, not replace those processes.

C. WILL RATIFICATION MATTER? EVIDENCE FROM THE ICCPR

“We see no convincing evidence that a legally binding adjudicative mechanism would lead to greater compliance by states with the ICESCR obligations.”³³ This section will provide such evidence. With the caveat that it is impossible to prove an institution’s empirical consequences before it has been established, and with the further caveat, as I have argued above, that the protocol is not strictly speaking an *adjudicative* mechanism, this section argues that such evidence is not only available, it is suggestive of salutary consequences for the individual right to complain. This section shows that ratification of the Optional Protocol to the ICCPR is in fact associated with improvements in civil rights practices in the countries that have ratified. There are good reasons to think that a similar process stands a chance of improving rights outcomes in the area of social, economic, and cultural rights as well.

The closest we can come to understanding the effect of the ICESCR’s Optional Protocol is to look at an analogous commitment: the ICCPR’s first optional protocol. How “successful” has that provision been? While there has been much speculation, and a few spectacular cases in which the abuse of the ICCPR’s individual complaint process has backfired,³⁴ prac-

³² The Committee’s General Comments acknowledge that the realization of economic social and cultural rights require domestic implementation through legislation, administrative decision and reform, and budgetary measures, and other measures; not a fiat from a committee of external experts. See the discussion in Dennis and Stewart (note 4 above).

³³ Dennis and Stewart, note 4 above. This and similar statements elsewhere in the literature on the effects of international human rights agreements cites research by Oona Hathaway: “Do Human Rights Treaties Make a Difference?” (2002) 111 *Yale Law Journal* 1935-2042. New research suggests there are likely to be much more positive consequences to international human rights treaties. See for example Mark M. Gray, Miki Caul Kittilson and Wayne Sandholtz: “Women and Globalization: A Study of 180 Countries, 1975–2000” (2006) 60(2) *International Organization* 293-333; and Simmons (note 5 above).

³⁴ Helfer (note 17 above).

tically no systematic evidence has been brought to bear on this question. To what extent has an OP commitment to the ICCPR influenced the quality of civil rights among its signatories? Certainly we can think of theoretical reasons that the OP might have positive effects on civil rights: States may try to improve their practices pre-emptively, anticipating the possibility of closer scrutiny touched off by the complaints of an individual;³⁵ State officials might improve their practices in direct response to discussions with and/or views of the HRC; or, State policy changes might be a much more complex response to the increased salience of a broader social movement that may have inspired the case in the first place. In short, there are a number of ways individual complaints might have effects that do not require the fist of centralized enforcement from the international community.

To proceed, we need a measure of civil liberties. Freedom House, a non-profit and non-governmental organization, has compiled civil liberties scores ranging from 1 to 7 based on a broad range of subcomponents,³⁶ and which parallels many of the basic requirements of the ICCPR. I develop a model that is extraordinarily stringent. Ordinary least squares are used,³⁷ pooling observations both across cases and over time, with the “county-year” as the unit of analysis. In every case, the dependent variable is *change* in actual civil liberties since the previous year. Positive coefficients therefore indicate *improvements* in civil liberties from year to year. In order to control for the baseline from which change is measured, I include a lagged measure of the level of civil liberties in the previous period. Because there is a range of possible explanations for civil liberties that vary by country or region, but not across time, country

³⁵ Malcolm Langford and Jeff King cite the example of the ICCPR’s Optional Protocol as encouraging the Australian High Court to anticipate and incorporate international law in interpreting common law. See Malcolm Langford and Jeff A. King: “Committee on Economic, Social and Cultural Rights: Past, Present and Future” in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 477, 514.

³⁶ The complete checklist can be accessed at <http://www.freedomhouse.org/research/freeworld/2000/methodology3.htm> (accessed 15 July 2003). The measure considers freedom of the media to express ideas (ICCPR, Article 19(2)), free religious expression (ICCPR, Article 18(1), Article 27), freedom of assembly (ICCPR Article 21), independent judiciary (ICCPR, Article 14(1)), equal protection of the laws (ICCPR, Articles 14(3), 26), protection from unjustified imprisonment and torture (ICCPR Article 7, 9(1)), freedom of movement (ICCPR Article 12), equal rights in marriage (ICCPR Article 23). Freedom House does use a broader set of considerations in addition to those with specific parallels in the treaty. For example, they consider trade unions and collective bargaining, freedom from war and insurgencies, freedom from extreme government indifference and corruption, and freedom from indoctrination by the state, none of which are explicitly addressed in the ICCPR. Nonetheless, there is a high degree of overlap. The civil liberties indicator parallels reasonably closely the spirit of the civil protections enumerated in the ICCPR.

³⁷ An instrumental variable ordered probit model would have been preferable given the categorical nature of the data (changes in the civil liberties index are typically though not exclusively 0s and 1s) but a two-stage ordered probit model would not converge when including country fixed effects. I made the decision to retain the fixed effects and use ordinary least squares regression.

fixed effects³⁸ are included in every specification. Thus, any differences reported in civil liberties correspond to changes within countries over time, and not to differences among countries themselves.

But how can we distinguish the effects of ratifying the Optional Protocol on actual human rights, when the root cause might be some factor that explains both ratification and civil liberties improvements? Governments might have improved their practices, whether or not they have ratified a treaty obligating them to do so. I account for this possibility by using instrumental variables³⁹ to model the decision to ratify the Optional Protocol in the first place. I use a two-stage approach, in which all of the variables that explain the behavioural outcome are used to estimate the first-stage ratification decision. This approach helps us to estimate the effects of ratification, once we have accounted for all of those factors which explain ratification in the first place.

Of course, many factors can make it more or less likely that a government will expand or contract the civil liberties offered to its citizens. Many of these are reflected in the control variables. (Note that all variables are defined in the Data Appendix.) One of the most important controls is the level of civil liberties in the previous period. Extremely liberal governments naturally have less room to improve than more restrictive ones. The better the existing practices, the less likely we are to see improvements. Another control is change in the quality of democracy itself. Controlling for the level of democracy makes for a very conservative test of our primary hypothesis about the role of the ICCPR's OP. This specification refuses to credit treaty ratification with improved civil liberties protection when that credit should go to the broader processes of democratization that we have witnessed over the course of the past two decades. Similarly, I control for domestic efforts to bring governmental abuses out into the open and under control by including each country's experience with domestic truth commissions and the use of criminal human rights trials. It is very likely that a government willing to prosecute or to expose abuses of the past is itself more likely to respect its citizens' civil rights.

Two other variables also capture the broad processes of transition and democratization and their possibly contagious nature. I include the level of civil liberties in a country's region in the previous period as a potential influence. It is very plausible that liberties diffuse from country to country directly as citizens observe the practices of their near neighbours and come to expect similar freedoms from their own governments. I also include year dummies for the transition years from the Cold War to the post-Cold War periods (1990 and 1991). These were certainly years of commonly experienced shocks associated with civil rights liberalization. While the ideals of the ICCPR may have in fact inspired some of the changes of this period, the specifications below control for the widespread liberalizations associated with the end of

³⁸ These are columns of dummy variables (1 or 0) that distinguish one country from another over time.

³⁹ The instruments I use are: regional OP ratification density, domestic ratification processes (the constitutional ratification hurdle), and the country's legal heritage (whether it is a common or civil law system). These variables influence ratification, but they bear no significant relationship with the rights outcomes of interest here. See the more elaborate justification provided in Simmons (note 5 above).

the Cold War. In short, if there are any positive effects associated with ratification of the ICCPR, they are not being driven by these transition years alone.

I also control for civil wars, which are notoriously associated with the degeneration in civil liberties when governments perceive their nation's security to be at stake. This is a simple dichotomous measure of whether a country was embroiled in a civil war or not during the year in question. I also control for a country's degree of social heterogeneity, since it is not unlikely that governments in more heterogeneous social settings use their power to favour some groups and to repress others. This is the log of the combined measure of religious, linguistic, and ethnic "fractionalization".⁴⁰ This variable does not vary over time. The greater the total fractionalization in a given society, the more repressive we might expect the government to be. And finally, I consider the influence of external providers of development assistance. Because most of this aid comes from the more liberal democracies, there is a possibility that aid dependence is associated with improved civil liberties over time. Whether this might be due to conditional aid or subtler processes of socialization and learning, aid dependence is expected to be positively associated with improvements in civil liberties.

The results of these tests are reported in Table 1. Ratification of the ICCPR's Optional Protocol may have some effect on civil liberties, but as we might expect, it is hardly the only or even the strongest effect among the factors considered here. These results suggest that the right of an individual to complain to the HRC about an ICCPR violation is associated with a .09 increase in the 7-point civil rights scale. Certainly this is not a huge effect, but it is detectably better than no effect at all. The scale of the effect can be compared to the effect of criminal prosecutions for human rights abuses (which are estimated to be associated with an improvement of .12 on the scale) and a domestic truth commission, which delivers (with somewhat high confidence) an improvement in civil liberties about three times higher.⁴¹

All of the control variables behaved as expected, and most were highly statistically significant. Certainly, the previous *level* of civil rights strongly predicts *changes* in the opposite direction. The better the practices in a country's region on average, the more likely a government itself is to improve its own civil liberties. A change in a country's level of democracy in the previous period is almost certainly likely to result in improved civil liberties in the next, as is overseas development assistance as a proportion of GDP. The transition years marking the end of the Cold War (1990-91) were clearly associated with civil liberties improvements compared to all other years.

We can conclude that there is *some* evidence that ratification of the ICCPR's Optional Protocol has made some difference in the likelihood that civil liberties will improve in the ratifying country, subject to some caveats. Despite the inclusion of many variables that represent processes that unfold over time, it is hard to tell whether there still may be some time-depend-

⁴⁰ Each component of this measure captures the likelihood that any two individuals drawn randomly from the population will be from the same religious, linguistic, or ethnic group. They are totalled, and the log of the sum (plus one) is taken to reduce the influence of extreme outliers.

⁴¹ Note however, that while treaty ratification is endogenous in this model, truth commissions are not. So it is not clear what advantage truth commissions would deliver above and beyond the conditions which were associated with setting them up in the first place.

