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

A Commentary

PRE-PUBLICATION VERSION

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Contents

Preface ..... **ii**

Notes on Contributors ..... **iv**

I. OVERVIEW **- 6 -**

1. Introduction ..... **- 7 -**

Malcolm Langford, Bruce Porter, Rebecca Brown,and Julieta Rossi ..... *- 7 -*

2. The Origins of the Optional Protocol ..... **- 24 -**

Catarina de Albuquerque and Malcolm Langford ..... *- 24 -*

II. PROCEDURE **- 46 -**

3. Individual Complaints Procedure ..... **- 47 -**

Christian Courtis and Julieta Rossi ..... *- 47 -*

4. The Inquiry Procedure ..... **- 91 -**

Donna J. Sullivan ..... *- 91 -*

5. Inter-State Procedure ..... **- 166 -**

Malcolm Langford, Cheryl Lorens and Natasha Telson ..... *- 166 -*

III. SUBSTANTIVE INTERPRETATION **- 193 -**

6. Reasonableness and Article 8(4) ..... **- 194 -**

Bruce Porter ..... *- 194 -*

7. Substantive Obligations ..... **- 227 -**

Malcolm Langford ..... *- 227 -*

8. Equality and Non-Discrimination ..... **- 280 -**

Rebecca Brown, Lilian Chenwi, and Michael Ashley Stein ..... *- 280 -*

IV. REMEDIES AND ENFORCEMENT **- 322 -**

9. Interim Measures ..... **- 323 -**

Viviana Krsticevic and Brian Griffey ..... *- 323 -*

10. Remedial Recommendations ..... **- 357 -**

Viviana Krsticevic and Brian Griffey ..... *- 357 -*

11. Enforcement ..... **- 391 -**

Basak Cali ..... *- 391 -*

Annex 1: Optional Protocol To The International Covenant On Economic, Social And Cultural Rights ..... **- 416 -**

Annex 2: International Covenant on Economic, Social and Cultural Rights ..... **- 427 -**

Preface

The origins of this commentary lie partly in a meeting of advocates in the Adjudication Working Group of ESC rights-Net. At its meeting in Nairobi in December 2008, the group contemplated the anticipated adoption of the Optional Protocol to the Internatinal Covenant on Economic, Social and Cultural Rights (OP-ICESCR) by the UN General Assembly later that year. This would mark the end of a long struggle for the recognition of the equal status of ESC rights and the equal rights of victims of violations to access to justice at the international level. Many members of ESCR-Net had been involved in the campaign and in the negotiation of the text of the OP-ICESCR.

The group recognized that the adoption of the OP-ICESCR is only a beginning and that the real challenges lay ahead. The OP-ICESCR was essentially an empty vessel. Its ultimate significance and effectiveness will depend on the quality of petitions and the involvement of a range of advocates and organizations, the ways in which the OP and the substantive rights being claimed are interpreted and applied and the extent to which recommended remedies are implemented.

It was clear to the Adjudication Working Group that it would be important to ensure broad participation and dialogue regarding the new OP-ICESCR and for advocates and scholars who had been involved in the theory and practice of ESC rights claims to engage with the issues that would now emerge under the OP-ICESCR. A number initiatives were agreed upon. A strategic litigation initative would be developed to assist domestic groups to develop strategic cases and, in appropriate cases, submit petitions. It was also decided that ESCR-Net should seek funding for and oversee the publication of an authoritative commentary on the key provisions of the OP-ICESCR, drawing on the expertise of its members and of affiliated academic researchers. However, the ocmmentary was not only intended to benefit claimants and their advocates but also provded a broader resource for states and the Committee – providing a deeper jurisprudential base on the range of issues likely to be raised. In so doing, the Commentary charts in effect both the legal opportunities but also the limitations.

After receiving generous support was received from the Ford Foundation, ESCR-Net was able to host a meeting of prospective authors and representatives of relevant

organizations to meet to discuss issues to be addressed and to arrange for key experts to take on the most critical issues. Finally, this book has materialised. We are grateful to all the authors who contributed chapters, Cheryl Lorens and Natasha Telson at the Norwegian Centre for Human Rights who provided editing support, to Frans Viljoen and Danie Brand at Pretoria University Press and Colm O'Cinneide for helpful comments and review.

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I. OVERVIEW

1. Introduction

Malcolm Langford,[*] *Bruce Porter,*[**] *Rebecca Brown,*[***] *and Julieta Rossi*[****]

1. A New Mechanism

On 10 December 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[1] This new treaty mechanism permits individuals or groups of individuals to make complaints to the UN Committee on Economic, Social and Cultural Rights if they have exhausted domestic remedies and believe a member State has failed to observe its obligations under the Covenant. It also provides for an optional inquiries procedure in cases of grave and systematic violations of Covenant rights. In 2009, the protocol was opened for signature and ratification: thirty states immediately signed the protocol. The protocol came into force on 5 May 2013 and the number of ratifications is steadily growing.[2] As at 1 June 2016, 21 States had ratified the protocol.

The OP-ICESCR is the result of years of campaigning and advocating by civil society organisations, human rights advocates, stakeholders and supportive states, demanding that economic social and cultural (ESC) rights be recognised as equal in status to civil and political rights. The separation of ESC rights from civil and political rights, codified in a sister covenant, the International Covenant on Civil and Political Rights[3] (ICCPR), helped institute an historical differentiation between the two sets of rights. When the ICCPR was adopted in 1966, an optional complaints procedure for alleged violations of civil and political rights was introduced to accompany it. However the ICESCR, which was introduced and came into force at the same time as the ICCPR in 1976, had no parallel complaints procedure.

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[1] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) [*Optional Protocol*].

[2] See http://indicators.ohchr.org

[3] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171(entered into force 23 March 1976) [*ICCPR*].

This institutional inconsistency survived for forty years. It was often explained on the basis of cold War ideological divisions and justified on the basis of different characteristics of ESC rights, which engaged broader and general questions of whether economic and social rights should be subject to judicial review and remedy. Because ESC rights involve not only immediate obligations but also obligations to progressive develop policies and programs to realise rights over a period of time, subject to institutional capacity and available resources, it was argued in earlier years that ESC rights are beyond the competence or remedial authority of courts and adjudicative bodies. The role of courts and other adjudicative bodies was conceived in narrower terms, of assessing the legality of government actions in the present, and providing immediate remedies. However, the following chapter in this volume paints a more nuanced picture of the decades-long efforts to secure an optional protocol to ICESCR. In chapter 2, *Alberquerque and Langford* argue that the resistance of the Eastern bloc to any form of international supervision of their obligations may be more important in explaining the delayed birth of the Opational Protocol than East-West division over ESC rights or questions over justiciability.

In any case, in the last three decades, it has been more broadly recognised that the differentiation of the two categories of rights radically undermined the holistic conception of human rights set out in the Universal Declaration of Human Rights. The Second World Conference on Human Rights in Vienna reaffirmed that the two sets of rightsare 'universal, indivisible and interedependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis' (para. 5). Thus, all human rights must be subject to the rule of law and the overarching principle that individuals must have access to effective remedies if their rights are violated. The conception of ESC rights as rights which cannot be claimed, understood solely in relation to governments and their commitments without giving any voice to claimants, reinforced patterns of exclusion of the most powerless and marginalised groups – the very patterns that human rights are supposed to remedy. If governments are to be held accountable for failure to meet their obligations with respect to ESC rights in equal footing with respect to civil and political rights, institutional mechanisms must be in place to enable rights holders to claim their rights.

Understandings of civil and political rights have also evolved in recent years and enhanced the foundation for a more unified approach to all human rights. More substantive understandings of civil rights such as life, non-discrimination and respect for the home and family life have included recognition of programmatic obligations traditionally associated with ESC rights as being fundamental to civil and political rights.[4] The positive measures necessary to address systemic barriers facing persons with disabilities or to protect the right to life and security of the person of those living in poverty, by ensuring access to food, housing or healthcare, are not fundamentally different in nature from the programmatic measures needed to realise ESC rights.

Rigid distinctions with respect to justiciability, or the types of remedies that are required by the two categories of rights, have increasingly been shown to be impracticable and conceptually flawed.[5] As to justiciability, the prevailing 'modern' or 'constitutional' approach is suspicious of the formalist tradition that permits declarations of *non liquet*; spaces where no law is declared applicable.[6] This approach acknowledges that in some cases that there may be uncertainty over whether legal standards are identifiable and discoverable or whether it is prudential to adjudicate in circumstances where an adjudicator's institutional compentence or demoncratic legitimacy may be limited, but contends that such issues should be raised only at the merits phase. As the US Supreme Court notably stated in 1962, if courts possess jurisdiction over a matter, and an applicant presents a case that is not "absolutely devoid of merit", they are compelled to conduct a "discriminating inquiry into the precise facts and posture of the particular case" and refrain from seeking to resolve it through "semantic cataloguing".[7] And, already in 1978, the Supreme Court of Washington comprehensively dismissed a series of standard justiciability complaints

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[4] C. Scott, Reaching Beyond (Without Abandoning) the Category of `Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol 21, No. 3 (1999), pp. 633-660; M. Jackman, What's Wrong With Social and Economic Rights, National Journal of Constitutional Law, Vol. 11 (2000), pp. 235-246; B. Porter, A. Nolan and M. Langford, *The Justiciability of Social and Economic Rights: an Updated Appraisal*, Center for Human Rights and Global Justice Working Paper Series 15 (2007), available at http://www.scribd.com/doc/57177908/Justiciability-of-ESCR.

[5] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

[6] C. Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept', *Federal Law Review*, 30: 239-63 (2002), at p. 253; S. Navot, 'Political Questions in the Court: Is "Judicial Self-Restraint" a better alternative than a "non justiciable approach"', *VII World Congress of the International Association of Constitutional Law: Rethinking the Boundaries of Constitutional Law*, 2007.

[7] *Baker v. Carr, 369 U.S. 186 (1962) (Supreme Court of the United States)*, p. 217.

concerning the right to education in a state constitution.[8] Similar reasoning can be found elsewhere with the South African court making the point most pithily:

> Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only … the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.[9]

With an ever-increasing number of countries providing constitutional protection of ESC rights[10] and regional human rights monitoring and enforcement systems recognising them as judicially enforceable[11] it was no longer tenable for the international human rights system to exclude these rights from adjudication and remedy through a complaints procedure. The adoption of the OP-ICESCR arguably represents the historic rejection of human rights divided, of the notion that claimants of ESC rights are not provided with a basic attribute of the concept of right, that is access to adjudication and remedies. As Louise Arbour, then UN High Commissioner on Human Rights, stated so eloquently, it represents "human rights made whole."[12]

The adoption of the OP-ICESCR was the culmination of years of negotiations, first over the viability of a complaints procedure for ESC rights and then over its content. States which did not support the optional protocol argued that ESC rights ought not to be considered justiciable, and hence should not be subject to a complaints procedure. When a consensus emerged to proceed with drafting a complaints procedure, these States

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[8] In *Seattle School District No. 1 v. Washington,* 90 Wn.2d 476 (1978), the Court rejected the textual argument that the provision was merely "preambular", vague or hortatory, as the provision was declarative of a constitutionally imposed *duty* (p. 499); dismissed the claim that the provision was solely directed to the legislature and created no subjective right; and pushed back against prudential claims concerning the separation of powers - it was "sensitive to the fact" that government was divided into branches but held that the "compartments of government are not rigid" (p. 505).

[9] *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (Constitutional Court of South Africa).

[10] Jurisdictions in which social and economic rights have been deemed justiciable and judicially enforceable include, *inter alia*, Argentina, Chile, Bangladesh Colombia, Finland, Kenya, Hungary, Latvia, the Philippines, Switzerland, Venezuela, South Africa and India. For descriptions of judicial roles in enforcing economic and social rights in various jurisdictions, see M. Langford. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. (Cambridge: Cambridge University Press: 2008).

[11] Langford, *Social Rights Jurisåprudence,* ibid.

[12] L. Arbour, Human Rights Made Whole, *Project Syndicate* (26 June 2008), online: Project Syndicate <http://www.project-syndicate.org/commentary/arbour1/English>.

proposed various ways in which the OP-ICESCR could compromise the broader principles of access to justice for all victims of violations of ESC rights. Proposals were advanced to restrict complaints to certain components of rights such as non-discrimination or minimum core content; to give States the option of selecting which rights would be subject to the protocol and which would be declared non-justiciable, and to grant states a "wide margin of discretion" in relation to this category of rights that is not applied to human rights. In the end, however, all of these proposals were rejected and a more principled and comprehensive approach won the day. The OP-ICESCR was drafted so as to remain essentially true to its purpose of providing access to justice for victims of violations of any and all ESC rights.

2. The Commentary

This commentary aims to address the need for scholarly research, reasoned argument, consistent interpretation and creative approaches to advocacy, adjucation and remedies under the new OP-ICESCR to ensure that its promise and purpose is fully realised. It aims to provide commentary that is rigorous from a scholarly perspective but relevant for practice and helpful in meeting the unique challenges of this new area of adjudication. It is thus targeted at both users of the Optional Protocol (applicants, lawyers, governments, the Committee) as well as a broader audience of scholars, students, national judiciaries and policymakers.[13]

The book is divided into three main sections that respectively address procedural issues, substantive interpretation and remedies and enforcement. Each of the chapters sets out the background to the relevant article of the Protocol and analyses the different issues that are likely to arise in its interpretation and application. The book seeks to move beyond a standard legal commentary to ask how the mechanism can be effectively applied and interpreted, particularly by providing a progressive model for social rights claiming that is implemented in practice. To this end, the chapters also address how arguments can be best structured, contradictions and dangers navigated, and Committee procedures appropriately oriented and developed.

[13] It should benoted that this book is not concerned with the arguments for and against ratification of the protocol: there is a separate literature on that question. However, the legal analysis may provide relevant material for these dicusssions.

The commentary can make a unique and critical contribution to legal scholarship and practice in three ways.[14] First, the protocol is new and its provisions have not been subject to sustained analysis. The jurisprudence under the protocol will represent the first focused case-based jurisprudence on compliance with economic, social and cultural rights to emerge from the UN human rights system. Drawing on experience and relevant jurisprudence under other complaints procedures, both within the UN system and regional systems but recognising the unique nature and potential of the OP-ICESCR, this book aims to lay the foundations for cutting-edge, authoritative jurisprudence. Second, the commentary seeks to provide both standard legal analysis together with the study of the potential and consequences of different approaches and arguments for the development of the protocol in practice. This analysis can be used by claimants, advocates and the Committee to develop jurisprudence which provides effective remedies and tangible enforcement of ESC rights to victims. Third, the publication draws together scholars and practitioners with the relevant expertise on the different provisions of the protocol and of their counterparts in other complaints procedures. It has benefitted from exchange and discussion among these and other experts, brought together for an in-person meeting and subsequently engaging in ongoing dialogue and discussion. Each of the chapters in this book have highlighted and discussed what is most innovative about the OP-ICESCR as well as potential ambiguities and controversies the CESCR may contend with once they begin to receive complaints.

3. Overview of the Protocol and Commentary

The Optional Protocol does not provide any substantive rights or obligations. These are set out in the ICESCR. The protocol is instead procedural in orientation. It mirrors the complaints mechanisms for other international human rights treaties within the UN system but slightly differs in a number of respects.

[14] There have been a number of other publications that address the OP-ICESCR. The most relevant are the ICJ's Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the special issue of the *Nordic Journal of Human Rights* in March 2009. However, neither of these publications provides a full in-depth analysis of each of the provisions nor an analysis of all the key interpretative issues that the CESCR will grapple with once they begin to receive communications, including reasonableness, assessing available resources, procedural issues, integrating a substantive equality approach, the application of the inquiries procedure and remedies and enforcement.

3.1 Complaint Procedures

The Protocol firstly recognises the competence of the Committee to hear complaints from "individuals or groups of individuals" who are under the State's "jurisdiction" and who claim to be "victims of a violation" of any of the ESC rights in the Covenant (Articles 1 and 2). Earlier drafts of the protocol included a collective communications procedure, which authorised non-governmental organisations to submit communications, but this was dropped during the negotiations.[15] However, it is possible to present communications of a collective nature both by a group of victims and potentially even by an NGO or a third person with the consent of the victims, and without their consent if enough justification is provided.[16]

The admissibility criteria for the protocol largely resemble those contained in other international human rights complaints procedures.[17] However, three drafting choices deserve comment. First, the Working Group removed an increasingly common exception to the exhaustion of domestic remedies rule, namely remedies that "are unlikely to bring effective relief".[18] Instead the older test, as encapsulated in the ICCPR, is maintained. Complainants must have exhausted all available remedies unless they are unreasonably

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[15] One lingering question is whether indigenous peoples could bring complaints under Article 1 of the Covenant in relation to socio-economic elements of the right to self-determination. The possibility is quite remote. The UN Human Rights Committee has found that the rights of peoples could not be adjudicated under a procedure restricted to "individuals" or "groups of individuals. See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

[16] See discussion in third chapter of this commentary.

[17] These are set out in Article 3 of the protocol. Complaints will be inadmissible if all available domestic remedies have not been exhausted unless they are unreasonably prolonged; the complaint 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.

[18] Optional Protocol to the Convention on the Elimination of Discrimination against Women, 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. ; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 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.; Convention Against Torture (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.

prolonged.[19] Nonetheless, a reasonable interpretation by the Committee, in line with jurisprudence of other UN Committees and regional bodies, should include those cases in which remedies do not exist or are not effective. Second, the Protocol in the UN system is seminal in its inclusion of a time limit: complaints must be submitted upon exhaustion of domestic remedies within one year. The author must otherwise demonstrate that it had not been possible to submit the communication by that deadline. Whereas this deadline is more generous than the six-month cut-off for the European Court of Human Rights and the Inter-American Commission of Human Rights, some claims could be excluded on this basis.[20] Thirdly, Article 4 complements the mandatory admissibility criteria with a negatively-oriented discretion: the Committee can 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." This 'pressure valve' was championed by a small group of States and NGOs as a way for the Committee to control the possibility of a flood of frivolous or undeserving cases.

In chapter 3, in their analysis of the complaints procedure, *Courtis and Rossi* focus on the procedural dimensions and highlight several innovations including two new criteria for admissibility; the provision of friendly settlement process; the possibility for the Committee to consult documentation from international and regional bodies and other actors; the inclusion of a reasonableness standard of review; and a clause allowing a linkage to international assistance and cooperation mechanisms, including the provision of a trust fund. The authors offer several important recommendations regarding interpretation of these new provisions in light of relevant and emerging international and regional jurisprudence.

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[19] In *Patiño v. Panama*, the Human Rights Committee held that "an applicant must make use of all judicial or administrative avenues that offer him a *reasonable prospect of redress*": Communication No. 437/1990, U.N. Doc. CCPR/C/52/D/437/1990 (1994) (emphasis added). It should be noted that it is unlikely that complainants will be required to exhaust explicitly political remedies.

[20] This will particularly be the case in those jurisdictions where no domestic remedies are available and a victim or their lawyers are not aware that an international procedure is available. See for example, *Moldovan and others v. Romania (no. 2);* application no. 41138/98 and 64320/01, judgment dated 12 July 2005. It is likely that the UN CESCR, like the European Court, would allow cases of "continuing violations" to fall outside such a rule and this rule is explicitly incorporated in article 3(2) of the Optional Protocol.

In addition to the complaints procedure, the Optional Protocol contains two other mechanisms: an inquiry procedure though which the CESCR may investigate a situation in a State Party if it receives "reliable information indicating grave or systematic violations" (Article 11) and an Inter-State complaints procedure (Article 10). Both procedures are only available if the State expressly selects them upon ratification. Chapter 4 by *Sullivan* focus on the inquiry procedure and provides an in-depth review of the process, a survey of other inquiry procedures within the UN system and the jurisprudence which has emerged so far, particularly the interpretation of "grave and systematic" violations and what can be considered "reliable" information. Sullivan also weighs benefits and limitations of the inquiry procedure and suggests various approaches that the CESCR might take to strengthen the efficacy of the procedure; and discusses extraterritorial jurisdiction, noting the particular relevance of the inquiry procedure given its lack of a jurisdictional provision.

Chapter 5 by *Langford, Lorens and Telson* examines the inter-state procedure in Article 10. Despite the limited usage of existing inter-State procedure in international human rights law, it notes the growing number of cases in international courts and their implications for the OP-ICESCR. The drafting history of of the inter-State procedure is analysed together with the procedural requirements of Article 10 and its application to extra-territorial obligations.

3.2 Substantive Assessment

Article 8 sets out how the Committee is required to assess complaints. Communications, as they are formally called, are to be examined in closed meetings in the light of "all documentation submitted". The documentation alluded to is principally from the parties but the Committee can consult third parties, such UN agencies, to obtain further documentation and the wording was crafted in such a way to allow the Committee to accept *amicus curaie* submissions. Such a submission was submitted in the first case decided by the Committee.[21]

[21] *I.D.G. v Spain* (CESCR) Communication No. 2/2014.

A great part of the debate on this article was focused on if, and how, the Committee should be explicitly guided in the way it would assess complaints. The eventual compromise was to include the reasonableness test and explicitly note State discretion in policy choices:[22] Article 8(4) therefore requires that "the Committee shall consider the reasonableness of the steps taken by the State Party" and "shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights."

In Chapter 6, *Porter* analyses this critical interpretive standard of reasonablenesness in article 8(4) of the OP-ICESCR. Examining the drafting history leading to the incorporation of the reasonableness test, he argues that it should be interpreted as a clear affirmation that all aspects of the obligation to progressively realise ESC rights are subject to rigorous review under the OP-ICESCR, including both substantive and procedural dimensions and engaging both individual and systemic/policy issues as they may arise in the context of particular complaints. Porter emphasises the important role that evidence from both claimants and States parties will play in ensuring that the Committee is able to properly fulfil its mandate under article 8(4).

As the optional protocol is only a procedural instrument, it is helpful to have an overview of the relevant substantive provisions of the ICESCR and how they intersect with the optional protocol. In Chapter 7, *Langford* examines the key rights and obligations that can be invoked under the protocol by alleged victims, which substantive issues are likely to be contentious and what are the permissible limitations to these obligations. In the following Chapter 8 by *Brown, Chenwi* and *Stein,* the universal principles of non-discrimination and equality are analysed with a particular focus on how these principles might be applied to ensure substantive equality for person's with disabilities, women and racialized groups under the OP-ICESCR. In particular, they argue that notions of positive and negative rights and obligations are ineffective in addressing ESCR violations for discriminated groups and that a standard which requires positive measures, coupled with a contextual analysis of the particular violation noted in the complaint, is necessary to remedy historic and socialised disadvantage in relation to realization of ESC rights.

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[22] *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.

3.3 Remedies and Enforcement

A procedure for the adoption of interim remedial measures is set out in Article 5. It applies only where the alleged victim/s might suffer "irreparable damage" before the complaint process is concluded. Such a remedy was developed by the Human Rights Committee and has been elevated into the texts of more recent procedures. During the final phase of the negotiations on the Optional Protocol to ICESCR, Norway requested that the phrase "bearing in mind the voluntary nature of such requests" be included. This was to emphasise that the remedy was not legally binding. This amendment was opposed by many states, although on differing and contradictory grounds. Some states feared it would imply that the final views of the Committee would be fully legally binding. The eventual compromise was a UK proposal that interim measures are to be only ordered in "exceptional circumstances". However, to what extent this addition changes the admissibility criteria of interim measures based on the "irreparable damage" that the victim might suffer is discussed further in this volume.

With regard to final remedies, Article 9 empowers the Committee to make "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 incorporated in the State reporting procedure. The Committee can also transmit its views or recommendations to various UN institutions, where there is a clear need for technical advice or assistance, particularly for developing countries. Accordingly, a UN trust fund is to be established "with a view to providing expert and technical assistance to States Parties" although this is "without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant."

In Chapters 9 and 10, *Krsticevic* and *Griffey* discuss respectively the nature of interim measures and remedial measures under the OP-ICESCR and the way in which both of these provisions have been interpreted and applied within other UN treaty bodies as well as within the regional human rights systems. In relation to interim measures, they note the innovative requirement that States parties protect individuals from ill-treatment or intimidation resulting from their communications with the Committee. In their discussion on remedies, the authors analyse the role of structural remedies in addition to individual

remedies to adequately address the context in which many ESC rights violations occur. The authors highlight the central importance of all these measures for efficacy of the mechanism.

In the final chapter, *Cali* examines the issues of enforcement that the CESCR and human rights advocates will confront upon issuance of recommendations and potential strategies for increasing the likelihood of compliance. Effective implementation and enforcement of CESCR recommendations will be critical to ensuring the legitimacy of the mechanism. Because remedies for ESC rights violations will often require structural changes, Cali suggests potential processes for the CESCR to ensure effective monitoring and enforcement of its decisions, such as a robust approach in exercising its follow up mechanism as well as flexibility in crafting the remedies themselves.

4. Opportunities and Challenges in Practice

The adoption of the OP-ICESCR arguably represents a paradigm shift within the UN human rights system, which could have reverberations at every level of human rights advocacy and adjudication, not only within States that have ratified the OP-ICESCR but in all domestic and regional systems. It holds out the promise of developing international jurisprudence on economic, social and cultural rights, adding to developments underway at regional and domestic levels, that will provide courts, advocates, human rights institutions and governments with critical guidance as to how to ensure access to justice and effective remedies to ESC rights violations for victims as well as and making States accountable to legal norms. Realising the true promise of the OP-ICESCR, however, will depend on the quality of the claims advanced, the quantity and quality of evidence provided, the ability to benefit from *amicus curaie* and other sources of expertise, the type and adequacy of arguments advanced by claimants and their representatives as well as the responses of States, the quality of the Committee's adjudication, the nature of the recommended remedies and the effectiveness of follow-up to remedial recommendations. The use of the inquiries procedure, as well, will be critical to addressing grave and systematic violations. All of these areas of work are new and challenging within the UN system.

With this first opportunity to adjudicate substantive ESC rights claims at the international level there come both great opportunities but also important challenges. Experience in domestic and regional systems has demonstrated that the quality of adjudication is often dependent on the quality of advocacy – both legal and broader socio/political advocacy. Good jurisprudence emerges from compelling facts, solid evidence, convincing and thoughtful legal arguments, effective *amicus curaie* interventions, supportive academic commentary, well informed and experienced decision-makers and broader social mobilisation to support legal claims. It will be largely incumbent upon civil society to ensure strong claims emerge under the OP-ICESCR and it will be a central task of the CESCR to ensure that these cases provide important precedent for the realisation of ESC rights.

A value of the OP-ICESCR that has often been emphasised is that it will demonstrate the indivisibility of all human rights and the overlap and shared principles with civil and political rights. In fact, many ESC rights claims which proceed under the OP-ICESCR may have been framed under domestic legal provisions as the right to life or to equality, based on more traditional jurisprudence from civil and political rights. Often the particular interests of women, people with disabilities, racialised groups or others facing discrimination are made more visible in an equality framework.[23] There may, therefore, be considerable value in jurisprudence emphasising interdependence, drawing on civil and political rights jurisprudence.

Another perceived value of the OP-ICESCR, conversely, is the establishment of a more distinct jurisprudence, focusing on the unique obligations under article 2(1) of the ICESCR, concepts of progressive realization, the consideration of the value of concepts like minimum core obligations and the tripartite typology of obligations and the reasonableness standard of review in 8(4) in the protocol. There are concerns that the CESCR will be tempted to take on too much existing civil and political rights jurisprudence rather than fully considering the additional dimensions of ESC rights and the broad sweep of the remedies required, particularly in relation to the obligation to fulfill. The opportunity to fully elaborate and clarify the unique nature of ESC rights violations

[23] See Brown, Chenwi and Stein in this volume as well as: L. Farha, "Committee on the Elimination of Discrimination Against Women',, in Langford, *Social Rights Jurisprudence* (n. 6 above), pp. 553-568; and I. E. Koch, From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities, O. Arnardóttir and G. Quinn (eds) *, The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff, 2009).

and the particular and possible flexible approach to remedying those violations will be important for ESC rights jurisprudence globally.

During the negotiation of the OP-ICESCR, concerns from sceptical States tended to focus on worries about the CESCR intruding into resource allocation and policy decisions that these States believed should be left to governments to decide. These concerns are certainly on the minds of Committee members. On the other hand, in light of limited capacity of the CESCR, there is a competing value in prioritising structural/systemic claims so as to provide the greatest impact from the OP-ICESCR – both in terms of remedial impact on the greatest numbers and of jurisprudence which will have a broader impact and reflects the often structural nature of the violations themselves.

One consequence is that there are different views on the types of cases that should be initially be presented. One approach is to avoid bringing forward claims in the early stages that require the Committee to take a position on the degree of deference to be accorded States in resource allocation. The concern is that such cases this may risk creating regressive jurisprudence from an excessively cautious Committee, anxious to avoid alaring States considering ratification. However, if cases are strategically chosen only in order to be reassuring to skeptical States, the historic significance of the OP-ICESCR and its potential impact may be lost, and the system risks losing credibility if it is overly dynamic and unpredictable. Positive decisions and remedies on substantive ESCR claims addressing structural violations may be seen negatively only by States which would not ratify the OP-ICESCR anyway, whereas to other states, and to affected constituencies, such cases may represent the essential "value added" of the OP-ICESCR. Successful cases in relation to broader policy and resource allocation may serve to provide a model of how useful and effective adjudication of ESCR can be.

In some cases, these distinctions may present a false binary. The first case decided by the Committee, *I.D.G. v. Spain*, is legally narrow, addressing a specific issue concerning the obligation to protect in the context of forced evictions. The Committee's finding that respondents in mortgage foreclosure cases be properly served with documents is not particularly controversial. However, the case is of potential relevance to a large class of victims in Spain who lost their homes after defaulting on mortgage payments in the context of the country's economic recession and substantial unemployment; and

highlights the existence of new forum in which systemic issues can be ventilated and litigated.

also provided an opportunity to raise the broader systemic issues before the Committee and the mass media: and signal

Experience under all Optional Protocols suggests that admissibility is the greatest obstacle to the consideration of communications. One particular problem under the OP-ICESCR will be the application of the requirement that the complainant submit a complaint within one year of the violation or exhaustion of domestic remedies. In countries without effective domestic remedies for many ESC rights, this requirement may inadvertently stop many potential complainants (particularly involving negative obligations) because they were not aware of the procedure. Equally, there is the question of what constitutes an effective remedy in the context of asymmetry between domestic provisions and Covenant rights. Experiences in regional and domestic systems may be helpful. Some systems, such as the African system, have adopted a more purposive approach to the exhaustion rule, which may prove important as a precedent for the challenges in applying this rule to ESC rights claims.

A second issue is the requirement of the complainant being an individual victim. The Human Rights Committee has interpreted this requirement so as to preclude the possibility of *actio popularis* or communications submitted by NGOs and limit the ability to challenge the general effects of laws or policies.[24] Given that many of the most important systemic claims advanced under domestic legal systems are undertaken by groups, organisations and/or victims challenging the broad effect of policies or government inaction, complaints and the CESCR will need to tread a careful path on the way in which petititons are filed.[25]

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[24] A. Conte and R. Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd ed.), (England: Ashgate Pub. Co, 2009) pp. 21-25; A. De Zayas et al, Application by the Human Rights Committee of the International Covenant on Civil and Political Rights under the Optional Protocol, *Canadian Human. Rights Year Book*, Vol. 3 (1986), pp. 101 at 110 – 111.
[25] See further the third chapter of this commentary.

Experience under other international complaint mechanisms suggests that questions of burden of proof and availability of information may also be critical to developing jurisprudence under OP-ICESCR. This will likely be of even greater importance under this Protocol, in relation to questions of resource allocation and the application of the reasonableness standard in 8(4).[26] There has been concern in domestic systems such as South Africa that the burden of showing that a policy is not reasonable has tended to fall on complainants, who lack the resources and means to provide such evidence. Further, strategic case development and adjudication under other Optional Protocol's has been seriously impeded by lack of transparency and accountability. For instance, there is often no access to the complainants' documents or State replies and no oral hearings. Generally, in domestic and regional systems, affected constituencies are aware of important cases going forward, and commentators have the opportunity to write about issues as they work their way through courts. Jurisprudence under the other Optional Protocol's has lacked this kind of transparency and openness to broader input under article 8(3), as well as separation of decisions on admissibility and merits, could be an important contribution of the OP-ICESCR to changing this pattern.

A developing area of international and domestic human rights law is the question of extra-territorial obligations. The ICESCR is based on State *jurisdiction* not *territory*, thus permitting extra-territorial obligations where a State action or omission is traceable to their jurisdiction. Whereas jurisdiction has traditionally been understood as physical or effective control, the definition is expanding in cases before regional and international courts towards a more purposive and contextual assessment. Litigation under the OP-ICESCR may benefit from work being done in interventions before trade and investment tribunals, in exploring ways to ensure that the obligation to protect rights in international agreements is not neglected under the OP-ICESCR.[27]

Cognisant of the historic importance of the first cases and early jurisprudence that will emerge under the OP-ICESCR, these as well as the opportunities and challenges discussed in the chapters of this Commentary will be important for both Committee

[26] See Porter's chapter in this volume as well as B. Porter, The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins, *Nordic Journal of Human Rights* , Vol. 27, No.1 (2009) pp. 39 – 53.

[27] See chapter by Sullivan in this volume as well as: C. Courtis and M. Sepúlveda, Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR? *Nordic Journal of Human Rights*, Vol. 27, No. 1 (2009), pp. 54-63.

members and civil society to remain vigilant of as claims and inquires begin to emerge under this instrument.

2. The Origins of the Optional Protocol

Catarina de Albuquerque[*] *and Malcolm Langford*

1. The Myths of Cold War Divisions

It is commonly assumed that the decision to omit a complaints protocol for the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] in 1966 was based on Cold War division. The ICESCR's sister treaty, the International Covenant on Civil and Political Rights (ICCPR), was endowed with such a mechanism.[2] This simple explanatory narrative is really only valid as concerns the decision to split the Universal Declaration 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.[3] Put in simple political terms, a majority could be found easily for developin two treaties but a unified treaty face opposition from both wings of the political spectrum.[4]

However, the reasons for the absence of an optional protocol to ICESCR are more complex[5] and it is worth keeping in mind Alston's comment that the expansion of the United Nations human rights regime:

> 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

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[1] 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.

[2] 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 and 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.

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

[4] Although, no State was able to impose its view on the ultimate text of the treaties: for example, the achievement of the rights in ICESCR was made subject to progressive realisation despite the call of Socialist States for it to be immediate.

[5] M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995), pp. 9-20.

> the offending states and the international standing of their governments, and a variety of other, often rather specific and ephemeral, factors.[6]

In this instance, the result cannot be simply attributed to the East–West divide and substantive differences over the catalogue of rights.[7] The reasons lie in contrasting views over the role of international accountability and, to a certain extent, the justiciability of economic, social and cultural (ESC) rights and institutional turf wars.

As to general accountability, Socialist States strongly opposed the creation of any expert committee for both treaties to receive and analyse periodic reports from States. The USA and some, but not all, Western states supported an expert committee for both covenants. The result of this disagreement over international oversight was the creation of an independent Human Rights Committee was created to oversee the ICCPR whereas oversight of the ICESCR was entrusted to the UN Economic and Social Council (ECOSOC), a body composed of States' representatives.

A similar pattern emerged with regard to complaints procedures. Socialist States maintained their opposition while only a few Western States were prepared to make the argument. This left Latin American States, which supported a complaints mechanism for ESC rights, 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.[8] Some rights could be could be justiciable immediately and others when they "become enforceable".

The French initiative was opposed on the floor.[9] A number of States raised the question of justiciability. Denmark argued 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

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[6] P. Alston, 'Critical Appraisal of the UN Human Rights Regime', in P. Alston (ed.): *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992) pp. 1-22, at 2.
[7] M. Dennis and D. 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?', *American Journal of International Law,* Vol. 98((2004), pp. 462-515
[8] UN Doc. E/CN.4/L.338, 18 ESCOR, Supp (No. 7), UN Doc. E/2573, para. 216 (1954).
[9] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 4 above), pp. 35 -36.

impossible for the committee to determine what rate of progress in any particular case should be."[10] Indeed, the wording of the two Covenants is slightly different on the question of remedies. The ICCPR explicitly calls for States to provide domestic judicial remedies whereas the equivalent provision of ICESCR vaguely refers to "legal and other measures". The resistance was not limited to States. 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.[11] The French withdrew the proposal without a vote.

The complexity of the State responses during the 1950s and 1960s does not, of course, completely remove the Cold War scenario from the explanatory picture. For instance, without Cold War divisions, a single treaty may have emerged and a limited 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.[12] But it would have required a majority of states committed to both ESC rights international adjudicative accountability.

2. The Rise of Justiciable ESC Rights

Since that date, the international consensus on the justiciability of ESC rights as well as the role of international accountability has slowly but inexorably shifted. Already in 1968, States at the International Conference on Human Rights called upon "all Governments to focus their attention" on "developing and perfecting legal procedures for prevention of violations and defence of economic, social and cultural rights".[13] In a follow-up study, the UN Secretary-General noted that the right to an effective remedy by the competent national tribunals applied "of course, also to economic, social and cultural rights".[14] The political monitoring procedure for the ICESCR also attracted increasing

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[10] UN Doc. A/2929, 10 UN GAOR, C.3, Annexes (Ag. Item 28), Pt. II, at 124, para. 41 (1955), cited in Craven, ibid.
[11] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 4 above), pp. 35-36.
[12] 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.
[13] *Final Act of the International Conference on Human Rights* (United Nations publication, Sales No. E.68.SIV.2), resolution XXI, para. 6.
[14] Ibid. para. 157.

criticism, particularly from Western States, for its lack of independence and efficiency.[15] In 1987, ECOSOC eventually agreed to establish an independent committee of experts, the UN Committee on Economic, Social and Cultural Rights ('Committee').[16]

This period also witnessed a major shift in constitutional rights. By the mid-1990s, a raft of new constitutions – particularly in Latin America and Eastern Europe but also in Western Europe, Africa and Asia - included justiciable ESC rights. If we take a statistical overview, we can see a relatively high recognition of constitutional ESC rights amongst 184 countries: right to health care (49 per cent of constitutions), right to join trade unions (72 per cent), right to fair remuneration (48 per cent), right to a healthy environment (72 per cent), right to social security (46 per cent) and right to free education (62.5 per cent).[17] Moreover, many countries have directly incorporated the ICESCR. In a sample of 147 countries where information is currently available,[18] 38 per cent had directly incorporated the Convention, 49 per cent had not domestically recognised the rights in this manner while 13 per cent had not ratified the Covenant.

The same trend could be seen at the regional level. The European Social Charter was revitalised in the 1990s with additional rights and the creation of a collective complaints mechanism.[19] The mandates for the newly established African Commission on Human and Peoples Rights and Inter-American Court on Human Rights included social rights, although to differing degrees.[20] Complaint mechanisms were created for international treaties on women's rights and persons with disabilities, which both include economic and social rights.[21]

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[15] See Economic and Social Council Resolution, 1980/24, para. 2 and Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 4 above), pp. 40-41 for a catalogue of defects.
[16] See generally, P. Alston, 'The Committee on Economic, Social and Cultural Rights1, in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992), pp. 473-508.
[17] Calculations were made from the new Dataset, Toronto Initiative for Economic and Social Rights: www.tiesr.org
[18] It currently excludes the Pacific States and half the Western European countries. The data will be soon finalized and new calculations can be made: see www.tiesr.org
[19] See R. Churchill and U. Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', *European Journal of International Law*, Vol. 15, No. 3 (2004), pp. 417-456.
[20] For an analysis of the social rights jurisprudence from these mechanisms, see Langford, *Social Rights Jurisprudence* (n. 21 below), pp. 323-408.
[21] 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* Dec. 22,

This shift in legal protection combined with judicial reforms and growing civil society engagement has given rise to a new 'social rights jurisprudence' in comparative and international law, although it has been more concentrated than diffuse.[22] Cases have been decided on the various dimension of social rights, such as the obligations to respect, protect, fulfil and non-discrimination as well as horizontal obligations between private actors.[23] Such decisions can be found in every region of the world, and in every type of legal system and tradition. Even the International Court of Justice has adjudicated upon the ICESCR, holding for instance that Israel had violated the Covenant through the construction of the 'security' fence and its associated regime. [24] Although, the jurisprudence tends be most sustained and concentrated in Latin America and South Asia, possibly because of the large inequalities in income and development as well as the direct access procedures, it is also present in a number of Western jurisdictions, such as Portugal, Finland and the states of the USA.