TABLE 1: EFFECT OF ICCPR OPTIONAL PROTOCOL RATIFICATION ON CIVIL LIBERTIES IMPROVEMENTS (POSITIVE CHANGE)

*Instrumental Variable Regression
Regression coefficients (p-values)*

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 7
Optional protocol obligation (t-1)	.099* (p=.067)	.092* (p=.074)	.093* (p=.068)	.090* (p=.097)	.083 (p=.127)	.087 (p=.119)
Civil liberties level (t-1)	-.214*** (p=.000)	-.217*** (p=.000)	-.217*** (p=.000)	-.233*** (p=.000)	-.236*** (p=.000)	-.241*** (p=.000)
Civil liberties in region (t-1)	.117** (p=.018)	.188*** (p=.001)	.114** (p=.023)	.113*** (p=.008)	.059 (p=.268)	.116** (p=.034)
Democratic improvement (t-1)	.021*** (p=.001)	.020*** (p=.002)	.020*** (p=.002)	.019*** (p=.003)	.018*** (p=.005)	.019*** (p=.004)
Civil war	-.190*** (p=.001)	-.188*** (p=.001)	-.192*** (p=.000)	-.222*** (p=.000)	-.231*** (p=.001)	-.241*** (p=.000)
Fractionalization	-.521** (p=.031)	-.562** (p=.021)	-.559** (p=.021)	.288*** (p=.004)	.571*** (p=.001)	.324*** (p=.002)
Criminal trials	--	.130* (p=.053)	.129* (p=.052)	.127* (p=.074)	.134* (p=.070)	.130* (p=.080)
Domestic truth commission	.282*** (p=.007)	.266** (p=.012)	.268** (p=.012)	.271** (p=.012)	.267** (p=.011)	.265** (p=.015)
1990	.245*** (p=.009)	.244*** (p=.087)	.245*** (p=.009)	.256*** (p=.009)	.252*** (p=.007)	.247*** (p=.010)
1991	.110* (p=.094)	.113* (p=.083)	.114* (p=.081)	.131* (p=.053)	.136** (p=.043)	.119* (p=.085)
Human Rights Commission member	--	--	.021 (p=.506)	--	--	--
Economic growth rate	--	--	--	.001 (p=.659)	--	--
Trade share in GDP	--	--	--	--	.002** (p=.042)	--
Overseas Development Aid/ GDP (logged), t-1	--	--	--	--	--	.591 (p=.191)
Number of countries	128	128	128	127	127	127
Number of observations	2308	2308	2308	2135	2094	2111
R-squared	.143	.145	.146	.162	.175	.169

*=significant at .10 level **=significant at .05 level ***=significant at .01 level

Note: country fixed effects included but not reported here.

Based on robust standard errors, clustering on country.

Note: includes only states that have ratified the ICCPR.

ent process that is associated with both ICCPR ratification and civil liberties improvements.⁴² While these results are suggestive of a positive relationship between ratification and improvements in a broad measure of civil liberties, they should be interpreted cautiously. Of course, different variables in addition to ratification of the OP are likely to explain economic, social and cultural rights, including various measures of development and economic and bureaucratic capacity. Still, there is some evidence to suggest that the individual complaints mechanism of the ICCPR is associated with modest improvements in civil liberties, controlling for many other possible explanations.

D. RATIFICATION AND EMULATION: WHY EVEN COUNTRIES WITH DOMESTIC ESC RIGHTS GUARANTEES SHOULD RATIFY THE PROTOCOL

I have argued above that ratification of the ICESCR's OP will put new issues important to individuals on the table for discussion and that this process could very well have salutary effects in those countries. But why should a country that has already made ample provisions in its own law for economic, social and cultural rights ratify? Surely in countries already in substantive compliance with the treaty, ratification will make little difference to the quality of life and the security of rights for individuals within those countries. There are still good reasons, however, for States in compliance to ratify the OP: *it will encourage other States to do so*. Emulation effects could very well contribute to a virtuous spiral in which rights leaders ratify, others follow their example, the dialogue over individuals' complaints begins, expectations converge, local political pressure for compliance increases, and responsible government agencies and legislatures consider their policy alternatives in the light of new interpretive information about the legitimate range of ways a state may fulfil its international legal obligations.

But do States really emulate the ratification decisions of others?⁴³ Once again, we can turn to analogous treaty provisions for evidence. Four important human rights conventions – the ICCPR, the CERD, the CEDAW, and the CAT – have optional protocols or complaint procedures analogous to that of the ICESCR.⁴⁴ Only the ICCPR contains the further option of

⁴² For example, when a time trend is included, it disturbs these results by increasing greatly the ICCPR standard errors (making it harder than ever to tell whether there is a relationship). Furthermore, the results are also weakened significantly when year fixed effects are included.

⁴³ There is a burgeoning literature on policy diffusion that explores – quantitatively and qualitatively – the various mechanisms that explain this observed tendency for States to adopt policies that have been adopted by others. For a recent review of the literature and some empirical tests, see Simmons et al.: *The Global Diffusion of Markets and Democracy* (Cambridge: Cambridge University Press 2008).

⁴⁴ Optional Protocol I of the ICCPR, for example, specifies that “A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.” Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI),

committing to allow other *States* to lodge violation complaints with the Human Rights Committee (though it has never been exercised).⁴⁵ By examining governments' willingness to take on commitments that progressively expose them to greater authoritative external scrutiny, we can test the proposition that States tend to emulate one another's ratification decisions.

I use what is called a hazard model to test for the factors that significantly raise the probability that a State will ratify one of these optional obligations in any given year, given that it has not yet done so. The explanatory variables raise (or lower) the proportionate "risk" or "hazard" that a State will ratify. Strictly speaking, this hazard model analyzes *time to ratification*, taking into account that some States will never ratify. The effects I report are called "hazard ratios." Factors that raise the relative likelihood of ratification take on hazard ratios-greater than one; those that reduce the likelihood, less than one. We are interested in the hypothesis that the more States within a country's region ratify one of these Optional Proto-

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. For a discussion of how this mechanism works see De Zayas et al.: "Application of the ICCPR under the Optional Protocol by the Human Rights Committee" (1985) 28 *German Yearbook of International Law* pp 9-64. The Optional Protocol of the Convention on the Elimination of all forms of Discrimination Against Women provides that "A State Party to the present Protocol ... recognizes the competence of the Committee on the Elimination of Discrimination against Women ... to receive and consider communications ... 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 rights set forth in the Convention by that State Party." Articles 1 and 2, Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* December 22, 2000. In the case of the CERD, a similar option is spelled out in Article 14, which reads: "A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention." Article 14, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* January 4, 1969. Similarly, the CAT contains a provision for optionally establishing such an obligation. According to Article 22, "A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention." 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.

⁴⁵ This option is contained in Article 41: "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration." 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* March 23, 1976.

TABLE 2: RECOGNITION OF INTERNATIONAL AUTHORITY TO RULE ON COMPLAINTS
Cox proportionate hazard model
Hazard ratios (p-values)

<i>Explanatory Variables:</i>	<i>State-to-state right of complaint:</i>	<i>Individual Right of Complaint...</i>			
	ICCPR Art 41	ICCPR OPI	CERD Art. 14	CAT Art. 22	CEDAW OP
Regional Ratifications	1.02* (p=.095)	1.018*** (p=.002)	1.34** (p=.016)	1.04* (p=.09)	.995 (p=.777)
Democratic since WW1	2.55 (p=.11)	3.58*** (p=.026)	6.34** (p=.032)	2.95 (p=.17)	5.81** (p=.011)
Democratic Since WW2	.976 (p=.973)	2.45* (p=.089)	4.45** (p=.04)	1.51 (p=.55)	6.99** (p=.012)
Newly Transitioned Democracy	1.58 (p=.482)	3.28*** (p=.000)	1.90 (p=.353)	4.88*** (p=.005)	4.64*** (p=.040)
British Legal Heritage	.529 (p=.181)	.509* (p=.065)	.119*** (p=.001)	.458* (p=.081)	.538 (p=.332)
Left Government	--	2.03*** (p=.007)	--	1.72 (p=.17)	--
Log GDP	1.16 (p=.147)	.806*** (p=.004)	1.07 (p=.613)	1.21* (p=.062)	.938 (p=.457)
GDP/capita	1.00 (p=.92)	1.00 (p=.26)	.999 (p=.168)	1.0001* (p=.056)	1.00 (p=.983)
#of countries	149	134	144	149	148
#of ratifications	37	70	29	35	27
#of observations	3677	2097	3465	1854	423
Prob >chi2	0.000	0.000	0.000	0.000	0.000

* significant at the .10 level ** significant at the .05 level ***significant at the .01 level

cols (that is, the greater the density of ratification within a State's region), the more likely a State itself is to do so. In other words, the hypothesis is that the more States within the region ratify, the more a country feels pressure – whether moral or political – to do so as well (controlling for other obvious influences).

Table 2 shows that emulation of neighbouring States' ratification behaviour is strong. Breaking up the world into nine regions (defined by the World Bank), the densities of ratification within those regions is a fairly reliable predictor of a given country's ratification. The hazard ratios are all positive and statistically significant (except for the case of the Convention on the Elimination of Discrimination Against Women). Every percentage point increase in the proportion of States within one's own region increases the likelihood that others will also ratify – for the ICCPR, by 1.8 per cent, for the CERD by 34 per cent, and for the CAT by about 4 per cent. We can be between 91 per cent certain (for the CAT) and 99.8 per cent certain

(for the ICCPR) that these relationships are not likely to have been generated by chance alone. Strong regional effects for ratification of individual complaint mechanisms obtain even we control for the influence of the quality and stability of democracy, the tradition of the local legal system, whether the government in power can be considered “left leaning”, and controlling for size and wealth of the country. Governments look to others in their region for signs of what is appropriate and expected. They often know their reputations will be judged in comparison to others in their region. This “demonstration effect” can be encouraged if some States take a leadership position and ratify the Optional Protocol. As I have argued in the section above, there is a good chance the added scrutiny and the enhanced dialogue about rights themselves will nudge policies in a positive direction.

E. CONCLUSIONS

This essay, rather than concentrating on a legal analysis of the ICESCR and the Optional Protocol, has argued in a consequentialist vein that ratification of the Optional Protocol *might help*. No one can say for sure, but the Optional Protocol invites new issues – important to actual human beings who live daily with their perceived injustices and deprivations – to be put on the table for discussion. As many have done, I have taken the position that such discussions have the potential to encourage better understandings of what the ICESCR requires. Unlike many, however, I do not see this as an example of the “judicialization” of human rights. Indeed, there is some prospect that the Committee will learn of some of the limits and frustrations of States in their attempts to comply with their obligations as much as they promulgate their own “views”. These cases could help shape expectations about the meaning of the treaty. This is especially important where there is a lingering perception that economic, social and cultural rights are not justiciable.⁴⁶

Alarmists worry that the Committee will engage in over-reach; others may be concerned that activists will abuse the complaint process to force governments’ hands in an unproductive way that does nothing but produce backlash. Some reflection should suffice to conclude that these concerns are probably overdrawn. Human rights advocates want rights to improve. Many have come to realize that “litigation strategies that are not linked to other forms of pressure rarely achieve major impact and often are irrelevant in a way that undermines the strength of supranational judicial bodies.”⁴⁷ Governments also have incentives to support improvements; empirical work has shown that higher productivity levels are associated with the better provision of certain economic and social rights.⁴⁸ Moreover, the Committee has no incen-

⁴⁶ Research in specific country contexts suggests the assumption that social, economic and cultural rights are non-justiciable is not very well founded. See Pieterse (note 9 above) with respect to South Africa and Melish (note 30 above) with respect to Latin America.

⁴⁷ Cavallaro and Schaffer, note 30 above.

⁴⁸ See Lorenz Blume and Stefan Voigt: *The Economic Effects of Human Rights*, Discussion Papers in Economics No. 66/04, 2004, Institute of Economics, University of Kassel.

tive to make ridiculous demands that States Parties are in no position to implement.⁴⁹ Their influence depends on maintaining the respect of governments.⁵⁰ Without that respect, their own legitimacy – their sole source of power - will be undermined. The ICESCR itself and the history of its drafting clearly acknowledge that compliance with the treaty is consistent with a broad range of developmental philosophies, strategies, and social/political systems.⁵¹

There is some reason to believe that empowering individuals to complain might nudge governments to take economic, social and cultural rights more seriously. Evidence from the ICCPR suggests that ratification of that treaty's analogous OP is associated with improvements across a broad measure of civil rights.⁵² We should have no illusions, however, that such results will be easy or automatic. In particular, no one should expect ratification of the Optional Protocol to make a big dent in the kinds of indicators cited at the beginning of this essay. As put by Mark Malloch Brown, “you cannot legislate good health and jobs. You need an economy strong enough to provide them” (UNDP, 2000: iii). Neither the Optional Protocol, nor the ICESCR for that matter, is a substitute for a reasonable development policy. But development also requires a government accountable for the distributional decisions it makes with a society's resources. Ratification of the Optional Protocol is a modest step in that direction, and governments should be encouraged to ratify.