3. Towards an Optional Protocol

Renewed demands for an Optional Protocol to ICESCR itself coincided with this increasing prominence of ESC rights from the late 1970s. In 1984, the possibility of a protocol was discussed at an international right to food conference.[25] While one presenter pessimistically concluded that "it is not to be expected that States will readily submit to a complaints procedure",[26] FIAN, an international NGO that was to emerge from that conference, together with Habitat International Coalition, commenced a nascent

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2000; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 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.

[22] See M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008). See also F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia and Maastrict Centre for Human Rights, 2006) and R. Gargarella, P. Domingo and T. Roux (eds.) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006).

[23] See chapter 5 in this volume for discussion of these types of obligations.

[24] *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* (2004) ICJ Reports 136.

[25] *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 P. Alston and K. Tomaševski (eds): *The Right to Food* (The Hague: Martinus Nijhoff, 1984), 97-100.

[26] G. Westerveen: "Towards a System for Supervising States' Compliance with the Right to Food", in Philip Alston, and K. Tomaševski (eds): *The Right to Food* (The Hague: Martinus Nijhoff, 1984), 119-134, at 127.

campaign. Representatives of the two organisations prepared a draft optional protocol which they presented at the 1993 World Conference on Human Rights[27] together with advocacy pamphlets and submissions.[28]

The first formal discussion of an Optional Protocol was initiated by the CESCR in 1990.[29] It was encouraged in this direction at the 1993 World Conference on Human Rights in Vienna,[30] where all States strongly affirmed the indivisibility of all human rights encouraged States and the CESCR to "continue the examination of optional protocols" to the ICESCR. This culminated in a report from the CESCR with a draft protocol being presented to the former UN Commission of Human Rights in 1996.[31] The CESCR strongly argued for a protocol on the grounds that it would better highlight "concrete and tangible issues", and provide a focused "framework for inquiry" and help realise ESC rights since decisions would carry some weight even though they would be "non-binding".[32] 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.

Between 1998 and 2001, governments and several organisations submitted comments to the draft. The limited number of governments submitting any comments to the draft indicated the minor importance many States accorded to a future optional protocol at that stage. The comments by States were – with some few exceptions - rather superficial and did not go into much detail.

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[27] *(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.

[28] 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.

[29] UN Doc. E/C.12/1991/Wp.2.

[30] See Vienna Declaration and Programme of Action, A/CONF.157/23, para. 75 and discussion in C. 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.

[31] 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.

[32] 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 K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 1999).

In 2001, the Commission on Human Rights slowly moved the discussion forward by appointing an Independent Expert on the Question of an optional protocol to the International Covenant on Economic, Social and Cultural Rights.[33] In 2002, this expert presented his report to the Commission in which he stated that a Working Group not be immediately created because the subject still created many doubts, uncertainties, and even opposition from several states.[34] The Commission renewed the Expert's mandate for another year and requested a further report. However, in the same year, it also established an open-ended working group to study options regarding the elaboration of an optional protocol to the ICESCR.[35] The working group was to begin work in 2003 once the Independent Expert's report was submitted. An important reason behind the sudden push for the creation of the working group resided in the coincidence that, for the only time in the Commission's existence, the United States was not a member and hence could not call for a vote on the draft resolution. In addition, NGOs began to organise themselves in a more coherent fashion under the banner of the International Coalition for the OP-ICESCR.

4. The Commission on Human Rights: Studying Options

In accordance with a follow-up resolution in 2003, the working group commenced its evaluation of the need for an optional protocol.[36] Its mandate was limited – a compromise between States: there was considerable ambiguity in relation to its course of action. The

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[33] *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Which the Developing Countries Face in Their Efforts To Achieve These Human Rights*, *adopted* 20 Apr. 2001, C.H.R. Res. 2001/30, U.N. ESCOR, Comm'n on Hum. Rts., 57th Sess., at 156, U.N. Doc. E/CN.4/2001/167 (2001).

[34] *Status of the International Covenants on Human Rights, Report of the Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights,* U.N. ESCOR, Comm'n on Econ., Soc. & Cult. Rts., ¶¶ 53, 55, 58th Sess., Provisional Agenda Item 10, U.N. Doc. E/CN.4/2002/57 (2002).

[35] *Question of the Realization in all Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights*, *adopted* 22 Apr. 2002, C.H.R. Res. 2002/24, U.N. ESCOR, Comm'n on Hum. Rts., 49th mtg., ¶ 9, U.N. Doc. E/2002/23-E/CN.4/2002/200 (2002).

[36] *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Which the Developing Countries Face in Their Efforts to Achieve These Human Rights*, *adopted* 22 Apr. 2003, C.H.R. Res. 2003/18, U.N. ESCOR, Comm'n on Hum. Rts., 55th mtg., ¶ 13, U.N. Doc. E/CN.4/2003/L.11/Add.3 (2003).

working group was directed to "consider options regarding the elaboration of an optional protocol" to the ICESCR and clearly not to draft an optional protocol to the International Covenant on Economic, Social and Cultural Rights. This formulation satisfied those States within the Commission which wished to commence drafting (pushing their particular "option") and those States which were opposed and which could argue for alternatives: for example, strengthening the working methods of the CESCR.

The Commission of Human Rights' Working Group (WG) met three times (2004, 2005, and 2006),[37] and the meetings included the presence of dozens of States' representatives, several human rights experts, and members of treaty monitoring bodies, of the ILO, UNESCO, African, Inter-American, and European Human Rights systems and representatives of non-governmental organisations.

The First Session of the Working Group (23 February to 5 March, 2004)

In the first session, the discussion was centred around presentations by various human rights experts, including special procedures' mandate holders as well as members of treaty monitoring bodies. The focus of the interventions were generally aimed at, on the one hand, demonstrating how an optional protocol could have a positive impact on the work of the UN and, on the other hand, showing how treaty monitoring bodies with competence mainly in the area of civil and political rights were already adjudicating on economic, social and cultural rights.[38]

However, some sceptical States argued that more theoretical debate was needed on issues related to the justiciability of social rights, even suggesting that the working group should have a "seminar-like" nature. For these sceptics, one could crudely divide their

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[37] *Economic, Social and Cultural Rights, 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. ESCOR, Comm'n on Hum. Rts., 60th Sess., Agenda Item 10, U.N. Doc. E/CN.4/2004/44 (2004) ('*First Session Report'*); *Economic, Social and Cultural Rights, 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. ESCOR, Comm'n on Hum. Rts., 61st Sess., Agenda Item 10, U.N. Doc. E/CN.4/2005/52 (2005) ('*Second Session Report'*); *Economic, Social and Cultural Rights, 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. ESCOR, Comm'n on Hum. Rts., 62d Sess., Agenda Item 10, U.N. Doc. E/CN.4/2006/47 (2006) ('*Third Session Report'*).

[38] *First Session Report*, ibid. paras. 28, 29, 31, 39.

approaches into concerns over subsidiarity, substance, and instrumentalism. As to *subsidiarity*, some States expressed resistance towards any form of international supervision over domestic affairs. This tradition position of the Soviet bloc was now expressed by the USA, the Russian Federation, and many Asian and Middle Eastern States. However, many other States sought to introduce such sovereignty considerations in more concrete ways by proposing wide margins of discretion for the assessment stage of the protocol or limiting the protocol's coverage. Switzerland also claimed that they are procedurally constrained by their constitution in which types of international supervision they can accept.[39]

For others, questions of *substance* appeared to play a larger role, in particularly the issue of justiciability. In the first session, 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.[40]

Moreover, a few States were concerned with the ability of the CESCR to carry out the task of assessing complaints. One State in the opening session asked whether "it would be difficult for a Geneva-based treaty monitoring body to acquire a complete and adequate understanding of the local context".[41] It was said in reply that it was up to the Satte to provide sufficient information.[42] Overall, the question of the Committee's expertise tended not to arise, either because it was viewed as adequate or it was impolite or impolitic to formally raise the question (leaving it to informal discussions). However, it

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[39] 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.
[40] *First Session Report* (n. 36 above) para. 23.
[41] Ibid. para. 63.
[42] Ibid. para. 64.

was asked whether adding another international treaty bodies would result in conflicting decisions, fragmenting further international law?[43] A representative of the International Labour Organisation responded that thus far there had been no discrepancies between the ILO Conventions and the ICESCR in practice,[44] and both UNESCO and ILO referred to a "long-standing practice of cooperation between the their respective agencies".[45] Whereas some States echoed these arguments other argued for realistic expectations noting that some conflict was inevitable pointing toward civil and political rights jurisprudence.[46]

Finally, the *instrumental* value of the Optional Protocol was the subject of significant discussion at the opening session of the Working Group. Supportive states pointed to a range of benefits both direct and indirect:

> 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.[47]

Some delegations noted that it would provide particularly 'a remedy for victims of violations of those rights'.[48]

A range of arguments against its consequential benefits were put in response. Some States 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".[49] 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

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[43] *First Session Report* (n. 36 above), paras. 38, 48 and 74.
[44] Ibid. 69.
[45] *Second Session Report* (n. 36 above), para. 29.
[46] *First Session Report* (n. 36 above), para. 74.
[47] *First Session Report* (n. 36 above) para. 23.
[48] Ibid. para.70.
[49] Ibid. para. 71.

strengthening national mechanisms. Others 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".[50] 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 noted 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."[51]

At the end of the first session, the Chairperson of the Working Group prepared draft recommendations to be submitted to the Commission. Two States (the USA and the Russian Federation) objected to the proposed text, and therefore blocked the possibility of consensus within the Working Group. For the United States, the discussion within the Working Groups clearly showed that "the idea of an optional protocol as proposed by the Committee is one whose time is yet not ripe". Its delegation went further and suggested the Chairperson to

> declare this working group a success as it has provided an excellent venue for ideas and opinions to flow, and has been able to conclude that the lack of consensus among States Parties is of such fundamental nature as to indicate that there is no realistic prospect of resolving such differences through any further meetings of the Working Group.

In response, the Chairperson decided to take "sole responsibility" for the proposed recommendations and she forwarded them to the Commission "for consideration"."[52]

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[50] Ibid. paras. 71, 74
[51] Ibid. para. 73.
[52] Ibid. para. 75.

She proposed that the Commission "[r]enew the mandate of the open-ended working group for a period of two years".[53] The Commission in its 2004 session accepted the proposal.[54]

The Second Session of the Working Group (10 to 20 January 2005)

The second session was devoted to discussions with several experts over a range of issues. Beyond examining how ESC rights have been examined at the regional level, it focused on how an optional protocol might work in practice. This included examining conflicts or complementaries with the work of the Commission's special procedures and existing complaints mechanism, which might cover aspects of economic, social and cultural rights. The Working Group also devoted time to discussing the draft optional protocol prepared by the CESCR[55] and a Report by the Secretary General containing a comparative summary of existing communications and inquiry practices.[56]

The themes of the discussion and questions raised by States were not particularly different from those in the first session, although the tone and atmosphere of discussions had clearly improved. The number of voices favouring an optional protocol had increased considerably.[57] At the end of the second session, Argentina, on behalf of Group of Latin American and Caribbean States (GRULAC), asked the Chairperson to prepare an analytical paper containing elements for an optional protocol to the ICESCR "in order to facilitate a more focused discussion at the third session."[58] Delegations requested that the

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53 Ibid. paras. 76-77.

54 *See Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Which the Developing Countries Face in Their Efforts to Achieve These Human Rights*, *adopted on 19/04/2004*, Commission on Human Rights, Resolution 2004/29, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., Supp. No. 3, at 102, 108, para. 14, U.N. Doc. E/CN.4/2004/127 (2004).

55 Ibid. paras. 95-99; *see also Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Commision on Human Rights (53d Session), U.N. Doc. E/CN.4/1997/105 (1997), paras. 1-2.

56 *See Session Report* (n. 36 above), paras. 85-94.

57 These States were Argentina (speaking on behalf of the Group of Latin American and Caribbean States (GRULAC), Belgium, Chile, Costa Rica, Croatia, Cuba, the Czech Republic, Ecuador, Ethiopia (speaking on behalf of the African Group), Finland, France, Germany, Mexico, Peru, Portugal, the Russian Federation, Spain, Slovenia and Venezuela. See UN Document E/CN.4/2005/52, para. 101. On the other hand, the representatives of Australia, Canada, Japan, Poland and the United States "had yet to be convinced that an optional protocol with a communications mechanism would contribute effectively to improving implementation of economic, social and cultural rights". Ibid. para. 103.

58 Ibid. para. 109.

paper present a non-judgmental analysis of all the various options for an optional protocol. On 30 November 2005, the Chairperson submitted the document, entitled *Elements for an optional protocol to the ICESCR—Analytical paper by the Chairperson-Rapporteur*.

The Third Session of the Working Group (6 to 17 February 2006)

The third session was devoted to discussing the Analytical Paper. This session marked a significant turning point in the negotiations due to a momentous change in terms of the support of an optional protocol. Two regional groups articulated clear support for the drafting of an optional protocol: Brazil, on behalf of the Group of Latin American and Caribbean States (GRULAC), "expressed full support for efforts to draft an optional protocol and an extension of the Working Group's mandate",[59] and Morocco (on behalf of the Group of African States) "expressed the hope that the Working Group could reach a consensus at its third session to lay the foundations for the elaboration of an optional protocol."[60] Additionally, Belgium, Croatia, Finland, Portugal, the Russian Federation, and Spain defended the development of an optional protocol, asserted that, "the critical mass of knowledge had been reached to equip the Working Group with a drafting mandate."[61]

On the other hand, Australia, Japan, India, the Republic of Korea, and the United States argued that the option of not having an optional protocol still needed further discussion on the grounds that there were still too many outstanding issues.[62] "China, Cuba, Egypt, the Islamic Republic of Iran, and Nepal instead emphasised the importance of strengthening international cooperation and assistance", stressing that an optional protocol would have to be applicable to all states parties, taking into account their different levels of development.[63] At the end of the third session, no recommendations were put forward regarding the renewal of its mandate and the decision was left to member States within the future Human Rights Council.

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59 Ibid. para. 6.
60 Ibid. para. 7.
61 Ibid. paras. 10, 16.
62 Ibid. paras. 11, 18.
63 Ibid. para. 12.

The reasons for the change in the balance of opinion and a shift towards a positive majority within the Working Group are diverse. It possibly resulted from the maturing of the debate or the increased familiarity of delegates and States with the justiciability of ESC rights: particularly given the wealth of examples given by participants (particularly NGOs but also States such as South Africa, Portugal and Finland). The consistent support of a wide range of experts may have also been important. However, more tactical factors may be equally important. NGOs began to increase and coordinate their lobbying and the African Group partly saw the optional protocol as an additional avenue for promoting the right to development. Indeed, some sceptical States recognised the optional protocol as an inevitable development as early as 2001 and saw their primary task as to delay its adoption and water down its eventual content.[64]

5. The New Human Rights Council: A Decisive Impetus

In June 2006, the newly created Human Rights Council decided to not only extend the mandate of the Working Group for a period of two years but specifically direct it to develop an optional protocol to the ICESCR.[65] The Council requested that the Chairperson first prepare a draft protocol to be used as a basis for the negotiations. According to the Council, the provisions in the draft should correspond to the main approaches outlined in the Chairperson's analytical paper and take into account all views expressed during the sessions of the WG.[66] The first draft was submitted on 23 April 200767 and was accompanied by an explanatory memorandum elucidating how the chairperson "sought to account for the various main proposals made in the course of …. negotiations."[68]

The Fourth Session of the Working Group (16 to 27 July 2007)

The Working Group discussed the draft at its fourth session and completed a first full reading before the end of the first week of negotiations. A second week was devoted to

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[64] Conversation of one prominet State delegation with Malcolm Langford, 5 April 2001.
[65] Resolution 1/3.
[66] UN Doc. E/CN.4/2005/52, paras. 1, 2.
67 *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* U.N. GAOR Hum. Rights Council (6th Session), U.N. Doc. A/HRC/6/WG.4/2* (2007), para. 5.
68 Ibid. para. 6.

negotiations on certain issues – the most controversial ones – as suggested by the Chairperson. These issues were: "the criteria to be used by the Committee in examining communications" (Article 8§4); the "scope of the optional protocol" (Article 2); "international assistance and cooperation and . . . establishment of a fund" (Articles 13 and 14); "admissibility criteria" (Article 4); "interim measures" (Article 5); and the "friendly settlement" of dispute (Article 7).69

In light of the discussions, the Chairperson decided to prepare a revised draft optional protocol. Made available to delegations in December 2007,[70] the it was prepared on the basis of proposals for amendments made during the fourth session and was accompanied again by a memorandum containing explanatory remarks on specific provisions and the combination of different proposals "in an effort to use the wording that seemed most consensual."[71]

The Fifth Session of the Working Group (4 to 8 February, 31 March to 4 April 2008)

Delegations welcomed the revised draft but debate continued on some of the key provisions. With regard to the competence of the Committee to receive complaints (Article 2),[72] some delegations proposed the inclusion of a qualification for the level of violation that would be subject to the communications procedure. For example, Canada, China, Poland, and Sweden favored retaining the requirement of a 'significant' violation. These States also wanted to limit the new procedure to only address cases affecting 'direct' victims.

The deletion of the then Article 3 on collective communications was proposed and supported by a number of States.[73] The first draft had included a collective

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69 *See Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 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. Human Rights Council (6th Session), U.N. Doc. A/HRC/6/8 (2007) (*Fourth Session Report*), para. 148.

70 *See Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Human Rights. Council (8th Session), U.N. Doc.A/HRC/8/WG.4/2 (2007) ('*Revised Draft Optional Protocol*).

71 Ibid. para. 4.

72 Ibid. paras. 32-33.

73 Ibid. para. 42. However, many States while not supporting the collective communications provision, expressed support to the proposal aimed at giving NGO's *amicus curie* standing.

communications procedure, which permitted international non-governmental organisations with ECOSOC consultative status to submit communications. It also allowed States parties to declare that certain national organisations had the right to submit collective communications against it. [74] This restrictive approach had actually drawn a sharp response from a number of States, particularly from Africa and 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, the inclusion of a collective complaints mechanism did not curry favour with a sufficient number of States and informal negotiations seemed to have tipped the Chairperson's hand. [75] She later 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.[76]

In the article concerning admissibility criteria (then Article 4), Canada, New Zealand, and the United Kingdom proposed a new subparagraph requiring that any complaint meet "a threshold of 'significant disadvantage,' unless the communication raised a serious issue of general importance." The provision was championed as a valve for the Committee to control what some feared could be a flood of frivolous or undeserving cases. This proposal met opposition from several delegations because it "would seem to imply that some violations could be considered insignificant, which was unacceptable."[77] It was, however, supported by a significant number of States and eventually emerged as a separate Article 4.

In relation to draft Article 5 on interim measures, the initial draft resembled the text of the optional protocols to CEDAW and ICRPD.[78] However, the United Kingdom proposed

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[74] *Draft Optional Protocol* (n. 66 above), art. 5.
[75] See respectively *Revised Draft Optional Protocol*(n. 69 above), para. 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.
[76] See *Draft Optional Protocol* (n. 66 above), para. 12.
77 *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 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,* UN Human Rights. Council (8th Session), U.N. Doc. A/HRC/8/7 (2008), para. 59 (*Fifth Session Report*).
[78] See note 20 above.

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".[79] The Norwegian proposal found little support on the floor. 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.

With regard to Article 8, the most controversial issues discussed by the delegations pertained to paragraph 4, which concerned the manner of adjudication by the CESCR. Some States insisted on the inclusion of an "unreasonableness" criteria or a reference to the State's "broad or wide margin of appreciation" or the freedom of states to determine the "appropriate policy measures and allocation of its resources in accordance with domestic priorities."[80] Several delegations, however, refused to accept these proposals.[81]

With regard to Articles 13 and 14, several delegations opposed the establishment of a trust fund to support implementation of CESCR recommendations to poorer States after a successful complaint. They noted the "danger of linking violations to funding, the risks of duplicating existing United Nations funds and the practical difficulties in managing such a fund."[82] Article 17, pertaining to the Committee's Rules of Procedure, was also the subject of a heated debate because Egypt, on behalf of the African Group, noted that the provision "should either indicate elements to be included in the rules of procedure or be deleted."[83] Japan, on the other hand, had "proposed adding [to that provision] and the States parties may comment on or make proposal for the rules of procedure, which will be considered by the Committee."[84]

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[79] 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. See *Mr. Nadeem Ahmad Dar v. Norway*, Communication No. 249/2004, U.N. Doc. CAT/C/38/D/249/2004 (2007).
80 *Fifth Session Report* (n. 76 above), art. 8, para. 91.
81 Ibid. art. 14, para. 114. These delegations were Argentina, Bangladesh, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation, and Sri Lanka.
82 Ibid. art. 14, para. 114.
83 Ibid. art. 14, para. 123.
84 Ibid. art. 17, para. 126.

In addition to the complaints procedure, the Optional Protocol contains two other mechanisms: an inter-State complaints and inquiry procedure Given the number of intractable and systemic violations that have been uncovered during the State reporting procedure, It was argued that the latter would allow the CESCR to make better and focused recommendations when it receives "reliable information indicating grave or systematic violations". However, there was division over its inclusion. 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 criteria which would be used to determine gross and systematic violations.[85] 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.

In her closing statement at the end of the first part of the fifth session on 8 February, the Chairperson asked delegations to seek instructions from their respective governments in order to finalise negotiations at the April meeting. Further informal consultations were also held in the ensuing two months and the second part of the fifth session started with the Chairperson's request that delegations bear in mind that they were at a 'problem solving' stage".[86] She said that the challenge was to "come up with possible solutions/ compromise proposals to solve the difficulties that we are still faced with—preferably these proposals should have been tested/ discussed beforehand with interested delegations that have differing views on the matter at hand."[87] The UN High Commissioner for Human Rights also addressed the Working Group and stressed that the establishment of communication procedure under the ICESCR "will truly be a milestone in the history of universal human rights, … send[ing] a strong and unequivocal message about the equal value and importance of all human rights [and] put[ting] to rest the notion that legal and

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[85] 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.
[86] Statement by the chairperson,on file with the author.
[87] Ibid.

quasi-judicial remedies are not relevant for the protection of economic, social and cultural rights."[88]

Working with a new revised version of the optional protocol,[89] the Working Group proceeded on an article-by article basis.[90] The Chairperson expressed her desire that "all delegations will be able to agree—or at least not to object—to the transmission of the text of the draft optional protocol to the Human Rights Council for adoption."[91] Article 1, as contained in the draft, was the first provision upon which the WG agreed, adopting it in the morning of 31 March 2008. By 3 April, there were only a few, but crucial, articles pending—the Working Group had reached consensus on all others. The Chairperson then prepared a compromise package that she submitted to delegations in the afternoon of that same day. On 4 April, the Working Group resumed its meeting, and the Chairperson was able to announce that there was no objection to the transmission of the text to the Human Rights Council for its consideration. The report also reflected statements made by the delegations.

6. Adoption of the Protocol

The draft Optional Protocol was submitted to the eighth session of the Human Rights Council for its consideration and adopted without a vote on 18 June 2008. However, Pakistan proposed the inclusion of the right to self-determination in the ICESCR as a ground for complaints under the protocol, something that had been earlier proposed by NGOs but excluded by States. 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

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88*Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the Open-ended Working Group On an Optional International Covenant on Economic, Social and Cultural Rights* (31 March 2008), *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/56935B5FB6A5B376C12574250039EAE0?opendocument

89 *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Letter from the Chairperson-Rapporteur*, Catarina de Albuquerque, to the Members of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, U.N. GAOR, Hum. Rts. Council, 8th Sess., U.N. Doc. A/HRC/8/WG.4/3 (2008).

[90]Statement by the chairperson, on file with the author.

[91] Ibid.

worked out and the procedure was to include "all" ESC rights in the Covenant.[92] This wording conceivably brings the socio-economic dimensions of right to self-determination under the remit of the procedure and 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 text was subsequently submitted to the General Assembly's Third Committee, which adopted the text without a vote on 18 November 2008.[93] Some weeks later on 10 December 2008, the General Assembly's Plenary adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights without a vote. 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".[94]

It was no coincidence that the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OPICECSR) was scheduled for adoption on the same day the Universal Declaration of Human Rights (UDHR) celebrated 60 years of existence. In fact, ever since negotiations of the draft optional protocol started in 2007, the objective was to symbolically ensure that this new instrument was adopted on the 10th of December 2008, giving a sign that after decades of differentiated treatment of civil and political rights on the one hand and of economic, social and cultural rights on the other hand, the world was ready to again embrace the vision of the UDHR, namely that all human rights – including economic, social and cultural - are universal and fundamental to enable us to live a life in dignity.

Such enthusiasm for the protocol was not necessarily shared amongst all States. 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

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[92] For a deeper discussion, see Mahon (note 29 above), 16-17

93 U.N. Doc. A/C.3/63/L.47, of 31 Oct. 2008. For the news of the Protocol's adoption by the General Assembly's Third Committee see http://www.un.org/News/Press/docs/2008/gashc3938.doc.htm.

[94] Statement by the Acting President in *Official Records,* 66th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 4.30pm, p. 1.

the General Assembly. One State 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 occasion"[95] whereas another stated that, "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" and it "believed that the majority of rights were insufficiently judiciable and less suited to form the basis of an individual complaints mechanism."[96] Curiously though, on adoption of the protocol, States were given the opportunity to lodge formal 'explanations of the vote' but no States did so.[97]

On 24 September 2009, the Optional Protocol was (finally) opened for signature at the 2009 Treaty Event held at the UN Headquarters in New York[98]. At the signing event the High Commissioner for Human Rights, Navanethem Pillay**,** mentioned that once the new optional protocol "enters into force, the ensuing jurisprudence that it will stimulate can offer guidance, with the benefit of concrete examples, regarding the interpretation of economic, social and cultural rights. It will thus clarify the scope of application of these rights by national tribunals and adjudicating bodies." She added that "[w]ith the adoption of the Optional Protocol, the United Nations has now been able to come full circle on the normative architecture envisaged by the Universal Declaration."[99]

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[95] 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.
[96] Ibid. 9.
[97] See *Official Records,* 66th Plenary meeting (n. 93 above), p. 1
[98] Treaty Event 2009 :Towards Universal Participation and Implementation (23-25 and 28-29 September 2009, United Nations Headquarters).
[99] Statement by Navanethem Pillay at the Signing Ceremony for the Optional Protocol to the International Covenant Economic, Social and Cultural Rights New York, 24 September 2009. Available under http://www.unhchr.ch/huricane/huricane.nsf/view01/5EE2E0E5168886FCC125763B00589EF3?opendocument.

II. PROCEDURE

3. Individual Complaints Procedure

Christian Courtis[*] *and Julieta Rossi*[**]

I. Introduction

This chapter[1] focuses on the procedure for the communications mechanism provided by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) (adopted by the UN General Assembly on 10 December 2008), and its main features, particularly admissibility.[2] The substantive provisions to be interpreted under this procedure are analysed in section III of this Commentary. As the procedure is directly inspired by existing communications mechanisms under other UN human rights treaties,[3] this chapter devotes some attention to the innovations introduced by the OP-ICESCR in comparison with these other existing mechanisms. The OP-ICESCR allows the Committee on Economic, Social and Cultural Rights (CESCR) to receive and

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[1] This chapter is partially based on C. Courtis, *Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Geneva: International Commission of Jurists/Inter-American Institute of Human Rights, 2010), pp. 1-119.

[2] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), G.A. Res. 63/117, UN Doc. A/RES/63/117 (2008). The protocol establishes three international protection mechanisms: a procedure involving 'communications'; a procedure involving inter-State communications; and an inquiry procedure for investigating grave or systematic violations of economic, social, and cultural rights. This chapter will only focus on the 'communications' mechanism.

[3] Existing communications mechanisms include those provided by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* 4 January 1969; Optional Protocol to the International Covenant on Civil and Political Rights (OP-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* 23 March 1976; 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* 26 June 1987; Optional Protocol to the Convention on the Elimination of Discrimination against Women (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* 22 December 2000; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (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* 3 May 2008; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force* 1 July 2003. The International Convention for the Protection of All Persons from Enforced Disappearances E/CN.4/2005/WG.22/WP.1/Rev.4 (2005), which was adopted but not yet in force, also provides for a communications mechanism. This chapter will focus particularly on the comparison with the OP-ICCPR, OP-CEDAW and OP-CRPD, which were the main sources of the communications mechanism established in the OP-ICESCR.

examine individual and inter-State communications, and to conduct inquiries. It puts an end to the lack of international protection historically suffered by economic, social, and cultural rights, and should be welcomed on this basis.

Generally speaking, the procedure of the communications system established by the OP-ICESCR has largely followed the guiding principles as laid out in similar instruments, such as the Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women (OP-CEDAW), the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), and the International Convention for the Protection of All Persons against Enforced Disappearance. However, there are some innovations that are worth mentioning, many of which have drawn inspiration from regional instruments. Although we will comment on each of these innovations below, the most important ones are:

- the inclusion of a new criteria for admissibility (Article 3.2.a) and an additional discretionary consideration which the Committee may apply if necessary under certain restrictions (Article 4);
- the provision of a procedural stage for reaching a friendly settlement within the communications procedure (Article 7);
- the possibility for the Committee to consult documentation emanating from international and regional bodies and other actors (Articles 8.1 and 8.3);
- the inclusion of a standard of review for considering communications (Article 8.4)[4]; and
- the inclusion of a clause allowing the communications procedure to be linked to international assistance and cooperation mechanisms, including the provision of a trust fund (Article 14).

The chapter will also discuss the procedural dimensions of the CESCR's first decision under the Optional Protocol[5] On September 17, 2015, the Committee delivered its

[4] We will not comment on this new feature, as it will be the subject of other of the contributions of this publication – see Bruce Porter, Chapter 6 on Reasonableness in this volume.
[5] *I.D.G. v Spain* (CESCR) Communication No. 2/2014 at para 11.4.

response to an individual complaint, regarding violations of the right to housing against Spain. Notably, from a procedural perspective, the Committee took into account a third party intervention from the International Network on Economic, Social and Cultural Rights (ESCR-Net) and the initial facts in the case occurred before the entry of the force of the Optional Protocol for Spain.

2. Jurisdiction

Article 2 of the OP-ICESCR sets out the scope of the communications procedure in three different senses. First, it defines the *subject-matter jurisdiction* of the Committee, that is, the possible content of a communication in relation with the ICESCR. Secondly, it defines the question of the *standing* to present communications, i.e., who is entitled to submit communications to the Committee. Finally, it raises the issue of the territorial scope of protection provided for in the communications procedure.

2.1 Subject-matter Jurisdiction

As far as the Committee's *subject matter jurisdiction* is concerned, Article 2 has taken a comprehensive approach covering all the economic, social, and cultural rights included in the ICESCR.

This solution emerged after a lengthy debate around two opposing positions in the Working Group sessions. On the one hand, there was the 'comprehensive' approach through which all the rights and obligations established in the ICESCR could be the subject of individual communications. On the other hand, the so-called 'limited approaches' advocated for limitations on the scope of the rights or obligations established in the Covenant that could be the subject of communications. During the Working Group sessions, the proponents of 'limited approaches' in turn suggested two types of limitations. First, the exclusion of Part I of the ICESCR—which includes the right of all peoples to self-determination—as a basis for presenting communications to the Committee. Second, the so-called '*à la carte*' approach, under which each State Party to the Protocol would have discretion to choose, by means of a declaration made at the time of ratification, the rights to come under the subject matter the Committee's jurisdiction.

The '*à la carte*' approach was ruled out after the Working Group agreed to a text by consensus. It was rejected on a number of different grounds put forward by many of the States involved in the Working Group as well as by the Coalition of Non-Governmental Organizations for an OP to the ICESCR (NGO Coalition), which was actively involved in the drafting process. One ground on which the approach was rejected was the lack of precedent in other United Nations human rights instruments. It was also argued that selecting only some rights to be protected under the communications procedure could lead to the establishment a hierarchy of rights. It was further observed that under such an approach the protection of economic, social, and cultural rights would be discretionary, weaker than that afforded to civil and political rights, and contrary to the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR), as it does not allow States to choose and reject rights at will. Several of the interventions made during the Working Group debates considered an '*à la carte*' approach to be incompatible with the notion that all human rights are interdependent and indivisible, particularly because it suggests that while the protection of civil, political, and other human rights does not allow for exceptions, the protection of economic, social, and cultural rights can be selective and left to the interests of State Parties.

Lastly, it was also pointed out that the pragmatic reasons given by some States for favouring the so-called '*à la carte*' option, including the argument that it would initially provide States the chance to test their commitment with a limited number of rights and at a later stage extend protection to other rights, were not supported by empirical evidence from other instruments, such as the ILO conventions and the European Social Charter, both of which include such an option.[6] Judging from the experience of systems that allow the '*à la carte*' option, the gradual expansion of protection that had been forecasted was not likely to materialise.

As for the second proposed limitation, relating to the right of self-determination in Part I of the Covenant, the text agreed upon by consensus in the Working Group and forwarded to the Human Rights Council for consideration originally excluded Part I of the ICESCR

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[6] Also in these systems, the justification for opting for the '*à la carte*' approach in the ILO Conventions and the European Social Charter was to allow the State the opportunity to gradually expand the list of protected rights. However, in practice, States have tended to limit themselves to the rights they chose initially, showing no great interest in extending the list of recognised rights.

from the scope of the communications procedure of the OP-ICESCR. Article 2 referred to the rights set forth 'in Parts II and III of the Covenant'.[7] In doing so, the proposed text departed from the wording used in Article 1 of the OP-ICCPR. The OP-ICCPR, Article 1 does not exclude Part I of the International Covenant on Civil and Political Rights (ICCPR[8]) which is identical to Part I of the ICESCR. To justify its exclusion in the OP-ICESCR, it was noted that the Human Rights Committee jurisprudence on the subject had rejected arguments based on Article 1 of the ICCPR[9] and that the communications mechanism was not appropriate for dealing with alleged violations of the right to self-determination because it was a collective right conferred upon peoples as such.

The text that the Working Group adopted provoked a variety of reactions. Several States reserved their position on the issue, voicing their concern that the right to self-determination was not included in the communications mechanism. Some non-governmental organisations had a similar reaction. The NGO Coalition for an Optional Protocol made an interpretative declaration arguing that exclusion of Part I of the Covenant should not mean the complete exclusion of claims based on invocation of the right to self-determination, given that it is a general obligation under the ICESCR. Rather, it should be understood to mean the exclusion of communications based *solely* on Part I: a communication that references the right to self-determination would be admissible provided that the author of the communication identified other rights under Parts II and III of the ICESCR as allegedly having been breached.[10]

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[7] 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* 3 January 1976.

[8] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171 (*adopted* 16 December 1966, *entered into force* 23 March 1976).

[9] See, for example, Human Rights Committee, *Kitok v. Sweden*, Views of 27 July 1988 (Thirty-third Session), Communication No. 197/1985, para. 6.3. The Committee stated that 'the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such'.

[10] The NGO Coalition made the following comment on Article 2 of the text agreed by the Working Group: 'Throughout the process we have supported a comprehensive approach that includes all the Covenant rights, and we would have preferred Part I of the Covenant to be included. Our interpretation of the intention of article 2 is that, although a communication would be inadmissible if it only alleged a breach of article 1 (of the ICESCR), admissible communications can in any event be examined in the light of all parts of the Covenant, including Part I'.

The exclusion of Part I of the ICESCR from the communications procedure led some States to propose amendments to the text agreed upon by the Working Group during the informal preparatory sessions that took place prior to the discussion of the draft Protocol in the Human Rights Council. In particular, they submitted to Portugal, the State leading negotiations on the OP-ICESCR, to amend Article 2 by removing the reference to the rights set out in Parts II and III of the ICESCR and replacing it with the phrase 'any of the economic, social and cultural rights set forth in the Covenant.'[11] Portugal took up the proposal, and with the support by States co-sponsoring the Human Rights Council resolution, the then draft OP-ICESCR was adopted by consensus the Council.

The intention to include Part I of the ICESCR in the communications mechanism can therefore be inferred from the preparatory work that led to the adoption of the OP-ICESCR, at least insofar as it is possible to argue that the right to self-determination is an economic, social, and cultural right included in the ICESCR, or that it has economic, social, and cultural dimensions.

It bears mentioning that the final wording of the OP-ICESCR and the reasons for it are practically identical to those used in the draft Optional Protocol submitted by the Committee on Social, Economic and Cultural Rights in 1996. The relevant part of the text proposed by the Committee at that time made the following provision:

Any individual or group claiming to be a victim of a violation by the State party concerned of any of the economic, social or cultural rights recognized in the Covenant, or any individual or group acting on behalf of such claimant(s), may submit a written communication to the Committee for examination.[12]

In particular, the Committee stated the following with regard to the possibility of presenting communications for alleged violations of Article 1 of the Covenant:

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11 OP-ICESCR (n. 2 above), Article 2.

12 See 'Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights' in *Status of the International Covenants on Human Rights. Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, United Nations document E/CN.4/1997/105, Annex, 18 December 1996, para. 31.

The Committee recommends that the optional protocol should apply in relation to all of the economic, social and cultural rights set forth in the Covenant and that this would include all of the rights contained in articles 1 to 15. The Committee noted, however, that the right to self-determination should be dealt with under this procedure only in so far as economic, social and cultural rights dimensions of that right are involved. It considered that the civil and political rights dimensions of the right should remain the preserve of the Human Rights Committee in connection with article 1 of the International Covenant on Civil and Political Rights.[13]

In this regard, and in practical terms, the proposed interpretation previously put forward by the NGO Coalition may be useful to avoid discussions about the nature of the 'right to self-determination' in the abstract. When seeking to invoke that right, the authors of communications would facilitate the Committee's work if they also indicated which rights from ICESCR, Parts II and III had also been breached. For example, in their claims they could identify the extent to which an alleged violation of the right to self-determination breaches specific rights laid down in the ICESCR, such as the right to food or the right to health. This would also prevent repetition of the debate that took place in the Human Rights Committee concerning the suitability of the communications mechanism for solely dealing with violations of the right to self-determination. In fact, although the Human Rights Committee has been reluctant to consider violations of the right to self-determination established in Article 1 of the ICCPR on their own, in several cases it has considered the same set of facts in light of Covenant Articles 25,[14] 26,[15] and 27.[16] In a similar vein, it may also be convenient to link alleged violations of the right to

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[13] Ibid., para. 25.

[14] Article 27 of the Covenant establishes political rights. Thus, for example, although the Human Rights Committee has held that it does not have the competence under the Optional Protocol to examine communications relating to violations of the right to self-determination established in Article 1 of the Covenant, it has stressed that, where relevant, it can interpret Article 1 in determining whether the rights established in Parts II and III of the Covenant have been violated (see, for example, *Marie-Hélène Gillot et al v France*, Views of 15 July 2002, Communication Nº 932/2000, para. 13.4).

[15] See, for example, *J. G. A. Diergaardt et al v Namibia*, Views of 7 July 2000, Communication Nº 760/1997.

[16] Under Article 27 of the Covenant, members of ethnic, religious, and linguistic minorities have the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Therefore, for example, in the aforementioned case of *Kitok v Sweden* (n. 9 above), the claim for possible violation of the right established in Article 27 of the Covenant was admitted and examined by the Committee.

self-determination to alleged violations of rights specifically established in Parts II and III of the ICESCR.

2.2 Standing to Submit Communications

A second issue addressed in Article 2 is that of standing to submit communications (*locus standi*), that is, who has the right to submit a communication before the Committee. The trend in other UN communication procedures has been to confer such standing solely to the direct victims of human rights violations. However, this has not precluded others from instituting proceedings on behalf of a victim.[17] In the area of economic, social, and cultural rights, comparative national and international case law shows the need for flexibility in terms of standing to allow cases where group or collective violations are to be heard.

This issue was discussed at length during the Working Group sessions. Part of the discussion focused on a specific feature of the draft protocol originally submitted to the Working Group by the Chairperson-Rapporteur. The draft in question provided for two kinds of communications, so-called 'individual communications' and 'collective communications'. In the wording of that original draft, 'individual communications' corresponded to the model adopted in the communications procedures established in other instruments from the universal human rights system. It took its inspiration from the wording used in the OP-CEDAW. Although the so-called 'collective communications' referred to in that original draft, followed the model adopted in the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Additional Protocol to the European Social Charter).[18]

It is useful to recall the differences between these models, as some of the arguments concerning the scope of the entitlement eventually adopted in Article 2 of the Optional

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[17] This has been regularly demonstrated time and again in practice by all of the United Nations human rights treaty bodies. For example, OP-CEDAW (n. 3 above), Article 2; the OP-CRPD (n. 3 above), Article 1.1; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (n. 3 above), Article 77.1; and the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above), Article 31.1, expressly give legal standing to third parties, provided that they are acting on behalf of and in representation of individuals whose rights have been violated.

[18] See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9.XI. (1995), Arts. 1-2.

Protocol were directly linked to the idea that the proposal to include a procedure for 'collective communications' was unnecessary and should therefore be rejected.

Under the 'individual communications' model contained in the rest of the procedures laid down in other instruments from the universal human rights system, both the alleged victims (either individuals or a group of individuals) and violation need to be identified, and domestic remedies exhausted. Standing to submit communications lies primarily with those alleged victims—as individuals— if the violation is individual in nature; or jointly or as a group, if there is more than one victim. The alleged individual victims or groups of victims can of course appoint representatives who are entitled to submit communications on behalf of those they are representing. Another possibility is that of submitting communications on behalf of the alleged victim(s), but without having his express consent—in other words, without the victim(s) having appointed a representative to submit a communication on his behalf. Such a possibility requires a specific justification from those submitting the communication.

In contrast, under the 'collective communications' model contained in the Additional Protocol to the European Social Charter, the specific victims do not need to be identified, nor do domestic remedies need to have been exhausted; there simply needs to be an allegation of an 'unsatisfactory application of the Charter.'[19] In this system, standing to submit communications or claims does not lie with the victims, but with organisations which, *a priori*, have been granted special status.[20] In the case of the Additional Protocol to the European Social Charter, it lies with the international organisations of employers and trade unions referred to in the Charter; other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for that purpose; representative national organisations of

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19 Ibid.

20 The system and language used in the Additional Protocol to the European Social Charter (n. 18 above), in turn took its inspiration from the complaints procedure established in Article 24 of the Constitution of the International Labour Organization, in which it is not the direct victims but employers' or workers' organisations who are entitled to submit claims. Article 24 of the ILO Constitution states that '[i]n the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit'.

employers; and trade unions within the jurisdiction of the Contracting Party. In the event of a specific declaration by the State concerned, other representative national non-governmental organisations receive standing. In the original draft proposed by the Chairperson-Rapporteur of the Working Group, entitlement to submit this kind of 'collective communication' was assigned to 'non-governmental organizations in consultative status with the Economic and Social Council of the United Nations'.

The proposal to establish a 'collective communications' system based on the model used in the Additional Protocol to the European Social Charter was not well received by States. In addition to arguments concerning the lack of precedent and the undesirability of having two parallel mechanisms with different requirements for admissibility, several State delegations said that it was unnecessary to establish a new procedure to entitle non-governmental organisations to present communications since they were already authorised to submit cases under the 'individual communications' mechanism common to all the other instruments in the universal human rights system (provided that they did so in representation of or on behalf of the alleged victim(s)). The reasons given for rejecting the proposal to have a 'collective communications' mechanism in the Optional Protocol thus shed light on the extent to which standing is established in Article 2 of the OP-ICESCR as provided by the agreed text.

The most important principle as far as standing is concerned is to allow victims direct involvement in submitting cases that concern them. The principle that the victims of violations of economic, social, and cultural rights should be placed at least on par with victims of human rights violations that are already protected by other communications mechanisms guided the drafting of the Protocol.[21] In this regard, the text of Article 2 of the OP-ICESC should be welcome: it allows victims, individually or jointly, to submit their own case by means of a communication and also allows them to authorise others to submit cases on their behalf, in accordance with the traditional principles of voluntary or agreed representation. Lastly, in keeping with the most recently established instruments

[21] In this regard, see, for example, Article 1 of OP-ICESCR (n. 2 above), which states 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' (emphasis added).

on the subject, it allows complaints to be submitted on behalf of the alleged victim(s), even without their consent, when there is an adequate justification for doing so.

When it comes to the issue of standing, Article 2 of the OP-ICESCR follows the wording of Article 2 of the OP-CEDAW. It states that communications may be submitted by:

[I]ndividuals 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 2 of the OP-ICESCR thus provides several possibilities, allowing communications to be submitted by:

a) individuals who claim to be victims of violations of the Covenant;

b) groups of individuals who claim to be victims of violations of the Covenant;

c) other third parties acting on behalf of those individuals or groups of individuals with their consent; and

d) other persons acting on behalf of alleged victims (individuals or groups of individuals) without their consent but are able to justify their reasons for putting forth a communication.

This range of available possibilities reflects the recognition that violations of economic, social, and cultural rights, like other human rights, may have individual but also collective impact. Examples of violations with a collective impact include the aggregation of individual violations produced by the same act or omission; breaches of the rights of group right-holders, such as indigenous communities or trade unions; or violations affecting goods that are collective or indivisible in nature, such as the environment, historical, or cultural patrimony.

The first possibility is for the communication to be submitted by the alleged individual victim of a violation that is individual in its scope. A second possibility is for the communication to be submitted by a group of individuals who have suffered a common violation—that is, by the aggregation of the individuals affected by the same act or

omission. A third possibility allows for the alleged victim or group of victims to be represented by others, with the consent of those being represented. In this case, the communication is submitted by the representative of the alleged victim or group of victims when a mandate—i.e. power of attorney—has been given.

The last possibility, namely that in which another person or persons submit the communication without a mandate from the alleged victim, is one that is recognised in communications procedures established in other treaties under the universal human rights system, either within the relevant convention itself or in the rules of procedure of the relevant treaty-monitoring body.[22] Communications and complaints procedures within the African and Inter-American human rights systems, for example, do not require that the person submitting the communication necessarily have the consent of the alleged victims of the violation in question.[23]

It is important to underscore that dealing with complex cases involving the violation of economic, social and, cultural rights – and civil and political rights—flexibility is necessary regarding standing requirements to prevent impunity in cases where the victims cannot act for themselves or appoint representatives. For example, there needs to be a solution for cases in which, for some reason, it is impracticable for all the individuals affected to give their express consent to submitting a communication. This may include cases where the rights violation is collective or large-scale in nature,[24] where those

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[22] In connection to this, see Article 90 of the Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.3 (1994). It should be noted that the Committee's work has included various cases in which it considered communications concerning violations of the rights of victims who had not submitted the complaints themselves, were not represented, and did not have a third party acting on their behalf (see. for example, Human Rights Committee, *Apirana Mahuika et al v New Zealand,* Views of 27 October 2000, Communication Nº 547/1993; and *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia*, Views of 29 July 1997, Communication Nº 612/1995).

[23] Article 56.1 of the African [Banjul] Charter on Human and Peoples' Rights, *adopted* 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, simply requires that communications '[i]ndicate their authors even if the latter request anonymity'. Article 44 of the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978, stipulates that '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party'.

[24] See, for example, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the General Assembly in Resolution 40/34 of 29 November 1985, Principle 1; and the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly through Resolution 60/147 of 16 December 2005, Principle 8. On this subject, see

affected have been subjected to threats and intimidation, or where submitting a communication might put them at risk. The submission of cases concerning harm to collective or indivisible goods also requires a flexible solution. By definition, no individual holds exclusive rights over these goods and it would be impracticable to require that the communication be submitted by the whole group jointly enjoying the collective good.[25] Some of the most important jurisprudence on economic, social and cultural rights developed by regional human rights systems concern these kinds of situations.[26]

In cases such as those raised above, in order to avoid impunity, the relevant matter is to ensure that someone is entitled to submit a communication when there are collective or group violations that either prevent or hinder its submission by individual victims or make it difficult to obtain the consent of all members of the affected group. Article 2 of the OP-ICESCR provides a solution for such cases by allowing, as a fourth possibility, for someone else to submit a communication on behalf of the alleged victim or group of victims without their consent, provided that they are able to justify why they are taking action. Some of the reasons already mentioned—victim vulnerability or impossibility of obtaining consent—may be sufficient grounds for submitting a communication without the express consent of the alleged victim or victims. In any case, the wording of the

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International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations. A Practitioner's Guide,* Practitioners' Guide Series Nº 2, (ICJ: Geneva, 2006), pp. 38-42 ('The notion of "collective victim"').

[25] See, for example, *Declaration of Basic Principles* (n. 24 above), Principle 10. Collective resources that benefit groups of people include language, historical and cultural heritage, the environment, collective or community land ownership, etc. Suppose that a State Party prohibits the use of a language. Such a measure could, *a priori*, be deemed a violation to the right to participate in cultural life (Article 15.1 of the ICESCR). Those affected would be all the users of that language, but, for the purposes of analysing the violation, it would be excessive to require all of them to submit a communication or to specifically consent to its submission.

[26] See, for example, African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Decision of 13-27 October 2001, Communication Nº 155/96 (case presented by two NGOs on behalf of members of the Ogoni people in which the African Commission considered that the rights to health, food, housing and the environment, among others, had been violated); European Court of Human Rights, *D.H. v The Czech Republic*, Appl. No. 57325/00, Judgment of 13 November 2007, (case presented by an NGO on behalf of some specific victims but which involved the situation of other unidentified victims, in which the European Court decided that there was a discriminatory denial of the right to education); Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 2006 (Merits, Reparations and Costs), Series C No 146 (case originally presented by an NGO on behalf of an indigenous community and its members in which the Court found that there had been violations of the right to a decent life, including lack of access to health services, education, water and sanitation and food, and the right to collective ownership of the community's ancestral land).

article does not predetermine the grounds that are possible; this assessment is left to the Committee.

As far as standing for non-governmental organisations to submit communications is concerned, Article 2 does not restrict their ability to submit on behalf of an alleged victim or groups of victims, with or without their consent (with an adequate justification in the latter case). Thus, communications can be submitted on behalf of alleged victims or groups of victims by both natural persons and legal entities, including non-governmental organisations.[27] This is in fact what several of the States participating in the Working Group intended when they suggested that it was unnecessary to establish a 'collective communications' mechanism, since non-governmental organisations may also submit communications under the model of other instruments from the universal human rights system. The solution provided in the text is not only useful, but in many cases it may be essential (particularly in complex cases or where there is large-scale harm) since it is extremely difficult for the group of victims concerned to act in a coordinated fashion. In such cases, given their knowledge and expertise, non-governmental organisations can ensure that the communication is better presented and processed.

Another indication that the States participating in the Working Group recognised the wide range of situations that can be involved in violations of economic, social and cultural rights, including those of a group or collective nature, is the fact that a proposal was made to amend the title originally proposed for Article 2, 'Individual Communications', and call it simply 'Communications.' This generic heading includes both individual and group or collective violations and better reflects the different standing possibilities contained in the article.

2.3 Spatial Scope of Protection

[27] On this, CERD found a communication submitted by non-governmental organisations admissible in a case involving a complaint about the use of racist expressions against an ethnic minority. The Committee took the view that, bearing in mind the nature of the activities of the organisations concerned and the groups of individuals they were representing, both were entitled to submit a communication without having to obtain the consent of all members of such groups or of all members of the ethnic community that had been wronged. See, for example, Committee on the Elimination of Racial Discrimination, *Zentralrat Deutscher Sinti und Roma et al. v Germany*, Opinion of 22 February 2008, Communication Nº 038/2007, in particular para. 7.2.

The third aspect of the communications procedure established in Article 2 is the spatial or territorial scope of the protection provided. Article 2 refers to '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.'[28] The language used is taken from other similar instruments.[29] The text does not reflect the fact that the wording of the ICESCR differs from that of other human rights instruments. While Article 2.1 of the ICCPR contains a specific reference to the jurisdiction of the State Party,[30] this is not the case for ICESCR, Article 2.1.[31] In fact, Article 2.1 of the ICESCR not only lacks reference of any kind to the territorial or jurisdictional limits of its application, but it also establishes international assistance and cooperation obligations that are absent from equivalent provisions under the ICCPR.[32]

Mindful that the ICESCR itself makes no mention of a jurisdictional limitation, there was therefore little reason to include one in the Optional Protocol. Indeed, the Optional Protocol, as a treaty which is purposed to establish a communications procedure, cannot modify substantive provisions from the main treaty that it complements. In any case, given that international jurisprudence has repeatedly recognised the extraterritorial scope of human rights treaties, this provision does not preclude the extraterritorial application of the international protection provided under the communications procedure, particularly because there are sufficient grounds to claim State Party jurisdiction over individuals or groups of individuals beyond its territory. The International Court of Justice has taken the

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28 [Emphasis added.]

29 See, for example, the OP-ICCPR (n. 3 above), Art. 1; ICERD (n. 3 above), Art. 14; CAT (n. 3 above), Art. 22.1; OP-CEDAW (n. 3 above), Art. 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (n. 3 above), Art. 77.1; OP-CRPD (n. 3 above), Art. 1.1; and the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above), Art. 31.1.

30 ICCPR (n. 8 above), Art. 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).

31 ICESCR (n. 2 above), Art. 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'.

32 For further comments, see M. Sepúlveda and C. Courtis, 'Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR?', *Nordic Journal of Human Rights*, Vol. 27, No 2 (2009), pp. 54-63.

view that the ICCPR, the ICESCR, and the Convention on the Rights of the Child are extraterritorially applicable in respect to acts comitted by a State in the exercise of its jurisdiction outside its territory.[33] The Human Rights Committee has recognised the extraterritorial application of the ICCPR in cases where acts have taken place outside State territory, in its general comments,[34] observations concerning countries,[35] and in the views it has taken in individual cases in the context of the communications procedure.[36] The Committee against Torture[37] and the Committee on Economic, Social and Cultural Rights have also reiterated the extraterritorial scope of their respective treaties.[38] This is also the case for the European Court of Human Rights.[39]

In addition to the established international jurisprudence that recognises the extraterritorial scope of human rights treaties, a series of principles—the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights—have recently been adopted by a group of experts in international law and human rights.[40] These principles confirm the responsibility of States for acts

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[33] International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, paragraphs 111, 112 and 113.

[34] Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 10, in CCPR/C/21/Rev1/Add.13, 26 May 2004.

[35] See, for example, the *Concluding Observations of the Human Rights Committee* on: United States of America (CCPR/C/79/Add.50, A/50/40, 3 November 1995, paragraphs 266-304, and CCPR/C/USA/CO/3/Rev1, 18 December 2006, paragraph 10) and Israel (CCPR/CO/78/ISR, 21 August 2003, paragraph 11, and CCPR/C/79/Add.93, 18 August 1998, paragraph 10). Extraterritorial application of the Covenant should also be extended to all individuals who are subject to the jurisdiction of a State when its troops are serving abroad, particularly in the context of peacekeeping and peace-restoration missions, NATO military missions, or belligerent occupation (see, among others, *Concluding observations of the Human Rights Committee* on: Poland, CCPR/CO/82/POL, 2 December 2004, paragraph 3; Belgium, CCPR/CO/81/BEL, 12 August 2004, paragraph 6; and Germany, CCPR/CO/80/DE, 4 May 2004, paragraph 11; and Iraq, CCPR A/46/40, 1991, paragraph 652, and CCPR/C/SR.1080-1082).

[36] *López Burgos v Uruguay*, Views of 29 July 1981, Communication No. 52/1979; *Lilian Celiberti de Casariego v Uruguay,* Views of 29 July 1981, *Communication* No. 56/79; and *Mabel Pereira Montero v Uruguay*, Views of 31 March 1983, Communication No. 106/81.

[37] Committee against Torture, *United Kingdom of Great Britain and Northern Ireland - Crown Dependencies and Overseas Territories,* Conclusions and Recommendations, CAT/C/CR/33/3, 10 December 2004, paragraph 4 (b); and *General Comment N° 2: Implementation of Article 2 by States Parties*, in UN Doc. CAT/C/GC/2 of 24 January 2008.

[38] See the *Concluding Observations of the Committee on Economic, Social and Cultural Right: Israel*, E/C.12/1/Add.90, 26 June 2003, paragraph 15, and E/C.12/1/Add.27, paragraph 11.

[39] See the European Court of Human Rights, *Loizidou v Turkey (Preliminary Objections)*, Appl. No. 15318/89, Judgment of 23 March 1995, paragraph 60.

[40] The Maastricht Principles were adopted on 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists. The experts who adopted the principles came from universities and organisations located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special

committed or those which could have implications outside their national territory and stress the relevance of this rule in the realm of economic, social, and cultural rights, particularly in times of economic globalisation.

The Principles, based on legal research conducted over a period of more than a decade, take as their starting point the conviction that the human rights of individuals and peoples are necessarily impacted, substantially and in both negative and positive ways by, the conduct of States other than their own. The Principles affirm that States are obliged to cooperate and assist one another in realising the economic, social, and cultural rights of all people. They also make clear that States may be held responsible for the adverse effects that their conduct makes on the enjoyment of rights beyond their own borders. The experts stressed that both economic globalisation and the increasing shift in decision-making competency and authority to international bodies are placing great strain on the capacity of each State to realise human rights of their own nationals and residents, and that all States, singly or jointly, must act to ensure that human rights do not become a casualty of this trend.

In sum, the limitation contained in the Optional Protocol places an inappropriate substantive requirement that is not included in the ICESCR and contradicts the trend currently underway in international human rights law. In any case, the communications procedure should not be excluded when there are reasons to assert that the State party exercises jurisdiction beyond its borders.

3. Admissibility

The admissibility requirements contained in the OP-ICESCR do not make any substantive innovations compared to those laid down in other communications procedures within the universal or regional systems of human rights protection. However, Article 3.2(a) and Article 4 both introduce procedural elements which, up until now, have

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Rapporteurs of the United Nations Human Rights Council. The Maastricht Principles complement and build on the 1986 Limburg Principles for the implementation of the International Covenant on Economic, Social and Cultural Rights and on the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. The text of the Maastricht Principles is available at: <www.maastrichtuniversity/humanrights and www.icj.org>.

not been featured in other communications procedures established by United Nations human rights treaties.

For a communication to be deemed admissible, domestic remedies must be exhausted (though there are exceptions which will be examined below), the communication must be submitted within one year following the exhaustion of domestic remedies, and there cannot be pending case concerning the same matter before the Committee itself or under another procedure of international investigation or settlement.

Communications based on facts that occurred prior to the entry into force of the OP-ICESCR for the State Party concerned, anonymous communications, communications that are not submitted in writing, or communications that do not comply with the minimum substantive requirements (i.e. they are incompatible with the provisions of the ICESCR, manifestly ill-founded, or not sufficiently substantiated) would also be considered inadmissible.

3.1 Exhaustion of Domestic Remedies

Given the subsidiary nature of international protection, the need for domestic remedies to be exhausted has been set as a requirement under all communications procedures established in human rights treaties in the universal system. As an exception to that principle, which is already specifically established in the OP-ICESCR,[41] the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment,[42] the International Convention for the Protection of All Persons from Enforced Disappearance,[43] and regional instruments,[44] express provision has been made for situations where the application of such remedies has been unreasonably prolonged.

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[41] See Article 5.2 b) of the Protocol (n. 2 above) which refers to the unreasonable prolongation of the application of remedies.

[42] See Article 22.5 b) of the Convention (n. 3 above) which states that 'this shall not be the rule where the application of the remedies is unreasonably prolonged or *is unlikely to bring effective relief to the person who is the victim of the violation of this Convention*' (emphasis added).

[43] See Article 31.2 d) of the Convention (n. 3 above) which states: 'All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged'.

[44] American Convention on Human Rights (n. 23 above), Art. 46.2; and the African Charter of Human and Peoples' Rights (n. 23 above), Art. 56.5.

The wording of the OP-ICESCR on this point adheres closely to that used in the OP-CEDAW[45] and the OP-CRPD.[46]

However, during discussion of the draft Optional Protocol in the Working Group, one of the exceptions included in some of the aforementioned instruments was omitted, namely the unlikelihood of such remedies bringing effective relief. There was no reason to introduce such a change with regard to this requirement when the interpretative standards of other treaty bodies within the universal human rights system and the judicial organs of regional systems are sufficiently well established. However, the removal of this requirement from the text does not mean that alleged victims should exhaust domestic remedies even if they are not effective. It is unreasonable and contrary to the effectiveness of the communications mechanism to require that the exhaustion of remedies known to be ineffective. The omission of this particular exception from the text does not, therefore, prevent the interpretation that the remedies which have to be exhausted are those which are effective (rather than being any existing remedy). The standards on this matter developed by other committees and regional human rights courts offer clear guidance on this: remedies that are unlikely to properly remedy the violation being denounced are not effective.[47] Although Article 5.4 (a) of the OP-ICCPR does not

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45 Article 4.1 of the Protocol (n. 3 above) states that: 'The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted *unless the application of such remedies is unreasonably prolonged* or unlikely to bring effective relief' (emphasis added).

46 Article 2 d) of the Protocol (n. 3 above) states that: 'All available domestic remedies have not been exhausted. *This shall not be the rule where the application of the remedies is unreasonably prolonged* or unlikely to bring effective relief' (emphasis added).

47 See, for example, among others, the Committee against Torture, *Josu Arkauz Arana v France*, Decision of 9 November 1999, Communication Nº 063/1997, para. 6.1; *T.P.S. v Canada*, Decision of 16 May 2000, Communication Nº 099/1997, para. 10.1; *Enrique Falcon Ríos v Canada*, Decision of 23 November 2004, Communication Nº 133/1999, paras. 7.3-7.5; and *Jovica Dimitrov v Serbia and Montenegro*, Decision of 3 May 2005, Communication Nº 171/2000, para. 6.1. See also the Committee against Racial Discrimination: *Anna Koptova v Slovak Republic*, Decision of 8 August 2000, Communication Nº 13/1998, para. 6.4; *Miroslav Lacko v Slovak Republic*, Decision of 9 August 2001, Communication Nº 11/1998, para. 6.2; *Zentralrat Deutscher Sinti und Roma et al. v Germany* (n. 27 above), para. 7.3. See also the Inter-American Court of Human Rights, *Advisory Opinion OC-9/87, 'Judicial Guarantees in States of Emergency'*, 9 October 1987, para. 24 ('for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective'). Also, for the European Court of Human Rights: *Airey v Ireland*, Appl. No. 6289/73, Judgment of 9 October 1979, para. 24 (the right of access to a court must be practical and effective and not theoretical or illusory); *Silver and Others v United Kingdom*, Appl. Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment of 25 March 1983, para. 113 ('where an individual has an arguable claim to be the victim of a violation of the rights set forth in the

explicitly refer to the effectiveness of remedies, the Human Rights Committee reached the same conclusion, holding that only available *effective* remedies should be exhausted—that is, those that have a reasonable chance of prospering and of suitably protecting the right infringed or remedying the harm caused by the violation in question.[48] In many jurisdictions, economic, social and cultural rights are still considered non-justiciable. In such cases, it seems obvious that there are no domestic remedies to be exhausted. The ratification of the OP-ICESCR might in fact create incentives for the establishment of domestic remedies in State parties that have yet not done so: this will allow the possibility of providing redress nationally, instead of being confronted directly with the supervision of an international body such as the Committee on ESCR.

Finally, during the Working Group discussions, some States suggested that it should be necessary for regional remedies to be exhausted—a rather problematic proposal, which, in the end, did not feature in the text submitted by the Chairperson-Rapporteur.[49]

3.2 Time Limit for Submitting Communications

The OP-ICESCR adds a requirement not found in other treaties from the universal system; **[50]** namely, the need for communications to be submitted within one year of the exhaustion of domestic remedies, except in cases where the author can demonstrate that it was not possible to do so. This requirement is, however, stipulated in regional human rights systems.**[51]** Although adding further admissibility requirements that make it harder to submit an individual communication should always be seen unfavourably, the interest

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[European] Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress').

[48] See, for example, the Human Rights Committee, *Luis Asdrúbal Jiménez Vaca v Colombia*, Views of 25 March 2002, Communication Nº 859/1999, para. 6.3; *Lansman et al. v Finland*, Decision on admissibility, 14 October 1993, Communication Nº 511/1992, para. 6.3; *C. v Australia*, Views of 28 October 2002, Communication Nº 900/1999, para. 7.3; *Bernardino Gomariz Valera v Spain*, Views of 22 July 2005, Communication Nº 1095/2002, para. 6.4; and *Zdenek Ondracka et al. v Czech Republic*, Decision of 31 October 2007, Communication 1533/2006, para. 6.3.

[49] See comment to article 8.3 in para 7 *infra.*

[50] It is, nevertheless, stipulated in Article 91 f) of the Rules of Procedure of the Committee against Racial Discrimination, CERD/C/35/Rev.3 (1989).

[51] American Convention on Human Rights (n. 23 above), Art. 46.1 b (which sets a time limit of six months); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols No. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*, Article 35.1 (which also sets a time limit of six months); African Charter of Human and Peoples' Rights (23 above), Art. 56.6 (which allows for a reasonable time period after the exhaustion of domestic remedies).

that justifies its inclusion here—ensuring that the situation to be examined is still relevant and that the submission is serious—is acceptable, and the time limit imposed does not seem excessive.

The time limit, originally envisaged in the draft OP-ICESCR presented by the Chairperson-Rapporteur, was six months. Several State delegations and the NGO Coalition considered it inappropriate on the grounds that it was too short. Several alternatives, including simply that of referring to a 'reasonable period', were discussed. Ultimately, the time limit was extended to one year.

3.3 Temporal Jurisdiction for the Examination of Communications

The temporal jurisdiction of the Committee is restricted to events that take place after the entry into force of the Protocol for the State Party in question. This provision of the OP-ICESCR, Article 3.2 (b) reflects the generally established procedural standard, through either rules of procedure or jurisprudence, in other individual communications procedures relating to human rights treaties in the universal system. Nevertheless, this limitation has caused controversy in the case of ongoing or continuous human rights violations, such as enforced disappearances. Thus, for example, complaints relating to cases of enforced disappearance that began before the OP-ICCPR came into force, but which continued after the Protocol entered into force for the State Party concerned, have been declared inadmissible *rationae temporis* by the Human Rights Committee.[52]

However, paragraph 2 (b) of Article 3 of the OP-ICESCR authorises the Committee to hear cases in which 'those facts continued after that date';[53] it allows the Committee to examine cases involving violations of economic, social and cultural rights that may have begun prior to the entry into force of the OP-ICESCR for the State Party, but have continued thereafter. The wording is similar to that used in the OP-CEDAW (Article 4.2 e) and the OP-CRPD (Article 2(f)). This is particularly important for economic, social, and cultural rights because some of the most emblematic cases in these areas involve violations by omission—that is, failure to adopt the appropriate measures to realise the right. Omissions are by definition continued until the due conduct takes place.

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[52] See, for example, *Norma Yurich v Chile*, Decision on admissibility of 2 November 2005, Communication N° 1078/2002.
[53] OP-ICESCR (n. 2 above), Art. 3.2(b).

This issue was raised by the Committee independently in *I.D.G. v. Spain.* It noted that "some of the facts that gave rise to the violations alleged by the author had taken place before 5 May 2013".[54] This was the date of entry into force of the Protocol for Spain. Four key events occurred before this date.[55] First, in June 2012, a Spanish court approved a bank's request for the commencement of a mortgage enforcement procedure with a view to auctioning off the property of the complainant. Secondly, in September 2012, four (unsuccessful) attempts were made by the court to notify the applicant of this process (which constituted the core of the complaint). Thirdly, on 11 February 2013, a court order was made for the commencement of the auction process and fourthly, on April 2013, a court rejected a request by the applicant for a reconsideration on the basis that she was not notified of the process. However, the Committee found that the claimed violation continued up to 16 October 2013. This was the date when the Constitutional Court addressed and denied the author's claim that the recovery process had violated her constitutional rights to effective judicial protection. According to the Committee, the Constitutional Court could have considered:

the alleged violations of the author's fundamental rights in relation to the present case, since the subject of the appeal was a consideration not of purely formal points or errors of law but of possible violations of the author's fundamental rights in relation to the complaint contained in the present communication, which means that the possibility of a violation of the author's rights existed at that time.[56]

Therefore, the Committee concluded that "it is competent *ratione temporis* to consider the present communication".[57] This is an important finding and illustration of the basic principle of continuing violations. Even though the initial factual circumstances leading to a violation might have occurred before entry into force, the denial of protection after entry into force can fall under the temporal jurisdiction of the Committee.

3.4 The Absence of Litispendence

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[54] *I.D.G. v. Spain*, para. 9.3.
[55] Ibid. paras. 2.3, 2.4 and 2.6.
[56] Ibid. para. 9.3.
[57] In doing so, the Committee cited Committee on the Rights of Persons with Disabilities, communication No. 5/2011, *Jungelin v. Sweden*, Views adopted on 2 October 2014, para. 7.6.

The requirement that there be no litispendence, that the same matter is not being examined under another procedure of international investigation or settlement, is also a common one.[58] It is important to stress here that 'another procedure of international investigation or settlement' should be understood as meaning quasi-judicial or judicial proceedings of a similar nature or scope, namely proceedings in which the object is to rule on a State's international responsibility for violating a right protected by a treaty or for failing to comply with a treaty obligation. Thus, and as United Nations treaty-monitoring bodies have extensively confirmed in practice, the requirement of no litispendence does not apply when a case is simultaneously submitted under an individual communications procedure established in a human rights treaty and under a special procedure of the United Nations Human Rights Council. This stems from the fact that individual communications procedures relating to human rights treaties and the special procedures established by extra-conventional bodies, such as the United Nations Human Rights Council, are different in nature.

Regarding other United Nations treaty bodies, the key issue to consider is the identity of the victims, the facts and the alleged violation. The possibility of the same matter being considered by another treaty body cannot be excluded, as other universal human rights treaties partially cover economic, social and cultural rights, for example, cases regarding alleged violations of the right to health or to education in connection with alleged violations of non-discrimination on the basis of gender or disability could be either channelled under the OP-CEDAW and OP-CPRC, respectively, or under the OP-ICESCR. A degree of overlap could also stem from the cases where economic and social rights are included in another universal human rights treaty – for example, freedom of trade union, simultaneously covered by article 8 of the ICESCR and also covered under article 22 of the ICCPR. There is also considerable overlap between the ICESCR and the Convention on the Rights of the Child when it comes to ESCR – the right to education is a case in point – so the same case could be channelled either through the OP-ICESCR or the third OP to the Convention on the Rights of the Child.

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[58] This can be found in Article 5.2 a) of the OP-ICCPR (n. 2 above); Article 22.5 a) of CAT (n. 3 above); Article 4.2 a) of OP-CEDAW (n. 3 above); Article 2 c) of OP-CRPD (n. 3 above); Article 31.2 c) of the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above); and Article 77.3 a) of the Convention for Protection of All Migrant Workers (n. 3 above).

Regarding regional human rights mechanisms, litispendence might occur in case of petitions based on economic, social and cultural rights under the mechanism of the African Charter on Human and Peoples' Rights. Petitions under the European Convention on Human Rights and Fundamental Freedoms and the American Convention on Human Rights are less likely to entail litispendence. The possibilities of framing cases as violations of economic, social and cultural rights under these instruments is limited – but not impossible. Complaints under the Additional Protocol to the European Social Charter are unlikely to generate litispendence, as the collective complaints system does not require the identification of victims – so the only cases where there could be litispendence are those where the applicant trade union or civil society organization is itself the victim of the alleged violation.

3.5 Other Admissibility Requirements

The remaining subsections of paragraph 2 establish formal requirements (such as the need for communications to be in writing and the prohibition of anonymous communications) and other stipulations that enable the Committee to reject unreasonable or insufficiently substantiated communications. All of these formulations were already established in earlier instruments and do not break any significant new ground by comparison with existing communications mechanisms.[59]

The only innovation is subsection (e), which stipulates that communications 'exclusively based on reports disseminated by mass media' are inadmissible. In reality, its addition was not necessary since a submission that only supplies evidence based on reports

[59] For example, the requirement relating to the rejection of communications that are incompatible with the provisions of the treaty in question is laid down in Article 3 of OP-ICCPR (n. 3 above); Article 22.2 of CAT (n. 3 above); Article 4.2 b) of the OP-CEDAW (n. 3 above); Article 2 b) of OP-CRPD (n. 3 above); and Article 31.2 b) of the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above). The inadmissibility of manifestly ill-founded or insufficiently substantiated communications appears in Article 4.2 c) of OP-CEDAW (n. 3 above) and Article 2 e) of OP-CRPD (n. 3 above). The inadmissibility of communications on the basis of an abuse of the right to submit a communication is contained in Article 3 of the OP-ICCPR (n. 3 above); Article 22.2 of CAT (n. 3 above); Article 4.2 d) of OP-CEDAW (n. 3 above); Article 2 b) of OP-CRPD (n. 3 above); and Article 30.2 b) of the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above). For their part, Articles 2 (communications in writing) and 3 (the inadmissibility of anonymous communications) of the OP-ICCPR (n. 3 above); Article 22.2 of CAT (n. 3 above) (the inadmissibility of anonymous communications); Article 3 of the OP-CEDAW (n. 3 above); and Article 2 a) of OP-CRPD (n. 3 above) establish the inadmissibility of anonymous communications and the requirement for communications to be submitted in writing.

disseminated by mass media can fall into the category of 'manifestly ill-founded' or 'insufficiently substantiated' communications established in the same subsection. Be that as it may, it is hard to imagine a communication submitted by the alleged victims or groups of victims of a rights violation in which their grievance would be based solely on media reports when, by definition, they themselves had suffered the alleged violation. The purpose of this addition therefore seems to be to ensure that communications submitted on behalf of victims or groups of victims without their consent comply with a minimum standard of proof. Although such a specific addition was not necessary, it should be stressed that the requirement that an alleged violation be sufficiently substantiated means that all submissions to international mechanisms should meet a minimum degree of reliability, especially when being made on behalf of the alleged victims.

4. Communications not Revealing a Clear Disadvantage

Article 4 of the OP-ICESCR introduces an unprecedented clause to communications procedures established under human rights treaties within the universal system. According to this provision, 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.'[60]

The wording was proposed by a number of States to address concerns that the Committee may at some point be confronted with a need to manage an excessive workload. It was based on the text of Article 12 of Protocol Nº 14 to the European Convention on Human Rights[61] which amended the European Convention with the aim of reducing the excessive workload of the European Court of Human Rights. In particular, Article 12 of Protocol Nº 14 amends paragraph 3 of Article 35 of the European Convention, establishing, in the relevant part, that the European Court of Human Rights shall declare any petition inadmissible if it deems that 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto

[60] OP-ICESCR (n. 2 above), Art. 4.
[61] Council of Europe Committee of Ministers (May 2004). Protocol N° 14 has not yet entered into force.

requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal'.[62]

The U.K., backed by a number of other states, proposed the text "The Committee may decline to consider a communication where it does not appear to reveal that the author has been significantly disadvantaged." The justification for the provision was that in the event of excessive numbers of cases, the provision would "offer flexibility to the Committee to allocate time and resources effectively." There was considerable debate in the Working Group about whether any similar workload crisis was likely under the OP-ICESCR and concerns expressed that leaving the application of this new consideration to the discretion of the Committee may lead to inconsistencies. The United Kingdom said that, "while it would have preferred "shall", it considered that the Committee should be relied upon to adopt a consistent approach in the light of its workload and the prevailing circumstances" [63] In order to clarify that the discretionary consideration of clear disadvantage would only be applied only when it was necessary because of workload, the additional phrase "if necessary" was added in the final text.[64]

It should be emphasised that even where made necessary by workload or other circumstances, declaring such cases inadmissible is left to the discretion of the Committee and is thus *optional* rather than obligatory. The Committee has therefore not included article 4 as the admissibility criteria that must be considered prior to proceeding to a consideration of the merits.[65] The provision also includes additional grounds for justifying admission of the case by the Committee, namely that the communication raises

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[62] Ibid. The English version of Article 12 of *Protocol N° 14 to the European Convention on Human Rights* speaks of 'significant disadvantage' while the French version uses the phrase 'significant harm' (*préjudice important*). Since the negotiating language of the Working Group on the Optional Protocol to the ICESCR was English, the wording proposed for Article 4 was based on the English version of Article 12 of Protocol Nº 14 to the European Convention.

[63] Fifth report of the Open-Ended Working Group to consider options regarding the elaboration of an Optional Protocol, 6 May 2008, A/HRC/8/7 (Fifth Working Group Session Report) at para 157.

[64] Ibid, at p. 34.

[65] Committee on Economic, Social and Cultural Rights, Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012) E/C.12/49/3 Rule 14, para 5.

a serious issue of general importance even if the author of the communication has not suffered a 'clear disadvantage.'[66]

The proposal to add this provision partly came from those States who were least enthusiastic about a communications mechanism for economic, social, and cultural rights. The acceptance of the provision could be viewed as part of efforts to reach a consensus on the text, in particular as a trade-off for accepting the comprehensive approach taken with regard to the Committee's subject-matter jurisdiction. However, Article 4 also had support from the Chairperson after she met with the President of the European Court of Human Rights and a number of NGOs championed the inclusion of the clause.[67]

Comparatively speaking, when considering other instruments from the universal human rights system that have established communications procedures, the addition of this new ground for inadmissibility was not necessary. Grounds such as 'manifestly ill-founded' or 'insufficiently substantiated' communications or 'abuse of the right to submit a communication' were sufficiently flexible for submissions in which, from the onset, there is clearly such little substance to the alleged violation to be declared admissible by the Committee.

The formula chosen is rather questionable since the notion of 'disadvantage' that has emerged in the context of standards on discrimination implies making a comparison between the person alleging the violation and the situation of others.[68] If read literally, this formula could give the impression that all allegations require a comparative judgment when, in reality, the latter is only relevant in cases in which solely a violation of the principle of equality or the prohibition of discrimination is being argued. For example, allegations that the substantive obligations stemming from the right to education or the right to health do not depend on a comparison being made with the situation of other right-holders: it will suffice to show that the claimant is the victim of a violation. However, given the context in which this provision has emerged, it is clear that there was

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[66] OP-ICESCR (n. 2 above), Article 4.