DATA APPENDIX

Description of the data used for the quantitative analysis in this article can be found at <http://www.humanrights.uio.no/forskning/publikasjoner/ntmr/2009/1/innhold.html> or <http://scholar.iq.harvard.edu/bsimmons/should-states-ratify-protocol>

⁴⁹ Nor do they have the authority, as it is broadly understood that the ICESCR requires progressive implementation. Article 2(1).

⁵⁰ This is a point made by many analysts, see for example Cavallaro and Schaffer, (note 10 above), at 220. More broadly there is a significant literature on strategic judges which suggests that they are motivated to render decisions that have some probability of being complied with, not over-ruled, and not frustrated by other governmental bodies. See, for example, Geoffrey Garrett et al.: “The European Court of Justice, National Governments, and Legal Integration in the European Union” (1998) 52 *International Organization* 149-76. 1998; Pablo T. Spiller and Raphael Gely: “Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labour-Relations Decisions, 1949-1988” (1992) 23 *Rand Journal of Economics* 463. While I have argued the OP is not a judicial process, the general findings of this literature should assuage to some extent concerns that the Committee will ask States to do the impossible.

⁵¹ Alston and Quinn (note 4 above).

⁵² Others have made the argument that coherence requires a holistic approach to the entire panoply of human rights. See, for example, Rolf Künemann: “A Coherent Approach to Human Rights” (1995) 17 *Human Rights Quarterly*, 323-42.

SHOULD NORWAY RATIFY THE OPTIONAL PROTOCOL TO THE ICESCR? – THAT IS THE QUESTION

STEIN EVJU*

Abstract: *Is there sound reason for Norway to not ratify the Optional Protocol to the ICESCR? This question is discussed in view of general principles of international law, the author's experience as an adjudicator within the European human rights system and developments in domestic case law. It is submitted that the better arguments are in favour of ratifying the Optional Protocol and that not doing so may prove to be counter-productive, in particular at the international level.*

Keywords: *United Nations, Economic Social and Cultural Rights, Council of Europe European Social Charter, Human Rights, Complaints Procedures, Norway.*

A. INTRODUCTION

At issue is whether Norway should ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ This question begs being asked in reverse. Is there any reason why Norway should fear the Protocol?

Answering this question draws one into wider socio-legal and political theory perspectives and a long-standing debate in Norway on the role of human rights standards and their possible impact on domestic law, democracy and governance.² The issue has proliferated in a variety of contexts and the opening article of this Special Issue also discusses two of the proposals made by Norway during the drafting of the Optional Protocol which arise from this domestic debate. I begin my discussion though by commenting briefly on the nature of the human rights standards concerned, and subsequently turn to their enforcement and the possible consequences of either acceding or not acceding to the Optional Protocol. In this article, I

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¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008).

² This was brought to the fore in the preparatory work to the 1999 Human Rights Act (Act No. 30 of 21 May 1999 on “styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)”; see NOU 1993: 18 Lovgivning om menneskerettigheter and Ot.prp. nr. 3 (1998-99).

will draw particularly on the experience of the European human rights system and its relationship with Norwegian domestic law.

B. STANDARDS OF A DIFFERENT NATURE?

A frequently used and familiar argument against economic, social and cultural rights is that such rights are not truly justiciable. They are vague, discretionary, and do not really lend themselves to enforcement.³

For nearly 60 years this debate has rumbled, creating something of a schism between classic civil and political rights and freedoms on the one hand and social and economic rights and standards on the other hand. Whereas both sets of rights are encompassed by the Universal Declaration of Human Rights (UDHR), they have been divided in the subsequent elaboration of some human rights treaties, eschewing the indivisibility and interdependence of human rights expressed in the UDHR. This is the case at the UN and European level with largely separate treaties on both sets of rights: International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ and the International Covenant on Civil and Political Rights (ICCPR).⁵ However, more recent treaties on children rights and rights of persons with disabilities accept the indivisibility of human rights, incorporating both groups of rights and not drawing overly sharp distinctions between them.⁶

Still, the argument of non-justiciability is largely untenable. Pushed to the extreme, it amounts to reducing economic, social and cultural rights to non-binding declarations of good intentions. On a principled level, it rejects the very notion of the indivisibility and interdependence of human rights. Notwithstanding the ideological schism captured in older international and European human rights treaties, the indivisibility, interdependence and interrelationship remains at the core of human rights and has been reiterated and reinforced, on a general level as well as in specific contexts by States.⁷

³ See also discussions in this Issue by Langa and Langford.

⁴ 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.

⁵ 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.

⁶ See generally, e.g., Tadeusz Jasudowicz: "The Legal Character of Social Rights from the Perspective of International Law as a Whole", in: Krzysztof Drzewicki, Catarina Krause and Allen Rosas (eds.): *Social Rights as Human Rights. A European Challenge* (Åbo: Institute for Human Rights 1994), 23-42; Roman Wieruszewski: "Some Comments concerning the Concept of Economic and Social Rights", *ibid.* 67-71; Jeff Kenner: "Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility", in: Tamara Hervey and Jeff Kenner (eds.): *Economic and Social Rights in the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford/Portland 2003), 1-25; Håkan Gustafsson, "Taking social rights seriously", in "Om sociala rättigheters status", 2005 *Tidsskrift för rettsvetenskap*, 439."

⁷ See, e.g., the Vienna Declaration and Programme of Action (1993) (UN General Assembly, A/CONF.157/23), para. 5; and the Preamble to the European Social Charter (revised), 1996 (RevESC) (ETS 163).

Pragmatically, it is difficult to distinguish between civil and political and economic, social and cultural rights. From a functional perspective there simply is no sharp dividing line. First, whether a provision is contained in a civil and political rights or an economic, social and cultural rights instrument cannot be decisive. Notwithstanding the historical background, the division into different instruments is essentially formal. The European conventions serve as a useful illustration in this regard. The European Convention on Human Rights (ECHR)⁸ also encompasses social rights, covering several dimensions of the right to health, access to health-care, rights to social benefits, the right to a healthy environment, and the right to housing, respectively.⁹ These topics are also addressed by the European Social Charter,¹⁰ i.e., specifically Articles 11, 12 and 13, and 31.¹¹ In short, the ESC is the European social and economic rights convention, albeit the legal protection it gives is not the same as that provided by the ECHR. Likewise, Article 11 of the ECHR (freedom of assembly and association) intersects with the broader rights to organise and to collective bargaining in Articles 5 and 6 of the European Social Charter. All in all, there is considerable overlap in the scopes of the two conventions and the two traditionally classified sets of rights. The classic distinction does not correspond to a dichotomy in substance.

Second, there is no clear-cut distinction between the two types of instruments as regards the level of precision of these provisions. For example, Articles 8, 9, and 10 of the ECHR, or Article 6(1) for that matter, can hardly be seen to lay down precise rules or easily applicable standards devoid of discretionary assessments. While many provisions of a similarly abstract nature can be identified in the European Social Charter, e.g., Articles 11-13, 30 and 31, a number of other Charter provisions are very precise, down to minute details, such as Articles 2 and 7. The examples could easily be multiplied but there is no reason here to elaborate; they are plain for all to see.

The key point is straightforward: there is no principled or systematic distinction between rights conventionally denoted civil and political and those denoted economic, social and cultural rights. Which of these rights are the more problematic in terms of (lack of) precision or the more ominous as regards possible impact at national level? There is no simple answer to this question; it depends on the individual provisions and circumstances pertaining to a pos-

⁸ Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ETS 5).

⁹ See from recent case law of the European Court of Human Rights (ECtHR) e.g. the judgments in *Tysiac v Poland* (20.03.2007; Article 8), *Dybeku v Albania* (18.12.2007; Article 3), *Luczak v Poland* (27.11.2007; Article 14 + P1-1), *Lemke v Turkey* (05.06.2007; Article 8), *Wallowa and Walla v The Czech Republic* (26.10.2006; Article 8 – implicitly, see para. 77). For an in-depth discussion, see Luke Clements and Alan Simmons: “Sympathetic Unease: European Court of Human Rights”, in Malcolm Langford: *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 409-427.

¹⁰ European Social Charter, 1961 (ETS 35) and European Social Charter (revised), 1996 (RevESC). For an overview of the various ESC instruments, see Stein Evju: “The European Social Charter – Instruments and procedures”, (2007) 25 *Nordic Journal of Human Rights*, 58.

¹¹ ESC Article 11 concerns the right to health, Articles 12 and 13 deal with the right to social security and the right to social assistance, and Article 31 is concerned with the right to housing.

sible problem situation. Provisions on economic, social and cultural rights as set out in the ESC are not *per se* less or more justiciable or suited to judicial enforcement than are ECHR provisions, whatever their substantive topic.

Obviously, human rights standards may impinge on governmental decision-making. That is in their very nature and purpose. In so doing, human rights standards may have fiscal consequences and affect domestic policy-making and resource allocation. The impact may potentially be considerable. Issues to do with protecting the environment are but one example, and may be illustrated by the judgment of the European Court of Human Rights in *Lemke v Turkey*¹² and the European Committee on Social Rights in *Marangopoulos Foundation for Human Rights (MFHR) v Greece*.¹³ The same is true for many other human rights matters.

Arguably, provisions contained in economic, social and cultural rights instruments can be seen to possess a larger potential to impact on governmental decision making and, in particular, resource allocation than those concerning civil and political rights. But civil and political rights are also not cost free. Again, the dividing line is not clear. Either way, in discussing which human rights provisions are more or less worthy of acceptance, citing differing financial impacts is a rather tenuous argument. It amounts, in the end, to ranking rights not by content but by costs – which is evidently unacceptable purely as a matter of principle.

C. THE OPTIONAL PROTOCOL – THREAT OR INCONVENIENCE?

1. SETTING AND PERSPECTIVES

The question, then becomes whether ratification by Norway of the Optional Protocol is likely to have a negative impact at domestic level, either in quantitative or in qualitative terms, or both. One observation is self-evident as a point of departure. The Convention itself, ICESCR, has been ratified by Norway, albeit with a reservation regarding one point,¹⁴ and is incorporated into domestic law.¹⁵ That is, the substantive human rights standards have been subscribed to and are as such applicable at the national level. Whether to accede to the Optional Protocol is, therefore, primarily, a question of enforcement and the enforceability of the standards already accepted.

Whether ratifying the Protocol turns out to be negative is a multi-faceted question. To start with, it should be recalled that Norway *has* ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)¹⁶ and the complaints mechanism of the European Social Charter supervisory system. The latter, in particular, may add perspective and provide a background for reflection in particular on the point of quantitative impact.

¹² Application No. 17381/02.

¹³ Collective Complaint No. 30/2006.