[67] See discussion in M. Langford, Closing the Gap? An Introduction to the Optional Protocol, *Nordic Journal for Human Rights*, 27(1) (2009), pp.1-28, at 23-4.

[68] This criticism also applies to the English version of Article 12 of Protocol Nº 14 to the European Convention on Human Rights though not to the French version since the notion of harm does not depend on comparing it to the harm suffered by others.

no intention of altering the substantive standards that define States' obligations or the Committee's subject-matter jurisdiction for considering communications—the notion of 'disadvantage' should therefore be understood to mean 'grievance' or 'harm'.

The justification for incorporating this new ground for inadmissibility into the European human rights system, namely the need to find solutions to ease the workload of the European Court of Human Rights, was of little relevance in this case, considering that the communications mechanism under the OP-ICESCR was not yet in operation. To assume that the Committee would be overburdened with communications was nothing more than speculation.

In any event, it is important to highlight that the discretionary nature of this inadmissibility criterion should not place a new burden on the author of a communication, namely that of proving that he or she has suffered a clear disadvantage. The author already has the burden of illustrating that the alleged treatment amounts to a violation under the Covenant and subsequently put forth evidence proving that the abuse was committed. It will be the Committee's task, in those cases where it finds that it is necessary to invoke Article 4, to assess whether the alleged violation amounted to a 'clear disadvantage.'[69] This notwithstanding, Article 4's inclusion in the OP-ICESCR make it possible for the State against whom the communication is directed to put forward arguments on that basis. In considering such arguments, the Committee will be required to decide which circumstances make the exercise of discretion under article 4 necessary and, in those circumstances, whether to exercise it. In turn, the author of the communication will be given the chance to contest the State's arguments or to claim that the case 'raises a serious issue of general importance'.

5. Interim Measures

The possibility of adopting interim measures is a fundamental guarantee designed to ensure that the rights established in the ICESCR are not irreparably damaged while the communication is being processed and the Committee is reaching its decision. Timely preventive intervention is clearly preferable to intervention *a posteriori*, once the harm

[69] OP-ICESCR (n. 2 above), Art. 4.

that was avoidable has already occurred. In this regard, the practice adopted by the Inter-American human rights system on threats to economic, social, and cultural rights is relevant and worth taking into consideration in order to underline the importance of interim measures. Within the framework of international litigation, the purpose and aim of such measures is to preserve the rights of the parties, guarantee the integrity and effectiveness of judgments on the merits of cases, and prevent proceedings from being ineffective.[70]

Interim measures are a common feature of communications procedures provided by treaties from both the universal system and the regional human rights systems.[71] However, within former, interim measures are usually provided for in the rules of procedure of treaty-monitoring bodies.[72] The fact that interim measures are grounded in the internal rules of monitoring bodies' procedure and not in a treaty provision has frequently been used by some States as an argument for challenging their mandatory character and a justification for not complying with them. The Human Rights Committee[73] and the Committee against Torture[74] have faced this type of situation on

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[70] See H. Fix-Zamudio, 'Prólogo del Presidente de la Corte Interamericana de Derechos Humanos', in *Serie E: Medidas Provisionales N°1 Compendio: 1987-1996* (San José, Costa Rica: Organization of American States – Inter-American Court of Human Rights, 1996), pp. iii; and A. A. C. Trindade, 'Prólogo del Presidente de la Corte Interamericana de Derechos Humanos', in *Serie E: Medidas Provisionales N° 2 - Compendio: Julio 1996 -2000* (San José, Costa Rica: Organization of American States – Inter-American Court of Human Rights, 2000), pp. ix, para. 7.

[71] For rules regarding interim measures in the Inter-American human rights system, see Article 63, American Convention on Human Rights (n. 23 above) for the Inter-American Court, and for the Inter-American Commission confer its *Rules of Procedure*, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.9 (2003). In the African system, interim measures are provided in Rule 111 of the *Rules of Procedure of the African Commission on Human and Peoples' Rights*, adopted on 6 October 1995 (made available through the Danish Centre for Human Rights). In the European system, they are provided in Article 39 of the *Rules of Procedure of the European Court of Human Rights* (n. 50 above). Registry of the Court (Strasbourg, 2009). The *Rules of Procedure of the European Committee on Social Rights* also provides for interim measures in Article 36 in collective complaints.

[72] They are thus provided in the rules of the respective Committees concerning communications procedures in the case of the ICCPR (Article 86 of the Rules of Procedure of the Human Rights Committee (n. 22 above), the ICERD (Article 94.3 of the Rules of Procedure of the Committee for the Elimination of Racial Discrimination) and CAT (Article 108 of the Rules of Procedure of the Committee against Torture (n. 88 below).

[73] See, among others, *Glen Ashby v Trinidad and Tobago*, Decision of 26 July 1994, Communication No 580/1994; *Gilbert Samuth Kandu-Bo and others v Sierra Leone*, Decision of 4 November 1998, Communications Nos. 839, 840 and 841/1998; *Lincoln Guerra and Brian Wallen v Trinidad and Tobago,* Decision of 4 April 1995, Communication N° 575 and 576/1994; *Charles Chitat Ng v Canada*, Decision of 7 January 1994, Communication N° 469/1991; *Peter Bradshaw v Barbados,* Decision of 19 July 1994, Communication N° 489/92; *Denzil Roberts v Barbados,* Decision of 19 July 1994, Communication N°

several occasions. For example, in 1994, the Human Rights Committee examined the first case in which a State refused to comply with interim measures requiring the suspension of a death penalty sentence. The Committee adopted a formal decision on this situation in which it expressed its concern at the failure of the State Party to comply with the request made to it pursuant to Article 86 of its rules of procedure and called on the State to take the necessary steps to ensure that such a situation would not recur in the future. The Committee recalled that the 'State party, upon ratifying the Optional Protocol, undertook to cooperate with the Committee under the procedure [set out in the Protocol]' and emphasised 'that the State party has failed to comply with its obligations, both under the Optional Protocol and under the Covenant'.[75] In another case, the Human Rights Committee specified the legally binding scope of interim measures in the following terms: 'By adhering to the Optional Protocol, a State party to the Covenant recognises the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its Views to the State party and to the individual (article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.'[76]

As a result of these situations, the most recent instruments containing communications procedures include interim measures within the text of the treaty itself, thus clarifying their binding nature and circumventing any arguments concerning their observance. Interim measures are provided for in the OP-CEDAW,[77] the OP-CRPD,[78] and the

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504/992,; and *Dante Piandiong, Jesus Morallos and Archie Bulan v Phillippines,* Decision of 19 October 2000, Communication No. 869/1999.

[74] See, among others, *Rosana Nuñez Chipana v Venezuela,* Decision of 10 November 1998, Communication N° 110/1998; and *T.P.S. v Canada* (n. 47 above).

[75] *Glen Ashby v Trinidad and Tobago* (n. 64 above), para. 441.

[76] *Sierra Leone. 30/07/2001, Communication No. 841/1998 , CCPR/C/72/D/841/1998. (Jurisprudence*), para. 5.1; and concerning *Gilbert Samuth Kandu-Bo et al. v Sierra Leone*, Communications Nos. 839, 840 and 841/1998.

[77] OP-CEDAW (n. 3 above), Art. 5.1.

[78] OP-CRPD (n. 3 above), Art. 4.1.

International Convention for the Protection of All Persons from Enforced Disappearance.[79]

In line with this trend, interim measures were introduced into the text of the OP-ICESCR. The wording of Article 5 of the OP-ICESCR takes its inspiration from the wording of Article 5 of the OP-CEDAW. The procedural mechanism for interim measures contained in the OP-ICESCR contains the following features:

- It enables the Committee to require the State to take interim measures *after it has received a communication* and *before it has determined its admissibility*. The suggestion made during the drafting process by the NGO Coalition that the Committee should be able to require interim measures to be taken even before receiving a communication, as permitted in the inter-American human rights system, was therefore rejected.

- It requests for the *urgent consideration* of the request of interim measures by the States Parties.[80]

- Interim measures may be requested if they are *necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations*.

While the rest of the text follows, almost exactly, the wording of Article 5.1 of the OP-CEDAW, Article 4.1 of the OP-CRPD, and Article 31.4 of the International Convention for the Protection of All Persons from Enforced Disappearance, it adds the phrase 'in exceptional circumstances.' However, this addition does not seem to have significantly changed the meaning of the provision: the purpose of such interim measures is to avoid irreparable damage. In light of the requirement that domestic remedies be exhausted before being able to submit a communication to the Committee, cases in which it is necessary to request interim measures to prevent irreparable damage could be viewed as the exception and not the rule. This interpretation may perhaps explain the addition. In any event, it should also be noted that, although there is no such phrase in their respective

[79] International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above), Article 31.4 .
[80] See also Article 5.1 of the OP-CEDAW (n. 3 above); Article 4.1 of OP-CRPD (n. 3 above); and Article 31.4 of the International Convention for the Protection of All Persons from Enforced Disappearance.

treaties, the practice of other treaty bodies within the universal human rights system, such as the Human Rights Committee and the Committee against Torture, has been judicious with regard to interim measures: requests for interim measures have been largely confined to calling for a stay of execution in death penalty cases, the halting of deportations, or extradition in cases in which there was a well-founded fear that the alleged victim would be subjected to torture or persecution in the country of destination. This may be an indication that they have restricted the request for interim measures to exceptional circumstances, even without a text requiring so.

As in other relevant instruments, the text further provides that, in cases in which interim measures are requested while a communication is being processed, the adoption of such measures does not imply a judgment on the admissibility or merits of the communication.[81]

The practice of the Inter-American human rights system related to interim measures, can serve as guidance for the Committee on Economic, Social and Cultural Rights. The practice of the Commission and the Court may be particularly insightful in regards to the adoption of interim measures in collective situations where the urgency of the intervention is required to halt human rights violations of a group of people.[82] Given that violations of economic, social, and cultural rights tend to be of a group nature or are presented in an aggregated fashion, the referred jurisprudence can be considered as a useful reference. More recently, the European Committee on Social Rights, applying its

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[81] See also Article 5.2 of OP-CEDAW (n. 3 above); Article 4.2 of OP-CRPD (n. 3 above); and Article 31.4 of the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above).

[82] For example, in order to protect the ancestral land of the Awas Tigni indigenous communities in Nicaragua, the Inter-American Commission ordered the state to adopt all necessary measures to suspend the concessional grant to a private company over the communal lands for wood exploitation purposes (Inter-American Commission of Human Rights, *Interim Measures*, 31 October 2007 referenced in Inter-American Court of Human Rights, case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, judgement of August 31, 2001, Series C No. 70, para. 20). In the same case, the Inter-American Court urged Nicaragua to adopt all measures necessary to protect the use of the land property owned by the communities and the natural resources that exist within the land (Inter-American Court, *Precautionary Measures*, 6 September 2002). Other urgent measures of a collective nature have been adopted in relation to severe prison conditions such us in the cases of *Urso Branco Prison* (Brasil, Inter-American Court, 2008); *Uribana Prison* (Venezuela, Inter-American Court, 2004); and *Mendoza Prison* (Argentina, Inter-American Court, 2004); detention conditions of children and adolescents, such us in the *FEBEM* case (Brasil, Inter-American Court, 2005) and detention conditions of persons with mental disabilities such us in the *Patients of Neuropsiquiatric Hospital* case (Paraguay, Inter-American Commission, 2007).

new rules of procedures, has also issued interim measures in a collective case regarding the right to housing[83] and might serve of guidance to the Committee as well.

6. Friendly Settlement

Article 7, which specifically regulates the issue of friendly settlement, is an innovation as far as the communications procedures of the universal system are concerned.[84] The possibility of reaching a friendly settlement is, however, available under communications and complaints procedures of the Inter-American and European human rights systems,[85] and its inclusion in the OP-ICESCR is a useful addition that might infuse the procedure with a practice that is important to regional mechanisms. If properly used, the friendly settlement procedure can speed up the solution of the case and establish a direct channel of dialogue between the victims and the State through which possible remedies can be discussed and implemented. Another advantage to point out is that the active involvement of the State in the definition of the remedy could positively impact its actual implementation. Within the Inter-American System of Human Rights, for example, some studies indicate that the highest level of compliance is verified in the context of friendly settlement procedures, where the State, in an autonomous way, establishes the type of commitments with which it is able to engage.[86] Indeed, the Inter-American Commission has accumulated vast experience in closing cases through friendly settlements and can provide interesting lessons in terms of procedure, follow-up mechanisms, etc. Similarly,

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[83] European Committee on Social Rights, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands Complaint No. 86/2012*, Decision on Immediate Measures, 25 October 2013.

[84] This procedure is mentioned only in relation to the Inter-State communications procedures in the ICCPR (n. 8 above), Art. 41.1 e); CAT (n. 3 above), Art. 21.1 c); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (n. 3 above), Art. 76 d).

[85] American Convention on Human Rights (n. 23 above), Arts. 48 and 49; Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 doc.13 rev. 1 at 10 (1980), Art. 23; Rules of Procedure of the Inter-American Court, Art. 54; European Convention on Human Rights (n. 50), Arts. 38 and 39; and the Rules of Procedure of the European Court of Human Rights, Article 44.

[86] V. Abramovich, *Remedios de alcance colectivo y obstáculos en la ejecución de decisiones en el Sistema Interamericano*, draft paper for ESCR-Net Conference on Enforcement of ESCR Judgments, (Bogota, May 2010), available at: <http://www.escr-net.org/usr_doc/Abramovich_-_Remedios_en_SIDH_(borrador).pdf>; F. Basch, et. al., 'La efectividad del sistema interamericano de protección de derechos humanos, Un enfoque cuantitativo sobre su funcionamiento y sobre el cumplimiento de sus decisiones', *SUR*, Vol 7, No. 12 (2010) pp. 28-29; B. Cali and A. Koch, 'Lessons Learnt from the Implementation of Civil and Political Rights Judgments' (June 6, 2011). Available: <http://ssrn.com/abstract=1858663> or <http://dx.doi.org/10.2139/ssrn.1858663>.

in the context of the European system, a study suggests that the active involvement of State authorities in the process of identifying suitable remedies to comply with the European Court of Human Rights' judgements, especially in cases that require complex and demanding measures, allows them to develop a sense of ownership of this process, and this in turn increases the likelihood of effective compliance.[87] These regional experiences might be of special relevance in guiding the functioning of this novel procedure within the UN system. The adopted text states that any agreement reached 'closes consideration of the communication.'[88] This solution might pose difficulties since what should close the communications procedure is not the fact that the author(s) of the communication and the State have reached a friendly settlement but that the terms of the agreement have been satisfactorily executed. Otherwise the friendly settlement procedure could be a way for States to prevent the consideration of the communication by the Committee without having any intention of complying with the agreement.

To avoid this shortcoming, a possible—if not ideal—solution could be that non-compliance with an agreement on a friendly settlement can give rise to a new communication alleging that, as a result of such non-compliance, the violation denounced in the original communication is ongoing.[89] Of course, it would be far simpler to keep the consideration of the original communication open until compliance with the friendly settlement has been verified, in order to avoid repeating stages of the procedure that have already been completed. It may even be desirable for the Committee be involved in the

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[87] See Cali and Koch, 'Lessons Learnt' (n. 79 above).
[88] OP-ICESCR (n. 2 above), Art. 7(2).
[89] See, *mutatis mutantis*, the European Court of Human Rights: *Mamatkulov and Askarov v Turkey*, Appl. Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para. 128; *Aoulmi v France,* Appl. No. 50278/99, Judgment of 17 January 2006, para. 111; *Olaechea Cahuas v Spain*, Application No. 24668/03, Judgment of 10 August 2006, paras. 81 and 82. In these cases, the European Court of Human Rights decided that the State's failure to comply with interim measures constituted a violation of the right of the alleged victim to submit a petition to the Court itself under Article 34 of the European Convention on Human Rights (n. 49 above). Similarly, failure to comply with an agreement on a friendly settlement, as well as affecting the right to submit a communication, affects the right to obtain reparations for a violation of the substantive right allegedly affected and ensures that the violation remains unpunished. In the inter-American human rights system, even when agreement on a friendly settlement has been reached, the Inter-American Commission still has the power to monitor compliance with the agreement. See, for example, the Inter-American Commission on Human Rights, Report Nº 21/07, Petition Nº 161-02, *Paulina del Carmen Ramírez Jacinto, Mexico, Friendly Settlement*, March 9 2007, point 2 of the Commission's decision: (The Commission decides) 'to continue with the follow-up and monitoring of the points of the friendly settlement that are pending implementation or that require ongoing compliance'.

implementation of the settlement agreement.[90] Given the possible range of scenarios, it might be useful that the Rules of Procedure grant the Committee some flexibility to deal with the issue.[91] Another possible way of preventing shortcomings is for the parties to include in the friendly settlement agreement a specific clause establishing that, in the event of non-compliance, they may inform the Committee so that it can pursue examination of the communication.[92]

7. Examination of Communications

Article 8 regulates the Committee's examination of the merits of the communication. This chapter does not deal with paragraph 4, which introduces the 'reasonableness' standard of review. Instead, we will focus on the innovations included in paragraphs 1 and 3, which allow for the Committee to consult and consider a broad range of documentation when examining a communication.

The text of paragraph 1, which requires the Committee to consider communications 'in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned', is inspired by paragraphs 1 of Article 7 of the OP-CEDAW. The difference between the two texts is, however, revealing.

Two issues generated some debate during the Working Group sessions. The first was the replacement of the term 'information', used in paragraph 1 of Article 7 of the OP-CEDAW with the term 'documentation.' This was a result of the States participating in the Working Group who were concerned that the Committee might also take into account information that it received informally or which was published in the media. They

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[90] In the context of the Inter-American system, given that the friendly settlement procedure is the most effective to achieve compliance with remedies, more robust participation of the Commission in the procedure, particularly in the implementation phase of the agreement, has been suggested. See Basch et al, 'La efectividad del sistema interamericano de protección de derechos humanos' (n. 79 above), p. 31.

[91] Within the Inter-American human rights system, a deficit that has been highlighted is the limited formal regulation of the friendly settlement procedure. In order to optimise the results of this procedure in terms of effective implementation it has been suggested, among other recommendations, that the precise powers of both the Commission and the parties be regulated. See Basch et al, 'La efectividad del sistema interamericano de protección de derechos humanos' ibid. p. 30.

[92] This is a practice frequently found in agreements on friendly settlements reached within the Inter-American human rights system. See, for example, the Inter-American Commission on Human Rights, Report Nº 70/07, Petition 788-06, *Víctor Hugo Arce Chávez, Bolivia, Friendly Settlement*, 27 July 2007, para. 19, Point 5 of the Compromise Agreement.

therefore suggested the use of the term 'documentation', which, in their view, required that the information considered by the Committee be that contained in documents that, in light of the latter part of the paragraph, must be transmitted to the interested parties. The term 'documentation' may encompass not only written documentation but also other formats, such as audiovisual or electronic media.

The second issue that provoked some discussion was directly related to a proposal by the NGO Coalition. It argued for the specific inclusion of the possibility to submit written documents to the Committee in the form of *amicus* briefs.[93] Although the States were reluctant to specifically include the term '*amicus* brief' in the text, the phrase 'all documentation submitted to it' is not necessarily restricted to the documentation submitted by the authors of communications and the interested State,[94] including thus the possibility of the consideration of *amicus* briefs submitted to the Committee. While the consideration of *amicus* briefs is an established trend in other Committees within the universal human rights system, such as the Human Rights Committee and the Committee on the Elimination of Discrimination against Women—even though the possibility of submitting them is not specifically mentioned in the respective instruments instituting their communications systems—until now, the *amicus* briefs were introduced through the parties. In contrast, the text of the OP-ICESCR does not preclude the submission of *amicus* briefs by third parties.

In line with this interpretation, in the first case in response to an individual complaint regarding violations of the right to housing, *I.D.G. v. Spain* (Communication 2/2014), the CESCR accepted a third party intervention from the International Network for

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93 As pointed out by the representatives of some of the delegations, the term *amicus curiae* would be incorrect in the case of quasi-judicial proceedings since the Latin term *curia* means 'court', and the Committees are not courts. Regardless, the function of submitting a written document in the form of an *amicus* brief to a Committee would be similar to that of an *amicus curiae* submitted to a court: it enables third parties who have recognised expertise on the issue under discussion and who are interested in the final outcome of the case to submit legal arguments that have consequences for making a decision on the case. Recall that the possibility of submitting *amicus* briefs is common in regional human rights systems such as the European and Inter-American. See, for example, the Rules of Procedure of the European Court of Human Rights, Art. 44; Rules of Procedure of the Inter-American Court of Human Rights, Art. 62.3. Although not specifically mentioned in its Rules of Procedure, the African Commission on Human and Peoples' Rights has also accepted submissions in the form of *amicus* briefs in some cases. Though not a frequent practice in the universal system, there are also some precedents in submissions made to the Human Rights Committee and the Committee against Torture.

94 In contrast, Article 7 paragraph 1 of OP-CEDAW (n. 3 above), refers to 'all information made available […] by or on behalf of individuals or groups of individuals and by the State party concerned'.

Economic, Social and Cultural Rights (ESCR-Net) through members of its Strategic Litigation Working Group - the Center for Economic and Social Rights (CESR), the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), and the Socio-Economic Rights Institute of South Africa (SERI). The decision in the case states:

Under article 8, paragraph 3, of the Optional Protocol, subject to the rules governing the consideration of communications and to authorization by the Committee, third parties may submit documentation relevant to the case under consideration. This documentation must be transmitted to the parties. On 4 February 2015, the Working Group on Communications, acting on behalf of the Committee, admitted a submission from the International Network for Economic, Social and Cultural Rights (ESCR-Net) under article 8 of the Optional Protocol and rule 14 of the Committee's provisional rules of procedure under the Optional Protocol. On 26 February 2015 the Committee transmitted the ESCR-Net submission of 24 February 2015 to the State party and the author and asked for their observations and comments"[95]

The submission, which was taken into account by the Committee in its decision, referenced established principles and relevant interpretation of such principles through international and comparative case law and other sources, stressing that States parties must interpret and apply domestic law consistent with their obligations under the ICESCR and must ensure effective judicial protection for Covenant rights, including the right to adequate housing.

Amicus briefs have played a decisive role in comparative case law regarding economic, social, and cultural rights, particularly in complex cases requiring assessing the appropriateness or reasonableness of State measures adopted to realise these rights. In the interest of optimally considering the case, it is best not to restrict information to that presented by the parties and to allow the Committee to avail itself of third party submissions in order to be fully informed and better equipped to evaluate the steps undertaken by the State. This becomes particularly relevant when the Committee is assessing available resources, the reasonableness of the measures adopted by the State party or considering compliance with minimum core obligations or the prohibition of

[95] CESCR, *I.D.G. v. Spain*, para 6.1.

both direct or indirect discrimination. Restricting information to that submitted by the parties may otherwise encourage States not to disclose relevant information, thus preventing the Committee from gathering enough evidence to make an informed assessment.

In a similar vein, paragraph 3 introduces an innovation in comparison with other individual communications procedures by allowing the Committee to 'consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including from regional human rights systems.'[96]

This paragraph was introduced as a procedural solution to a concern that some States had regarding the relationship between communications procedures instituted through the OP-ICESCR and regional communications or complaints procedures. These States suggested that, in addition to the requirement that domestic remedies be exhausted, the requirement that regional remedies be exhausted should also be included as a condition of admissibility. The suggestion posed a number of insurmountable difficulties: it would have excessively delayed victims' access to a final decision by an international body, subordinated the importance of the decisions taken by regional bodies to a kind of appeal to the Committee (thereby establishing an unjustifiable hierarchy among human rights protection systems), and caused serious problems of inequality in cases for which there are no appropriate regional appeal systems for dealing with violations of economic, social and, cultural rights or in which the States concerned are not a party to the procedures established by such systems.

The solution provided by the OP-ICESCR is to allow the Committee to gather relevant information on the respective situation from other international bodies, specifically including bodies from the regional human rights systems. This innovation should be welcomed, as it enables the Committee to consider and be consistent with relevant decisions that have already been adopted by regional bodies. Likewise, the Committee may consult reports or information produced by international specialised agencies dealing with a specific situation of a State Party on technical issues covered by the ICESCR such

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[96] OP-ICESCR (n. 2 above), Art. 8(3).

as food, health, education, water, housing, or labour. This solution can also be linked with the provisions of Article 14 of the OP-ICESCR, which allow the Committee to transmit its views to other international bodies and agencies when a communication has revealed the need for technical advice or assistance.

8. Follow-up to the Views of the Committee

Article 9 of the OP-ICESCR deals with the question of how compliance with the Committee's views will be monitored. The need for treaty-monitoring bodies to follow up on States' compliance with their decisions has traditionally been extremely important in ensuring the effectiveness of the international protection provided as a result of communications procedures. With the exception of the OP-CEDAW, treaties within the universal system in which such procedures have been established do not contain measures for following up on compliance with such decisions.[97] However, such procedures are set out in the rules of procedure of the respective treaty bodies.[98] In the case of the Human Rights Committee, there is a Special Rapporteur to follow up on views adopted by the Committee. He or she must report periodically to the Committee on follow-up activities and the Committee must include information on these activities in its annual report.[99] For some years now, the Human Rights Committee has begun mentioning instances where States have failed to comply with its views in some of the conclusions and recommendations on specific countries it has adopted in its review of State reports. The Rules of Procedure of the Committee against Torture, as well as establishing a similar procedure, both allow rapporteurs to 'engage in necessary visits to the State party concerned'.[100]

Paragraphs 2 and 3 of Article 9 of the OP-ICESCR take their inspiration from OP-CEDAW, paragraphs 4 and 5 of Article 9. Although they do not include the regulatory developments contained in the Rules of Procedure of the Committee against Torture, these provisions of the OP-ICESCR signify an important step forward. It would also be

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97 See OP-ICCPR (n. 3 above) , ICERD (n. 3 above), CAT (n. 3 above), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (n. 3 above), the International Convention for the Protection of All Persons from Enforced Disappearance (n. 3 above), and OP-CRPD (n. 3 above).

98 See, for example, Article 101 of the Rules of Procedure of the Human Rights Committee (n. 21 above) and Article 114 of the Rules of Procedure of the Committee against Torture, U.N. Doc. CAT/C/3/Rev.3 (1998).

99 Article 101 of the Rules of Procedure of the Human Rights Committee, ibid.

100 Paragraph 4 of Article 114 of the Rules of Procedure of the Committee against Torture, (n. 91 above).

desirable that the Committee on Economic, Social and Cultural Rights consider the practice of the Inter-American and European systems, which have been dealing with the issue of compliance of State authorities with reports and judgements for several decades.[101]

9. Protection Measures

Article 13 deals with the protection of individuals who make use of their right to submit communications or are otherwise involved in the communications procedure. It establishes a new obligation for State parties to the OP-ICESCR: that of taking all appropriate measures to protect those who submit communications to the Committee. The provision is founded, among other things, on the principle of good faith in complying with treaty provisions. Thus, States are required not only to refrain from taking reprisals for submitting communications but also to offer active protection to those concerned in the event of ill treatment or intimidation. Failing to comply with these obligations can severely impair the exercise of the right to submit a communication, and thus the very object and purpose of the OP-ICESCR.[102] The inclusion of this provision is justified both because of the protection it offers, and because these obligations have already been assigned to States in other normative instruments[103] and have been generically recognised by human rights jurisprudence as being indispensable requirements for the effectiveness of all international communications, petitions, or complaints procedures.

The wording of Article 13 is taken directly from Article 11 of the OP-CEDAW. Three important aspects can be singled out:

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101 See, Abramovich, 'Remedios' (n. 79 above); Basch et al, 'La efectividad del sistema interamericano' (n. 79 above); Cali and Koch, 'Lessons Learnt' (n. 79 above).

102 In this regard, the Inter-American Court of Human Rights has argued that attacks on witnesses or possible witnesses 'can have a negative and decisive impact on the system for the protection of human rights established by the Charter of the Organization of American States and by the Pact of San José'. See Inter-American Court of Human Rights, *'Velázquez Rodríguez', 'Fairén Garbi and Solís Corrales' and 'Godínez Cruz' Cases*, Resolution of 15 January 1988 (Provisional Measures), 2.

103 In this regard, see the OP-CEDAW (n. 3 above) and the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted under United Nations General Assembly resolution A/RES/53/144, Article 9.4 of which states that: 'everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms'.

- the State is obliged to adopt positive protection measures, as appropriate, and not only to refrain from exerting pressure;

- the formula used, which refers to 'ill-treatment or intimidation', should be interpreted broadly to include any form of attack, unwarranted interference or pressure directed at the physical, moral, or psychological integrity of those involved in the communication that seek to prevent or hinder its submission or consideration, cause it to be withdrawn, or impose reprisals for employing this international procedure;[104]

- those who deserve protection are not confined to those submitting communications but include any individuals under the jurisdiction of the State Party who suffer ill-treatment or intimidation because of such a communication. This includes, for example, relatives and close friends of the authors of communications, other members of the group of alleged victims, individuals who may have been involved in drafting the communication, individuals who may have sent the Committee additional information or expert opinions, etc.

10. International Assistance and Cooperation

The inclusion of Article 14 in the OP-ICESCR originated in a claim made by African States regarding the need to give particular consideration to international assistance and cooperation as vehicles for realising economic, social, and cultural rights, especially in developing countries. The specific reference made to international assistance and cooperation in the clause establishing the general obligations under the ICESCR (Article 2.1) and other specific clauses (Articles 11, 15, 22 and 23) clearly constitutes a difference in the wording of the ICESCR compared to that of other treaties, which contains no such

[104] For example, the Inter-American Court of Human Rights decreed provisional measures to protect witnesses and others involved in an action before the Court itself after witnesses had been murdered and there had been 'a campaign of calumny against Hondurans who have testified in these cases, portraying them as disloyal to their country and exposing them to public hatred and disrespect and even physical or moral attacks'. As well as protecting the lives and physical integrity of those involved in the proceedings, the Court required the State to 'adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention'. See Inter-American Court of Human Rights, *'Velázquez Rodríguez', 'Fairén Garbi and Solís Corrales' and 'Godínez Cruz' cases* (n. 91 above), Considering 5 and operative paragraphs 1 and 2.

references, such as the ICCPR. The proponents of such clauses argued that the wording of the Protocol should reflect this difference.

The solution provided by the OP-ICESCR is consistent with the jurisprudence developed by the Committee on Economic, Social and Cultural Rights in at least two respects. Firstly, it reflects consideration of the distinction made by the Committee in General Comment Nº 12 between a State Party's 'unwillingness' and 'inability' to fully realise the rights enshrined in the ICESCR.[105] If the failure to progressively give full effect to the rights enshrined in the ICESCR is due to a lack of resources, then, strictly speaking, it would not be considered a violation attributable to the State. Secondly, according to the Committee's own doctrine, the resources available to States include both their own and those obtained through international cooperation and assistance.[106] Therefore, in the event that a State argues a lack of resources as a justification for non-realisation of the rights included in the ICESCR, it has the burden to show that it has sought international assistance and cooperation and is still unable to obtain the resources required.[107] Article 14 may offer the possibility to highlight the need for international assistance and cooperation when the State party either failed to seek it or when it was unsuccessful in doing so.

10.1 Transmission to other international bodies and agencies

Paragraph 1 of Article 13 allows the Committee, with the consent of the State concerned, to draw the attention of United Nations and other competent bodies to technical advice,

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105 See CESCR, *General Comment Nº 12, The right to adequate food*, (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 17.

106 See CESCR, *General Comment Nº 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para. 13.

107 In its General Comment No. 12, (n. 94 above), the CESCR specified as follows: 'Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its general comment No. 3, paragraph 10. *A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support* to ensure the availability and accessibility of the necessary food' (para. 17, emphasis added). This argument, though in this case referring to the right to food, is applicable to all the rights contained in the ICESCR, provided it is based on an interpretation of the general obligations established in Art. 2.1 of the Covenant.

assistance, and other international measures mentioned in the Committee's findings, conclusions, and recommendations. Examples of such bodies are the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), UN-Habitat, UNAIDS, and the United Nations Development Programme (UNDP), as their spheres of competence usually include technical assistance in the areas necessary to realise many of the rights included in the ICESCR.

Transmission of the Committee's views or recommendations concerning communications can be important for cases or situations in which it is evident that the State concerned was unsuccessful in its efforts to obtain resources from international assistance and cooperation, or where the violation or failure to realise the concerned rights is due to the lack of technical capacity.

The solution proposed provides a good compromise between the right of an individual who has suffered a situation that appears to be a *prima facie* violation of economic, social, or cultural rights to submit a communication to an international body reporting its existence, and the need to alert the international community to cases in which the State's ability to gradually realise those rights is limited because of a lack of resources. Both the communications procedure and the inquiry procedure thus have become means through which the Committee is able to facilitate compliance of Articles 22 and 23 of the ICESCR.

Similarly, paragraph 2 allows the Committee, again with the consent of the State concerned, to bring the attention of the mentioned bodies to matters arising from communications that it considers to be related to their respective fields of competence. The information referred to them can, in this way, make them aware or enhance their knowledge of situations that may require international assistance or cooperation, and may therefore contribute to the realisation of the economic, social, and cultural rights contained in the ICESCR.

In both cases, the linking of the communications procedure, as one that is capable of detecting obstacles and difficulties that prevent States from fully implementing ICESCR rights, to the work of technical bodies and programmes with its assistance, cooperation,

and promotion mandate, allows the work of the different United Nations bodies and organisations to be coordinated. It also suggests that there is a specific body ensuring that the work being done by different actors within the United Nations system to realise economic, social, and cultural rights is consistent and mutually reinforcing. Concern that this consistency exist was already reflected in Article 38 of the CRPD.

11. Conclusion

The regulation of the communications procedure under the OP-ICESCR is largely inspired by previously existing similar instruments such as the *Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women* and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities,* and generally fulfils the goal of extending a similar protection for economic, social and cultural than to other human rights that already benefitted from access to a universal complaints mechanism.

While the communications procedure under the OP-ICESCR follows fairly the model offered by those instruments, it has indeed included some innovations. Some of these innovations bring greater flexibility to the procedure, and should be welcome, as they might equip the Committee to better deal with complex cases. Examples of these innovations are the possibility of friendly settlements, the power of the Committee to request and consider documentation other than that submitted by the parties, and to link its views with potential source of international assistance and cooperation when a case reveals the need to do so.

Other innovations have expanded the admissibility criteria – thus apparently making it more cumbersome for applicants to reach the merits stage. But in fact none of them has substantially changed the admissibility criteria set by previously existing communications procedures. Some of these changes in the admissibility criteria are redundant, while the "lack of clear disadvantage" ground for inadmissibility is left to the discretion of the Committee and allows for exceptions.

4. The Inquiry Procedure

Donna J. Sullivan[*]

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.

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Article 11 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP ICESCR) establishes an inquiry procedure that permits scrutiny of the most severe, persistent or widespread violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] An inquiry provides a means by which the Committee on Economic, Social and Cultural Rights (CESCR) can establish an authoritative factual record of violations and elaborate its interpretation of rights and obligations under the ICESCR.

This chapter examines the inquiry procedure with a view to assessing its benefits and limitations as a mechanism for advancing the realisation of ICESCR rights. Section 1 presents an overview of the procedure and Section 2 summarises the drafting history of Articles 11-12. Section 3 discusses the principal features of the procedure and Section 4 takes up questions of interpretation raised by the text of Article 11. Section 5 weighs the benefits and limitations of the inquiry procedure and the conclusion highlights questions concerning its future development.

1. Overview of the Inquiry Procedure

Article 11 establishes the CESCR's competence to initiate an inquiry into 'grave or systematic' violations of ICESCR rights when it receives 'reliable' information that indicates the existence of such violations. In order to be bound by the procedure, a State party to the OP ICESCR must 'opt-in' by making an affirmative declaration accepting the CESCR's competence under Article 11.[2] The inquiry procedure is investigatory in nature and accommodates active fact-finding by the CESCR, including an on-site visit to the territory of the State party concerned if the latter consents. The CESCR's investigatory role is coupled with a mandate for cooperation with the State party: it is required to seek the State party's cooperation during all stages of an inquiry. However, if the State party refuses to cooperate, the CESCR retains the authority to initiate and conduct an inquiry without an on-site visit. The CESCR is required to conduct an inquiry confidentially.

Article 11 applies only to violations that are either 'grave' or 'systematic' in nature. The interpretation of these threshold elements is addressed in detail in Section 4, below, but

[1] Respectively GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008); 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.
[2] OP ICESCR, Article 11(1).

can be summarised as follows: the term 'grave' qualifies the severity or seriousness of the violations at issue; and the term 'systematic' refers to violations that are recurrent in nature, involve large numbers of victims or occur on a wide geographic scale, and are tolerated, authorised or instigated by the State, including a persistent failure by the State to take effective action to prevent and respond to a pattern of violations.

The procedural framework of Article 11 follows the structure of the United Nations (UN) inquiry procedures on which it was modelled; namely, the procedures established in Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (OP CEDAW)[3] and Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Article 20).[4] The main stages of Article 11 proceedings are: the preliminary consideration of information submitted to, and obtained by, the CESCR; the CESCR's decision regarding whether to establish an inquiry; its activities pursuant to the inquiry, including an on-site visit if the State party consents; its evaluation of the information gathered in the course of the inquiry; its adoption of findings, comments and recommendations; the publication of the report of the inquiry; and follow-up. The Provisional Rules of Procedure for the OP ICESCR (Rules of Procedure or Rule(s)) adopted by the CESCR in 2012 set out details regarding proceedings and the CESCR's methods of work under Article 11.[5]

Inquiry proceedings are initiated by the CESCR at its discretion when it is in receipt of reliable information indicating the existence of grave or systematic violations by a State party that has 'opted in' to the procedure. The CESCR is authorised by Article 11(3) and OP ICESCR Rules 26(3) and 28(1) to designate one or more of its members to assist it in assessing whether an inquiry is warranted and, if that decision is affirmative, to conduct the inquiry. The use of designated representatives is the regular practice under CAT Article 20 and the OP CEDAW and is essential to the feasibility of the procedure. However, the decision to begin preliminary consideration of information in connection

[3] 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* 22 Dec. 2000.
[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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* 26 June 1987 (Convention Against Torture).
[5] CESCR, *Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted by the Committee at its 49th session (12-30 Nov. 2012), ECOSOC Doc. E/C.12/49/3, 15 Jan. 2013 (OP ICESCR, *Rules of Procedure*).

with a possible inquiry, the decision to establish an inquiry, and the final outcome of an inquiry must be agreed by the CESCR as a whole.

The outcome of an inquiry takes the form of the CESCR's findings regarding the facts, conclusions regarding possible breaches of the ICESCR, comments related to its findings, and recommendations to the State party. Like the CESCR's other jurisprudence, these are non-binding. Recommendations can encompass a broad range of preventive and remedial measures at the systemic level, as well as measures tailored to particular aspects of the violations. Although individualised remedies are not available under Article 11, the CESCR may indicate specific types of remedies that should be made available to identified groups of victims. After the CESCR agrees upon its findings, comments and recommendations, they are transmitted to the State party. The State party has a six-month period within which to submit its observations in response.

The confidentiality requirement does not apply to the outcome of an inquiry. Article 11(7) provides for the publication of a summary account of the inquiry in the CESCR's annual report.[6] Practice under CAT Article 20 and the OP CEDAW indicates that, in addition to this summary account, the CESCR can also issue a lengthier report that details its activities in the inquiry, the facts pertaining to the alleged violations and their causes, its analysis of the facts and law, and its recommendations, together with the State party's observations in response to the CESCR's analysis and conclusions.