¹⁴ Norway signed in 1968 and ratified on 13 September, 1972, without accepting Article 8(1)(d) on the right to strike, however.

¹⁵ By the Human Rights Act, 1999 (see note 2 above).

¹⁶ Optional Protocol of 1966 (UNTS vol. 999, p. 171), signed by Norway in 1968 and ratified on 13 September, 1972.

2. THE ESC AND COLLECTIVE COMPLAINTS

Norway has ratified the European Social Charter (1961) as well as the Revised European Social Charter (1996) which superseded the former upon ratification.¹⁷ At the outset, there were only minor differences between the 1961 Charter and the ICESCR as far as their thematic scope is concerned. Now, the situation is different. The Revised Charter spans a broader spectrum of rights than those encompassed by the ICESCR. Further, the provisions of both Charters are generally framed in more detail and more precisely formulated than those of the ICESCR.

Nonetheless, it was considered undesirable to include the European Social Charter among the human rights instruments being incorporated into domestic law by the 1999 Human Rights Act. The underlying reasoning is flawed and rather tenuous.¹⁸ It may however be perceived as an expression of reluctance to accept more precise and thus more binding norms into the universe of immediately applicable rules in domestic law.

On the other hand, Norway has acceded to the specific complaints mechanism which is now a part of the supervisory machinery of the Charters, the Collective Complaints Procedure.¹⁹ Just like the Optional Protocol to the ICESCR, it spans the full scope of the Charter; the Collective Complaints procedure covers all of the substantive provisions of the relevant Charter. But there are other and quite significant differences between the two.

Firstly, under the Collective Complaints procedure there is no requirement for anyone to be a “victim” of a violation of a protected right, as under Article 2 of the Optional Protocol to the ICESCR. On the contrary, collective complaints under the Charters are “collective”. They cannot deal with alleged violations of rights of individuals, be they moral or legal persons. The procedure is reserved for “complaints alleging unsatisfactory application of the Charter” (Articles 1 and 4). Secondly, the Collective Complaints Procedure has no requirement of exhaustion of domestic remedies, which differs from Article 3(1) of the Optional Protocol. Thirdly, under the Collective Complaints Procedure the right of complaint is not vested in individuals or groups of persons. The right of complaint rests with national and international trade unions and employers associations and international (potentially also national) NGOs.²⁰ This complaints procedure now has been in operation for more than ten years. By the end of 2008 a total of 53 collective complaints had been registered, 48 of which had been decided.

The Collective Complaints Procedure can hardly be said to have caused trouble for Norway or domestic policy-making or the application of domestic law.

¹⁷ On 26 October, 1962, and 7 May, 2001, respectively.

¹⁸ See NOU 1993: 18 Lovgivning om menneskerettigheter, 119-122, and Ot.prp. nr. 3 (1998-99), 36.

¹⁹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995 (CCP) (ETS 158). Norway ratified the Protocol on 20 March, 1997, as the third State Party. The Protocol entered into force on 1 July, 1998.

²⁰ CCP Articles 1 and 2.

3. THE QUANTITATIVE ASPECT

If we first look at this, it is notable that none of the 53 complaints filed so far have been filed against Norway. Under the Protocol, States may make a declaration permitting national NGOs to file complaints.²¹ Norway has not made use of this option. The fact that Norwegian NGOs are not able to file complaints can, however, not account for the absence so far of complaints against Norway. In most cases, a national organisation can easily solicit the assistance of its international counterpart and have a complaint filed by the latter. It is unlikely, too, that the absence of Norwegian cases is due to a lack of knowledge of the Collective Complaints Procedure. Perhaps, then, the explanation is that there is little to complain about, or potential complainants see little “added value” in having recourse to the complaints procedure. This latter point is possibly of some significance. The complaints procedure is not the sole means of supervision but an addition to the original and basic reporting procedure.²²

The reporting procedure under the European Social Charters is certainly more comprehensive and elaborate than that under the ICESCR. In addition, the Optional Protocol would open up for a significantly higher number of complainants than does the ESC Collective Complaints Procedure, although the threshold for commencing the complaints procedure is significantly higher under the Optional Protocol.²³ All in all, there is little reason to assume accession to the Protocol resulting in a large number of complaints or creating significant trouble for the State in terms of expending work and resources.

4. THE QUALITATIVE ASPECT

To start with, it should be recalled that the Optional Protocol does not impose new substantive obligations. The substantive norms are in the ICESCR itself – and they have been accepted by Norway and are part of the domestic legal order. Consequently, the issue must be whether there is a risk that the ICESCR will be subject to expansive interpretation by the UN Committee on Economic, Social and Cultural Rights (CESCR), with the creation of more intrusive or burdensome obligations on the State. This question may be asked with reference specifically to ratification of the Protocol by Norway, but also raised independently with regard to the operation of the Protocol complaints procedure and the development of case law regardless of a Norwegian ratification.

Reluctance to accept the Optional Protocol may be perceived as expressing Norwegian reservations about the supervisory body, the UN Committee on Economic, Social and Cultural Rights, and how it will develop its case law. Such apprehension may be understandable not only on general grounds, but also in light of the Committee’s membership and comparable lack of legal expertise. We may recall an old view expressed by Torkel Opsahl. Emphasis-

²¹ CCP Article 2. Only Finland has so far availed itself of this option.

²² On this *see* Stein Evju, *l.c.* (note 10 above), and for an updated overview of the technical aspects the ESC website at http://www.coe.int/t/dghl/monitoring/socialcharter/ReportCalendar/CalendarNRS_en.asp.

²³ See text at notes 19-20 above.

ing the important role of independent international treaty bodies and their case law in the development and for the implementation of human rights law, he still added a *caveat*. Discussing the role of specialised supervisory bodies within this context, he stated that there is good reason for domestic courts not to accept their case law as decisive just in itself.²⁴ From personal experience of sitting on one such body, I can easily sympathise with this view.²⁵ However, this is not specific to complaints procedures, or to the one at issue here.

Abstaining from ratification of the Optional Protocol would not solve the problem either. First, supervision and case law develop through, perhaps most of all, the regular reporting procedure. Second, once the Optional Protocol enters into force developments will take place through the complaints procedure regardless of whether it is ratified by Norway.

Further, Norwegian courts take into account and accord weight not merely to judgments of the ECtHR but to case law of other supervisory bodies as well. This is true of international conventions regardless of whether they are included in the Human Rights Act. Supreme Court cases from the past decade or so provides ample illustrations. Rt. 2001 p. 1006, dealing with freedom of religion, is one example. Rt. 2001 p. 418 and Rt. 2001 p. 1413, both of which concern freedom of association issues, draw not only on the ECHR but also on ILO conventions and the European Social Charter and case law pertaining to these instruments. A special reference should be made to the Supreme Court decision *Elin Tåsås et al. v Norsk Sjømannsforbund*,²⁶ on freedom of association issues. There the Supreme Court, citing also RCHR Article 11, focused primarily on ESC Article 5 on “the right to organise”, but based its elaboration of standards in domestic law expressly on the particular case law of the European Committee on Social Rights.

The simple but fundamental point is that through the supervisory procedures and the case law of the supervisory bodies the substance of convention standards is developed and development will continue to take place, with or without the operation of the Optional Protocol and certainly independently of whether or not Norway accedes to the Protocol.

5. EFFECTS OF ABSTENTION

If Norway decides not to ratify the Optional Protocol, would it also refuse to accept or abide by the interpretations of convention standards that are developed in CESC case law? One may recall the Supreme Court decision in Rt. 1997 p. 580, where the issue at hand was a strike ban and protection of collective bargaining and collective action pursuant to ECHR, ESC and ILO standards. Part of the Court’s reasoning for accepting the ban was a rejection of ILO case

²⁴ Torkel Opsahl: *Internasjonale menneskerettigheter* (Oslo: NCHR 1991), at 16-17 et seq. Opsahl was a member of the European Commission of Human Rights, 1970-1986, and of the UN Human Rights Committee, established pursuant to the ICCPR, 1977-1986. Hans Petter Graver expressed a similar opinion, in “Internasjonale konvensjoner som rettskilde”, 2003 *Lov og Rett* 468, 477.

²⁵ The author was a member for 12 years (1996-2008) of the special supervisory body for the ESC, the European Committee of Social Rights (ECSR).

²⁶ November 2008 (HR-2008-2036-A) (dissent 3-2) (n.y.p.).

law on the right to strike. The conventions concerned, Nos. 87 and 98,²⁷ could not, in the Court's view, entail obligations beyond those Norway had read into the texts and to which it intended to accede when ratifying them.²⁸

A subjectivist approach like this is not viable or sustainable. It also seems to have been abandoned given subsequent developments in legislation and case law, including the Norwegian Supreme Court decisions referred to above.²⁹

More generally, to reject case law developments within the framework of human rights conventions is an untenable position. It would conflict with general principles of legal method in public international law, including those set out in the Vienna Convention,³⁰ and would in the end amount to discarding the dynamic nature of public international law. Moreover, since the 1997 decision, this has been the prevailing approach of the Norwegian Supreme Court with regard to case law pertaining to the ECHR and European Social Charter. Obviously, it would be problematic to apply a different approach to other conventions, such as the ICESCR. In addition, it would be difficult to decide where to draw the line against conventions for which case law of supervisory bodies should be disregarded, and even more difficult to explain and defend why the State or national courts consider themselves entitled to pick and choose and thus differentiate.

On a wholly different note, such an approach would not serve as a desirable model for the international community at large. It is, of course, wholly appropriate to recall that technically, and with the exception of the ECtHR, case law from international supervisory bodies is not legally binding. It is not so that by accepting a complaints procedure, power is irrevocably transferred to the international level; national courts still have the opportunity to scrutinize and censure case law from international bodies when considering its potential influence on domestic decision-making. Acceding to a complaints procedure is not a case of selling one's soul to the devil, or to Geneva in this case. There is a balance to be struck between pure subjectivism and system conform assessments and criticism.

D. CONCLUSIONS AND CLOSING REMARKS

My starting point is simple. The ICESCR is incorporated into and thus part of domestic law. Developments concerning the construction and application of the convention, through the reporting procedure or through a complaints procedure, will be of significance for Norway and impact domestic law – whether we like it or not, and regardless of whether Norway decides to ratify the Optional Protocol.

The question, then, is whether it might not be preferable to ratify the ICESCR Optional

²⁷ ILO Convention No. 87, Freedom of association and protection of the right to organise convention, 1948, and ILO Convention No. 98, Right to organise and collective bargaining convention, 1949.

²⁸ See Stein Evju: "NORWAY, Supreme Court, Rt. 1997 p. 580 [annotated]", in (1999) 17: *International Labour Law Reports* 109-124.

²⁹ For a broader overview see Hans Petter Graver, *l.c.* (note 24 above).

³⁰ Vienna Convention on the Law of Treaties, 1969.

Protocol anyhow, and thus be in a position to take part in the shaping of prospective developments. My answer to this question is in the affirmative. If a complaint is lodged against Norway, the State will have the opportunity to argue not only the specificities of the case but also the interpretation of convention provisions more broadly, regardless of whether the state of the law at issue is based on the reporting procedure or on complaints case law. Experience from the ESC Collective Complaints Procedure shows that with a specific case, one has the opportunity to elaborate and to argue much more in detail than is possible in the regular reporting procedure. This offers a much better platform for discussing those issues that are important. In short, it is better to be a player on the field than to stand on the sidelines.

The resource allocation argument is a recurring one. To set things straight it should be emphasised that economic, social and cultural rights are about much more than just allocation of resources. Articles 6, 7, and 8 of the ICESCR and Articles 1(2)-(4), 2, 4, 5, 6, and 7 of the European Social Charter may be taken as examples. In conjunction with the resource allocation argument it is occasionally suggested, in the domestic debate, that matters falling within the scope of the ICESCR are not suitable for review by an international complaints body. An international body, so the argument goes, is far removed from the national reality and would lack the national courts' intimate knowledge of the national legal system and domestic reality. At a closer look, this is a rather peculiar line of reasoning. It presupposes that economic, social and cultural rights provisions are justiciable and suited for judicial review (which is the case in Norwegian law), including those involving resource allocations. But Norwegians, or Norway, would not want any international "outsiders" to have a say in how to construe and apply such public international law norms. The reality at the national level is so complex and vulnerable that this task should be reserved for domestic bodies. On the one hand, such reasoning takes us full circle back to square one – i.e., the potential impact of ratifying or not ratifying the optional Protocol. On the other hand, it does add to objections likely to be raised against the standpoint it so endeavours to promote. To invoke national circumstances as a ground for not accepting the case law of treaty bodies does not accord well with the principle embodied in Article 27 of the Vienna Convention that provisions of internal law cannot serve as justification for failure to perform a treaty.

A final observation is more political than legal, but should still be made. In many contexts Norway seeks to attain and maintain a high profile in the field of international human rights. A decision not to ratify the Optional Protocol to the ICESCR would not correspond well with Norway's efforts in this regard. Such a decision would convey a negative impression and an unfortunate message to other States, and may in consequence attenuate efforts to promote and protect human rights internationally, and economic, social and cultural rights in particular. This would not chime with the aims and ideas accentuated as key components of Norwegian foreign and international development policies. Far more importantly, however, adopting such a position might jeopardise substantive developments in the field of economic, social and cultural rights, also in countries where the need for reinforcement and development is far stronger than in Norway. When considering what to do, this perspective ought not to be lost from sight.

To sum up, it is my view that the better arguments are in favour of ratifying the Optional Protocol and that not doing so may prove to be counter-productive, in particular at the international level.

IDEALS AND IMPLEMENTATION

– RATIFYING ANOTHER COMPLAINTS PROCEDURE?

INGE LORANGE BACKER*

Abstract: *It is submitted that that ratification by Norway of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) may have undesirable effects for Norway, particularly since the individual complaints mechanism may in reality encroach upon the legislature's assessment of how best to achieve the aims of the Covenant and other societal goals. In the author's view, many of the arguments advanced in favour of ratification do not stand closer examination.*

Keywords: *United Nations, Human Rights, Economic, social and cultural rights, Justiciability, Complaints Procedures, Norway.*

A. INTRODUCTION

For some, once Norway has joined an international instrument, it goes without saying that Norway should also accept international control mechanisms established for its supervision and enforcement. How can Norway be unwilling to accept such independent international control of obligations which we have undertaken to fulfil? Surely, this must be even clearer with respect to a human rights convention which embodies values and societal goals that we share.

In his article, Professor Evju argues extensively along these lines in favour of the ratification by Norway of the Optional Protocol to the ICESCR.¹ In my view, the issue is far from being that simple, and I believe there are sound reasons why Norway should not ratify the protocol.

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¹ In his article, Professor Evju also draws upon his extensive experience from the European Committee of Social Rights. As the Revised European Social Charter only allows for collective complaints, I consider that the experience from that complaints procedure has little relevance for the question of whether to accede to the individual complaints procedure under the Optional Protocol to the ICESCR. This is even more so because Norway has not made use of the option to allow NGOs to lodge complaints. Accordingly, I refrain from further comments on this point.

B. ARE THE RIGHTS JUSTICIABLE?

The discussion often starts by asking if the rights in question are “justiciable” or “self-executing”. These terms imply an assessment of whether the provisions by their content and language lend themselves to being applied as binding by courts or similar bodies in decisions in individual cases. Vagueness or a need for supplementary provisions (at national level) or administrative setup in order to become effective may hinder justiciability. There is also the possibility that a given provision carries a “core” of justiciability in the sense that beyond that core, the State may decide at its discretion how and how far it will go in order to implement the inherent values of the provision.²

The justiciability of a particular provision will have to be determined in the jurisdiction in which it will be applied.³ Provisions in international conventions incorporated into Norwegian law will only be applied by the national courts if they are considered justiciable by the courts.⁴ But even if a provision is not applied directly by a Norwegian court because it lacks justiciability, it may still be taken into account as a legal argument amongst others when deciding the case at national level.⁵

The Protocol seems, for its part, to rest on the assumption that all the provisions of the Covenant are justiciable, including the right to an adequate standard of living (Art. 11) and the right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12). Certainly, such a general assumption differs from the view held when then Norwegian Human Rights Act 1999 was prepared.⁶ Once justiciability is assumed there will be ample scope for the Committee to require States parties that have ratified the Protocol to make use of “the maximum of its available resources” to promote the rights of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷, even if the test of reasonableness laid down in Article 8 (4) of the Protocol should secure a margin of appreciation for the State involved.

² This option could also be seen as an example of a wide margin of appreciation for the nation state.

³ Cf. Ian Brownlie: *Principles of Public International Law* (7th ed., Oxford: Oxford University Press 2008) 48-49.

⁴ See Rt. 2001 p. 1006 at 1015. The view of courts may, of course, be influenced by statements by the legislature, and, especially if no indication is provided by the legislature, by statements by an international body made subsequent to the ratification.

⁵ The provision will then have the status of a value or goal recognised by the law and influence the interpretation or application of other legal rules when they are open for different meanings. Likewise, an administrative authority exercising discretionary powers, will be permitted (perhaps also obliged) to take into account a non-justiciable provision.

⁶ See, in particular, NOU 1993:18 *Lovgivning om menneskerettigheter* p. 125, cp. also pp. 104 *et seq.*; cf. Matthew Craven: *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Oxford University Press 1995) pp. 101-02.

⁷ 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, Article 2(1).

C. THE RISK OF EXTENDED OBLIGATIONS THROUGH CASE LAW

According to Professor Evju, accession to the Protocol is “primarily, a question of enforcement and enforceability of the standards already accepted”. This assertion fails to take account of the open nature of most of the provisions of the Covenant which leave ample scope for different interpretations and solutions. Arguably, the Covenant establishes the values and directions but leaves it to subsequent implementation to decide how far States should go. The Committee will therefore, unavoidably, not only address matters of enforcement and enforceability, but standard-setting as well. The principle of evolutive or dynamic interpretation which appears to prevail in human rights bodies makes it difficult to predict the legal situation. The very existence of that principle of interpretation implies, in reality, a transfer of legislative powers from the national parliament based on general elections to a small international body of experts or other members.

In my view, this is more than enough to explain why Norway’s incorporation of the ICE-SCR into domestic law, cannot be used as an argument in favour of ratifying the Protocol. On the contrary, incorporation into domestic law may serve as an argument *against* ratification, since it provides national courts with the means to enforce justiciable rights of the convention while taking due account of the national legislature and the national situation when the question of dynamic interpretation comes up.⁸

Professor Evju claims that by ratification Norway will “be in a position to take part in the shaping of prospective developments” of the Covenant. When a complaint is lodged against Norway, Norwegian authorities can certainly argue their case before the Committee. It is another question whether these arguments will influence the Committee. This is unlikely, for one thing, where the Committee bases its assessment upon previous case law. It is unrealistic to expect – and not expressly authorised under the Protocol⁹ – the Norwegian Government to intervene in complaints cases against other States in order to contribute to the establishment of case law which would be desirable from the Norwegian point of view; the small number of Norwegian interventions in cases before the ECJ and the ECtHR, which will often have stronger implications for Norway, testifies to this. If a Norwegian should be elected member of the Committee, he or she must of course act independently of Norwegian interests. In short, from the point of view of influencing the development of case law under the Covenant, little is to be gained by ratification of the Protocol.

⁸ Moreover, under national law, the Norwegian Parliament may by express legislation rectify the construction adopted by the national courts if it is considered to be too evolutive to be accepted in the light of other values and considerations. After a decision by the Committee against Norway concerning a complaint this will hardly be possible.

⁹ See Langford, Introduction to the Optional Protocol’ in this Issue, Section D 4.

D. EFFECTS OF ABSTENTION

Considering the effects of abstention, Professor Evju appears to argue on the one hand that abstention would give rise to the question whether Norway would then reject case law developments, which in Professor Evju's view would be an untenable position;¹⁰ on the other hand, he seems to accept that – “technically” at least – case law from other international supervisory bodies than the ECtHR is not legally binding. His actual position remains unclear.

For my part, I find it clear that the attitude which a State may take under international law towards case law from an international supervisory body, varies according to whether the body's competence has been accepted by that State. Even if the view is taken that such case law may always be taken into account when interpreting the relevant convention, it will certainly and always be relevant and carry greater weight for States which have ratified the control mechanism under which the case law develops. This difference is likely to be more striking if the convention – or at least some of its provisions – is directly applicable in national law. It follows that it does make a difference for Norway's future attitude to case law developed under the complaints procedure whether the country has ratified the Protocol or not. This is an aspect which, of course, must be taken into account when deciding to ratify or not.

Professor Evju invokes the additional argument that non-ratification of the Protocol “would in the end amount to discarding the dynamic nature of public international law”. Surely, by ratifying conventions, States parties have not subscribed to that sort of dynamism – which is more like an invention made by international lawyers and certain international bodies. Professor Evju appears to make dynamic nature an inherent quality of international law – a doubtful and unclear proposition which serves to question, not to justify, the legitimacy of case law developments.

E. THE NOTION OF INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS

Does the notion of indivisibility and interdependence of human rights naturally or necessarily lead to the ratification of the Protocol? According to this argument, Norway should ratify the Protocol because Norway has already accepted individual complaint mechanisms with respect to other human rights instruments which focus mainly on civil and political rights (the European Court of Human Rights and the UN Human Rights Committee). In my view, this is not a convincing argument.

First, the character and meaning of the notion of indivisibility and interdependence need to be assessed. It is submitted that this notion must, above all, be assessed in a political context. It serves to bridge the gap between States which place the emphasis on civil and political

¹⁰ His reference to the Vienna Convention on the Law of the Treaties in this context is questionable, since the relevant provision – art. 31 (3) (b) – only refers to subsequent practice “which establishes the agreement of the parties regarding its interpretation”.

rights and States which give priority to economic, social and cultural rights, thus paving the ground for universal support of human rights. Civil and political rights give little meaning to people that are deprived of food and housing. From a legal point of view, the notion may serve to ensure that a given human right is construed and applied so as not to interfere with other human rights. To assume that the notion itself is rejected because certain human rights provisions are deemed non-justiciable, is unwarranted.