Follow-up to an inquiry includes the measures described in Article 12 and such other formal or informal procedures as the CESCR may decide to develop. Article 12(1) authorises the CESCR to invite the State party to include in its report under Articles 16 and 17 of the ICESCR information regarding any measures taken in response to an inquiry. Article 12(2) stipulates that at the end of the six-month period provided in Article 11(6), the CESCR may request the State party to provide information on the measures it has taken in response to the inquiry.

The State party's obligation under Article 13 to take protection measures for the benefit of individuals communicating with the CESCR pursuant to the OP ICESCR applies to the inquiry procedure as well as the communications procedure.

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[6] For analysis of paragraph 7, see Section 3.5 below.

The Article 11 procedure fits squarely within the paradigm of the inquiry procedures under other UN human rights treaties. In addition to CAT Article 20 and the OP CEDAW, these include Article 6 of the First Optional Protocol to the Convention on the Rights of Persons with Disabilities (First OP CRPD)[7] and Article 13 of the Third Optional Protocol to the Convention on the Rights of the Child (Third OP CRC).[8] These four procedures and the Article 11 procedure share a common function and structure.

The OP CEDAW, OP CRPD and Third OP CRC procedures all apply to 'grave or systematic' violations and CAT Article 20 applies to the 'systematic' practice of torture. Apart from the obvious differences in their normative bases, the major distinction between the Article 11 procedure and these other inquiry procedures is the 'opt-in' character of Article 11. All four of the other procedures require a State party to 'opt-out' by entering a declaration at the time of signature or ratification indicating that they do *not* recognise the competence of the supervisory committee to conduct inquiries.[9]

The inquiry procedure established in CAT Article 20 was the first of its kind under a UN human rights treaty. It represented a significant innovation in UN human rights treaty monitoring mechanisms and served as the model for the OP CEDAW inquiry procedure. The OP CEDAW provided the template for the Article 11, the OP CPRD and the Third OP CRC procedures. Article 11 follows the OP CEDAW in covering all rights guaranteed under the main treaty. Paragraphs 2-6 of Article 11, concerning the scope of application and the main stages of proceedings, replicate OP CEDAW Article 8, paragraphs 1-5. Paragraph 7 of Article 11 tracks CAT Article 20(5).[10] Article 12 of the

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[7] First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 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* 3 May 2008.

[8] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, G.A. Res. A/RES/66/13 (2011), *entered into force* 14 April 2014. The International Convention for the Protection of All Persons from Enforced Disappearance incorporates two procedures with similar features. The first authorises the Committee on Enforced Disappearances to conduct a visit in response to 'reliable information indicating that a State Party is seriously violating the provisions' of the Convention and the second authorises the Committee to bring situations of widespread and systematic disappearances to the attention of the U.N. General Assembly. Neither has the broad investigatory function characteristic of the other UN inquiry procedures and neither appears designed to result in authoritative findings regarding violations. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), *entered into force* 23 Dec. 2010, Articles 33 and 34.

[9] Convention Against Torture, Art. 28(1); OP CEDAW Art. 10(1); OP CRPD Art. 8; Third OP CRC Art. 13(7).

[10] OP CEDAW Articles 8-10 do not mention publication of inquiry reports, but OP CEDAW Article 12 provides that the Committee on the Elimination of Discrimination against Women (CEDAW) will publish a summary of its activities under the OP CEDAW in its annual report.

OP ICESCR, concerning follow-up measures, reproduces OP CEDAW Article 9 in pertinent part.

A relatively small number of inquiries have been concluded under the CAT Article 20 and OP CEDAW procedures.[11] As of August 2014, eight inquiries had been concluded under CAT Article 20 since 1988, when the Committee against Torture (CAT) began its work, and one inquiry had been concluded under the OP CEDAW since 2000, when the OP CEDAW entered into force.[12] The underutilisation of these procedures is not attributable to an unwillingness among States to be bound by an inquiry procedure: only twelve of the 155 States parties to the Convention Against Torture have opted out of Article 20;[13] and just five of the 105 States parties to the OP CEDAW have opted out of the Article 8 procedure.[14]

The CAT Article 20 inquiries concerned allegations of systematic torture in a geographically diverse group of States parties: Turkey; Egypt; Peru; Sri Lanka; Mexico; Serbia and Montenegro; Brazil; and Nepal.[15] With the exception of Egypt and Nepal, the States parties involved all agreed to cooperate with the CAT, although not necessarily with all the CAT's specific requests for information or access to particular sites or

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[11] As of August 2014, no inquiries had been conducted under the OP CRPD or the Third OP CRC.

[12] As of August 2014, the CEDAW had initiated but not concluded two other inquiries: the final report of one was pending and an on-site visit had been completed in the second.

[13] Status as at 8 Aug. 2014.

[14] Status as at 8 Aug. 2014.

[15] *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Turkey*, 48 U.N. GAOR Supp. (No. 44), U.N. Doc. A/48/44/Add.1, 15 Nov. 1993 (*CAT Turkey inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Egypt*, 51 U.N. GAOR Supp. (No. 44), paras. 180-222, U.N. Doc. A/51/44 (1996) (*CAT Egypt inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Peru*, 56 U.N. GAOR Supp. (No. 44), paras. 144-193, U.N. Doc. A/56/44 (2001) (*CAT Peru inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Sri Lanka*, 57 U.N. GAOR Supp. (No. 44), paras. 123-195, U.N Doc. A/57/44 (2002) (*CAT Sri Lanka inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Mexico*, 58 U.N. GAOR Supp. (No. 44), paras. 147-153, U.N. Doc. A/58/44 (2003); *Report on Mexico produced by the Committee under Article 20 of the Convention and reply from the Government of Mexico*, U.N. Doc. CAT/C/75, 26 May 2003 (*CAT Mexico inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Serbia and Montenegro*, 59 U.N. GAOR Supp. (No. 44), paras. 156-240, U.N. Doc. A/59/44 (2004) (*CAT Serbia inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Brazil*, 63 U.N. GAOR Supp. (No. 44), paras. 64-72, U.N. Doc. A/63/44 (2008); *Report on Brazil produced by the Committee under Article 20 of the Convention and reply from the Government of Brazil*, U.N. Doc. CAT/C/39/2, 3 Mar. 2009 (*CAT Brazil inquiry report*); *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Nepal*, 67 U.N. GAOR Supp. (No. 44), pp. 177-179, U.N. Doc. A/67/44 (2012); ibid, pp. 273-308 (*Annex XIII, Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party*) (*CAT Nepal inquiry report*).

individuals.[16] All except Egypt and Nepal agreed to on-site visits by the CAT's designated representatives. All eight inquiries were initiated in response to requests from NGOs. In all but two of these investigations, the CAT concluded that the State party concerned had practiced systematic torture during the period under examination.[17]

The single inquiry concluded under the OP CEDAW as of this writing examined the murders and disappearances of women in Mexico.[18] The Government of Mexico cooperated fully in the inquiry and permitted an on-site visit. Like the CAT Article 20 inquiries, the OP CEDAW Mexico inquiry was triggered by an NGO request. The Committee on the Elimination of Discrimination against Women (CEDAW) concluded that violations of a grave *and* systematic nature had occurred.[19]

Although limited, the practice under CAT Article 20 and the OP CEDAW offers guidance for the interpretation and application of the Article 11 procedure, since the latter was based on, and raises a number of legal and operational questions in common with, those procedures.[20] A thorough discussion of the implications of practice under those procedures, including reasons for their underutilisation, is beyond the scope of this chapter. However, practice under CAT Article 20 and the OP CEDAW that is of particular relevance to an understanding of the Article 11 procedure is noted. Of course, the Article 11 procedure must be interpreted and applied in the context of the OP

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[16] The Egyptian Government did reply to the CAT's communications, but its replies were largely non-responsive to the Committee's questions.

[17] In a widely criticised decision, the CAT found that the practice of torture in Sri Lanka was not systematic in nature. In the inquiry on Serbia and Montenegro, it found that torture had been practiced systematically prior to October 2000, but was no longer systematic in nature after that date.

[18] *Report of the CEDAW*, 59 U.N. GAOR Supp. (No. 38), paras. 393-408, U.N. Doc A/59/38 (2004) (summary account of *CEDAW Mexico inquiry*); *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO, 27 Jan. 2005 (*CEDAW Mexico inquiry report*). As of this writing, reports on two other inquiries conducted by the CEDAW were pending. The first concerned alleged violations of reproductive rights in the Philippines and the second concerned alleged murders and disappearances of Aboriginal women and girls in Canada.

[19] *CEDAW Mexico inquiry report*, ibid, paras. 259-260.

[20] The OP ICESCR, *Rules of Procedure* related to Articles 11 and 12 largely parallel the rules of procedure for the CAT Article 20, OP CEDAW, OP CRPD and Third OP CRC inquiry procedures. See CAT, *Rules of Procedure*, U.N. Doc. CAT/C/3/Rev.6, 13 Aug. 2013 (CAT, *Rules of Procedure*); *Report of the CEDAW*, 56 U.N. GAOR Supp. (No. 38), U.N. Doc. A/56/38 (2001), Annex I, as amended by 62 U.N. GAOR Supp. (No. 38), U.N. Doc. A/62/38 (2007), Chap. V (CEDAW, *Rules of Procedure*); CRPD, *Rules of Procedure*, 3rd session, 22-26 Feb. 2010, U.N. Doc. CRPD/C/4/2, 13 Aug. 2010 (CRPD, *Rules of Procedure*); CRC, *Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, U.N. Doc. CRC/C/62/3, 8 April 2013 (CRC, *Rules of Procedure Third OP CRC*).

ICESCR and the ICESCR, with reference to the legal and methodological issues specific to an examination of grave or systematic violations of the ICESCR.

2. Drafting History

As noted, with the exception of the opt-in provision, the Article 11 procedure essentially reproduces the OP CEDAW inquiry procedure. This reliance on precedent facilitated the inclusion of the inquiry procedure in the OP ICESCR. The fact that the draft versions of the text establishing the inquiry procedure used language previously accepted by States in the OP CEDAW, OP CRPD and CAT Article 20 procedures also operated to limit the substantive discussion of key elements of the Article 11 procedure, including the threshold requirement. The *travaux preparatoires* for the inquiry procedure reveal disagreement about its inclusion in the OP ICESCR but do not offer significant guidance for interpretation of the text. What does emerge clearly from the record of the negotiations is that delegations recognised that the CESCR would have broad investigatory authority under the procedure and would be empowered to launch an inquiry even if the State party concerned withheld its cooperation.

The inquiry procedure received relatively limited attention over the course of the drafting process for the OP ICESCR. Consideration of the possible inclusion of an inquiry procedure in the draft optional protocol began with 2005 deliberations 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 (Working Group), against the backdrop of information provided to delegations about existing inquiry procedures under UN human rights treaties.[21] The following year the Working Group had before it the Chairperson's analytical paper on elements for an optional protocol, which presented a concise description of an inquiry procedure based on OP CEDAW Article 8

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[21] 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 second session*, U.N. Doc. E/CN.4/2005/52, 10 Feb. 2005, paras. 85-86. At its second session the Working Group had before it two reports prepared by the Secretariat on existing complaints and inquiry procedures: *Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the Charter of the United Nations, Report of the Secretary-General*, CSW, 41st session, U.N. Doc. E/CN.6/1997/4, 21 Jan. 1997; and *Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the United Nations system, Report of the Secretary-General*, U.N. Doc. E/CN.4/2005/WG.23/2, 22 Nov. 2004. At its first session, the Working Group received a briefing on the OP CEDAW and its drafting process, including the inquiry procedure. *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, 15 Mar. 2004, para. 52.

and highlighted the differences between an inquiry procedure and a complaints procedure.[22] Discussions during the 2005 and 2006 sessions centred on the desirability of including the inquiry procedure rather than proposals regarding its features.[23]

At its 2007 session, the Working Group had before it the first draft of the optional protocol produced by the Chairperson, which contained an inquiry procedure mirroring that of the OP CEDAW, with the addition of a paragraph on the publication of inquiry reports tracking CAT Article 20(5).[24] In her explanatory memorandum accompanying the draft, the Chairperson noted that she had relied on agreed language from the OP CEDAW, OP CRPD, and CAT Article 20 in light of disagreement in the Working Group about the inclusion of an inquiry procedure and the absence of suggestions from delegations about its specific features.[25] Delegations accepted the Chairperson's draft text of the inquiry procedure as the basis for discussion. The ensuing debate again focused primarily on whether an inquiry procedure should be incorporated in the optional protocol. This pattern continued throughout the remainder of the drafting process: discussions centred mainly on the desirability of a procedure largely identical to the OP CEDAW procedure and did not explore any significant innovations to the functions of the procedure or its scope of application.[26]

Over the course of the debates, a relatively small number of delegations stated their clear opposition to the inclusion of the procedure.[27] A comparable number of States voiced

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[22] *Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights Analytical paper by the Chairperson-Rapporteur*, U.N. Doc. E/CN.4/2006/WG.23/2, 30 Nov. 2005, para. 27.

[23] See *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Prepared by the Chairperson-Rapporteur*, U.N. Doc. A/HRC/6/WG.4/2, Annex II, Explanatory Memorandum, 23 April 2007, para. 33.

[24] Ibid. draft Articles 10-11, 20.

[25] Ibid. Annex II, Explanatory Memorandum, para. 33.

[26] For example, the Working Group could have limited the application of the inquiry procedure to specific rights or created a different threshold for application. Denmark proposed that the scope of application be limited to 'cases of non-discrimination or other fundamental and well-defined principles', but the Working Group did not act on this suggestion. *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, 30 Aug. 2007, para. 112.

[27] States expressing opposition to, or significant reservations about, the inclusion of the inquiry procedure included: Egypt, Nigeria, Angola (*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, 14 Mar. 2006, para. 73; Australia, China, India, Italy, Poland, Russia and the United States (*Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fourth session* (n. 26 above), paras. 112, 187.)

clear support for the procedure,[28] but many States took no firm position on the matter.[29] The bases for opposition cited by delegates related principally to the scope of the CESCR's authority and discretion, including concerns about: the sources of information that could be considered by the CESCR; the possibility that in the absence of identified victims, the CESCR could consider anonymous information; the basis on which the reliability of information would be assessed; the meaning of the terms used to describe the threshold of application; and the necessity for the State party's consent at all stages of the proceedings.[30] Other delegations raised questions about the 'potentially large scope of investigations' under an inquiry procedure and the absence of a requirement to identify victims, without opposing the inclusion of the procedure.[31] The potential overlap of an inquiry procedure with the work of the UN special mechanisms was mentioned by several delegations as a factor weighing against its inclusion and concerns related to the costs associated with inquiries were raised by some delegations.[32]

From the outset of negotiations, the inquiry was framed as an optional procedure and its optional character was a central factor shaping the debate. The first draft of the protocol produced by the Chairperson incorporated an opt-out provision drawn from OP CEDAW Article 10.[33] Although a few States took the position that the procedure should be compulsory upon ratification of the optional protocol, there was little support for this approach.[34] Several delegations expressly conditioned their openness to the inclusion of the procedure on its optional character.[35] The draft opt-out provision was retained until

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[28] *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fourth session*, (n. 26 above), para. 111 (Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa and Sweden).
[29] See, e.g., *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Prepared by the Chairperson-Rapporteur* (n. 23 above), para. 32 and nn. w-y (identifying Azerbaijan, Finland, Mexico and Portugal as supporters of the inclusion of the procedure; Egypt, Nigeria, and Angola as opponents of its inclusion; and Argentina, Brazil, Belgium, Chile, France, Italy, Spain, and the United Kingdom as undecided on the matter).
[30] *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR on its third session* (n. 27 above), para. 73 (Egypt, Nigeria and Angola).
[31] Ibid. para. 71 (Belgium, France, Italy and the United Kingdom).
[32] *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fourth session* (n. 26 above), para. 113 (Australia, Ethiopia, Italy, Poland and the United States) *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR on its third session* (n. 27 above), para. 71 (Belgium, France, Italy and the United Kingdom).
[33] See *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Prepared by the Chairperson-Rapporteur*, U.N. Doc. A/HRC/6/WG.4/2, Annex I, 23 April 2007, Article 20.
[34] *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, 23 May 2008, para. 101.
[35] Ibid. para. 101.

the final session of the Working Group,[36] when the Russian Federation proposed that the inquiry be made an opt-in procedure. The Russian Federation argued that the approach to the inquiry procedure should be consistent with the opt-in approach taken to the inter-state procedure established in Article 10.[37] This proposal was accepted and the draft adopted by the Working Group inserted an opt-in provision into Article 11.[38] Although the suggestion that there were legal grounds for requiring an opt-in approach to both procedures was clearly spurious, the shift to an opt-in approach secured the inclusion of the procedure and no other significant changes to the draft text were made.[39] Several procedural aspects of the inquiry procedure were the subject of limited discussion in the Working Group, including whether there was a need to include a provision on follow-up and whether to establish a six-month time frame for the State party's response. These questions were all resolved in favour of a text following the OP CEDAW model.[40]

In addition to the conversion of the inquiry to an opt-in procedure and the use of previously agreed language, the high threshold for application of the procedure undoubtedly contributed to its acceptance. Although a number of States raised general questions and concerns about the meaning of the terms 'grave' and 'systematic',[41] it was evident that this language would impose significant restrictions on the types of violations the CESCR could investigate.[42] The fact that these terms had been previously agreed in

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[36] *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights prepared by the Chairperson-Rapporteur*, U.N. Doc. A/HRC/8/WG.4/2, Annex I (first revised draft), 24 Dec. 2007, Article 11 bis (previously Article 20), and Annex II, Explanatory Memorandum, para. 43; *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Letter from the Chairperson-Rapporteur*, U.N. Doc. A/HRC/8/WG.4/3 (second revised draft), 25 Mar. 2008, Article 11 bis.

[37] U.N. Doc. A/HRC/8/7 (n. 34 above), para. 179.

[38] Ibid. Annex I, p. 38.

[39] Following the adoption of the draft text by the Working Group in 2008, Egypt, on behalf of the African Group, 'expressed its overall satisfaction with the text, welcomed the inclusion of ... the provisions on ... [*inter alia*, the] inquiry procedure ...'. Ibid. para. 220.

[40] See ibid, para. 98 (regarding the six months time frame) and para. 100 (regarding the inclusion of a provision on follow-up measures); *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fourth session* (n. 26 above), para. 118 (regarding the six months time frame).

[41] *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR on its third session* (n. 27 above), para. 72, Argentina, Brazil, Chile and Spain; *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fourth session* (n. 26 above), para. 114 (Burkina Faso, China, Egypt (on behalf of the African Group), Ethiopia, Nigeria and the United States.) The Chairperson's 2006 analytical paper described an inquiry procedure as applying to violations of a grave or systematic nature. U.N. Doc. E/CN.4/2006/WG.23/2 (n. 22 above), para. 27. This threshold was accepted as the basis for subsequent discussions.

[42] See *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fifth session* (n. 34 above), para. 97 (indicating that Ecuador preferred the deletion of the terms 'grave or systematic', while Argentina, Austria, Brazil, Greece, the Netherlands, New Zealand, Sweden and the United States requested their retention).

the OP CEDAW inquiry procedure allowed delegations to bypass substantive discussion of their meaning. The fact that in ten years only one inquiry had been conducted under the OP CEDAW may have suggested to States that they might well be able to avoid scrutiny under the Article 11 procedure even if they opted into it.

The *travaux preparatoires* trace the path of political compromise leading to the acceptance of the procedure but provide little information about the drafters' interpretation of key elements of the text of Article 11. Delegations made no clear statements about the meanings they sought to attach to the terms 'grave', 'systematic', or 'reliable'.[43] When questions were raised about the meaning of the term 'reliable' during the third session of the Working Group, the representative of the CESCR, acting as a resource person, responded that the reliability of information received in connection with the Article 11 procedure could be evaluated by the CESCR in the same manner as information received under the periodic reporting procedure.[44] On the question of the publication of inquiry reports, one delegation specifically stipulated that States should be able to provide comments on the report before it was made public, but the opportunity for comments by the State party concerned was in any event contemplated by the draft provision reproducing CAT Article 20(5).[45]

The *travaux prepartoires* confirm that the drafters recognised the breadth of the investigative competence conferred on the CESCR under Article 11.[46] The majority of the objections to the inclusion of an inquiry procedure concerned features that contribute to the wide scope of the CESCR's investigative authority. The drafters understood that the decision to initiate an inquiry rests with the CESCR and that it need not obtain the cooperation of the State party concerned to launch an inquiry.[47] During the debates,

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[43] Comments of a more specific nature were made by: the delegation of Brazil, *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fourth session* (n. 26 above), para. 17 (stressing 'the need to clarify the actions or omissions that would lead to an inquiry'); ibid, para. 115 (pointing to the 'need for clear human rights indicators to identify situations of grave and systematic violations'); and the delegations of Chile and the United Kingdom, ibid, para. 116 (asserting that 'an absence of resources would not justify grave violations').

[44] *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR on its third session* (n. 27 above), para. 75.

[45] Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fifth session (n. 34 above), para. 99 (Australia).

[46] See, e.g., *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR on its third session* (n. 27 above), para. 71.

[47] See, e.g., *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fifth session* (n. 34 above), para. 102 (expression of concern by the Russian Federation 'at the power given to the Committee to launch an inquiry'. The Chairperson's 2006 analytical paper cited features distinguishing an

delegations took note of several features of the procedure that broaden its scope and enhance its accessibility to victims, including the absence of a victim requirement and the lack of restrictions on the sources of information and the form in which it is provided.[48] There can be no doubt that the drafters accepted that the CESCR would have the authority to initiate an inquiry without the State party's cooperation and would have wide latitude to determine its working methods and the interpretation of the threshold requirement.

3. Key Features

The salient features of the inquiry procedure for the purpose of assessing its utility as an accountability mechanism are: its opt-in character; its scope of application; the investigatory nature of the CESCR's role; the confidentiality rule; the breadth of the CESCR's authority to establish and conduct an inquiry; the outcome of an inquiry; the extent to which the procedure accommodates a timely response to violations; and its accessibility to victims, non-governmental organisations (NGOs) and civil society.

3.1 'Opt-in' character of the inquiry procedure

The CESCR has no jurisdiction to conduct an inquiry or consider a request for an inquiry concerning a State party that has not made a declaration accepting the CESCR's competence under Article 11.[49] The declaration can be entered at any time, and need not be registered at signing, ratification or accession. This 'opt-in' clause is the chief structural limitation of the Article 11 procedure. As noted, it represents a departure from the precedent of the CAT Article 20, OP CEDAW, and OP CRPD procedures, which were all in force when the OP ICESCR was adopted. The drafters' decision to

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inquiry from a complaints procedure, including the fact that 'in the inquiry procedure the Committee *does not have to receive a formal complaint* and *it is up to the Committee to decide to initiate the procedure*…'. (emphasis added) U.N. Doc. E/CN.4/2006/WG.23/2 (n. 22 above), para. 27. The information on the CAT Article 22 and OP CEDAW inquiry procedures presented to the Working Group by the Secretariat similarly made clear that these procedures are initiated at the discretion of the treaty body and the consent of the State party concerned is not required. See U.N. Doc. E/CN.6/1997/4, 21 Jan. 1997 (n. 21 above), paras. 101-103; U.N. Doc. E/CN.4/2005/WG.23/2 (n. 21 above), paras. 51-56.

[48] See *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR on its third session* (n. 27 above), paras. 71 and 73. The absence of a victim requirement was highlighted in the Chairperson's 2006 analytical paper as a feature distinguishing inquiries from complaints procedures. U.N. Doc. E/CN.4/2006/WG.23/2 (n. 22 above), para. 27. See also *Report of the Open-ended Working Group on an optional protocol to the ICESCR on its fifth session* (n. 34 above), para. 102 (request by India for clarification as to whether an inquiry procedure could be triggered in the absence of a communication and, if so, on what grounds).

[49] OP ICESCR, Art. 11(1).

contravene precedent and require States parties to 'opt-in' under Article 11 is deeply regrettable. The drafters of the Third OP CRC chose to return to the model of an 'opt-out' inquiry procedure rather than following the example of Article 11. An 'opt-out' approach encourages broader adherence to inquiry procedures. Indeed, given the nature of the violations covered by Article 11, adherence to the inquiry procedure should have been compulsory upon ratification of the OP ICESCR. The utility of the inquiry procedure is further undermined by Article 11(8), which permits a State party to withdraw its declaration 'opting-in' to the inquiry procedure at any time.[50]

3.2 Scope of application

Paragraph 1 of Article 11 defines the violations to which the procedure applies: 'grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant.' It thus makes clear than none of the rights recognised in the ICESCR is excluded from the scope of Article 11. The terms 'grave or systematic' establish a high threshold of application. The two elements of the threshold are disjunctive, as is clear from the use of the word 'or.' The interpretation of these terms is explored in detail in Section 4.2, *below*. If interpreted and applied by the CESCR in a progressive manner consistent with the aim of enhancing accountability for ICESCR violations, the threshold requirement does not undermine the potential utility of the procedure. Reports by NGOs and UN special mechanisms and the CESCR's concluding observations on States parties' periodic reports all point to the frequency of violations that would appear to meet the threshold.

3.3 Investigatory nature of the procedure and the CESCR's role

The inquiry procedure is investigatory in nature. Article 11 assigns the CESCR an investigatory fact finding role, in addition to its competence to make findings of fact and law. This differs clearly from its adjudicative (quasi-judicial) role under the communications procedure. In an inquiry, the CESCR is expected to carry out an active investigation into the alleged violations. Its role should not be confined to reviewing the information submitted to it and requesting corroboration or clarification of the information provided. It should also seek to identify additional sources of information

[50] A State party thus has the possibility to reverse a decision to 'opt-in' to the inquiry procedure without resorting to denunciation of the OP ICESCR as whole under Article 20.

and evidence and to obtain the information necessary to support a thorough analysis of the alleged violations.

The language of Article 11(3), the OP ICESCR Rules of Procedure and the manner in which inquiries have been conducted under the CAT Article 20 and OP CEDAW procedures on which Article 11 is based all confirm that the CESCR's role entails active investigation. The open-ended language of paragraph 3 gives the CESCR broad discretion to determine the modalities of its investigation. The Rules of Procedure explicitly state the CESCR's freedom to decide the modalities of an inquiry, subject to the confidentiality requirement.[51] The CESCR's authority under paragraph 3 to delegate responsibility for conducting an inquiry to one or more of its members creates a feasible modality for investigative fact-finding.[52] Rule 28(3) empowers the members designated by the CESCR to 'determine their own methods of work'.[53]

The language of paragraph 3 regarding information to be considered by the CESCR reflects its broad investigatory authority: in addition to observations submitted by the State party, the CESCR is to take into account 'any other reliable information available to it'. The Rules of Procedure affirm that the CESCR's role includes information gathering. During its preliminary evaluation of information brought to its attention under Article 11, the CESCR may 'seek to obtain additional relevant information substantiating the facts of the situation'.[54] Rule 27(3) provides a non-exhaustive list of sources from which the CESCR may seek additional information.[55] Under Rule 32, the designated representatives may invite interpreters and 'such persons with special competence in the fields covered by the Covenant, as are deemed necessary by the CESCR to provide assistance at all stages of the inquiry'. This option allows the CESCR to seek expert opinion on a wide range of legal and factual matters relevant to an inquiry. There is no restriction on the

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[51] Rule 28(2) states '[a]n inquiry shall be conducted confidentially and in accordance with any modalities determined by the Committee'. OP ICESCR, *Rules of Procedure* (n. 5 above).
[52] The rules of procedure reiterate this authority. Rule 26(3) refers to the designation of members to assist in the preliminary consideration stage of proceedings and Rule 28(1) refers to the designation of members to conduct an inquiry. Ibid. The same members would normally be designated for both functions.
[53] Rule 28(3) states that the designated members shall take into account the ICESCR, the OP ICESCR and the Rules of Procedure in devising their methods of work. Ibid.
[54] Rule 26(1). Rule 27(1) refers to the CESCR's examination of information received 'and/or compiled on its own initiative'. Ibid.
[55] Rule 27(3) states that the CESCR may seek information from, '*inter alia*': the State party's representatives; governmental organisations; UN bodies, specialised agencies, funds, programmes and mechanisms; international organisations, including the regional human rights systems; national human rights institutions; and NGOs. Ibid. Other sources include victims, witnesses, and the representatives of civil society groups and victim support groups not constituted as NGOs.

form or sources of information that can be received or obtained by the CESCR.[56] It may consider information in non-written form, such as photographs, video recordings, and oral testimony, in addition to written information.

The authority to carry out an on-site visit with the consent of the State party greatly strengthens the investigatory function of the procedure.[57] Visits allow the CESCR's designated representatives to conduct *in situ* inspections of the sites connected to the alleged violations and to interview a wide range of actors, including victims, witnesses, NGOs, community based groups, and State officials. In preparing for and conducting a visit, the representatives can identify new sources of information, clarify the facts, and evaluate the broader context of the alleged violations. A visit facilitates a more accurate and complete understanding not only of the facts directly related to the violations, but also of causal factors and the nature of the remedial measures appropriate to the situation.[58]

The CESCR's designated representatives are empowered to convene hearings during a visit, to enable them 'to determine facts or issues relevant to the inquiry' and they have authority to set the 'conditions and guarantees' for hearings.[59] They have the discretion to adapt their working methods to facilitate input from victims and community based groups. For example, in order to make the proceedings more accessible to victims and members of vulnerable groups, the designated representatives could permit interviewees and witnesses to be accompanied and advised by representatives of victim support groups or NGOs. They could take steps to minimise the extent to which the fear of reprisals inhibits victims, witnesses or other parties from participating in inquiry related activities. Although the CESCR will issue a request to the State party to take 'all appropriate steps ensure that individuals under its jurisdiction are not subjected to reprisals as a consequence of providing information or participating in any hearings or meetings in

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[56] The rules of procedure of the CAT, CEDAW, CRPD and CRC explicitly recognise the treaty body's authority to decide the form and manner in which it obtains information. CAT, *Rules of Procedure* (n. 20 above), Rule 82(5); CEDAW, *Rules of Procedure* (n. 20 above), Rule 83(4); CRPD, *Rules of Procedure* (n. 20 above), Rule 83(4), CRC, *Rules of Procedure* (n. 20 above), Rule 35(4).

[57] Article 11(3). Rule 30(1) refers to an on-site visit '[w]here the Committee deems it warranted'. OP ICESCR, *Rules of Procedure* (n. 5 above).

[58] Only the CESCR's designated representatives will be able to rely directly on oral testimony and *in situ* inspections in their assessments of the evidence. The CESCR as a whole will base its conclusions on the written record presented by the designated representatives.

[59] Rule 31(1)(2), OP ICESCR, *Rules of Procedure* (n. 5 above).

connection with an inquiry',[60] this formal measure may have limited practical effect. To deter reprisals against interviewees and witnesses or breaches of their privacy rights, the designated representatives could withhold their identifying details from the State party and request assurances from the State party that it will not conduct surveillance of individuals with whom they have contact in the course of a visit.

A flexible approach to the modalities of an inquiry will strengthen the effectiveness of the CESCR's investigatory activities. It has wide latitude to adapt its working methods as necessary in the particular circumstances, to enable it to obtain information that is as complete and accurate as possible and to ensure that it receives ample input from the individuals and groups directly affected by the violations.

3.4 Confidentiality requirement

Pursuant to Article 11(4) an inquiry must be 'conducted confidentially'. The OP ICESCR Rules of Procedure stipulate that the confidentiality requirement applies to 'all documents and proceedings' of the CESCR 'relating to the conduct of the inquiry' and that meetings in which inquiries are considered must be closed.[61] The CESCR cannot publicly disclose its own working documents, documents submitted to it in connection with an inquiry, the substance of its internal deliberations, or the substance of its communications with the State party, victims, NGOs and other sources of information. However, as previously noted, the confidentiality requirement does not apply to the outcome of an inquiry.[62]

The confidentiality requirement binds the CESCR, not the authors of a inquiry request, victims, the State party, or other actors participating in an inquiry, with the following exceptions set out in the Rules of Procedure: persons who testify at a hearing during an on-site visit must make a declaration agreeing to respect the confidentiality of the

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[60] Rule 31(4), OP ICESCR, *Rules of Procedure*, ibid. OP ICESR Article 13 obligates States parties to 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 CESCR pursuant to the OP ICESCR.

[61] OP ICESCR, *Rules of Procedure* (n. 5 above), Rule 25.

[62] The rules of procedure for the CAT Article 20, OP CEDAW, OP CRPD and Third OP CRC inquiry procedures uniformly stipulate that the confidentiality requirement applies to the treaty body's documents and proceedings related to the conduct of an inquiry and that meetings concerning inquiry proceedings must be closed. However, CAT Rule 79(1) provides that meetings during which the CAT considers general issues, such as procedures for the application of Article 20, shall be public, unless the CAT decides otherwise. CAT, *Rules of Procedure* (n. 20 above).

procedure; [63] and interpreters and persons with 'special competence' who have been requested to assist in an inquiry must make the same declaration.[64] In addition, practice under CAT Article 20 and the OP CEDAW indicates that the CESCR may at its discretion request NGOs and other individuals or groups not to communicate information to the media about an on-site visit. Subject to these exceptions, NGOs and other parties may choose to publicise the information they provide to the CESCR, to the extent that such disclosure is compatible with their advocacy strategies. However, it is likely that the State party will monitor any public statements made by NGOs and individuals about an inquiry, and it may register protests with the CESCR if it considers that the confidential nature of the proceedings has been breached.[65]

An unnecessarily broad approach to the confidentiality requirement is not dictated by Article 11(4), which states that an inquiry shall be '*conducted* confidentially'. This language need not be interpreted as precluding the public disclosure of information related to the *status* of an inquiry. There is no compelling reason for the CESCR not to disclose the facts that it has: received an inquiry request regarding a particular State; decided to launch an inquiry or declined to do so; or concluded an inquiry. Acknowledgement by the CESCR that a State party has been named in connection with alleged violations would not in itself be prejudicial to the State party, since claims against States are routinely publicised through the activities of various UN human rights mechanisms and are understood in these contexts to be allegations whose veracity must be established by the mechanism concerned.[66]

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[63] Rule 31(3), OP ICESCR, *Rules of Procedure* (n. 5 above). This declaration is binding with regard to information about the hearing itself and the content of a witness's interactions with the CESCR, not content that is a matter of public record.

[64] Rule 32(2), OP ICESCR, *Rules of Procedure* (n. 5 above) (applicable to persons not bound by an oath of office to the UN).

[65] See, e.g., CAT Brazil inquiry (n. 15 above), para. 213.

[66] The CAT's rules of procedure authorise it to issue communiqués concerning closed meetings 'for the use of the information media and the general public regarding its activities under article 20 of the Convention'. CAT, *Rules of Procedure* (n. 20 above), Rule 80. Rule 47 of OP ICESCR Rules of Procedure states that the CESCR may issue press communiqués on its activities under the OP ICESCR for the use of the media and the general public, but makes no mention of communiqués relating to closed meetings under Article 11. OP ICESCR, *Rules of Procedure* (n. 5 above).

3.5 Scope of the CESCR's authority to establish and conduct an inquiry

No requirement for State party's consent or cooperation

The CESCR's authority to establish an inquiry is not conditioned on the consent or cooperation of the State party concerned. As indicated by the term 'may' in Article 11(3), the decision to establish an inquiry is entirely at the CESCR's discretion once it determines that reliable information indicates the existence of violations reaching the threshold.[67] Article 11(4) directs the CESCR to seek the cooperation of the State party 'at all stages of the proceedings,' indicating that the CESCR is expected to make repeated efforts to secure the State party's cooperation. However, the CESCR has the competence to proceed with an inquiry if the State party refuses to cooperate or to permit an on-site visit. Practice under the CAT Article 20 procedure confirms this interpretation. The CAT has twice proceeded with an inquiry without an on-site visit.[68]

Article 11(4) reflects the reality that the efficacy of an inquiry is significantly enhanced by the State party's cooperation. Non-cooperation restricts the scope of the treaty body's fact-finding activities, not only by precluding a visit but also by foreclosing its access to information obtainable only from the State and to State officials whose roles and responsibilities are closely linked to the alleged violations. The CAT's inquiry on Egypt illustrates the difficulty of resolving contradictory factual accounts on the basis of written submissions. Although it established a reasoned basis for its findings, the CAT clearly considered that the information before it was incomplete.[69] Obviously, an on-site visit does not *per se* yield a more complete and credible account of the facts. To achieve that result, the treaty body's representatives must seek information actively prior to and during a visit, respond firmly to any recalcitrance by the State party regarding access to individuals or locations, and subject the State party's justifications for its conduct to

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[67] CAT Article 20(2), OP CEDAW Article 8(2), OP CRPD Article 6(2) and the Third OP CRC Article 13(2) all use the term 'may', making the decision to initiate an inquiry a matter of the treaty body's discretion.

[68] *Egypt inquiry report* (n. 15 above), para. 193 ('[t]he Committee invited the Government to reply to its request [for a visit] by 17 June 1994 and stated that should no reply or a negative reply have been received by that date, the Committee would continue' the inquiry); *Nepal inquiry report* (n. 15 above), para. 13 (''the Committee decided that, as its continuing efforts to visit the State party were unsuccessful, it would proceed with the confidential inquiry without a visit''). See also UN Doc. E/CN.6/1997/4 (n. 21 above), para. 103: '[under CAT Article 20] an inquiry may also proceed without the cooperation of the State party...'.

[69] *Egypt inquiry report* (n. 15 above), at paras. 206, 218 and 220. The CAT identified the criteria used in assessing the credibility of the allegations presented: the large number of allegations; their different origins; their consistency as to methods of torture and places where it was practised; and the reliability of the sources in their dealings with the CAT on other matters. Ibid. para. 219.

rigorous scrutiny.

Notwithstanding the benefits of cooperation, a State party's refusal to cooperate or to consent to a visit should not deter the CESCR from conducting an inquiry. Practice under CAT Article 20 confirms the importance of proceeding with an inquiry despite a refusal by the State party to cooperate, in order to reinforce the principle of accountability for violations. The core functions of the Article 11 procedure are to: establish an authoritative record of the facts; present an authoritative decision about whether breaches of the ICESCR have occurred; and identify corrective and preventive measures to be taken if breaches have occurred. Inquiries conducted without the State party's cooperation can perform these functions effectively if the CESCR creates the fullest possible record by actively seeking information from a wide range of sources, even if non-cooperation narrows the scope of the issues that can be resolved definitively.

Discretionary nature of the CESCR's decision to undertake an inquiry

Not only may the CESCR launch an inquiry without the State party's cooperation, it may decline to establish one even if it has determined on the basis of the information available that an inquiry *is* warranted. Certain factors might induce the CESCR to decide against an inquiry that appears to be warranted, such as a belief that it might be possible to address the situation more effectively through informal dialogue with the State party or a desire to await the outcome of pending action by other human rights bodies. However, it is more likely, and clearly desirable, that in such circumstances the CESCR would not take a formal decision against an inquiry but would keep the situation under consideration until it is satisfied that the alleged violations have been addressed or that the allegations were unfounded.

Nothing in Article 11 limits the CESCR's authority to initiate a new inquiry when another inquiry in still in progress or to initiate inquiries into more than one situation at the same time.[70] Summary records of the CAT's public meetings and its conference room papers indicate that it has maintained ongoing concurrent reviews of the possible need for

[70] Cf. CAT, *Summary Record of the 2nd part of the 835th meeting* (40th session, 16 May 2008), U.N. Doc. CAT/C/SR.835/Add.1 (2008), para. 9. However, time constraints created by the treaty body's overall workload and the lack of adequate financial resources may limit the number of inquiries that can be undertaken concurrently.

an inquiry into allegations concerning several different States parties.[71] Informal information indicates that the CEDAW initiated a new inquiry while another was still in the final stages of completion and it has had multiple inquiry requests under concurrent review.