Professor Evju also accords too much weight to the observation that there may be no sharp dividing line between rights contained in the ICESCR and other human rights. True, there may not be a clear-cut distinction. Nevertheless, the typical content of economic, social and cultural rights differs from a civil and political right, including those enshrined in the ECHR. No valid argument can, in my view, be drawn from the jurisprudence of the European Court of Human Rights which sometimes, by its evolutive or dynamic interpretation, tends to stretch the convention rights further into the field of economic, social and cultural rights. This case law development, brought about by the court itself without any express acceptance by the States, can hardly serve as an argument to the effect that States should ratify further instruments because of the obligations they have already undertaken through previous ratifications. Moreover, human rights provisions differ in formulation and preciseness. It is easy to point at economic, social and cultural rights where the provisions are drafted as goals rather than definite levels. The right then takes a vague form which is significantly different from the typical civil and political right. Admittedly, as Professor Evju points out, a number of the latter provisions allow for restrictive interpretation or exemptions by virtue of vague and imprecise clauses. But the possibility of restrictive interpretation based on a vague clause can hardly bring the provision on a par with economic, social and cultural rights, which by themselves are utterly vague.

Lastly, economic, social and cultural rights tend to have a much greater impact on resource and budgetary allocations than other human rights. It is indeed a gross misunderstanding to argue, as Professor Evju appears to do, that differing financial impact has no relevance since there is no clear dividing line between the two types of human rights as regards costs. A quick glance at the current Norwegian state budget¹¹ will show that the level of public expenditure linked to economic, cultural and social rights by far exceeds costs related to civil and political rights.

Professor Evju seems to argue that refusing to ratify the Protocol would suggest that economic, social and cultural rights are “less worthy of acceptance” and that the level of financial impact has hardly any relevance. Whether to accept individual complaints to an international body is not, however, a question of accepting or rejecting a human rights convention which has already been ratified and it certainly does not amount to “ranking rights not by contents but by costs”. Instead, it is a question of whether to accept that an international body (and, as a possible consequence, national courts as well) should be given power to decide the

¹¹ Suffice it to mention that under the Norwegian state budget for 2009 more than 400 billion NOK (almost 1/3 of the total expenditures) will be spent on education, social security and health services (articles 9, 12 and 13 of the Covenant), while the justice sector accounts for less than 20 billion NOK in all, see St.prp. nr. 1 (2008-2009).

level of social security, medical services and other rights with far-reaching budgetary implications – possibly at the expense of other human rights.

F. CLOSING REMARKS

Regardless of its impact on the domestic legal system, the argument that Norway should ratify the Protocol as a contribution towards promoting human rights standards worldwide remains to be considered. But surely, what will matter most in the field of economic and social rights is the transfer and development of resources and competence to States that fall short of the goals. Spending resources on arguing and defending a particular claim of non-compliance with the Covenant may be of little help to other individuals in need and at worst become counterproductive. Norway's reputation for promoting human rights does not rest on our adoption of all human rights instruments, but on our general commitment to human rights and choice of a variety of means as appropriate to that end.

When considering whether to ratify a new international instrument – even human rights instruments – it is perfectly legitimate and justified to take great account of possible and likely effects at national level. The last decade should have taught us the lesson that the risk of an unexpected and sometimes outright undesirable effect domestically is not to be neglected. Until international bodies and lawyers limit their allegiance to a dynamic development of conventional obligations through case law, scepticism towards new instruments may be justified. In my view, this holds true for the Optional Protocol establishing a complaints procedure under the ICESCR.

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

BY MARTIN SCHEININ* AND MALCOLM LANGFORD**

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.¹ 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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¹ 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.² 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”.³

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.⁴ 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 body⁵ or even an International Court of Human Rights⁶ 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

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.

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

³ 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.

⁴ 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).

⁵ 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.⁷

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.⁸

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-

⁶ 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.

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

⁸ Steiner (note 3 above), 18.

erality of the norm concerned, but rather on the authority of the body making the decision.”⁹ 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.¹⁰

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.”¹¹

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,¹² or insufficiently precise in concluding observations.¹³ 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

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

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

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

¹² 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).

¹³ 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.”¹⁴ 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.”¹⁵

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.¹⁶ 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.¹⁷ 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

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

¹⁵ Henry Steiner (note 3 above), 42.

¹⁶ See Nowak (note 1 above), 849.

¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ Subsequent concluding observations of the Human Rights Committee emanating from the reporting procedure appear to reverse that decision.²¹

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.²² Paragraph 9 states:

¹⁸ *Ibid.*, para 6.7.

¹⁹ 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.

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

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

²² 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 2002.²³ 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.

²³ 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.²⁴ 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*²⁵ and *Broeks*,²⁶ 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,²⁷ 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

²⁴ 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.

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

²⁶ 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).

²⁷ *Zwaan-de Vries* (note 25 above), para. 15.

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

In the subsequent case of *Gueye et al. v. France*,²⁹ 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.³⁰

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.³¹ In this case, the conditions for indirect discrimination were held to be absent but were found present in *Derksen and Bakker*.³² 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”.³³ 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’,³⁴ sexual orienta-

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

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

³⁰ 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).

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

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

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

³⁴ 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’.³⁵ *Young v. Australia* involved the denial of a survivor’s pension to a same-sex partner of a war veteran³⁶ 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, property³⁷ and sanitation rights.³⁸ Taking the first example, in *Waldman v. Canada*,³⁹ 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.⁴⁰ 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.”⁴¹

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.⁴² 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

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

³⁶ *Ibid.*

³⁷ 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.

³⁸ 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.

³⁹ 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).

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

⁴¹ Para. 10.5.

⁴² 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*,⁴³ 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.⁴⁴ 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.⁴⁵

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,⁴⁶ destruction of a prisoner's medication,⁴⁷ the denial to a prisoner of his medical records,⁴⁸ as well as the removal of a schizophrenic person to a country where he would not get appropriate treatment and medication.⁴⁹ 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.⁵⁰ This was also expressed in the General Com-

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

⁴⁴ 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.

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

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

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

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

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

⁵⁰ 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”.⁵¹

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.⁵²

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.⁵³ 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.⁵⁴ 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.⁵⁵ 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.

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

⁵² See discussion above at notes 17 to 19.

⁵³ European Court of Human Rights, Annual Report 2008 (Provisional Edition, January 2009), available at www.echr.coe.int/echr/.

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

⁵⁵ As at 6 October 2008.

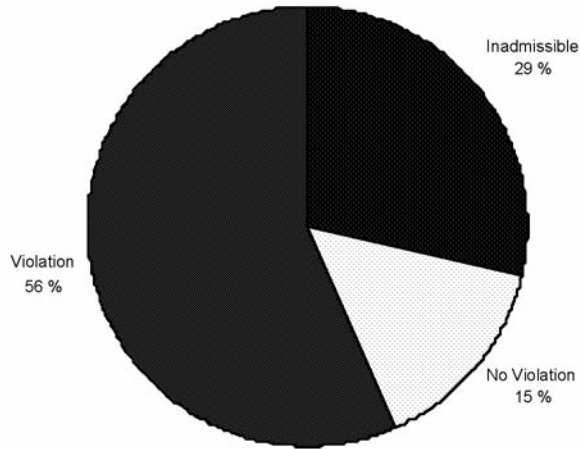


FIGURE 1. DECISIONS BY HUMAN RIGHTS COMMITTEE

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.

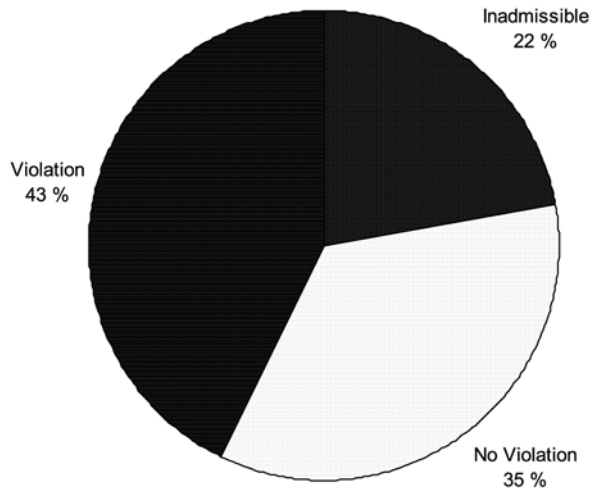


FIGURE 2. DECISIONS ON ARTICLE 26 BY HUMAN RIGHTS COMMITTEE

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.⁵⁶

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.⁵⁷ 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.⁵⁸

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.⁵⁹

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-

⁵⁶ See discussion in opening article of this Special Issue.

⁵⁷ See Steiner (note 3 above).

⁵⁸ 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.

⁵⁹ 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.⁶⁰

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-

⁶⁰ 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.⁶¹

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.

⁶¹ 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.

LEGAL MATERIALS

OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

PREAMBLE

The States Parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that the Universal Declaration of Human Rights and the International Covenants on Human Rights recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Recalling that each State Party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) undertakes to take steps, individually and through international assistance and cooperation, 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 Covenant by all appropriate means, including particularly the adoption of legislative measures,

Considering that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it would be appropriate to enable the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

ARTICLE 1: COMPETENCE OF THE COMMITTEE TO RECEIVE AND CONSIDER COMMUNICATIONS

1. A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.
2. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

ARTICLE 2: COMMUNICATIONS

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. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

ARTICLE 3: ADMISSIBILITY

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.
2. The Committee shall declare a communication inadmissible when:
 - (a) It is not 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;
 - (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date;
 - (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
 - (d) It is incompatible with the provisions of the Covenant;
 - (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;
 - (f) It is an abuse of the right to submit a communication; or when
 - (g) It is anonymous or not in writing.

ARTICLE 4: COMMUNICATIONS NOT REVEALING A CLEAR DISADVANTAGE

The Committee 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 5: INTERIM MEASURES

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

ARTICLE 6: TRANSMISSION OF THE COMMUNICATION

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

ARTICLE 7: FRIENDLY SETTLEMENT

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant.
2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol.

ARTICLE 8: EXAMINATION OF COMMUNICATIONS

1. The Committee shall examine communications received under article 2 of the present Protocol in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.
4. 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 set forth in the Covenant.

ARTICLE 9: FOLLOW-UP TO THE VIEWS OF THE COMMITTEE

1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
3. The Committee may invite the State Party to submit further information about any meas-

ures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

ARTICLE 10: INTER-STATE COMMUNICATIONS

1. A State Party to the present Protocol may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
 - (a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
 - (b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
 - (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;
 - (d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;
 - (e) The Committee shall hold closed meetings when examining communications under the present article;
 - (f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
 - (g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
 - (h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:
 - (i) If a solution within the terms of subparagraph (d) of the present paragraph is

reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. A declaration under paragraph 1 of the present article shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

ARTICLE 11: INQUIRY PROCEDURE

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under this article.
2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
4. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.
5. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
6. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
7. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report provided for in article 15.
8. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

ARTICLE 12: FOLLOW-UP TO THE INQUIRY PROCEDURE

1. The Committee may invite the State Party concerned to include in its report under articles 16 and 17 of the Covenant details of any measures taken in response to an inquiry conducted under article 11 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 11, paragraph 6, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

ARTICLE 13: PROTECTION MEASURES

A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

ARTICLE 14: INTERNATIONAL ASSISTANCE AND COOPERATION

1. The Committee shall transmit, as it may consider appropriate, and with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the State Party's observations and suggestions, if any, on these views or recommendations.
2. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights recognized in the Covenant.
3. A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.
4. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant.

ARTICLE 15: ANNUAL REPORT

The Committee shall include in its annual report a summary of its activities under the present Protocol.