Information triggering preliminary evaluation of the need for an inquiry

As noted, the inquiries conducted under CAT Article 20 and the OP CEDAW were all undertaken in response to requests submitted by NGOs and this is likely to be the norm under Article 11. The OP ICESCR Rules of Procedure assume that the examination of information under Article 11 will be triggered by the submission of a formal request for an inquiry. Rule 22 states that 'the Secretary-General shall bring to the attention of the Committee reliable information that is received for the Committee's consideration indicating grave or systematic violations' by a State party.[72] However, Article 11 does not refer to a request as the catalyst for the evaluation of information in connection with a possible inquiry: it uses the phrase 'receives reliable information' to describe the CESCR's initiation of proceedings under Article 11.

In their rules of procedure, the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Rights of the Child (CRC) have stated their authority to consider information under their respective inquiry procedures on their own initiative, without receiving a request. The CRPD's Rules of Procedure provide that it may 'on its own initiative, compile information available to it, including from the United Nations bodies, for its consideration' under the Article 6 inquiry procedure.[73] The CRC's Rules of Procedure state that it 'may, on its own initiative, in case of reliable information on the existence of grave and systematic violations … , initiate an inquiry'.[74] The CAT has not adopted a parallel rule of procedure, but the fact that CAT Article 20 does not require it to

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[71] See, e.g., CAT, *Summary Record of the 2nd part of the 835th meeting* (40th session, 16 May 2008), U.N. Doc. CAT/C/SR.835/Add.1 (2008).

[72] OP ICESCR Rules 23-24 direct the Secretariat to keep a permanent record of information brought to the CECSR's attention and to prepare a brief summary of the information for circulation to the members. OP ICESCR, *Rules of Procedure* (n. 5 above).

[73] CRPD, *Rules of Procedure* (n. 20 above), Rule 79. Rule 79 clearly refers to the CRPD's authority to initiate the preliminary consideration stage of an inquiry *proprio motu*, since Rule 78(1) refers to the transmission by the Secretariat of information 'that is or appears to be submitted for the Committee's consideration' under the inquiry procedure.

[74] CRC, *Rules of Procedure Third OP CRC* (n. 20 above), Rule 31(2). Rule 31(2) clearly refers to the CRC's authority to initiate the preliminary consideration stage *proprio motu*, since Rule 31(1) refers to the transmission by the Secretariat of information 'information that is or appears to be submitted for the Committee's consideration under article 13'.

wait to receive a formal complaint of torture before initiating an inquiry has been acknowledged in its internal discussions.[75]

This approach allows a treaty body to follow up on information that comes before it in the course of its other activities under the treaty, rather than waiting to receive a formal request. It gives effect to a central rationale for the inquiry procedure, which is to facilitate a timely response to grave or systematic violations. Information pointing to the occurrence of such violations may come before the treaty body in the context of material regularly presented to it, such as States parties' periodic reports, submissions from UN agencies or programmes, and reports by the special mechanisms of the UN Human Rights Council.[76] Numerous individual communications against the same State party in relation to the same types of violations might alert the treaty body to a need to obtain additional information for consideration under the inquiry procedure. Although the CESCR did not include in its Provisional Rules of Procedure a provision stating its authority to decide *proprio motu* to compile information for consideration under Article 11, it could in the future adopt this approach since it has wide latitude to develop its methods of work.

No admissibility criteria

Article 11 does not establish any admissibility criteria. The information before the CESCR need not identify the victims of the alleged violations. Information submitted anonymously can be considered, although anonymity would affect the CESCR's assessment of reliability. Prior consideration of the same matter by another human rights body or the CESCR itself does not bar an inquiry. Violations that have been the subject of communications under Article 8 thus could be examined under the inquiry procedure if they meet the Article 11 threshold. The exhaustion rule, which is a significant procedural obstacle under the communications procedure, does not apply. Information may be

[75] CAT, *Summary record of the 835th meeting, Consideration of information under Article 20 of the Convention* (40th session, 16 May 2008), U.N. Doc. CAT/C/SR.835/Add.1 (2008), para. 9. See also U.N. Doc. E/CN.4/2006/WG.23/2 (n. 22 above), para. 27 (stating that in an inquiry procedure 'the Committee does not have to receive a formal complaint and it is up to the Committee to decide to initiate the procedure').

[76] A decision to launch an inquiry may be supported by the treaty body's prior attention to the violations at issue in the context of the periodic reporting procedure. See, e.g., *CAT Nepal inquiry* (n. 15 above), paras. 3-6; *CEDAW Mexico inquiry* (n. 18 above), para. 3.

submitted and considered at any time after the date on which the alleged violation occurred.

The OP ICESCR does not address the question of the CESCR's jurisdiction *ratione temporis* under Article 11. However, under international law, a State party to the OP ICESCR will not be bound by Article 11 in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the OP ICESCR for the State concerned *and* before the effective date of its declaration under Article 11(1).[77] This restriction concerns the CESCR's jurisdiction to consider the situation at issue and is not an admissibility requirement as such. When presented with facts that raise a question as to its jurisdiction *ratione temporis* under Article 11, the CESCR should undertake an analysis along the same lines as the analysis to be carried out in its review of communications to determine their admissibility *ratione temporis*. In particular, the CESCR should recognise the well-established exception for continuing violations that is incorporated in OP ICESCR Article 3(2)(b).

Mandatory elements

Several aspects of Article 11 proceedings are mandatory. When the CESCR receives information that appears to indicate grave or systematic violations by a State party which has opted into the inquiry procedure, it must carry out a preliminary evaluation to determine whether the information is reliable and whether it points to the existence of grave or systematic violations. [78] If the CESCR reaches an affirmative conclusion on both counts, it must invite the State party to cooperate in the examination of the information and to submit its observations on the information.[79] In the next stage of proceedings, the CESCR's examination of the available information in order to decide whether to initiate an inquiry must take into account any observations submitted by the State party.[80] As noted, it must obtain the State party's consent to an on-site visit during an inquiry. At the conclusion of an inquiry, the CESCR is required to transmit its findings, comments and

[77] See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 Jan. 1980, Article 28.
[78] The language of Article 11(2) and OP ICESCR Rule 26(2) indicates that this evaluation is mandatory.
[79] Article 11(2); OP ICESCR Rule 27(1). OP ICESCR, *Rules of Procedure* (n. 5 above).
[80] Article 11(3); OP ICESCR Rule 27(2). OP ICESCR, *Rules of Procedure* (n. 5 above).

suggestions to the State party and allow a period of six months for the State party to submit its observations in response.[81]

The CESCR's authority to decide the content of, and to publish, reports

Article 11(7) states that the CESCR '*may, after consultations with the State Party concerned*, decide to include a summary account of the results of [inquiry] proceedings in its annual report...' (emphasis added).[82] Paragraph 7 replicates the second sentence of CAT Article 20(5).[83] Any suggestion that this language might require the CESCR to obtain the State party's consent to publication and/or its agreement to the content of a report is contradicted by long established practice under CAT Article 20(5). The constant practice of the CAT makes clear that it is not required by Article 20(5) to obtain the State party's consent to publication of the report or its agreement to the content of the report.[84] The CAT considers the decision to publish a summary report a matter of its sole discretion and it has consistently elected to publish.

The CAT developed its approach to the publication of inquiry reports at the outset of its work under Article 20. In its first three inquiries, the States parties concerned objected to the publication of the CAT's summary report. In its first inquiry, the CAT decided to publish, notwithstanding the State party's objections, and explained that 'in view of the number and seriousness of the allegations of torture', the findings and conclusions by the CAT and its designated representatives, and the State party's replies, it was 'convinced that such publication is necessary in order to encourage full respect for the provisions of the Convention in Turkey'.[85] In the CAT's second inquiry, the State party refused to

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[81] Article 11(5) and (6); OP ICESCR Rule 33(1) and (3). OP ICESCR, *Rules of Procedure* (n. 5 above).

[82] The OP ICESCR Rules of Procedure do not elaborate on Article 11(7), but Rule 25 states that the confidentiality requirement is 'without prejudice to the provisions' of Article 11(7) and Rule 33(2) states that transmission of findings, comments and recommendations to the State party is 'without prejudice' to Article 11(7). OP ICESCR, *Rules of Procedure* (n. 5 above).

[83] The OP CEDAW does not contain a comparable provision, but the CEDAW's Rule of Procedure 80(2) provides: '[b]efore including a summary of the activities undertaken under articles 8 or 9 … in [its] annual report…, the Committee may consult with the State party concerned with respect to the summary'. CEDAW, *Rules of Procedure* (n. 20 above).

[84] The CAT's rules of procedure make clear that the decision to publish a summary account of the inquiry in its annual report is entirely a matter of its discretion. Rule 90 states that it 'may' decide to publish a summary report and '[i]f it decides to include a summary account' of the inquiry in its annual report, the text of the summary account must be forwarded to the State Party. CAT, *Rules of Procedure* (n. 20 above). See also UN Doc. E/CN.6/1997/4 (n. 21), para. 104: '[the CAT] has the possibility of including a summary of the results of its proceedings in its annual report. Such inclusion is preceded by consultations with the State party thereon, but the final decision rests with the Committee' (citing Article 20(5)).

[85] *CAT Turkey inquiry report* (n. 15 above), para. 21.

permit an on-site visit and voiced its opposition to publication of the report in the strongest terms.[86] The CAT set aside these objections and published the report, reiterating the reasons given in connection with its first inquiry.[87] In its third inquiry, the CAT postponed publication of the report for one year, in order to consult the State party about its objections to publication and obtain from it additional information. The report was published the following year with an acknowledgement of the State Party's cooperation in the inquiry and a summary of its response to the CAT's findings and recommendations.[88] The State party's concerns about publication were resolved by incorporating its comments on the CAT's conclusions into the report.

This approach, which allows the State party to register its disagreement with the outcome of an inquiry while preserving the function of the inquiry procedure as an accountability mechanism, has been followed subsequently by the CAT. Article 20 reports note that the CAT invited the State party to submit its observations on the possible publication of the report, indicate that the State party agreed to publication,[89] and present a synopsis of the State Party's response to the report or, if a full report is issued, the State party's response in full. The publication of the State party's observations on the report is in itself beneficial, since it creates an authoritative record of the State party's views on the facts, the interpretation of domestic and international law, and any procedural or substantive legal questions concerning the inquiry procedure that may arise.

Article 11(7) should be interpreted in line with the practice of the CAT, which was well-established prior to the drafting of the OP ICESCR.[90] When they chose to incorporate the language of CAT Article 20(5) into Article 11(7), the drafters had been informed of the CAT's practice by means of background documentation and briefings.[91] Nothing in the

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[86] Egypt argued that publication could have 'highly prejudicial' repercussions for its relations with the CAT and the purposes of the Convention itself and 'might ultimately be interpreted as signifying that the Committee is indirectly encouraging terrorist groups not only in Egypt but worldwide'. *CAT Egypt inquiry report* (n. 15 above), para. 199.
[87] Ibid. para. 200.
[88] *CAT Peru inquiry report* (n. 15 above), paras. 155 and 188-89.
[89] See, e.g., *Report of the CAT, Summary account of the results of the proceedings concerning the inquiry on Brazil* (n. 15 above), para. 72; *Report of the CAT, Summary account of the results of the proceedings concerning the inquiry on Mexico* (n. 15 above), para. 153; *CAT Mexico inquiry report* (n. 15 above), para. 222.
[90] The reports of the CAT's first six inquiries had all been published by 2004.
[91] The Working Group had before it UN Doc. E/CN.6/1997/4 (n. 21 above), which clearly states that the final decision regarding publication rests with the CAT. See UN Doc. E/CN.4/2005/WG.23/2 (n. 21 above), para. 1: '[the present report] should be read in conjunction with [U.N. Doc. (E/CN.6/1997/4], which has been made available to the participants in the working group.' At its second session, the Working Group

drafting debates supports an interpretation of Article 11(7) that departs from the established interpretation of CAT Article 20(5).

As to the CESCR's exercise of its discretion regarding publication, publication should be routine for the reason stated by the CAT with regard to the CAT Article 20 procedure: the publication of an inquiry report is necessary to encourage 'full respect' for the provisions of the ICESCR. The public record of an inquiry is central to its utility as an accountability mechanism, in relation to both the particular violations under scrutiny and the future conduct of other States parties.

3.6 Outcome of the procedure and follow-up

The CESCR's findings, comments and recommendations

The CESCR's findings, comments and recommendations will be formulated on the basis of the findings reported by the designated members who have conducted the inquiry, together with the latter's comments on their findings and their proposals for recommendations to be adopted by the CESCR. An inquiry will represent a substantial institutional undertaking for the CESCR and the outcome should be correspondingly substantial. Both the substance of its findings, comments and recommendations and the manner of their presentation will be key to the effectiveness of an inquiry.

Practice under CAT Article 20 and the OP CEDAW indicates that the scope and degree of specificity of the treaty body's findings, comments and recommendations vary with the quantity and quality of the information made available to the designated representatives and the rigour with which they carry out their investigation, as well as the substantive focus of the inquiry. The CESCR's findings should set out its conclusions regarding the facts, including any issues of fact that remain unresolved, and its determination regarding whether the State party has committed grave or systematic violations of the ICESCR. Comments can deal with a wide range of issues, with the aim of clarifying the CESCR's analysis of the situation and the bases for its recommendations. Key issues to be addressed include, *inter alia*: the social, cultural, economic, political and legal context within which the violations are situated; interpretations of the relevant rights and obligations under the ICESCR; causal factors related to the violations; the consequences

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had an interactive dialogue with an expert panel that included a member of the CAT whose presentation addressed the Article 20 procedure. See U.N. Doc. E/CN.4/2005/52 (n. 21 above), para. 38.

of the violations; action or inaction by the State party that does not rise to the level of a breach of its obligations, but nonetheless increases the likelihood of violations or exacerbates the effects of violations; aspects of the situation that concern structural inequality and discrimination and the position of marginalised groups; and concerns related to the safety of victims and others who have communicated with the CESCR's representatives during an inquiry.

The scope of the CESCR's recommendations can be similarly broad. Recommendations should be sufficiently specific to be amenable to monitoring and sufficiently comprehensive to reflect the full range of policy, legal, administrative, budgetary and other measures required to bring the State party into compliance with its obligations. They should encompass measures to bring about cessation of the violations, remedy past violations, and prevent future violations. Although the inquiry procedure is not designed to supply individual remedies of the type available under the communications procedure, the CESCR could specify remedial measures to redress harm to the members of a particular group affected by the violations, such as steps to provide access to housing, health care or environmental protections to individuals belonging to an identified group.

Inquiry reports

An inquiry report should present a clear, sufficiently detailed and credible account of the findings of fact and the legal reasoning supporting the CESCR's findings, conclusions and recommendations. Both the CAT and the CEDAW have issued two versions of inquiry reports: summary accounts published in the treaty body's annual report; and full reports published as separate documents. Full reports include: a summary of the treaty body's activities; a detailed review of the evidence; detailed findings of fact; comments analysing the facts and law; an assessment of the degree of cooperation provided by the State party; specific and general recommendations; and the full text of the State party's observations on the report.[92] The CESCR should issue a full report whenever possible, since it will establish a more complete record and is likely to be more persuasive than the summary account.

[92] See, e.g., *CEDAW Mexico inquiry report* (n. 18 above).

Follow-up to an inquiry

Article 12 identifies two follow-up measures to be taken by the CESCR. Paragraph 1 authorises it to invite the State party to include in its report under ICESCR Articles 16 and 17 the 'details of any measures taken in response to an inquiry'. Under paragraph 1, the CESCR can request the State party to include this information in its periodic reports on an ongoing basis, until the CESCR considers that the measures taken have resolved the situation satisfactorily. Paragraph 2 provides that, at the end of the six-months period under Article 11(6), it may request the State party to provide information on the measures taken in response to the inquiry.

The CESCR could at its discretion develop additional methods to encourage the State party to implement the recommendations from an inquiry. It could designate follow-up rapporteurs to promote implementation through a range of activities, including formal and informal dialogue with representatives of the State party and periodic requests for updated information from NGOs closely involved in the inquiry, victims, and other sources that provided input during the inquiry.[93] In practice, monitoring and reporting by NGOs and civil society will be a central factor in determining whether the CESCR's recommendations have a meaningful impact on the State party's conduct. Information provided by these sources can help the CESCR to assess the accuracy of the State party's account of action it has taken in response to the inquiry and can alert the CESCR to any recurring violations or retaliation against individuals or groups for having cooperated in the inquiry. It would therefore be useful to create a formal process for seeking and receiving information from victims, their advocates, NGOs, and civil society groups. A formal process would help to ensure that the information reaches the CESCR on a regular and timely basis and would encourage NGOs and other parties engaged in monitoring the situation to coordinate their submissions. Such a process would support efforts by the CESCR and civil society to ensure that the results of an inquiry have identifiable effects on the State party's conduct, thereby augmenting the CESCR's other approaches toward the same end.

[93] The CAT appoints rapporteurs to carry out follow-up under Article 20. See, e.g., *Report of the Committee Against Torture*, 68 U.N. GAOR Supp. (No. 44), para. 100, U.N. Doc. A/68/44 (2013).

3.7 Timeliness

During the OP ICESCR drafting negotiations, the capacity for rapid action was cited as a feature justifying the inclusion of an inquiry procedure. Article 11(3) states that the members designated to carry out an inquiry are to 'report urgently' to the CESCR. Several features of the procedure contribute to a more timely consideration of violations: the absence of admissibility requirements; the relative ease with which the preliminary consideration stage of proceedings can be triggered; the CESCR's ability to communicate orally with the State party's representatives and other sources of information, rather than relying solely on the written exchange of information; and the use of designated representatives to carry out an inquiry, which reduces the difficulty of coordinating the activities of various actors involved in an inquiry, and, in favourable circumstances, decreases delays in access to the State party's representatives. In addition, an inquiry request can be prepared and submitted more rapidly than can a communication.[94]

In practice, however, action taken under CAT Article 20 and the OP CEDAW cannot be characterised as 'urgent' in any ordinary meaning of the term. The length of time required to complete an inquiry under these procedures has averaged four years, from the preliminary consideration of information, to the adoption of findings and recommendations and publication of the summary account of the inquiry. There is little reason to anticipate a more rapid resolution of inquiries under Article 11. Experience under the CAT Article 20 and OP CEDAW procedures indicates that the preliminary evaluation stage of proceedings is likely to extend over several of the CESCR's regular sessions and that efforts to obtain consent for, and to arrange, a visit will occasion lengthy delays.

Article 11 does not indicate any timeframe for the CESCR's decision to establish an inquiry, its efforts to secure the State party's cooperation and consent to an on-site visit, its consideration of the report submitted by the designated representatives, or its adoption of findings, conclusions and recommendations. The Rules of Procedure authorise the CESCR to establish certain flexible time limits. Under Rule 27(1), the CESCR will prescribe a time limit for the State party to submit its observations on the information

[94] An initial submission with basic information would be sufficient to trigger the preliminary evaluation stage, if the information is reliable and the facts alleged point to the existence of violations that meet the threshold. Additional information can be submitted on an on-going basis for the duration of an inquiry.

received and/or compiled on the CESCR's own initiative.[95] Rule 28(1) stipulates that the designated representatives are to 'conduct an inquiry and to make a report within an *appropriate* time limit'.[96] Factors affecting the rapidity with which an inquiry can be initiated and completed include: the CESCR's workload in connection with its other activities and any other inquiries under consideration or in progress; the timeliness of the State party's responses to the CESCR; delays associated with preparations for a visit to which the State has consented; and difficulty in achieving consensus among CESCR members about the need for an inquiry or its findings. In this context, however, urgency should be measured relative to the options available under other human rights procedures. The speed with which an inquiry can be launched and concluded does appear to offer a significant advantage over the OP ICESCR communications procedure.

3.8 Accessibility of the Procedure to Victims, NGOs and Civil Society

Several features of the inquiry procedure enhance its accessibility to victims, their advocates, NGOs, and civil society groups, including groups whose access to justice is restricted by social or economic factors. Chief among these is the absence of admissibility requirements. In particular, the absence of requirements related to standing, victim status, and the exhaustion of domestic remedies removes procedural obstacles that are frequently insurmountable for victims and their advocates under human rights complaints procedures. Information can be submitted regarding situations in which individuals are reluctant to be identified due to a danger of reprisal or the factual circumstances surrounding the violations makes it impractical or impossible to identify individual victims. Individuals or groups submitting information do not need to demonstrate any relationship to the victims of the alleged violations or any particular expertise regarding the issues raised by the situation. The absence of an exhaustion requirement is vital to the accessibility of the inquiry procedure, given the reality that domestic remedies for violations of ICESCR rights are frequently non-existent, ineffective or inadequate.

The absence of restrictions on the form or sources of information that can be considered by the CESCR may mitigate the effects of social and economic barriers that would limit the use of the procedure by victims and community groups, including the obstacles

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[95] Rule 27(1), OP ICESCR, *Rules of Procedure* (n. 5 above).
[96] Rule 28(1), OP ICESCR, *Rules of Procedure*, ibid.

created by a lack of literacy and legal literacy. The flexibility of the process by which the CESCR can seek and receive information in connection with an inquiry also has advantages for advocates. NGOs can benefit from repeated opportunities to present additional information as it becomes available and to refine arguments about the law and facts in response to the CESCR's concerns. Sources other than the author(s) of an inquiry request can submit information directly to the CESCR, including groups involved in monitoring or advocacy related to the alleged violations, experts on the issues under examination, or national human rights institutions.

An on-site visit contributes significantly to the accessibility of the procedure, as it allows victims, witnesses, NGOs and the representatives of community-based groups to interact directly with the CESCR's representatives. Interviews and hearings during a visit provide an opportunity to shape the direction of the CESCR's investigation and permit those most affected by the violations to describe their experiences, share their knowledge, and communicate their concerns in their own voices.

Finally, the CESCR's competence to request protection measures supports the accessibility of the inquiry procedure by offering a means by which victims, witnesses, and others can seek international scrutiny of ill-treatment or intimidation against them in connection with their interactions with the CESCR.[97]

The major structural constraints on the accessibility of the inquiry procedure are the confidential nature of proceedings and the requirement that the CESCR seek the State party's cooperation. The confidentiality requirement prevents the authors of a request from ascertaining the status of proceedings and content of the CESCR's deliberations, except insofar as the information is available informally or can be inferred from the CESCR's requests for information. It thus limits their ability to respond directly and in the most effective manner to the evidence and arguments presented by the State party. It similarly hampers their ability to address the CESCR's concerns regarding the evidence, or the CESCR's understanding of domestic law, the Article 11 threshold, or the substantive rights and obligations implicated by the alleged violations. Strictly interpreted, the confidentially requirement means that the authors of a inquiry request

[97] OP ICESCR, Article 13; OP ICESCR Rules of Procedure (n. 5 above), Rule 31(4). These guarantees apply to ill-treatment, intimidation or reprisals by non-State actors to the extent that the State has obligations to prevent and respond to violations by non-State actors.

cannot ascertain the status of the CESCR's proceedings, except insofar as the CESCR's requests for additional information suggest a conclusion about the status of proceedings or the CESCR seeks their input regarding the details of a visit and/or invites them to meet with the designated representatives during a visit.[98] In addition, the confidentiality requirement affects the extent to which information about an inquiry can be incorporated into other advocacy initiatives related to the violations. The implications of the confidentiality requirement for advocates are thus twofold: it hinders advocacy aimed at influencing the CESCR and it constrains the manner in which inquiry related activities can be integrated into their broader strategies for addressing the alleged violations.

The CESCR's mandate to seek the State party's cooperation in an inquiry creates strategic disadvantages for advocates and introduces delays that undermine the utility of the procedure for advocacy purposes. Efforts to obtain the State party's cooperation give the State access to information not available to the authors of a request, including, at a minimum: the status of proceedings; details regarding the alleged violations that are the CESCR's main focus of concern; and the basic parameters of the record before the CESCR. Although the CESCR is expected to maintain confidentiality regarding the identity of its sources of information where necessary to protect them from retaliation or threats of reprisal, the authors of an inquiry request will be strategically disadvantaged by the State party's access to information. Coupled with the confidentiality requirement, the CESCR's duty to seek the State party's cooperation opens the door to pressure by the State party on the CESCR to refrain from initiating an inquiry and/or to alter the manner in which an inquiry proceeds.

In addition to these structural constraints, there are a number of practical limitations on the accessibility of the inquiry procedure to victims and disempowered groups. Chief among these are the lack of access to information about the ICESCR and the inquiry procedure and the lack of capacity to document violations and address technical aspects of domestic and international law. The potential value of an inquiry must be weighed against the procedural disadvantages described above and the human and financial resources needed to support inquiry related activities, including coordination among

[98] When consent to a visit has been obtained, normal practice under the CAT Article 20 and OP CEDAW is for the treaty body (through the Secretariat) to invite the authors of the inquiry request and other parties that have submitted information to identify individuals to be interviewed and locations to be visited, and to request NGOs to facilitate access to victims and witnesses.

national and international groups. Involvement in an inquiry can be a resource intensive undertaking for NGOs, victim support groups and other civil society groups. In addition to the resources expended in preparing submissions, they are likely to bear the costs associated with assembling victims and witnesses to meet with the CESCR's designated representatives during a visit.

4. Questions of interpretation

The Article 11 procedure raises relatively few questions of interpretation regarding substantive legal issues. The first of these is the meaning of the term 'reliable' and the second is the meaning of the terms used to define the threshold of application. In both cases, the ordinary meaning of the language, its context in Article 11 and the OP ICESCR, the object and purpose of the OP ICESCR and the ICESCR itself, and the relevant practice of the CAT and the CEDAW all align to yield a consistent understanding. As previously indicated, the drafting history of Article 11 does not offer extensive or definitive guidance regarding the meaning of these elements; it is, in any case, a supplementary means of interpretation. The third question of interpretation concerns the absence of any reference to the State party's jurisdiction or territory and the consequent possibility that violations of the rights of individuals in foreign states can be considered under the inquiry procedure.

4.1 The meaning of 'reliable information'

The term 'reliable' in Article 11(2) indicates that the information before the CESCR must be capable of being reasonably relied upon to prove or disprove the existence of the facts alleged. In domestic and international legal contexts, reliability refers to an objective or inherent characteristic of evidence. It thus differs from credibility, which refers the extent to which information or evidence should be believed, but credibility may be a factor in determining the reliability of information. The concept of 'reliable' is analogous to the concept of 'well-founded', the term used in CAT Article 20(1). The OP ICESCR Rules of Procedure indicate that it may, through the Secretariat, seek to ascertain the reliability of both the information received and the sources of that information.[99]

[99] Rule 26(1), OP ICESCR, *Rules of Procedure* (n. 5 above).

Reliability is a conclusion reached by the treaty body after review of the information and is best understood with reference to the factors that indicate reliability. Common sense indicia of reliability include: the internal consistency of the information provided by a source and consistency among accounts of the situation from different sources; the existence of corroborating evidence; the specificity of the allegations; the source's record, if it has one, of reliability in fact-finding and reporting; and, in the case of media sources, the extent to which they are independent and non-partisan. In their personal capacity, the CEDAW members who conducted the Mexico inquiry stated that the reliability of information provided in connection with an inquiry request is evaluated on the basis of its consistency, the corroborating evidence offered, and the credibility of the sources, as well as information from all other sources.[100] In the Egypt inquiry, the CAT identified the factors it had relied upon in reaching the conclusion that the allegations of torture received from NGOs were well founded: the volume of allegations; the variety of sources; consistency among the allegations as to the circumstances of the violations; and the record of reliability of the sources in the context of the CAT's other activities.[101]

Taken together, these indicia offer a frame of reference for determining the reliability of information. A caveat should be added regarding the significance attached to whether a source of information has an established record of fact-finding and reporting or dealing with the CESCR in other contexts: while these factors are useful in confirming the reliability of sources, there should be no negative presumption about the reliability of information provided by a source that has not had previous contact with the CESCR and/or does not have an established record in fact-finding and reporting.

4.2 The Meaning of the Threshold Requirement

The Article 11 procedure applies to violations that are *either* grave *or* systematic in nature. This section explores the interpretation of these two elements in light of the ordinary meanings of these terms, the function of the inquiry procedure, the meaning of both terms in the context of Article 8 of the OP CEDAW, the meaning of a systematic violation in the context of CAT Article 20, and relevant practice of other UN bodies.

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[100] M. Tavares da Silva & Y. Ferrer Gómez, 'The Juárez Murders and the Inquiry Procedure', in H. Schöpp-Schilling and C. Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the U.N. Committee on the Elimination of Discrimination against Women* (New York: Feminist Press at the City University of New York, 2007), pp. 298-308 and 299.
[101] *CAT Egypt inquiry* (n. 15 above), para. 219.

With regard to the term 'violations', it will be for the CESCR to decide in the particular circumstances of an inquiry whether the State party's acts or omissions constituted violations of ICESCR rights, taking into account its own jurisprudence, any relevant practice of other human rights bodies, and any relevant rules and principles of international law.

'Grave'

The term 'grave' in its ordinary sense means 'serious' or 'severe'. The terms 'grave', 'serious' and 'severe' have been used frequently and often interchangeably by UN bodies to qualify human rights violations. These terms all lack legal definitions. They have been used descriptively to characterize violations of a range of civil, political, economic, social and cultural rights. In the practice of human rights bodies, the characterization of violations as 'grave', 'serious' or 'severe' generally denotes their heightened intensity or aggravated nature, the extremity of their consequences or the vulnerability of the victims; it does not necessarily imply a hierarchy among the affected rights. In the context of resolutions adopted by UN political bodies, these terms also convey condemnation of the human rights violations at issue.

The term 'grave' is not synonymous with 'gross'. Had the drafters of either Article 11 or Article 8 of the OP CEDAW intended the threshold to be 'gross violations', they presumably would have chosen to adopt that language, since the phrase and the concepts associated with it had been in usage in the UN from the 1970s onwards.[102] 'Gross' implies a higher threshold than the term 'grave'.[103] Although it does not have an abstract legal definition, the term 'gross violations' has a generally agreed enumerative definition in the practice of UN human rights bodies. It is considered to refer to 'at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced

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[102] Under the ECOSOC Resolution 1503 (XLVIII) procedure, the UN Commission on Human Rights considered communications relating to a 'consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.' The 1503 procedure was the basis for the current complaint procedure in the Human Rights Council, as revised in 2007, which retains 'gross violations' as a threshold. See Institution-building of the United Nations Human Rights Council, Res. 5/1, 18 June 2007, para. 85.

[103] See, e.g., Human Rights Council, *Second session of the intersessional open-ended intergovernmental working group on the implementation of operative paragraph 6 of General Assembly resolution 60/251, established pursuant to Human Rights Council decision 1/104, Summary of the Discussion on the Complaint Procedure Prepared by the Secretariat* (4th session, 2007), U.N. Doc. A/HRC/4/CRP.6, 13 Mar. 2007, para. 15: '[t]he option ... to replace the term 'gross' by 'serious' was felt to amount to a lowering of the current threshold and as such raised some concerns.'

disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.'[104] As examples of 'gross violations' covered by the complaints procedure of the UN Human Rights Council, commentators have cited torture, disappearances, extra-legal executions, other arbitrary or summary executions, widespread arbitrary imprisonment or long-term detention without charge or trial, and widespread denial of the right to leave one's country.[105] In preparatory work on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[106] Special Rapporteur van Boven observed that the term 'gross' has quantitative and qualitative dimensions: it indicates both 'the serious character of the violations' and 'the type of human right that is being violated'.[107] In an analysis of practice in the Inter-American system, Professor Medina suggested that the quantitative element associated with the concept of 'gross violations' implies massive violations or a substantial number of cases, and the qualitative element concerns the type of rights violated, the character of the violation, and the status of the victims.[108] Regarding the types of rights violated, Medina concluded that 'gross violations' refers to infringements, or the threat of infringements, of the rights to life,

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[104] *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities* (45th session, 1993), U.N. Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para. 13. See also ibid, paras. 9-12. The study notes that '[g]iven also the indivisibility and interdependence of all human rights, gross and systematic violations of the type of human rights cited above frequently affect other human rights as well, including economic, social and cultural rights.' Ibid. para. 12. The list of 'gross violations' in Professor van Boven's final report was reiterated in a working paper on gross and large-scale violations of human rights as an international crime prepared for the Sub-Commission by Professor Chernichenko. *Definition of gross and large-scale violations of human rights as an international crime, Working paper submitted by Mr. Stanislav Chernichenko, Sub-Commission on Prevention of Discrimination and Protection of Minorities* (45th session, 1999), U.N. Doc. E/CN.4/Sub.2/1993/10, 8 June 1999, paras. 14-15.

[105] D. Weissbrodt and N. Rodley, 'United Nations Charter-based Procedures for Addressing Human Rights violations: Historical Practice, Reform and Future Application', in G. Gilbert, F. Hampson and C. Sandoval (eds.), *The Delivery of Human Rights: Essays in Honor of Professor Sir Nigel Rodley*, (New York: Routledge, 2011), pp. 13-38 and 29. For additional analysis of the concept of gross violations, see F. Ermacora, 'Procedure to Deal with Human Rights Violations: A Hopeful Start in the United Nations?', *Human Rights Journal*, Vol. 7 (1974), pp. 670-689, at 678-679; M.E. Tardu, 'United Nations Response to Gross Violations of Human Rights: The 1503 Procedure', 20 *Santa Clara Law Review*, Vol. 20, pp. 559-601, at 582-584.

[106] U.N. General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147, 16 Dec. 2005.

[107] U.N. Doc. E/CN.4/Sub.2/1993/8 (n. 104 above), para. 8.

[108] C. Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (The Hague: Nijhoff Publishers, 1988), pp. 7-16 and 12-15.

personal integrity or personal liberty.[109] She noted that the elements identified are interrelated and require a case-by-case evaluation, such that a general rule regarding the number of victims and other elements cannot be formulated in the abstract.[110]

It is clear that the concept of 'grave violations' cannot be reduced to the concept of 'gross violations'. It cannot be equated solely with violations of the rights to life and the integrity and security of person or other abuses typically included in the catalogue of 'gross violations'. However, like 'gross violations', 'grave violations' would seem to consist of a combination of quantitative and qualitative dimensions or aspects.

'Systematic'

In its ordinary sense, the term 'systematic' conveys a range of meaning, from regularity of occurrence to elements of planning, organisation and structure. The broader context relevant to the interpretation of the term 'systematic' in Article 11(2), as a term used in a human rights treaty and based on language used in other human rights treaties, is international human rights law rather than international criminal law or international humanitarian law. Specialised meanings given to the concept of 'systematic violations' in the latter bodies of law therefore should not be ascribed to the concept of a 'systematic' violation under Article 11(2).

Guidance from Article 8 OP CEDAW

The drafting history of the OP CEDAW provides limited guidance concerning the meaning of the Article 8 threshold criteria.[111] No definitions for these terms were agreed on during the negotiations by the Open-Ended Working Group of the Commission on the Status of Women on the Elaboration of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CSW Working Group). Government delegations and NGOs cited widespread rape and other violence against

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[109] Ibid. at 16.

[110] Ibid. In the same vein, Weissbrodt and Rodley explain that under the Human Rights Council complaints procedure, the criteria regarding the nature of the violations ('gross') and the scale or frequency with which they occur ('consistent pattern') are interrelated: '[t]he more widespread the practice, the less may be the need for the violations to be gross, and vice versa.' Weissbrodt and Rodley, 'United Nations Charter-based Procedures' (n. 105 above), p. 29.

[111] The *travaux preparatoires* of Article 8 do not include summary records. The reports of the CSW Working Group on the draft OP CEDAW present synopses of the views stated by State and NGO delegations and summarise comments by specific delegations in some instances. The author was present during public meetings of the CSW Working Group on the OP CEDAW and during a number of informal consultations among delegations active in supporting the inclusion of the inquiry procedure in the OP CEDAW.

women and trafficking in women as examples of violations to which the procedure would apply.[112] However, there was no attempt in the drafting process to narrow the scope of application to violence against women or exclude specific rights in the Convention from the scope of application. Early drafts provided that the inquiry procedure would apply to 'serious [and] [or] systematic violations'.[113] The term 'grave' was substituted for 'serious' in the last stages of the negotiations, without an explanation on the record of any difference in meaning that might exist between the two terms.

After the adoption of the draft text by the CSW Working Group, a number of delegations made interpretive statements regarding the application of the inquiry procedure. A large group of States affirmed that the inquiry and communications procedures both apply to an act or *failure to act* by a State party.[114] China, Egypt, Israel and Japan expressed the view that the inquiry procedure should not be applied to single or isolated incidents or individual cases.[115] The Philippines stated its understanding that the term 'grave' is

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[112] NGOs mentioned 'Fatwa-related violence, violations that crossed national borders and implicated several Governments, such as trafficking, or violence against women in conflict situations' as examples of violations the inquiry procedure should cover. See Commission on the Status of Women (CSW), *Elaboration of a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Secretary-General* (40th session, 1996), U.N. Doc. E/CN.6/1996/10, 10 Jan. 1996, para. 110 (synopsis of replies regarding elements for an optional protocol).

[113] See, e.g., CSW, *Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Note by the Secretariat*, U.N. Doc. E/CN.6/1997/WG/L.1, 10 Mar. 1997 (draft text prepared by the Chairperson of the Open-ended Working Group), Annex, draft Article 10(1); CSW, *Report on the 42nd session*, U.N. ESCOR Supp. No. 7 (1998), U.N. Doc. E/1998/27, E/CN.6/1998/12, Appendix I, Revised Draft Optional Protocol submitted by the Chairperson on the basis of the compilation text contained in the report of the CSW on its 41st session (E/1997/27) and proposals made by the CSW at its 42nd session, draft Article 10(1), p. 82. A number of delegations considered that there was a need for a procedure to deal with 'serious' and/or systematic violations that would not be met by the communications procedure. See, e.g., CSW, *Additional views of Governments, intergovernmental organizations and non-governmental organizations on an optional protocol to the Convention, Report of the Secretary-General* (41st session, 1997), U.N. Doc. E/CN.6/1997/5, 18 Feb. 1997, paras. 76, 194 (Spain); para. 77 (Chile); para. 195 (Panama); and para. 196 (Colombia).

[114] CSW, *Report on the 43rd session*, U.N. ESCOR, Supp. No. 7 (1999), U.N. Doc. E/1999/27, E/CN. 6/1999/10, Annex II, *Report of the Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Interpretative statements on the draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women,* at p. 60 (Canada), p. 64 (Germany on behalf of the European Union and Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Cyprus, Switzerland, Iceland, Liechtenstein and Norway).

[115] The People's Republic of China conflated the two threshold elements: '[the inquiry procedure] should apply only to cases where women's rights are seriously violated and on a massive scale.... a single event of violation of women's rights should not constitute 'grave or systematic violations'. U.N. Doc. E/1999/27, E/CN.6/1999/10, Annex II (n. 114 above), p. 61. Egypt stated that 'the reference to grave violations, using the plural form, means the repeated occurrence of such violations.' Ibid. p. 63. Israel stated that 'grave or systematic violations' should be understood to exclude 'singular isolated incidents.' Ibid. p. 66. Japan stated that the inquiry procedure 'shall not be conducted for individual and accidental cases.' Ibid. p. 67. See also CSW, *Report on the 42nd session*, ESCOR Supp. No. 7 (1998), U.N. Doc. E/1998/27, E/CN.6/1998/12,

'distinct from systemic [sic] and imposes no higher standard than 'serious' violations.'[116] Ghana, on behalf of eleven other African countries, stated that the 'phrase 'grave or systematic' will be construed broadly so as not to impede the effective functions of the Committee.' [117]

To the extent that the statements made by delegations in the CSW Working Group suggest any general conclusion about the drafters' understanding of the Article 8 threshold, it is that the majority of delegations left it to the CEDAW to determine the meaning of 'grave or systematic.'

The CEDAW has yet to present an explicit definition of the Article 8 threshold, but its analysis of the violations at issue in the Mexico inquiry suggests an implicit definition. The CEDAW found those violations to have been both grave and systematic in nature.[118] The situation involved: violations of the rights to life and to integrity and security of person in the form of murders, disappearances, and rapes; a large number of victims; the continuation of violations over a prolonged period of time; a pattern of impunity for the violations; the complicity of local government officials in some cases; and a protracted failure by the State party to ensure the effective functioning of the criminal justice system and adequately address the causal factors related the violations.

The CEDAW used the phrase 'serious and systematic' to describe the violations, in addition to the phrase 'grave and systematic',[119] suggesting that it considers the term 'grave' to mean 'serious', rather than the higher threshold associated with the term 'gross'. According to the personal views of the two members of the CEDAW who conducted the Mexico inquiry, 'grave' means 'a severe abuse of fundamental rights under the Convention'.[120] As examples of grave violations they cited 'discrimination against women expressed in the abuse of their right to life and security, to their integrity, both

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Appendix II, Chairperson's summary of views expressed and comments made by delegations during the negotiations on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, p. 91, para. 31 (referring to view of unidentified delegation(s) that 'single cases of violations could be serious' but these should be dealt with under the communications procedure rather than the inquiry procedure.)

[116] Ibid. p. 70.

[117] Ibid p. 64 (on behalf of Botswana, Kenya, Lesotho, Malawi, Mauritius, Namibia, South Africa, Uganda, United Republic of Tanzania, Zambia and Zimbabwe).

[118] CEDAW, *Mexico inquiry report* (n. 18 above), para. 259.

[119] Ibid. para. 260.

[120] Tavares da Silva and Ferrer Gómez 'The Juárez Murders and the Inquiry Procedure' (n. 100 above), pp. 299-300.

physical and mental, or to any other fundamental rights protected by the Convention' and 'severe violence or torture, disappearances or kidnappings, trafficking or killings'.[121]

However, neither these comments nor the nature of the violations at issue in the Mexico inquiry should be taken to mean that the term 'grave' in Article 8 applies only to violations involving the rights to life and to integrity and security of person. Threats to these rights clearly would be considered 'grave' violations, since such threats have been characterised as constituting 'gross violations'.[122] More broadly, given its emphasis on interrelationships among rights, the CEDAW would be unlikely to decide in the abstract that any particular rights *cannot* be the subject of 'grave' violations. It would be more likely to assess the gravity of violations from a holistic perspective, especially in the case of violations that have wider effects on other rights.

The CEDAW has devoted considerable attention to violations of women's sexual and reproductive health and rights, including: the denial of access to adequate emergency obstetric care; the denial of access to therapeutic abortion; forced or coerced sterilisation; and maternal mortality and morbidity linked to unsafe abortion or lack of access to appropriate reproductive health services.[123] These violations generally entail breaches of the rights to life and to physical and mental integrity, but the CEDAW would presumably categorise them as 'grave violations' of sexual and reproductive health and rights. The application of the concept of 'grave violations' to the full range of rights covered by the Convention remains to be explored by the CEDAW in future inquiries.

In the Mexico inquiry, the CEDAW identified factors supporting its conclusion that systematic rather than isolated violations had occurred:

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[121] Ibid. p. 308.

[122] See Medina, *The Battle of Human Rights* (n. 108 above), p. 16; and van Boven, U.N. Doc. E/CN.4/Sub.2/1993/8 (n. 104 above).

[123] See, e.g., CEDAW, *Concluding Observations, Hungary* (54th session, 2013), UN Doc. CEDAW/C/HUN/CO/7-8, 26 Mar. 2013, paras. 32, 33(b); CEDAW, *Concluding Observations, Colombia* (56th session, 2013), UN Doc. CEDAW/C/COL/CO/7-8, 29 Oct. 2013, para. 29; CEDAW, *Concluding Observations, Cambodia* (56th session, 2013), UN Doc. CEDAW/C/KHM/CO/4-5, 29 Oct. 2013, para. 36; CEDAW, *Concluding Observations, Benin* (56th session, 2013), UN Doc. CEDAW/C/BEN/CO/4, 28 Oct. 2013, para. 32; CEDAW, *Concluding Observations, Dominican Republic* (55th session, 2013), UN Doc. CEDAW/CO/DOM/6-7, 30 July 2013, para. 36; CEDAW, *Concluding Observations, Nepal* (49th session, 2011), UN Doc. CEDAW/C/NPL/CO/4-5, 11 Aug. 2011, para. 31; and CEDAW, *Concluding Observations, Zambia* (49th session, 2011), UN Doc. CEDAW/C/ZMB/CO/5-6, 19 Sept. 2011, para. 33. For CEDAW's views on the gravity of reproductive rights violations in individual cases, see *Pimentel v. Brazil*, Communication No. 17/2008, 25 July 2011, para. 7.6; and *L.C. v. Peru*, Communication No. 22/2009, 17 Oct. 2011, paras. 8.18, 9(a). As of this writing, the CEDAW has yet to issue its report on the inquiry into violations of women's sexual and reproductive rights in the Philippines and informal information indicates that an inquiry request concerning access to abortion has been filed.

The methods used in the murders and disappearances perpetrated in Ciudad Juárez over the past decade have been used again in recent years in Chihuahua City and apparently in other parts of Mexico, offering further evidence that we are faced not with an isolated although very serious situation, nor with instances of sporadic violence against women, but rather with systematic violations of women's rights, founded in a culture of violence and discrimination that is based on women's alleged inferiority, a situation that has resulted in impunity.[124]

The CEDAW highlighted evidence indicating a pattern of impunity for the violations and complicity by State officials. It noted that copious information had been provided by various sources concerning 'the obstruction of investigations, delays in searching for women who had disappeared, falsification of evidence, irregularities in procedures, pressure exerted on the mothers, negligence and complicity by State officials, the use of torture to extract confessions, and the harassment of relatives, human rights workers, and organizations of civil society'.[125]

The factors associated by the CEDAW with the concept of a 'systematic' violation thus included: a substantial number of individual cases;[126] violations occurring over a prolonged period of time (over the course of a decade); similarity in the factual circumstances of the individual cases, including the methods of the violations and the profiles of the victims;[127] the same or similar underlying causes for the violations ('a culture of violence and discrimination ... based on women's alleged inferiority');[128] and the impunity of the perpetrators and the failure of the State party to ensure accountability for the violations. The CEDAW linked its characterisation of the violations as systematic to the similarity in the circumstances of the violations and the volume of evidence rather than the number of murders, disappearance and rapes it considered to have been definitively established.[129] The central elements appear to have been the persistence of the violations and the State party's toleration of the violations in the form of inaction or

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[124] CEDAW, *Mexico inquiry* (n. 18 above), para. 261. See also ibid, para. 260: 'these serious and systematic violations of women's rights have continued for over 10 years, and ... it has not yet been possible to eradicate them, to punish the guilty and to provide the families of the victims with the necessary assistance.'
[125] CEDAW, *Mexico inquiry* (n. 18 above), para. 43. See also ibid, paras. 145-150.
[126] Tallies of the number of cases ranged from 270 upwards. Ibid. paras. 61 and 73.
[127] Ibid. paras. 63-65 and 69-72.
[128] Ibid. para. 261. See also ibid, at para. 34 (referring to the need to combat 'the root causes of gender violence in its structural dimension and in all its forms').
[129] Ibid. paras. 43 and 26.

ineffective action in response to the violations, and/or the complicity of government officials. However, the CEDAW evaluated the evidence in light of the cumulative effects of factors related to both elements of the threshold requirement and, as previously noted, characterised the violations as grave *and* systematic .[130]

The facts in the Mexico inquiry suggest an additional conclusion concerning the CEDAW's understanding of the term 'systematic': it is not necessary for violations to occur in most regions of the national territory or even in more than one region for them to be considered systematic. The Mexico inquiry focused on murders and disappearances in and around the municipality of Ciudad Juárez in the State of Chihuahua.[131] The detailed aspects of the CEDAW's findings and most of its recommendations were specific to the violations in Ciudad Juárez. The inquiry report briefly cited, but did not examine in any detail, a similar pattern of murders and disappearances in Chihuahua City, also located in Chihuahua State.[132] The report also noted that NGO sources had provided information concerning similar murders in other regions of Mexico, but these violations were not included in the inquiry.[133] The CEDAW considered the evidence from Ciudad Juárez to be a sufficient basis for finding that Mexico had committed systematic violations. It did not require the occurrence of violations in multiple regions of Mexico.[134]

Finally, there is no suggestion in the CEDAW's findings that a formal or informal State plan or policy directing or permitting the violations is a necessary element of the concept of a 'systematic' violation. The CEDAW focused on the inadequacy and ineffectiveness of the measures taken by the State party's and referred to the State's 'toleration' of the violations.[135] The question of whether 'systematic' implies a deliberate plan or policy supporting the violations did not arise in the CEDAW's comments and conclusions or the

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[130] See, e.g., ibid, at para. 263: 'there have been serious lapses in compliance with the commitments made by Mexico through its ratification of the Convention ... as evidenced by the persistence and tolerance of violations of women's human rights. This is shown by the continuation of very widespread and systematic violence against women and by the crimes of murder and disappearance of women as one of its most brutal manifestations'.
[131] Ibid. para. 22 (describing Ciudad Juárez).
[132] Ibid. at para. 46.
[133] Ibid. para. 47. Although the CEDAW's conclusions stated the murders were spreading beyond Ciudad Juárez to Chihuahua City and cities in other parts of Mexico (see paras. 261 and 285), the inquiry report did not examine the facts surrounding cases in Chihuahua City nor did it review any evidence regarding similar violations in other regions of Mexico.
[134] The CEDAW's inquiry on the Philippines (outcome pending as of this writing) examined alleged violations in Manila City, a large metropolis.
[135] *CEDAW Mexico inquiry* (n. 18 above), para. 263.

Government's observations on the report.[136]

Guidance from CAT Article 20

The CAT set out its interpretation of the term 'systematically' in Article 20 in its first inquiry and has reiterated this interpretation in subsequent inquiries. The CAT considers that:

> [T]orture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.[137]

This definition incorporates quantitative and qualitative elements. The former consist of the regularity of occurrence and persistence of violations ('habitual', not occurring 'fortuitously'), the prevalence of violations ('widespread'), and the occurrence of cases in a 'considerable part of the territory'. The qualitative elements include the 'deliberate' character of the torture, which presumably refers to the specific intent required by the CAT Article 1 definition of torture, and the absence of a requirement for direct intention on the part of the Government. The latter omission indicates that 'systematic' does not imply the existence of a formal or informal State policy or plan directing or approving the violations. The reference to situations in which torture occurs at the local level in contravention of central State policy confirms that the CAT's concept of 'systematic'

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[136] In their personal capacity, the two CEDAW members who conducted the Mexico inquiry put forward an interpretation of 'systematic' that is broader than the one suggested in the Mexico inquiry report, as it extends to a prevalent pattern of violations that occurs 'either deliberately with the intent of committing these acts, or as a result of customs and traditions, or even as the result of discriminatory laws or policies, with or without such purpose'. Tavares da Silva and Ferrer Gómez 'The Juárez Murders and the Inquiry Procedure' (n. 100 above), p. 300.

[137] *CAT Turkey inquiry* (n. 15 above), para. 39. For more recent reiteration of this definition, see *Nepal inquiry report* (n. 15 above), para. 97. See also ibid, at para. 105 ('[t]he Committee's determination as to whether or not torture is being systematically practiced takes into account both the frequency and territorial scope of incidents of torture in the country and also whether the State party has put effective mechanisms in place to prevent the commission of such abuses'.)

practice does not include any requirement that violations be committed in furtherance of, or under the authority of, a State policy or plan. Additional qualitative elements identified by the CAT relate to State action or inaction. The inclusion of torture that results from 'factors which the Government has difficulty in controlling' implies that the State is making efforts to prevent and punish torture but those efforts are unsuccessful. The reference to 'inadequate legislation which in practice allows room for the use of torture' indicates that an inadequate legal framework for addressing violations creates conditions permitting (if not encouraging) systematic violations to occur.

The CAT Article 20 procedure has a more restricted scope of application than do the Article 11, OP CEDAW, OP CRPD and Third OP CRC inquiry procedures, since it applies to a subset of rights and necessarily incorporates the CAT Article 1 requirement that the acts concerned have been inflicted by, or consented to, acquiesced in, or instigated by a public official or person acting in an official capacity.[138] Particularly in light of the state action requirement under CAT Article 1, the CAT's omission of a requirement tying the concept of 'systematic' in Article 20 to the existence of a formal or informal State policy or plan indicates that no such requirement should apply to the concept of 'systematic' under the Article 11 procedure.

This aspect of the CAT's interpretation was challenged by the Government of Brazil in its observations on the CAT's conclusions in the Brazil inquiry. Brazil argued that 'systematic' should be understood according to its meaning in international criminal law, international humanitarian law, and the International Law Commission's (ILC) discussions of serious violations of obligations stemming from peremptory norms of general international law. It characterised those sources as requiring that, in order to be 'systematic' in nature, violations must be 'committed according to a certain pattern, *under an intentional plan or policy*, albeit not explicitly admitted' (emphasis added).[139] Contrary to Brazil's contention, the meanings ascribed to 'systematic' in international criminal law, humanitarian law, and the ILC's aforementioned discussions should not be assumed to establish what it described as the 'common meaning' of 'systematic' for purposes of interpreting Article 20(1). CAT Article 20 must be interpreted in the context of international human rights law rather than other bodies of international law.

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[138] Convention Against Torture (n. 4 above), Article 1(1).
[139] *CAT Brazil inquiry* (n. 15 above), para. 236. For Brazil's objections to the CAT's interpretation, see ibid, at paras. 230-241.

Although it uses the term 'widespread' to describe and to define the systematic practice of torture, the CAT considers the totality of the circumstances rather than requiring a minimum number of cases to establish the widespread nature of violations.[140] The CAT does not require that a large number of violations must be capable of being definitively established. In the Turkey inquiry, the CAT concluded that it was sufficient to prove even a small number of torture cases with absolute certainty, in light of the volume and consistency of the testimony gathered with regard to the methods of torture and the circumstances in which it was perpetrated.[141] In addition, the CAT has determined that torture was being practiced systematically at a point in time when the number of complaints of torture received by public human rights bodies and NGOs had been in decline over recent years.[142]

The territorial scope of incidents of torture is a factor considered by the CAT, but the requirement that incidents have occurred 'in at least a considerable part' of the State party's territory does not imply that violations must occur in the majority of its territory or in multiple regions. In the Nepal inquiry, the allegations concerning abuses by police and security forces were concentrated in a single region and data on torture in detention was available from only 20 of 75 national districts.[143] The CAT accepted this information as sufficiently indicative of wider national patterns to support its finding that torture was being systematically practiced.[144] As with the significance it attaches to the number of cases, the CAT considers the territorial scope of violations a factor to be assessed in the totality of the circumstances. The central aspects of the CAT's interpretation appear to be the persistence of torture, its widespread nature, and the impunity of the perpetrators as a

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[140] See, e.g., *CAT Mexico inquiry* (n.15 above), para. 218 (summarising the bases of its conclusion regarding the systematic nature of torture). In the Nepal inquiry, sources characterised torture in detention as widespread based on reports by approximately 20% of detainees that they had been tortured, a characterisation accepted by the Committee. *CAT Nepal inquiry* (n. 15 above), paras. 56 and 102. See also *Peru inquiry* (n. 15 above), para 163.

[141] *CAT Turkey inquiry* (n. 15 above), at para. 38: 'even though only a small number of torture cases can be proved with absolute certainty, the copious testimony gathered is so consistent in its description of torture techniques and the places and circumstances in which torture is perpetrated that the existence of systematic torture in Turkey cannot be denied'. See also *CAT Nepal inquiry* (n. 15 above), para. 101 (reiterating this formula).

[142] *CAT Nepal inquiry* (n. 15 above), para. 102: 'reports suggest that today, security forces in Nepal are committing torture at a lower rate than alleged during the conflict era. However, as the Committee has previously determined, a State party may be considered to be systematically practicing torture despite the fact that there has been a decrease in allegations of violations of the Convention in the years in which the investigation has occurred.' See also *CAT Mexico inquiry* (n. 15 above), para. 218.

[143] *CAT Nepal inquiry* (n. 15 above), paras. 47-48 and 56.

[144] Ibid. paras. 100-102 and 108.

consequence of the State's toleration of torture or its limited capacity to control the situation, and/or the inadequacy of its legal framework.

Guidance from other UN human rights sources

The term 'systematic' has long been used by UN human rights bodies and special mechanisms to refer to human rights violations of a widespread or persistent nature that are tolerated by the State or carried out at its instigation. In many such instances, it has been used descriptively rather than as a term of art. UN political bodies also have frequently employed the term 'systematic' in resolutions condemning human rights violations by Member States. In these contexts, it lacks precise definition but often has been used to describe structural racial or ethnic discrimination and widespread or persistent violations of the rights to life, integrity and security of person.

The concept of 'systematic' violations has elements in common with the concept of a 'consistent pattern' of violations, part of the threshold requirement under the ECOSOC Resolution 1503 procedure and the complaints procedure of the Human Rights Council that replaced it. Commentators have identified various elements implicit in the concept of a 'consistent pattern' or 'systematic' violations: a time element, variously described as situations in which the violations are continuous, are spread out over a minimum period of time, occur repeatedly over a substantial period of time or situations in which the violations are sporadic but the threat of violations is continuous;[145] a quantitative element related to the number of cases;[146] an element related to the nature of the State's action or inaction in relation to the violations, ranging from State policy ordering the violations to its complicity in the violations, to toleration of the violations and the absence of remedies;[147] and an element related to sustained will or planning on the part of the

[145] See Ermacora, 'Procedure to Deal with Human Rights Violations'(n. 105 above), pp. 678-679; Tardu, 'United Nations Response to Gross Violations of Human Rights' (n. 105 above), pp. 582-84; Medina, *The Battle of Human Rights* (n. 108 above), pp. 12 and 15.

[146] See Ermacora, ibid; Tardu, ibid; Medina, ibid, p. 12. Chernichenko observed that: '[i]t is in theory possible for the human rights of an individual or small group of individuals to be violated systematically. If such violations continue unchecked, however, it is probably a sign that the overall human rights situation is poor. Systematic, large-scale human rights violations as a rule are gross in character. This is particularly true of systematic discrimination'. *Working paper submitted by Mr. Stanislav Chernichenko*, U.N. Doc. E/CN.4/Sub.2/1993/10 (n. 104 above), para. 16. He noted that it was not possible to specify the number of individual cases necessary to constitute a 'large-scale' violation. Ibid. para. 13

[147] See Ermacora, 'Procedure to Deal with Human Rights Violations'(n. 105 above), pp. 678-679; Tardu, 'United Nations Response to Gross Violations of Human Rights' (n. 105 above), pp. 582-84; Medina, *The Battle of Human Rights* (n. 108 above), pp. 15-16.

perpetrators,[148] including circumstances in which the perpetrators are non-state actors and the State fails to end the violations and provide remedies.[149] These elements are seen as interrelated and to be evaluated in the particular circumstances of each situation, rather than approached in a formulaic manner.

The meaning of 'grave or systematic' violations in Article 11(2)

As noted, the *travaux preparatoires* for Article 11 do not offer significant guidance regarding the interpretation of the threshold terms. Their meaning must be determined in the context of the ICESCR, taking into account practice under the OP CEDAW and CAT inquiry procedures and the meanings attached to the concept of a 'systematic violation' in human rights law and practice.

'Grave'

'Grave' violations should be understood to mean serious or severe violations of the rights guaranteed by the ICECSR, without restrictions in the abstract on the nature of the rights affected. Rather than imposing such restrictions, whether by attempting to define a hierarchy of rights within the ICECSR in order to identify 'fundamental' rights or by requiring a link to the rights to life, integrity and security of person, the CESCR should assess the qualitative and quantitative aspects of the violations in the totality of the circumstances. 'Grave' may refer to: the degree to which rights are infringed; the nature of the rights infringed; the number and status of the victims affected by the violations; the immediate and long term consequences of the violations, including effects on other rights; and a combination of these factors. The number of victims should not be determinative, but a multiplicity of victims would indicate that the violations are grave. A single events based violation that affects a substantial number of victims could be properly considered 'grave'. The rationale underlying the adoption of a high threshold of application indicates that a single violation committed against an individual or small group of individuals generally would not warrant an inquiry. Nonetheless, there may be circumstances in which such violations could justify an inquiry, such as cases in which a single high profile violation is committed with the intent of intimidating a part of the population and is carried out with impunity.

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[148] Tardu, ibid, pp. 582-84.
[149] Medina, *The Battle of Human Rights* (n. 108 above), p 16.

'Systematic'

Drawing on practice under the OP CEDAW and CAT Article 20 and analyses by commentators of the analogous concept of a 'consistent pattern' of violations, 'systematic violations' under Article 11 should be understood to mean violations that occur repeatedly on a large or wide scale and are authorised or tolerated by the State through its action or inaction. Taken together, the quantitative elements related to the repetition of similar violations over time on a large or wide scale and the qualitative elements related to the State's failure to bring an end to the violations amount to a situation in which violations can be characterised as a persistent pattern of violations carried out with impunity.

'Repeated occurrence' means that the violations are not isolated or random occurrences, but take place repeatedly over a period of time that is sufficient for the State to be aware of their recurrent nature and take effective action to end them. A relationship among individual cases or events such that they constitute the repeated occurrence of violations may be manifested in various aspects of the violations, including: the circumstances in which they occur; the manner in which they are perpetrated; their causes; the status or profile of the victims; and/or the nature of the State's response or lack of response to the violations. Repeated violations of ICESCR rights may acquire systemic or structural dimensions or have their roots in systemic and structural inequality and discrimination. Following the approach of the CAT and the CEDAW, it should not be necessary to establish the existence of a large number of violations with certainty in order to show the systematic nature of violations if there are numerous accounts that converge in their descriptions of the circumstances and manner of the violations.

'Large or wide scale' means that the violations involve a significant number of victims or are geographically widespread. These two aspects may be interrelated, such that the concept of systematic can encompass violations that occur in a single region of the State party or even in a single municipality but involve a significant number of victims *and* violations that affect a smaller number of victims but take place in multiple regions. Both a multiplicity of victims and a geographically widespread occurrence of violations are indications of the systematic nature of violations. However, these quantitative elements should be evaluated in the particular circumstances of the situation and cannot be reduced to a general formula regarding numbers of similar violations, the duration of violations over time, the numbers of victims, or the geographic distribution of violations.

The concept of 'systematic violations' implies that the State has failed to bring an end to persistent violations and ensure that the perpetrators – whether State or non-state actors – do not enjoy impunity. These failures may be attributable to the State's toleration of the violations in the form of omissions to act as required by its international obligations or to the State's active role in authorising or directing the violations. As suggested by the CAT, systematic violations may result from a gap between policy and implementation, including failures to prevent or end the violations that result from factors that the State has difficulty in controlling, or from an inadequate legal framework that contributes to conditions permitting systematic violations to occur.

Nothing in the text or drafting history of Article 11(2) suggests that the term 'systematic' implies the existence of a formal or informal State policy or plan or requires evidence of an intention by the State to perpetrate or permit the violations. Practice under the OP CEDAW and CAT Article 20 inquiry procedures confirms this interpretation. As with the concept of 'grave' violations, the concept of 'systematic' violations encompasses certain quantitative and qualitative elements that can be identified in the abstract, but the interpretation of the term 'systematic' is fact dependent, requiring a contextual assessment of these elements in the aggregate.

Application of the Article 11 threshold

In its review of periodic reports, the CESCR has repeatedly characterised violations or a lack of progress toward the realisation of rights with reference to degree, scope, scale or persistence over time. Applying the concepts underlying the 'grave or systematic' threshold to specific facts should not present a significant analytical challenge for the CESCR.

In principle, violations of all levels of State obligation under the ICESCR can reach the Article 11 threshold. In practice, the theoretical, conceptual and evidentiary challenges involved in establishing a violation under Article 11 will vary significantly among levels of obligation. Application of the threshold to the duty to respect should pose relatively few theoretical and conceptual difficulties given the CESCR's existing jurisprudence on the duty to respect. The outcome would turn principally on the sufficiency of the evidence regarding the nature and circumstances of the alleged violations.

Application of the threshold to the duty to protect would present greater theoretical and conceptual challenges, as it would require a closely contextualised analysis of the scope

and content of the State party's obligation to exercise due diligence to prevent and respond to violations by non-State actors. It would require evidence having a broader ambit, since it would be necessary to demonstrate that there were reasonable measures the State could have taken to avoid the violations. This includes measures at the structural level and, where the violations were foreseeable and avoidable by the exercise of State power, measures responsive to the specific circumstances of the case.

The theoretical and conceptual framework for identifying violations of the duty to fulfil is the least fully articulated of the three levels of obligation. However, to be considered under Article 11, alleged violations of the duty to fulfil would necessarily have a scope, magnitude, degree of persistence or degree of severity that should reduce debate about whether the State's acts or omissions were justified under the ICESCR. Evidentiary challenges would include the methodological difficulties associated with using indicators to assess compliance with the duty to fulfil rights, including assessing causality with regard to outcomes, and the greater breadth of the evidence that would need to be assembled and evaluated. In the long term, it is with regard to violations of the duty to fulfil that the inquiry procedure could make the most useful contributions to the CESCR's jurisprudence. The type of factual record that can be created in an inquiry would support a fully contextualized analysis using structural, process and outcome indicators of a qualitative as well as quantitative nature. It would also allow the CESCR to refine its views on the minimum essential levels of rights. A logical starting point for use of the Article 11 procedure to examine alleged violations of the duty to fulfil would be situations involving deliberately retrogressive measures having a disproportionate impact on marginalised groups for which the State cannot provide sufficient justification under the ICESCR.

'Grave or systematic violations' should be understood as encompassing events based violations and violations of a structural or systemic nature. As with levels of obligation, the type and extent of evidence needed to establish a violation will differ according to whether the alleged violation is primarily events based or structural in nature. In practice, many events based violations reaching the Article 11 threshold will also have structural dimensions.

Violations may be both grave and systematic in character, making it difficult to draw a categorical distinction between those aspects of the violations that relate to their gravity and those that relate to their systematic nature, or they may be only 'grave' or only

'systematic' in character. The quantitative and qualitative aspects of the alleged violations should be assessed as a whole. Examples of violations that frequently have quantitative and qualitative characteristics sufficient to meet the threshold include, *inter alia*: forced evictions; forced labour (including debt bondage, trafficking and other forms of modern slavery); child labour; high levels of maternal mortality and morbidity linked to inadequate access to safe and legal abortion services, contraception, and emergency obstetric services; involuntary sterilisation of women belonging to disadvantaged and marginalised groups; incarceration of drug users without access to adequate medical care and without judicial oversight; State interference with the activities of autonomous trade unions; restrictions on women's inheritance and property rights; eligibility conditions for social assistance benefits that discriminate against disadvantaged and marginalised groups; the destruction of existing access to productive resources and food resulting from public development projects, extractive activities and agribusiness projects; denials of indigenous peoples' cultural rights, their rights over their ancestral lands and natural resources, and their rights to livelihood, food, and water; the failure to regulate, monitor and investigate the activities of private industries that cause extensive pollution and environmental degradation; and blocking or withholding aid in situations of natural disaster or armed conflict.[150]

Persistent and/or widespread manifestations of discrimination are by nature systematic, typified by a broad impact on multiple rights and a range of legal, policy, political, economic, and sociocultural causes. The CESCR has described manifestations of discrimination in many States parties as persistent and/or widespread in nature.[151] An inquiry can accommodate the type of multifaceted analysis needed to address systematic *de facto* discrimination.

The inquiry procedure could be particularly useful for examining multidimensional violations that involve multiple rights, multiple events, multiple and intersectional forms of discrimination, multiple causes, and/or multiple actors. Examples include the violations associated with: extractive industry activities; infrastructure and development

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[150] These types of violations have been documented in a wide range of States parties.

[151] See, e.g., CESCR, *Concluding observations, Finland* (38th session, 2008), U.N. Doc. E/C.12/FIN/CO/5, 16 Jan. 2008, para. 13; CESCR, *Concluding observations, Egypt* (51st session, 2013), U.N. Doc. E/C.12/EGY/CO/2-4, 13 Dec. 2013, paras. 9-10, 15-16; CESCR, *Concluding observations, India* (40th session, 2008), U.N. Doc. E/C.12/IND/CO/5, 8 Aug. 2008, para.13; and CESCR, *Concluding observations, People's Republic of China* (52nd session, 2010), E/C.12/CHN/CO/2, 23 May 2014, para. 14; CESCR, Concluding Observations, Uruguay, 45th session, U.N. Doc. E/C.12/URY/CO/3-4, 1 Dec. 2010, para. 7.

projects; agribusiness projects; economic and other land concessions ('land grabbing'); and mass relocation of ethnic groups.[152] It is also well suited to the scrutiny of violations that involve breaches of all levels of obligation, such as denials of girls' equal access to educational opportunities.

4.3 Application of Article 11 to violations beyond the State party's borders

Article 11 contains no clause limiting its application to the territory or jurisdiction of the State party. The absence of a reference to the State Party's territory or its jurisdiction over the alleged victims of a violation is the result of the drafters' decision to reiterate the language of Article 8(1) of the OP CEDAW, which is silent on these questions.[153] In consequence of this omission, the Article 11 procedure would appear to be applicable to conduct attributable to a State party that violates the rights of individuals outside its territory, to the extent that the relevant rights and obligations under the ICESCR apply extraterritorially and the violations are grave or systematic in nature.[154] The conduct of non-State actors in relation to which the State is responsible under international law that violates the rights of individuals outside its territory could also be considered under the inquiry procedure, to the extent that the relevant rights and obligations apply

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[152] See, e.g., CESCR, *Concluding observations, Ecuador* (49th session, 2012), U.N. Doc. E/C.12/ECU/CO/3, 13 Dec. 2012, paras. 25-26; CESCR, *Concluding observations, Mauritania* (49th session, 2012), U.N. Doc. E/C.12/MRT/CO/110, Dec. 2012, para. 8; CESCR, *Concluding observations, Colombia* (44th session, 2010), U.N. Doc. E/C.12/COL/CO/5, 7 June 2010, para. 9; CESCR, *Concluding observations, Indonesia* (52nd session, 2014), U.N.Doc. E/C.12/IDN/CO/1, 23 May 2014, paras. 27-28; R*eport of the Special Rapporteur on the rights of indigenous peoples, Extractive industries and indigenous peoples*, U.N. Human Rights Council (24th session, 2013), U.N. Doc. A/HRC/24/41, 1 July 2013; Human Rights Watch, *"How Can We Survive Here?" The Impact of Mining on Human Rights in Karamoja, Uganda* (New York: Human Rights Watch, 2014); International Human Rights Clinic and ESCR-Net, *The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project* (New York: N.Y.U. School of Law, 2013); International Federation for Human Rights, Justiça Global and Justiça nos Trilhos, *Brazil: How Much are Human Rights Worth in the Brazilian Mining and Steel Industry* (Paris: International Federation for Human Rights, Justiça Global and Justiça nos Trilhos,, May 2012); U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia, A human rights analysis of economic and other land concessions in Cambodia* (21st session, 2012), U.N. Doc. A/HRC/21/63/Add.1, 24 Sept. 2012; and Human Rights Watch *"They Say We Should Be Grateful": Mass Rehousing and Relocation Programs in Tibetan Areas of China* (New York: Human Rights Watch, 2013).

[153] In contrast, OP ICESCR Article 2 contains a jurisdiction clause. See M. Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights', in M. Langford, W. Vandenhole, M. Scheinin and W. Van Genungten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2012), pp. 212-229 and 228 (arguing that this reference to jurisdiction should be 'read as referring to the admissibility conditions that require a sufficient factual link' between an individual and State obligations under the ICESCR, including the extraterritorial dimensions of those duties.) Cf. CAT Article 20 (inquiry procedure applies to the systematic practice of torture 'in the territory of a State Party'.)

[154] 'Conduct' includes a State party's acts and omissions in the territory of a foreign state and acts and omissions by a State party within its territory that infringe the ICESCR rights of individuals outside its territory.

extraterritorially and the violations meet the threshold requirement.

As is well known, the ICESCR contains no provision on its scope of application. References in the ICESCR to international cooperation and assistance for the realisation of rights make clear that States parties' obligations have dimensions that extend beyond their national borders, but the normative status of those obligations remains contested and their scope and content remain indeterminate.[155] The CESCR has affirmed that international cooperation for the realisation of ICESCR rights is a general obligation under Article 2(1).[156] It has set out broadly formulated duties to respect, protect and fulfil specific rights in the context of bilateral relations and participation in the activities of international organisations.[157] However, the CESCR's views on the legal bases, scope and content of these obligations require further clarification. A rapidly expanding body of scholarship directed toward more systematic analysis of the obligations of international cooperation has begun to fill the theoretical lacunae and illustrate how breaches might be identified in specific circumstances. This scholarship takes into account wider developments in international law and policy, as well as the obligations established by the ICESCR.[158]

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[155] ICESCR, Articles 2(1), 11(1), 22 and 23. See O. De Schutter, *et al*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 34 (2012), pp. 1084-1169, at 1094 (Commentary to the Maastricht Principles).

[156] CESCR, *General Comment 3: The Nature of States Parties' Obligations* (5th session, 1991), U.N. Doc. E/1991/23, Annex III at 86, paras. 13-14.

[157] See, e.g., CESCR, *General Comment 19: The right to social security* (39th session, 2008), U.N. Doc. E/C.12/GC/19, 4 Feb. 2008, paras. 53-58; CESCR, *General Comment No. 15: The Right to Water* (29th session, 2003), U.N. Doc. E/C.12/2002/11, 20 Jan. 2003, paras. 30-36; CESCR, *General Comment No. 14: The right to the Highest Attainable Standard of Health* (22nd session, 2000), U.N. Doc. E/C.12/2000/4, paras. 38-42. For an overview of the CESCR's practice on extraterritorial application of the ICESCR, see F. Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', *Human Rights L. Rev.*, Vol. 1, No. 1, Mar. 2011, pp. 1-35.

[158] See, e.g., W. Vandenhole, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy', *Nordic Journal of International Law*, Vol. 76 (2007), pp. 73-100; M. Langford, 'A Sort of Homecoming: Extraterritorial Obligations and the Right to Housing', in M. Gibney, S. Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010), pp. 166-193; J. Bueno de Mesquita, P. Hunt and R. Khosla, 'The Human Rights Responsibility of International Assistance and Cooperation in Health', in M. Gibney, S. Skogly, *Universal Human Rights and Extraterritorial Obligations*, ibid, pp. 104-129; S. Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law', *Columbia J. of Transnational Law*, Vol. 44, No. 3 (2006), pp. 691-800; F. Coomans, 'Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations', *Max Planck Yearbook of U.N. Law*, Vol. 11 (2007), pp. 359-390; R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', *Modern Law Review*, Vol. 70, No. 4, (2007), pp. 598-625; and S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Amsterdam: Intersentia, 2006).

Extraterritorial obligations under the ICECSR have a second source in international human rights law. A growing body of international jurisprudence has established that human rights treaty law has extraterritorial application, binding States parties outside their national borders where they have jurisdiction over territory or individuals unless otherwise provided by the terms of the treaty. On this basis, the extraterritorial application of the ICESCR has been confirmed by the CESCR[159] and the International Court of Justice[160] in relation to Israel's conduct in the Occupied Palestinian Territories. Jurisdiction has been variously defined in the jurisprudence of global and regional bodies, ranging from more expansive approaches that focus on the State's power, control or authority over individuals to more restrictive approaches that require effective overall control of territory.[161] The jurisprudence is still evolving and lacks coherence, particularly regarding concepts and standards of jurisdiction, but it has been argued that a unifying principle can be discerned in the decisions of global and regional bodies: a State's human rights treaty obligations apply when it is in a position to control the exercise of individual

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[159] *Concluding Observations of the CESCR, Israel* (30th session, 2003), U.N. Doc. E/C.12/1/Add.90, 26 June 2003, para. 31 (applying an effective control standard of jurisdiction). This reference to 'effective control' does not mean that the CESCR considers the 'effective control' standard to require a form and level of control equivalent to military occupation. It can be read as a description of the *de facto* control exercised by Israel. See also *Concluding Observations of the CESCR, Israel* (47th session, 2011), U.N. Doc. E/C.12/ISR/CO/3, 16 Dec. 2011, para. 8.

[160] International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Rep., 9 July 2004, paras. 107–13. See also *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 Oct. 2008, I.C.J. Reports 2008, p. 353, para. 109 (omitting any reference to territorial control as a condition for the extraterritorial application of Article 5 of the Convention, which includes economic, social and cultural rights among the rights to be guaranteed without racial discrimination.) See also *Concluding observations of the CERD, Israel* (80th session, 2012), U.N. Doc. CERD/C/ISR/CO/14-16, 9 Mar. 2012, para. 10 (applying an effective control standard); and *Concluding Observations of the HRC, Israel* (99th session, 2010) U.N. Doc. CCPR/C/ISR/CO/3, 3 Sept. 2010, para. 5 (applying an effective control standard).

[161] Jurisdiction in this context refers to the State's factual control or power, not its prescriptive or enforcement jurisdiction. For analysis of jurisprudence on extraterritorial applicability of human rights law and the underlying legal and policy issues, see M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Amsterdam: Intersentia, 2004), pp. 73-81; R. Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans, M. Kamminga, *Extraterritorial Application of Human Rights Treaties*, ibid, pp. 83-123; R. Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', *Michigan J. of International Law*, Vol. 26 (2005), pp. 739-806; J. Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context', 40 *Israel Law Rev.* (2007), pp. 396-452; and M. Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', *Human Rights Law Rev.*, Vol. 8, No. 3 (2008), pp. 411-448; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), pp. 193-235; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press, 2011).

rights.[162]

Scholarly analysis of the extraterritorial application of human rights treaties has utilised the distinctions among levels of State obligation as a conceptual framework for exploring the scope and content of extraterritorial obligations. Emerging consensus holds that the obligation to respect rights applies whenever a State acts extraterritorially, but that the application and scope of obligations to protect and fulfil rights depends on the type and degree of control exercised by the State.[163] Thus, for example, if a State exercises a level of control over territory that is equivalent to military occupation and substitutes its authority for that of the State whose territory has been occupied, the obligations to protect and fulfil rights, in addition to the obligation to respect rights, should be presumed to apply. However, the actual circumstances will determine the specific content of the State's positive obligations in relation to particular rights.[164] Although the distinction between negative and positive obligations offers a starting point for identifying generally agreed views on extraterritorial obligations, a bright line distinction between the two is not always possible. An approach that emphasises context and the precise circumstances of the violations at issue, rather than proceeding from distinctions in the abstract, therefore seems necessary.