ARTICLE 16: DISSEMINATION AND INFORMATION

Each State Party undertakes to make widely known and to disseminate the Covenant and the

present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

ARTICLE 17: SIGNATURE, RATIFICATION AND ACCESSION

1. The present Protocol is open for signature by any State that has signed, ratified or acceded to the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 18: ENTRY INTO FORCE

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.

ARTICLE 19: AMENDMENTS

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

ARTICLE 20: DENUNCIATION

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 2 and 10 or to any procedure initiated under article 11 before the effective date of denunciation.

ARTICLE 21: NOTIFICATION BY THE SECRETARY-GENERAL

The Secretary-General of the United Nations shall notify all States referred to in article 26, paragraph 1 of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 19;
- (c) Any denunciation under article 20.

ARTICLE 22: OFFICIAL LANGUAGES

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 26 of the Covenant.

NY LITTERATUR/NEW LITERATURE

We shall be listing and summarizing in this column recent additions to the libraries of the Nordic institutes for human rights. For more information about the publications please visit the homepages of the libraries/institutes.

Edited by EVA HÖGLUND with contributions from BETTY HAUGEN, LENA OLSSON and KAREN LISE THYLSTRUP*

Amnéus, Diana. *The Responsibility to Protect by military means: emerging norms on humanitarian intervention?* Stockholm: Department of Law, Stockholm University 2008. Doctoral thesis, Stockholm University. xii, 589 p. ISBN 978-91-7155-735-3

When states fail to protect their population against genocide, crimes against humanity or war crimes, the Security Council has an external "Responsibility to Protect". When the situation is considered to pose a threat to peace, international law recognizes a right for the Council to approve of the use of military intervention when peaceful means are inadequate. This is also what Diana Amnéus aims to show in her doctoral thesis.

The decisions of the Security Council regarding humanitarian intervention since the end of the Cold War in particular in Bosnia, Somalia and Rwanda support such an extended right to respond to gross violations of human rights and humanitarian law. UN Member States have also recognized a new principle, the "Responsibility to Protect", at the UN Summit in New York in 2005.

Each individual state bears the internal primary 'obligation to protect' its population against serious abuse under international law. A military intervention is a last resort, and can be used only when the diplomatic, political and economic measures do not work.

The regional organizations could also have a legal right to carry out humanitarian interventions to stop genocide and other serious viola-

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eh=Eva Höglund, M.Pol.Sc., Coordinator for human rights studies, Institute for Human Rights/Åbo Akademi University, Åbo, Finland. E-mail: eva.hoglund@abo.fi Institute homepage: <http://www.abo.fi/instut/imr/>.

klt=Karen Lise Thylstrup, Master of library and information science, Librarian, DCISM Library, Danish Center for International Studies and Human Rights, Copenhagen. E-mail: klt@dcism.dk Library homepage: <http://www.dcismbib.dk/>.

lo=Lena Olsson, Librarian, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund. E-mail: Lena.Olsson@rwi.lu.se Institute homepage: <http://www.rwi.lu.se/>.

tions of international law, without a mandate from the Security Council, in the future. There needs to be more cases of humanitarian intervention, as in Kosovo (1999) and Liberia (1991), before states give their consent to such a right, and it gets more recognition as a genuine right.

In the case of Darfur, Sudan, as well as the UN Security Council and African Union (AU) failed to protect the public against the serious abuses. This despite a Security Council decision in the summer of 2007 on the creation of the UN and AU's joint forces UNAMID. Too often a lacking political will and lack of sufficient state resources hinders making the principle of 'Responsibility to Protect' a reality. Diana Amn us argues that we also need to uphold the prohibition of use of force in international law through the UN, and not through regional organizations.

Bibliography and links to documents published on the internet. **Io**

Arold, Nina-Louisa. *The Legal culture of the European Court of Human Rights*. Leiden: Martinus Nijhoff 2008. ix, 214 p. (The Raoul Wallenberg Institute Human Rights Library, 29) ISBN 978-90-04-16067-5

The author teaches law at the Faculty of Law at Lund University and is a researcher at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The book presents the results of a study on the legal culture of the European Court of Human Rights (ECtHR). The author emphasizes that very little is known about the judges and clerks working at the Court. To what extent do their backgrounds affect their thinking and the judgments in the cases of the Court? Does the fact that the judges are educated in different legal traditions – common law, civil law and socialist law (former) – and that they are brought up and educated in different political systems affect their views on human rights, and even more importantly, their opinion in the judgments? Do

the judges from Eastern Europe consider human rights less important than the judges from Western Europe? Through interviews with judges (37 in all), and an analysis of the judgments, Arold has managed to find answers to these important questions. The results show that the legal culture brings judges together and that any previous misgivings regarding differences of opinions and cultures turned out to be unjustified.

The author states that further research needs to be done on the impact of the new trans-national and alien legal cultures in the domestic law to further explain this new culture. Human rights have a growing importance and they affect all areas of domestic law.

This is a book, which is important to everybody working with human rights in the European context, and should be compulsory readings for the judges at the Court. The author has also published an article in the *Nordic Journal of International Law* vol. 76, 2007, titled 'The European Court of Human Rights as an Example of Convergence' and the article gives an introduction to the book and an analysis of the outcomes of the study. **Io**

Ersb ll, Eva. *Dansk indf dsret i international og historisk belysning*. K benhavn: Jurist- og  konomforbundets Forlag 2008. Ph.D. thesis, Aarhus University. 798 p. ISBN 978 87 574 1886 6

Eva Ersb ll has studied legal practice in the area of Danish citizenship rights from 1776 to today.

Comparing Danish practice with international standards of human rights and EU legislation, she finds the 1950 Danish reform of citizenship law quite out of step with Denmark anno 2009. The law, she contends, is ripe for another reform. **klt**

Faye Jacobsen, Anette (ed.). *Human rights monitoring: a field mission manual*. Leiden and Boston: Martinus Nijhoff Publishers 2008. xxvi, 628 p. ISBN 978 90 04 16517 5.

Contents

Preface;

Chapter 1. *Human Rights Monitoring* / Anette Faye Jacobsen;

Chapter 2. *Human Rights Law – An Introduction* / Anette Faye Jacobsen;

Chapter 3. *Part A. The Right to Life; Part B. The Death Penalty* / Fergus Kerrigan;

Chapter 4. *Prohibition of Torture* / Paul Dalton;

Chapter 5. *Right to Liberty and Security of Person* / Paul Dalton;

Chapter 6. *A. The Right to a Fair Trial; Part B. Right to an Effective Remedy* / Fergus Kerrigan;

Chapter 7. *Freedom of Expression* / Thomas Tri-er Hansen;

Chapter 8. *The Right to Freedom of Thought, Conscience and Religion* / Stéphanie Lagoutte;

Chapter 9. *The Right to Freedom of Association and Assembly* / Rita Roca;

Chapter 10. *The Right to Property* / Thomas Tri-er Hansen;

Chapter 11. *Part A. The Right to Family Life and Privacy* / Stéphanie Lagoutte ;

Chapter 11. *Part B. The Right to Respect for Privacy, Home and Correspondence* / Birgitte Kofod Olsen and Rikke Frank Jørgensen;

Chapter 12. *Rights of Refugees and Asylum Seekers* / Erik Roxström;

Chapter 13. *Rights of Minorities* / Ditte Goldschmidt;

Chapter 14. *The Right to Non-discrimination* / Katrine Thomasen;

Chapter 15. *Equality between Men and Women* / Dace Kavasa;

Chapter 16. *Glossary*.
Index.

The manual, which is a co-production between Council of Europe, the Organization for Security

*and Co-operation (OSCE) in Europe, the Office for Democratic Institutions and Human Rights (ODIHR) and the Danish Institute for Human Rights, provides information on basic monitoring techniques as well as focused overviews of current human rights law and practice in selected areas of importance for most practitioners working with human rights monitoring. It contains checklists for monitors, as well as references to literature and relevant links, and annotated lists of instrument provision relevant to each theme. The manual is intended for people of various backgrounds, including field officers, human rights trainers and other human rights defenders with no specific legal training. **klt***

Faye Jacobsen, Anette. *Menneskerettigheder, demokrati og retssamfund*. København: Gyldendal 2008. 173 p., ill. ISBN 978 87 02 04590 1

This book is intended for human rights education in social studies in upper secondary schools.

The first chapter gives a general introduction to civil and political and economic, social and cultural rights as well as an introduction to both universal and regional human rights protection systems. Chapter two deals with the role human rights play in a globalized world, and in Chapter three the author explains about the role of a constitution in a democracy. Chapter four is dedicated to the topics: the principles of rule of law, and the role of courts in society. And the final and fifth chapter is about human rights and democracy in the multicultural Danish society.

Throughout the book the author refers to a Danish context.

*In connection with the book there is a website www.temabogsamfundsfag.gyldendal.dk with exercises, relevant links and suggestions for further reading. **klt***

Halme, Miia. *Human rights in action*. Helsinki: Helsinki University Print 2008. Doctoral dissertation, University of Helsinki. xi, 244 p. (Research series in anthropology) ISBN 978-952-10-4481-6
Full text: <http://urn.fi/URN:ISBN:978-952-10-4482-3>

*This publication constitutes an Academic Dissertation at the Faculty of Social and Cultural Anthropology of the University of Helsinki. The study explores human rights in action in the Scandinavian Network of Human Rights Experts, SCANET, a loose network of human rights experts and scholars from the Nordic and Scandinavian region. The study explores who in the network are assigned the status of expert and student and thus investigates what relation the patterns of knowledge flow, established by the network, hold to global and local societal structures. The author combines anthropological insights with critical legal theory and explores the conceptions of knowledge, expertise and learning embedded in the educational activities of SCANET. If education in human rights is vital for empowering individuals to become free and equal members of their societies then how are these goals met in practice the author questions. Do human rights in action realize the ideals of emancipation and equality of the abstract discourse? **eh***

Hedlund, Mary-Ann & Brit Djupvik Semner. *Likestillings- og diskrimineringslovene: med kommentarer*. Bergen: Fagbokforlag 2008. Vol. 1, 666 p. ISBN 978-82-450-0280-5

This commentary to the Norwegian laws on equality and discrimination will, when completed, consist of two volumes. The first covers the Gender Equality Act of 1978 and the Anti-discrimination Ombud Act of 2005. Tracing the development of these laws the authors analyze national and international legal sources. EU and EEA regulations concerning gender equality are given special

*attention. The commentary provides a thorough coverage of rulings delivered by the complaints boards for gender equality and discrimination, particularly those of recent date. The book includes the Norwegian text of the relevant EU and EEA regulations, a select bibliography, subject index and case law index. **bjh***

Hellum, Anne & Kirsten Ketscher (eds). *Diskriminerings- og likestillingsrett*. Oslo: Universitetsforl. 2008. 432 p. ISBN 978-82-15-01262-9

*This volume provides a comprehensive and systematic grounding in Norwegian anti-discrimination and equality law. Intended for academics and practicing lawyers, the editors are concerned to raise the status of anti-discrimination law in legal studies and research. In addition to pieces by the editors, contributions are signed Helga Aune, Hege Brækhus, Ronald Craig, Mary-Ann Hedlund, Gudrun Holgersen, Marianne Jenum Hotvedt, Henning Jakhelln, Kirsten Sandberg, Vibeke Blaker Strand, Aslak Syse, & Elisabeth Vigerust. A select bibliography, subject index and case law index are included. **bjh***

Kaila, Heidi, Elina Pirjatanniemi & Markku Suksi (eds). *Yksilön oikeusasema Euroopan unionissa = Individens rättsställning inom Europeiska unionen : juhlakirja Allan Rosas = festskrift Allan Rosas*. Turku/Åbo: Institutet för mänskliga rättigheter vid Åbo Akademi 2008. xxx, 770 p. ISBN 978-952-12-2051-7

The publication is a Festschrift for Allan Rosas' sixtieth birthday and the title in English would be "The legal status of the individual in the European Union". Allan Rosas is Judge at the European Court of Justice and former Director of the Institute for Human Rights and Professor of Constitutional and International Law at Åbo Akademi University. The publication consists of articles

written by among others Finnish professors, politicians, judges and researchers. The articles deal with the fundamental rights in the European Union, the rights of the individuals, democracy, participation and public relations, and the possibilities of individuals to utilize their rights. The final chapter discusses the impact of the Lisbon treaty on the status of individuals in the European Union. Among other topics, the following are dealt with in the publication: equality and non-discrimination, rights concerning religion and languages, environmental protection, the European Union Agency for Fundamental Rights, the position of victims of crime and the rights of special population groups like students and retired people. The articles are written in Finnish and Swedish. **eh**

Kofod Olsen, Birgitte, Christoffer Ulrik Badse og Martin Ole Futtrup (eds). *Menneskeret i Danmark: status 2008*. København: Institut for Menneskerettigheder 2009. 193 p. ISBN 87 91836 26 3

The report is also available as a pdf-document on www.menneskeret.dk.

The annual status report on the human rights situation in Denmark 2008. In the preface the editors express concern about the negative impact the anti-terrorism laws have on the rule of law and the citizens' legal rights.

*The status report will be published on www.humanrights.dk in an English translation later this year. **kt***

Koivurova, Timo. *The Draft Nordic Saami Convention: nations working together*. Article in *International Community Law Review*, vol. 10, no. 3 (2008), pp. 279-293. Leiden: Martinus Nijhoff Publishers 2008. ISSN 1871-9740

The article is based on a presentation in the seminar "Equity and Mutual Sharing – Indigenous

*Tradition in Contemporary World" in Queen Mary, University of London in May 2007. The article studies the underlying ideas of the Draft Nordic Saami Convention, especially on how the Draft Convention tries to ensure a position as equal as possible for the Saami in relation to the Nordic states. It was the Saami who first took up the idea of drafting a Saami Convention and the Draft Convention was produced by an Expert Committee and submitted to the Nordic governments and the Saami Parliaments in 2005. The Draft Convention is a pioneering attempt to implement what is being encouraged also in the UN Declaration on the Rights of Indigenous Peoples. According to the author the Draft Convention represents an innovative possibility to grow beyond the state-centred paradigm in international relations in a realistic way and it will likely have a lasting inspirational impact on indigenous peoples all over the world. **eh***

Pentikäinen, Merja. *Creating an integrated society and recognising differences: the role and limits of human rights, with special reference to Europe*. Rovaniemi: Lapland University Press 2008. Doctoral dissertation, University of Lapland. x, 415 p. (Acta Universitatis Lapponiensis, 140) ISBN 978-952-484-220-4

The publication constitutes an Academic Dissertation at the Faculty of Law of the University of Lapland. The issue of integration and creating an integrated society has become an extremely topical one in Europe and it has been pointed out that the integration of migrants must become a national priority for the European states. The study examines the role of international human rights norms in the efforts to address the challenges of maintaining diverse yet integrated societies. The focus is on the human rights documents which are applicable in Europe. The author presents a survey of norms pertaining to various groups, such as minorities, indigenous peoples, refugees and

migrants. This is followed by an assessment of the norms adopted to address questions like racial discrimination and other forms of intolerance. The author performs a comprehensive analysis of these international human rights norms and combines this with practically oriented views on integration put forward by three international bodies, i.e. the Advisory Committee of the CoE Framework Convention, the European Commission against Racism and Intolerance and the OSCE High Commissioner on National Minorities. She concludes by stating that there is a need for further clarification of the concept of integration as well as redefining the human rights regime. **eh**

Scheinin, Martin. *Våra mänskliga rättigheter*. Uppdaterad och bearbetad till förhållanden i Sverige av Jonas Grimheden, Raoul Wallenberg institutet. Lund: Raoul Wallenberg institutet för mänskliga rättigheter och humanitär rätt i samarbete med Institutet för mänskliga rättigheter vid Åbo Akademi 2008. 69 p. ISBN: 91-86910-27-2

This booklet is published to celebrate the 60th anniversary of the Universal Declaration of Human Rights. It is a revised and updated edition of a book by Professor Martin Scheinin at Åbo Akademi University to celebrate the 50th anniversary of UDHR.

The booklet fills a gap, because Sweden is missing a short comprehensive book that can serve as an introduction to basic human rights in Swedish. Human rights are violated all over the world, including Sweden. Knowledge and awareness of the rights are crucial in order to identify a violation of these rights. The booklet is meant for a broader public that would like to have a basic understanding of human rights and it gives a list to instances where the citizens can take their complaints.

From the headings we get an understanding of the contents: Human Rights – What Is It? What is Included in the Human Rights? The Protection

of Human Rights. In the publication questions are included, which can serve as a starting point for further discussions. References to webpages and to additional readings are included and a Swedish-English dictionary of common terms in the field ends the publication. lo

Skåre, Siri, Ingvild Burkey & Hege Mørk (eds). *Manual on human rights monitoring : an introduction for human rights field officers*. [3rd ed.]. [Oslo] : University of Oslo, Norwegian Centre for Human Rights 2008. 1 vol. (loose-leaf binder with 12 pamphlets). ISBN 978-82-8158-059-6

This manual was put together by the Norwegian Resource Bank for Democracy and Human Rights (NORDEM) at the request of the United Nations High Commissioner for Human Rights. The first edition was published in 1997. A primary source of reference for human rights field work, it introduces the theoretical basis of human rights and offers practical advice on putting theory into practice in the field. The first part is general in nature, an introduction to the international and regional human rights systems and non-governmental organizations. The second part begins with a general introduction to human rights monitoring and methodology for human rights fact-finding; then a methodology for monitoring the administration of justice; an introduction to trial observation; and finally a manual on election observation. The new edition includes a new chapter (“Human rights professionals and the criminal investigation and prosecution of core international crimes” / Morten Bergsmo & William H. Wiley). Three of the original chapters have been thoroughly revised (“The international human rights system” / William G. O’Neill & Annette Lyth ; “How to recognise human rights issues in practice” / William G. O’Neill ; “Health, safety and security” / Miles Martin). The remainder are updated with events and developments in the field of human rights since the second edition came out in 2001.

The manual is available for downloading free of charge from the Norwegian Centre for Human Rights' website: www.humanrights.uio.no/programmes/nordem/publications/manual/. **bjh**

Suksi, Markku. *Personal autonomy as institutional form – focus on Europe against the background of Article 27 of the ICCPR*. Article in *International Journal on Minority and Group Rights*, vol. 15, no. 2-3 (2008), pp. 157-178. Leiden: Martinus Nijhoff Publishers 2008. ISSN 1385-4879

The author examines the institutional content for personal autonomy against the background of Article 27 of the ICCPR. Persons belonging to minorities shall have the complete freedom to organize themselves in associations and the right to, in community with other members of their group, enjoy their own culture, profess and practice their own religion, or use their own language. According to the author the reference to 'community' adds on a collective dimension through Article 27 to the individual rights established in other articles of the ICCPR. The author then discusses certain legal issues and problems with a view to personal autonomy, e.g. which forms of associations does personal autonomy encompass and what aims of such associations are permissible? He examines support in international legal documents for private forms of organization and discusses legal interpretations by the European Court of Human Rights in support of personal autonomy. He concludes by stating that while there exists no general right to autonomy, it is possible to argue that there exists a right to personal autonomy and personal autonomy should be understood as one of the forms of autonomy. **eh**

Vogt, Kari, Lena Larsen and Christian Moe. *New directions in Islamic thought : exploring reform and Muslim tradition*. London : I.B. Tauris 2009. viii, 276 p. ISBN 1-84511-739-5, 978-1-84511-739-9

How should Muslims reconcile their beliefs with the modern world? Adherents of the Islamic faith and practice feel torn between their role as private citizen and their religious affiliations and identities. This book shows how prominent Muslim intellectuals attempted to bridge the gap by reformulating traditional Islamic ideas in a way that is consistent with contemporary ideas of equality, justice and pluralism. In addition to the editors, the following authors have contributed: Khaled Abou El Fadl, Kecia Ali, Abdullahi An-Na'im, Zainah Anwar, Asma Barlas, Aïcha El Hajjami, Mohsen Kadivar, Mohammad Hashim Kamali, Muhammad Khalid Masud, Ziba Mir-Hosseini, Tariq Ramadan, Nazife i man & Abdolkarim Soroush. The book includes a subject index. **bjh**

Westerstrand, Jenny. *Mellan mäns händer: kvinnors rättssubjektivitet, internationell rätt och diskurser om prostitution och trafficking*. Uppsala: Uppsala universitet 2008. Doctoral dissertation, Uppsala University. 414 p. ISBN 978-91-506-2033-7

Full text: <http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-9362>

[*Between Men's Hands: Women's legal subjectivity, international law and discourses on prostitution and trafficking*. In Swedish with an English conclusion]

The title "Between Men's Hands" can be assumed to refer to the very point Westerstrand wants to emphasize regarding occurrences such as prostitution and trafficking: the invisible participants – the buyers and the men. The cover of the book is a manipulated picture of Michelangelo's paintings in the Sistine Chapel, which serves as a metaphor for the point that the intimacy of women passes between the hands of men. An important point in the book is that the people participating in prostitution and trafficking should not be forgotten.

This is a legal dissertation, which combines legal research with, among others, sociological

research methods. Westerstrand's research contributes to the illumination of the world of thought that is the basis of our ideas of what prostitution and trafficking is, and the different legal solutions to the problem. The dissertation also highlights the different religious and cultural conceptions and the power this conception of the availability of women to men has in the minds of people.

The dissertation especially emphasizes three central aspects of the question of how the trade of women for sexual exploitation should be handled legally: The question of the importance of 'consent', the question of whether trafficking should be seen as a 'process' or as a 'result', and finally the question whether trafficking should be seen as having 'sexual exploitation' or 'forced labour' as its aim. According to Westerstrand, the discourse of prostitution is important in the way prostitution

laws are written, and the discourses also influence the way international law deals with the questions of trafficking to a large degree.

The dissertation includes empirical materials and legal provisions from the UN, ILO, Council of Europe and the EU.

Westerstrand is critical of the one-sidedness that the debate about prostitution shows, which, according to the author has been dominated by a conflict between two positions, one which to some extent has been deliberately simplified, and advocates a normalization of prostitution, and another, which is a radical feminist prostitution critique.

The literature list covers the area of research and also includes valuable links to homepages containing information about trafficking, among other things. **10**

Njål Høstmælingen, Elin Saga Kjørholt og
Kirsten Sandberg (red.)

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