Experts have made significant strides toward the articulation of a coherent framework for analysing the extraterritorial scope of obligations regarding economic, social, and cultural rights. Their efforts synthesise jurisprudence on the extraterritorial application of human rights treaties, which has dealt primarily with civil and political rights, and analysis of the legal bases and scope of State obligations of international cooperation and assistance.[165] The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) represent a crystallisation

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[162] See Lawson,'Life After Banković' (n. 161 above), pp. 84-86 and103-104; Scheinin, 'Extraterritorial Effect' (n. 161 above), pp. 79-81; Wilde, 'Legal "Black Holes"?' (n. 161 above), pp. 790-804.

[163] See Cerone, 'Jurisdiction and Power' (n. 161 above), pp. 446 and 452; Lawson, 'Life After Banković' (n. 161 above), p. 120; Lubell, *Extraterritorial Use of Force Against Non-State Actors* (n. 161 above), pp. 228-230; and Milanovic, *Extraterritorial Application of Human Rights Treaties* (n. 161 above), pp. 209-219.

[164] Lubell argues that an Occupying Power must fulfil minimum core obligations regarding ICESCR rights, but its obligations regarding long term realisation of these rights should be defined in relation to the context. Prolonged military occupation could trigger long term aspects of the obligation to fulfil rights. N. Lubell, 'Human Rights Obligations in Military Occupation', *International Rev. Red Cross*, Vol. 94, No. 885 (2012), pp. 331-334.

[165] See generally the essays in M. Langford, *et al*, *Global Justice, State Duties* (n. 153 above); F. Coomans, R. Künnemann (eds.), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2012); O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge: Cambridge University Press, 2010), pp. 162-170 and 216-233.

of these efforts to define a comprehensive normative framework for the extraterritorial application of obligations to respect, protect and fulfil economic, social, and cultural rights. Adopted in 2011 by a group of prominent experts in international law and human rights, the Maastricht Principles are derived from general international law, in addition to the ICESCR and other human rights treaties.[166]

Although the theoretical and doctrinal bases for a coherent approach are increasingly clear, a significant gap remains between the assertion of general principles and the application of specific obligations to a State party's extraterritorial conduct and the extraterritorial effects of its conduct in particular circumstances. The inquiry procedure could contribute to the efforts by the CESCR, scholars and activists to bridge this gap. An inquiry would allow the CESCR to examine the complex set of legal issues implicated by the duties of international cooperation and the extraterritorial application of the ICESCR in relation to specific facts, in order to arrive at a fuller understanding of States parties' obligations vis-a-vis individuals in foreign states.

The inquiry procedure is well-suited to an analysis of the extraterritorial dimensions of States parties' obligations because it can be used to develop a factual record that is both broad-based and detailed. The absence of a requirement that individual victims be identified would allow the CESCR to consider violations that affect large groups of individuals or segments of the population. In an inquiry, the CESCR could expand the scope of its investigation as necessary in light of the available facts. By reason of this open-ended scope, an inquiry could accommodate a more complete and nuanced exploration of direct and indirect causation. Although the inquiry procedure is applicable only to the subset of violations that reach the 'grave or systematic' threshold, it thus has the potential to serve as an effective vehicle for the CESCR to clarify its views on theoretical issues and identify standards capable of application to particular rights and obligations.

For example, an inquiry could be used to explore the extent of a State's extraterritorial obligations in relation to the negative human rights impacts of the foreign operations of

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[166] For the text of the Maastricht Principles with commentary, see De Schutter *et al*, 'Commentary to the Maastricht Principles' (n. 155 above). Principle 9 proposes a definition of jurisdiction that encompasses a range of situations in which the State is considered to have the capacity to comply with its obligations to respect, protect and fulfill rights. Ibid. at 1104-1109. See also M. Salomon and I. Seiderman, 'Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Global Policy*, Vol. 3, No. 4 (2012), pp. 458–462.

private companies domiciled in its jurisdiction. Human rights abuses and environmental degradation associated with the operations of transnational corporations in the agribusiness, forestry, infrastructure and extractive industries have become increasingly pervasive. In particular, the widely documented human rights abuses associated with mining operations by foreign companies in developing countries could provide a useful starting point for building jurisprudence on the responsibility of home States. These abuses typically involve a broad range of rights and frequently rise to the level of the Article 11 threshold. They have particularly far-reaching effects on the rights of indigenous peoples and disadvantaged and marginalised groups.

The human rights impacts of mining operations include: extensive environmental degradation and pollution (including deforestation and the pollution of surface water, groundwater, soil and air), resulting in the destruction of access to water, food and traditional means of livelihood; the adverse health consequences of exposure to mining activities and pollution; forced evictions and forced displacement; increased poverty and hunger due to loss of livelihood and income; exploitative and unsafe working conditions for workers; violence, intimidation and harassment against project opponents by police, military personnel and private security forces; criminalisation by the host State of social protest; denials of the right of indigenous and tribal peoples to free, prior, and informed consent to mining operations within their territories; breakdown of the social and cultural fabric of indigenous communities and their loss of access to traditional land and areas of cultural and spiritual importance; the lack of access to effective remedies for victims; and impunity for the perpetrators of the abuses.[167]

These impacts often result from the combined conduct of multiple actors, including: the host State; the transnational mining company; the home State in which the company is domiciled or registered; and multilateral financial and development institutions. Effective measures to prevent and remedy mining-related abuses must take into account the roles of

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[167] See, e.g., CRC, *Concluding observations, Australia* (60th session, 2012), U.N. Doc. CRC/C/AUS/CO/4, 28 Aug. 2012, para. 27 (expressing concern at 'reports on Australian mining companies' participation and complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji, where children have been victims of evictions, land dispossession and killings.'); Amnesty International, *'Profits and loss: Mining and human rights in Katanga, Democratic Republic of the Congo'*, (London, June 2013); Human Rights Watch, *'"What is a House without Food": Mozambique's Coal Mining Boom and Resettlements'*, (New York: Human Rights Watch, 2013); and Working Group on Mining and Human Rights in Latin America, *The Impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights* (Washington: Due Process of Law Foundation, *et al.*, 2014).

all State and non-State actors. This discussion focuses on the extraterritorial obligations of home States in relation to the foreign mining operations of private corporations registered in their jurisdiction, in circumstances where the home State provides substantial financial, political or legal support for those operations.[168] However, it should be borne in mind that the obligation of host States to protect rights against infringement by foreign companies operating in their territories is primary and not replaced by the responsibility that may be assigned to home States.[169]

In the ideal circumstances for an inquiry into mining-related abuses, both the host State and the home State would have opted in to Article 11, both would cooperate fully in the inquiry, and the CESCR would carry out an on-site visit to the host State. In circumstances where the home State has not opted in to Article 11, the CESCR could examine the facts regarding the home State's role as a part of its analysis of causal factors related to the violations and its assessment of the host State's capacity to prevent and respond to the violations, without purporting to hold the home State accountable under the ICESCR. Thus, even if the home State's responsibility under the ICESCR cannot be addressed because it has not opted in to Article 11, an inquiry could contribute to a more nuanced understanding of the roles and relationships of home and host States.

The fact patterns that have been documented in connection with the conduct of home States and the human rights impacts of mining operations suggest possible directions for an analysis of home State responsibility, in light of well established and evolving jurisprudence. A solid basis for finding a violation of the home State's extraterritorial

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[168] State-owned and partially State-owned mining companies operating abroad are subject to more extensive control by the home State than their private counterparts. The content of the home State's extraterritorial obligations would vary accordingly, even if it is not possible to attribute the conduct of the State-owned company to the State under international law. See, e.g., Human Rights Watch, *'"You'll Be Fired if You Refuse"*, Labor Abuses in Zambia's Chinese State-owned Copper Mines' (New York: Human Rights Watch, Nov. 2011).

[169] See CESCR, *Concluding observations, Norway* (51st session, 2013), U.N. Doc. E/C.12/NOR/CO/5, 13 Dec. 2013, para. 6 (calling on Norway to adopt measures to prevent human rights abuses abroad by corporations having their main offices under its jurisdiction 'without … diminishing the obligations of the host States'; CRC, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights* (62nd session, 2013), U.N. Doc. CRC/C/GC/16, 17 April 2013, para. 42 ('Host States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child'). See also A. Khalfan, 'Division of Responsibility Amongst States', in M. Langford, *et al*., *Global Justice, State Duties* (n. 153 above), pp. 299- 331 and 309-312; and W. Vandenhole and W. Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide', in ibid, pp. 332-363, 336-337.

obligations would exist where there is a sufficiently close casual nexus between the impairment of rights and the conduct (act or omission) of the home State, a high degree of foreseeability attached to the human rights consequences, and a failure by the home State to take the measures generally recognised as constituting the exercise of due diligence to prevent and respond to human rights abuses by non-State corporate actors.[170]

Causal nexus

In this context, the home State's nexus to the victims is established via its nexus to the transnational mining company. Maastricht Principle 25(c) asserts that 'based on the active personality principle, a state may regulate an enterprise that has its center of activity in the national territory, which is registered or domiciled on the territory, or which has its main place of business or substantial business activities in the territory'.[171] In its General Comment No. 16, the CRC affirmed that home States have obligations to 'respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned'.[172] It identified the various relationships between business enterprises and the State that are described in Maastricht Principle 25(c) as constituting reasonable links.[173]

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[170] In several general comments, the CESCR has referred in broad terms to State obligations to protect against infringements of rights by non-State actors in other countries. See CESCR, *General Comment No. 14* (n. 157 above), para. 39; *General Comment No. 15* (n. 157 above), para. 31; and *General Comment No. 19* (n. 157 above), para. 54. See also CRC, *General Comment No. 16* (n. 169 above), para. 43 (including the duty to protect in home States' obligations). The due diligence standard articulated by the Inter-American Court of Human Rights in the Case of Velásquez-Rodríguez is well established in international human rights jurisprudence on State responsibility in relation to the conduct of non-State actors. See Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Series C No. 4, para. 172. See also ECtHR, *Osman v. the United Kingdom*, Appl. No. 23452/94, Judgment of 28 Oct. 1998, para. 116 (State obligation to take reasonable measures to prevent serious rights violations by non-State actors of which the authorities were or ought to have been aware). The CRC has described the scope and nature of the State obligation to protect in terms congruent with human rights jurisprudence applying the due diligence standard: '[a] State is … responsible for infringements of children's rights caused or contributed to by business enterprises *where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy* such infringements or otherwise collaborated with or tolerated the infringements' (emphasis added). CRC, *General Comment No. 16* (n. 169 above), para. 28. See also Special Representative on Business and Human Rights, J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (*Guiding Principles*), U.N Human Rights Council, U.N. Doc. A/HRC17/31, 21 Mar. 2011, Principle 1 and commentary.

[171] See *Commentary to the Maastricht Principles* (n. 155 above), 1139.

[172] CRC, *General Comment No. 16* (n. 169 above), para. 43 (citing the Maastricht Principles.)

[173] Ibid.

In the case of transnational mining companies, home States have engaged in conduct that creates extensive causal links to the human rights abuses associated with the companies' foreign operations. Documented forms of conduct by a home State that establish clear causal links include: a) financial support for mining companies' foreign operations in the form of government-backed loans, guarantees, and insurance; b) the use of official development assistance (ODA) to promote corporate commercial interests as a matter of State policy, including the use of ODA to fund projects jointly with mining companies; c) diplomatic support to mining companies, including support for specific projects in the face of opposition by the affected communities, actions by embassy officials that promote corporate impunity for human rights abuses, diplomatic pressure on host States to comply with or alter the terms of their contracts with mining companies, and diplomatic intervention in legal cases concerning corporate accountability; d) efforts to influence legislative or policy initiatives within the host State in order to create regulatory frameworks favourable to mining companies, including the use of ODA to provide technical and financial support for drafting legislation; e) investment by State-sponsored pension programmes in companies with a record of human rights abuses in their overseas operations; f) State sponsored trade missions to establish contacts between corporate officers and foreign officials; g) bilateral investment treaties (BITs) that have the effect of interfering with efforts by a host State to protect and realise rights, by establishing guarantees that prioritise the protection of investor interests and stipulating the use of international arbitration procedures based on non-binding standards for dispute resolution; and h) the refusal to withdraw financial and political support from mining companies with a public record of human rights abuses.[174]

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[174] See Australian High Commission in Ghana, 'Australia supporting sustainable mining in Africa' (press release), 4 Feb. 2014, available at <http://www.ghana.embassy.gov.au/acra/pressreleaseIndaba2014.html>; Australian African Mining Industry Group, *Submission No. 50, Parliamentary Inquiry into Australia's Relationship with the Countries of Africa*, Parliament of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade (2010); Working Group on Mining and Human Rights in Latin America (n. 167 above); Canadian Network on Corporate Accountability, 'Dirty Business, Dirty Practices: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad', Ottawa, 2007. The use of BITs to protect the legal rights of transnational corporations as foreign investors is ubiquitous. Direct interference by a BIT with the realisation of human rights is illustrated by the well-known example of the BIT between Germany and Paraguay, cited by Paraguay before the Inter-American Court of Human Rights as justification for its failure to restitute the traditional lands of the Sawhoyamaxa indigenous community. See IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of 29 March 2006, Series C No. 146, para. 115. BITs have been used by transnational corporations to obstruct efforts by host States to protect rights, including measures to protect public access to safe water and to mitigate the impact of states of emergency or crisis, and efforts by host States to secure indigenous peoples' right to restitution of their traditional lands. For case studies, see, e.g., J. Perez, M.

These examples include both conduct by the home State in its territory that has extraterritorial effects (e.g., the provision of loans and guarantees) and extraterritorial conduct by agents of the home State (e.g., the actions of embassy officials). These forms of conduct entail direct support by the home State that *enables* mining companies' foreign operations. Such conduct establishes direct casual links to the foreseeable harms associated with those operations. An indirect causal relationship exists where companies' foreign operations have a substantial impact on the home State's economy. Direct State support in multiple forms creates more extensive causal links. Home States have provided such multifaceted support to mining companies in a significant number of cases.

Multifaceted direct support by the home State creates an institutional framework that makes it possible for companies to operate abroad on the terms most favourable to their commercial and legal interests and to expand their operations. If a home State maintains an institutional and legal framework that enables mining companies' foreign operations and promotes their interests as a matter of explicit State policy, it holds substantial *de facto* power over their ability to carry out their operations abroad and the legal and financial terms under which they operate.[175] The causal links created in these circumstances are cumulative and imply concomitantly more extensive extraterritorial obligations.[176] If it is not conceded that multifaceted direct State support as a matter of State policy amounts to significant *de facto* power over the ability of mining companies to operate abroad on commercially and legally favourable terms, such support should be seen as giving the home State the capacity to influence decisively the actions of the companies to which it provides support.[177]

Foreseeability

Gistelinck and D. Karbala, 'Sleeping Lions: International investment treaties, state-investor disputes and access to food, land and water', Oxfam Discussion Paper, Oxford: Oxfam GB, May 2011. See also L. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* (Montreal: Rights & Democracy, 2009).

[175] Although enabling conduct of the type described does not constitute operational control, it does entail *de facto* power over companies' ability to access foreign markets on favourable terms, secure the financial support necessary to undertake projects and legal protection for their investments, and evade liability for negative human rights and environmental impacts.

[176] See generally P. Simons and A. Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014); and S. Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining', *Yale Human Rights and Development J.*, Vol. 11, No. 1 (2008), pp. 177-206.

[177] See De Schutter *et al*, 'Commentary to the Maastricht Principles' (n. 155 above), p. 1144 (Principle 26); S. Narula, 'International Financial Institutions, Transnational Corporations, and Duties of States', in M. Langford *et al*, *Global Justice, State Duties* (n. 153 above), pp. 114-149 at 143-44; C. Ryngaert, 'Jurisdiction: Towards a Reasonableness Test', in ibid, pp. 192-211 at 203-207.

A high degree of foreseeability exists where home State authorities are aware or should be aware that a particular mining company has committed human rights abuses or caused environmental degradation in the past. A high degree of foreseeability also exists where home State authorities are aware or should be aware based on available evidence that there are repeated patterns of violations and/or trends in the impacts of mining projects.[178] Regular patterns of human rights abuses associated with mining operations have been widely and credibly documented in different country contexts. Based on the public availability of this information, it is reasonable to conclude that a home State *should be aware* that there is a significant risk of specific types of human rights abuses in connection with mining companies' foreign operations. Moreover, mining activities are *per se* likely to have significant adverse, and often long term, effects on the environment and on the human rights to health, water and food. As a consequence, there may be sufficient foreseeability in relation to the severity of the harms caused by mining operations *as a category*, and the risk of such harm, to hold a home State accountable for those harms if it has failed to adopt and implement a preventive regulatory framework, without requiring evidence that the consequences were foreseeable in the specific factual circumstances.[179]

In addition, the precautionary principle in international environmental law should be taken into account in assessing whether the harm and risk of harm attached to mining operations are sufficiently foreseeable to warrant the imposition of home State responsibility. The precautionary principle extends the obligation to prevent harm, or minimise the risk of harm, beyond activities that have been already identified as involving such a risk, to encompass a duty to take 'appropriate measures to identify activities which involve such a risk'.[180] The Maastricht Principles apply this principle to economic, social and cultural rights, affirming that States are required to obtain information in order to identify and assess the potential impacts of their conduct on the enjoyment of economic, social and cultural rights outside their territories.[181] The foreseeability of harm and the risk of harm associated with foreign mining operations

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[178] On the foreseeability of violations as a condition for State responsibility, see 'Commentary to the Maastricht Principles' (n. 155 above), pp. 1113-14.
[179] This suggestion is addressed to circumstances in which home States provide substantial support for mining companies' foreign operations.
[180] *Report of the International Law Commission* (53rd Session, 2001), U.N. GAOR, 56th Session, Supp. No. 10, at 391, U.N. Doc. A/56/10 (2001) (Commentary on Article 3).
[181] 'Commentary to the Maastricht Principles' (n. 155 above), pp. 1115-1116 (Principles 13 and 14).

should be assessed in light of the efforts made by the home State to ascertain if there are risks not yet identified on the basis of available information.

Due diligence: preventive and remedial measures to be taken by the home State

The exercise of due diligence to prevent and respond to human rights abuses resulting from the foreign operations of transnational corporations is now generally agreed by the CESCR, other UN human rights treaty bodies and many commentators to require home States to take a set of core measures. These include: the creation of an effective regulatory framework, with monitoring, investigation and accountability procedures; the use of independent human rights impact assessments as a condition for financial and other forms of State support; and the establishment of mechanisms or procedures to ensure victims' access to effective remedies.

The CESCR has called on States parties to take legislative and administrative measures to ensure that the foreign operations of companies domiciled or operating in their jurisdictions do not negatively impact economic, social and cultural rights in host countries.[182] Other UN human rights treaty bodies have similarly called for home State regulation to prevent the negative human rights impacts associated with the foreign operations of transnational corporations.[183] With the exception of the CRC, the treaty bodies have not elaborated on the legal bases for a duty to regulate.[184] The Maastricht Principles propose several legal and factual bases for imposing an obligation to regulate transnational corporations for the purpose of protecting rights. These include circumstances where: the corporation, parent, or controlling entity has its centre of

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[182] See, e.g., CESCR, *Concluding observations, Austria* (51st session, 2013), U.N. Doc. E/C.12/AUT/CO/4, 13 Dec. 2013, para. 12; CESCR, *Concluding observations, Norway* (51st session, 2013), U.N. Doc. E/C.12/NOR/CO/5, 13 Dec. 2013, para. 6; CESCR, *Concluding observations, People's Republic of China (PRC)* (52nd session, 2014), U.N. Doc. E/C.12/CHN/CO/2, 23 May 2014, para. 13; CESCR, *Statement on the obligations of State parties regarding the corporate sector and economic, social and cultural rights* (46th session, 2011), U.N. Doc. E/C.12/2011/1, 20 May 2011, para. 5.

[183] See, e.g., CERD, *Concluding observations, Canada* (80th session, 2012), U.N. Doc. CERD/C/CAN/CO/19-20, 4 April 2012, para. 14; CERD, *Concluding observations, Canada* (70th session, 2007), U.N. Doc. CERD/C/CAN/CO/18, 25 May 2007, para. 17; CRC, *Concluding observations, Australia* (60th session, 2012), U.N. Doc. CRC/C/AUS/CO/4, 28 Aug. 2012, para. 28; CRC, *Concluding observations, Germany* (65th session, 2014), U.N. Doc. CRC/C/DEU/CO/3-4, 25 Feb. 2014, para. 23; CRC, *Concluding observations, Republic of Korea* (58th session, 2011), U.N. Doc. CRC/C/KOR/CO/3-4, 6 Oct. 2011, para. 27; and HRC, *Concluding observations, Germany* (106th session, 2012), U.N. Doc. CCPR/C/DEU/CO/6, 12 Nov. 2012, para. 16. See also Narula, 'The Right to Food', (n. 158 above), pp. 146-47 and nn. 155-56.

[184] Many of the treaty body recommendations cited in notes 181-182 post-date Ruggie's assertion that international human rights law does not require States to regulate the extraterritorial activities of businesses domiciled in their territory, but does not prohibit them from doing so if there is a 'recognized jurisdictional basis'. *Guiding Principles* (n. 170 above), Commentary to Principle 2.

activity, is registered or domiciled, or has its main place of business or substantial business in the State concerned; and a 'reasonable link' exists between the State concerned and the conduct it seeks to regulate.[185] In order to meet the due diligence standard in human rights law, preventive measures must be adequate and effective. Regulatory regimes should therefore be enforceable, because purely voluntary regulatory frameworks have generally proven inadequate and ineffective for the purpose of protecting rights.[186]

Independent human rights impact assessments are a second vital aspect of the State's duty to exercise due diligence to prevent negative rights impacts associated with the foreign operations of companies to which it extends support. The CESCR, the CRC and special mechanisms of the UN Human Rights Council have called on States to condition access to public finance and other forms of State support on the preparation of human rights impact assessments, including access to funding by export credit agencies and investment by State pension plans.[187] The CRC has declared that corporate access to public finance and other forms of public support should be conditioned on the conduct of human rights due diligence and that support by State agencies with a significant role regarding business should 'take steps to identify, prevent and mitigate any adverse impacts the projects they

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[185] See 'Commentary to the Maastricht Principles' (n. 155 above), pp. 1137-44 (Principle 25).

[186] UN human rights treaty bodies have described measures to be taken by home States in terms indicating that regulatory regimes should be enforceable. See CESCR, *Concluding observations, PRC* (n. 182 above), para. 13 (calling for measures to ensure 'legal liability' of companies and their subsidiaries for violations of ESC rights in their foreign operations); CESCR, *Concluding observations, Austria* (n. 182 above), para. 12 (Austria to 'set and enforce' standards governing the human rights impacts of corporations' foreign operations); CRC, *Concluding observations, Australia* (n. 183 above), para. 28 (Australia to 'examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding [human rights abuses committed] overseas and establish monitoring mechanisms, investigation, and redress of such abuses'); CRC, *Concluding observations, Germany* (n. 183 above), para. 23 (Germany to 'examine and adapt its civil, criminal and administrative legislative framework to ensure that business enterprises and their subsidiaries operating in or managed from the State party's territory are legally accountable' for violations); and CRC, *Concluding observations, Republic of Korea* (n. 183 above), para. 27 (calling for a 'legislative framework that requires companies domiciled in Korea to adopt measures to prevent and mitigate adverse human rights impacts in their operations … abroad'). For an overview of State practice regarding regulatory options to ensure that corporations conduct human rights due diligence in connection with their territorial and extraterritorial operations, see O. De Schutter, A. Ramasastry, M. Taylor and R. Thompson, 'Human Rights Due Diligence: The Role of States', International Corporate Accountability Roundtable (Washington, 2012).

[187] See, e.g., CESCR, *Concluding observations, Norway* (n. 182 above), para. 6; CESCR, *Concluding observations, Austria* (n. 181), para. 11; CRC, *Concluding observations, Australia* (n. 183 above), para. 28; CRC, *Concluding observations, Republic of Korea* (n. 183 above), para. 27; and U.N. Human Rights Council, *Report of the Special Rapporteur on the right to food, Guiding principles on human rights impact assessments of trade and investment agreements* (19th session, 2011), U.N. Doc. A/HRC/19/59/Add. 5, 19 Dec. 2011. See also De Schutter *et al*, 'Commentary to the Maastricht Principles' (n. 155 above), pp. 1115-18 (Principle 14).

support might have on children's rights before offering support to businesses operating abroad'.[188]

Finally, the CESCR has stressed that access to effective remedies for victims of corporate abuses of economic, social and cultural rights is of the 'utmost importance'.[189] Regarding the role of home States in ensuring access to justice, the CRC has asserted that when there is a reasonable link between the State and the conduct concerned, the State has a duty to 'enable access to effective judicial and non-judicial mechanisms' to provide remedies for rights abuses by business enterprises operating abroad.[190] The CRC also stipulated that 'States should provide international assistance and cooperation with investigations and enforcement of proceedings in other States'.[191] Appropriate measures to ensure access to a remedy may include independent non-judicial mechanisms with investigatory powers. However, many commentators have emphasised the necessity of ensuring access to judicial remedies and identified specific steps home States should take toward that end, including: legislating access to home State courts for victims in circumstances where an adequate and effective remedy is not accessible in the host State; limiting or eliminating financial barriers that prevent victims from pursuing a remedy in home State courts; and strengthening civil and criminal law frameworks for holding corporations accountable for their involvement in human rights abuses abroad.[192]

Conclusion

The CESCR would have a strong basis for finding a violation of a home State's extraterritorial obligation to protect rights if the facts established in an inquiry were to

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[188] CRC, *General Comment No. 16* (n. 169 above), para. 45.
[189] CESCR, *Statement on the obligations of State parties regarding the corporate sector and economic, social and cultural rights* (n. 182 above), para. 5. See also CESCR, *Concluding observations, Austria* (n. 182 above), para. 11(identifying an accessible complaint mechanism as a key element of a human rights-based approach to ODA and trade policies).
[190] CRC, *General Comment 16* (n. 169 above), para. 44. As noted above, the CRC considers the relationships between business enterprises and a home State described in Maastricht Principle 25(c) to be 'reasonable links'. See also, HRC, *Concluding observations, Germany* (n. 183 above), para. 16 (calling for 'appropriate measures to strengthen the remedies provided to protect people who have been victims of activities' of enterprises domiciled in its territory and/or its jurisdiction operating abroad).
[191] CRC, *General Comment 16* (n. 169 above), para. 44.
[192] See, e.g., G. Skinner, R. McCorquodale and O. De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business', International Corporate Accountability Roundtable, (Washington, 2013), pp. 68-69; Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy', (London, 2014); Catherine Coumans, 'Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms', *University of British Columbia Law Rev.*, Vol. 45, No. 3 (2012), pp. 651–690.

show that: the State provided multifaceted direct support to a mining company whose foreign operations resulted in foreseeable human rights abuses; and the State had failed to establish an effective legal and administrative framework to prevent and respond to human rights abuses associated with mining companies' foreign operations. The case for finding a violation would be particularly strong if the State directly supported the mining project at issue, the company had a prior record of causing similar harms, the State did not condition its support on the company's adoption of effective measures to prevent negative human rights impacts in connection with the project, and the State did not ensure that adequate monitoring and redress procedures were in place.

5. Weighing the Utility of the Inquiry Procedure

5.1 Benefits of the Inquiry Procedure

The inquiry procedure yields an authoritative factual record and a determination by the CESCR regarding whether the State party has violated rights under the ICESCR. Both these results reinforce the principle of accountability for violations. The CESCR's findings, comments and recommendations can establish a framework of particularised obligations for which the State party is accountable, including obligations related to the causes of violations. Detailed and comprehensive recommendations can provide a focus for monitoring by the CESCR, civil society, and legislative or judicial entities within the State party itself. The results of an inquiry can provide guidance to all States parties and to other human rights bodies about the scope and content of ICESCR rights. An inquiry can afford opportunities for expanded dialogue between the CESCR and officials at different levels of government, which can encourage the State party to comply with its obligations in relation to the violations and to ICESCR rights in general.

An inquiry can have a wider range of effects that contribute cumulatively to a cessation of the violations and the adoption of remedial and preventive measures by the State, including: bringing new facts to light; encouraging other global and regional human rights bodies to scrutinise the violations; supporting any efforts to end the violations made by governmental actors within the State party concerned; heightening domestic and international political pressure on the State to end the violations; reinforcing bilateral or multilateral political or other initiatives aiming at ending the violations; bolstering efforts to publicise the violations and increase awareness of ICESCR rights; countering efforts by the State party or private actors to undermine the advocacy and credibility of victims,

witnesses, and individuals and groups working to end the violations; discouraging retaliatory action by the State or private actors against victims or individuals and groups working to end the violations; and stimulating additional fact-finding, documentation, campaigning and other advocacy by domestic and international groups.

The inquiry procedure is well-suited to the examination of systemic and structural violations, the collective dimensions of violations, and their root causes. Two features make the procedure especially useful for these purposes. First, a broad and detailed factual record can be developed in an inquiry. Second, the absence of admissibility requirements (including standing and victim status requirements) permits scrutiny of violations involving large numbers of victims, entire groups or communities, and victims who cannot be individually identified or do not wish to be identified. An inquiry can facilitate analysis of systemic and structural inequalities that goes beyond the circumstances of individual cases, to address causal factors and structural solutions. It can accommodate attention to the wider economic, social, political and cultural context at the national level and to the transnational dimensions of violations, thereby encouraging a holistic understanding of the situation. The inquiry procedure offers a means by which the CESCR can clarify the nature of obligations related to these types of violations, explore their causes, and identify corrective measures of a structural nature that are sufficiently comprehensive to deal with the violations and their causes effectively.[193]

As outlined in Section 4, the inquiry procedure offers a means by which States parties may be held accountable for compliance with the extraterritorial dimensions of their obligations under the ICESCR. The same features that make it useful to an examination of systemic and structural violations make it well suited to this purpose. Other significant benefits of the procedure include the features that enhance its accessibility to victims, their advocates, NGOs and civil society groups and the CESCR's wide latitude to determine the modalities of an inquiry and adapt its working methods to the particular circumstances of an inquiry.

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[193] Cf. UN Doc. E/CN.6/1997/5 (n. 113 above), para. 77 (comment by the delegation of Chile, explaining that the OP CEDAW inquiry procedure 'would deal with non-compliance that was likely to have many victims but which required a more comprehensive solution and, possibly, the provision of general background information that it would be difficult to expect an individual complainant to possess'.)

5.2 Limitations of the Inquiry Procedure

The principal structural limitations on the utility of the inquiry procedure as an accountability mechanism are its opt-in character and the confidential nature of the CESCR's proceedings. The opt-in clause will no doubt reduce adherence to the procedure and may adversely affect the diversity of the States parties that agree to be bound by it. To the extent that the confidentiality requirement operates to the benefit of a State party seeking to evade scrutiny of its conduct and hampers efforts by human rights advocates to bring an end to violations, it undermines the inquiry procedure itself. The confidentiality requirement creates clear disadvantages for human rights advocates, as detailed in Section 3.8.

The fact the CESCR has sole discretion to initiate an inquiry operates to its benefit but may entail a disadvantage for the parties who request an inquiry, since the CESCR can decline to establish an inquiry even if reliable information indicates that one is warranted and its reasons for doing so will remain confidential. In contrast, under the communications procedure the CESCR can only decline to consider a communication on the grounds stipulated in the OP ICESCR and it must issue a formal decision of inadmissibility. Taken together, the CESCR's discretion, the confidential nature of its proceedings and the mandate to seek the State party's cooperation introduce a significant degree of uncertainty regarding the availability of the inquiry procedure in practice.

Significant delays in Article 11 proceedings are likely and will undermine the utility of the procedure. Efforts to obtain the State party's cooperation and consent to a visit inevitably introduce delays in inquiry proceedings even when the State party is not dilatory. The CESCR might prolong the preliminary evaluation stage of the proceedings unduly or permit significant delay in proceedings that have been initiated, in the hope of obtaining the State party's cooperation. The State party can intentionally prolong its interactions with the CESCR regarding its cooperation and/or consent to a visit, either with the aim of delaying the proceedings for reasons related to its domestic political or other interests, or in bad faith, having already decided to refuse cooperation. If the State consents to a visit, the process of reaching an agreement on the timing and itinerary for the visit is time consuming. Further, the fact that certain aspects of the proceedings must be conducted during the CESCR's regular sessions creates unavoidable delays.

Finally, any assessment of the utility of the inquiry procedure must acknowledge the reality of administrative and financial constraints on the CESCR's activities under Article 11. Experience under the other UN inquiry procedures suggests that administrative and financial considerations within the UN human rights system will inhibit the frequency with which inquiries are undertaken. [194]

6. Conclusion

Clearly, an inquiry is best treated as one element within a broader set of initiatives to be pursued by those working to end violations of the ICESCR. An inquiry that results in a finding of violations can reinforce action already taken by civil society, other human rights bodies and the international community in response to the violations and can encourage new efforts to end the violations. The utility of the inquiry procedure should thus be measured by reference to the contribution it can make to a broader set of responses to violations of the ICESCR.

However, an Article 11 inquiry can make a unique contribution to accountability for violations of economic, social and cultural rights. Even if the violations examined in an inquiry have already come under scrutiny by other human rights bodies, such as the UN special mechanisms, the CESCR's specialised expertise on economic, social and cultural rights will allow it to elucidate aspects of the situation that other human rights bodies without such expertise may not explore in detail. An examination of the situation within the ICESCR framework, as the main global treaty on economic, social and cultural rights, reinforces the normative weight of the rights and obligations it establishes.

The first step toward realising the potential of the inquiry procedure is to secure opt-in declarations by a large and diverse group of States parties to the OP ICESCR. Looking forward, whether or not the procedure proves effective for its intended purposes will depend on a wide range of factors. Some relate to the CESCR's working methods under the procedure and its approaches to the interpretation of rights and duties under the ICESCR in the context of an inquiry. Others relate to the types of violations considered in specific inquiries and to the responses of the States parties concerned during an inquiry and after its conclusion. Over time, the utility of the procedure will also be shaped by the

[194] Administrative considerations likely to affect the CESCR's decision to initiate an inquiry include: its overall workload; the number of inquiry requests pending; the existence of other inquiries in progress; and constraints on the level of support the Secretariat is able to offer.

extent to which it has been used in relation to a geographically diverse group of States parties and States parties at differing levels of social and economic development.

The frequency with which economic, social and cultural rights advocates make use of the procedure and the nature of the violations they seek to have addressed will have a significant impact on the development of the inquiry procedure as an accountability mechanism. These factors will in turn be shaped by such variables as: their access to information about the procedure; their assessments of its utility; the availability of other, more effective mechanisms that could be used to address the violations; the availability of resources to support the documentation of violations and other activities in connection with an inquiry; and the degree of any interference with their work by State or non-State actors. The active involvement of economic, social and cultural rights advocates, including a diverse representation of civil society groups, in the OP ICESCR drafting process is reason for optimism about their willingness to engage with the inquiry procedure in the future.

Addendum: recent practice under other UN inquiry procedures

OP CEDAW Article 8

Two inquiries under the OP CEDAW have been concluded since this chapter was written. Both address questions of importance to future use of the Article 11 procedure: the interpretation of the threshold requirement; and the characterization of economic, social and cultural rights violations as 'grave or systematic' in nature.

In March 2015, the CEDAW issued the report of its inquiry on missing and murdered Aboriginal women and girls in Canada.[195] It found that Canada had committed grave violations of the rights of Aboriginal women and girls, citing the provisions of the Convention that it has associated closely with the prohibition of gender-based violence (Articles 1, 2(c)(d) and (e), 3, and 5(a)), read in conjunction with Articles 14(1) and 15(1).[196] One month later, the CEDAW issued a summary report of its inquiry on

[195] *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention*, U.N. Doc. CEDAW/C/OP.8/CAN/1, 6 Mar. 2015 (*CEDAW Canada inquiry report*). The inquiry included an on-site visit in 2014.
[196] Ibid. paras. 214-215.

women's sexual and reproductive health rights in the Philippines.[197] It concluded that the State party had committed grave and systematic violations of the Convention, citing: Article 12, read alone; Article 12, read in conjunction with Articles 2(c), (d) and (f), 5, and 10(h); and Article 16(1)(e), read alone.[198]

Threshold requirement

In its inquiry on Canada, the CEDAW chose to focus solely on the gravity of the violations. It stated that, in light of its conclusion that grave violations had occurred, there was no need to consider whether the violations had also been systematic.[199] The CEDAW explained that findings regarding the gravity of violations 'must take into account, notably, the scale, prevalence, nature and impact of the violations found'.[200] Several aspects of the violations mentioned by the CEDAW as indicators of their gravity can be more appropriately characterized as markers of their systematic nature, including: 'the protracted failure of the State Party to take effective measures to protect Aboriginal women', 'weaknesses in the justice and enforcement system' resulting in impunity, and the 'lack of any efforts to bring about any significant compensation and reparation'.[201] The CEDAW's rationale for not reaching a conclusion on the systematic nature of the violations is not readily apparent, since its factual findings included the existence of a prevalent pattern of violence against Aboriginal women over time, linked to a history of discriminatory laws and policies and coupled with the failure of the State party to ensure access to justice and end impunity for the violence.[202]

In its inquiry on the Philippines, the CEDAW outlined its interpretation of both threshold elements and summarized the factual basis for its conclusion that the breaches had been both grave and systematic in nature. Regarding the meaning of 'grave', the CEDAW reiterated the formula stated in the inquiry on Canada (gravity is determined with reference to the scale, prevalence, nature and impact of the violations)

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[197] *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/OP.8/PHL/1, 22 April 2015 (*CEDAW Philippines inquiry report)*. This inquiry included an on-site visit in 2012.
[198] Ibid. para. 46.
[199] *CEDAW Canada inquiry report* (n. 195 above), para. 214.
[200] Ibid. para. 213.
[201] Ibid. para. 214.
[202] Ibid. paras. 95, 97, 110, 128-130, 147 and 172. The CEDAW rejected the State party's argument that it lacked competence *ratione temporis* to examine events that occurred prior to the entry into force for Canada of the OP CEDAW. It invoked the continuing violations exception and refused to draw any 'arbitrary historical borderline' between events pre- and post- entry into force. Ibid. paras. 88-92.

and highlighted features of the violations that fitted within this formula.[203] It particularly emphasized the consequences of the violations as indicators of their gravity.[204]

Regarding the meaning of 'systematic', the CEDAW explained that:

The systematic denial of equal rights for women can take place either deliberately, namely with the State party's intent of committing those acts or as a result of discriminatory laws or policies, with or without such purpose. The systematic nature of violations can also be assessed in light of the presence of a significant and persistent pattern of acts which do not result from a random occurrence….[T]he systematic character of each of the violations found is evident from the prevalent pattern of violations which occurred as a result of policies disproportionately impacting women and discriminating against them'.[205]

The CEDAW referred to the persistence of the violations over time as a factor indicating that they were 'not isolated cases'. However, the time factor would seem to relate more closely to the question of impunity for violations than to their scale or prevalence. The prolonged continuation of violations may signal the existence of impunity resulting from a failure by the State to prevent and respond to violations as required by the treaty. The CEDAW noted the Philippine's tolerance of the violations over time as a factor indicating the systematic nature of the abuses, but did not refer explicitly to impunity.[206]

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[203] See *CEDAW Philippines inquiry report* (n. 197 above), para. 47 ('[t]he number of persons affected by the policies … is significantly high, as thousands of women of child-bearing age continue to have inadequate access to sexual and reproductive health services'; 'higher rates of unwanted pregnancies and unsafe abortions, increased maternal morbidity and mortality and increased exposure to sexually transmitted diseases and HIV'; and the 'potentially life-threatening consequences of resorting to unsafe abortion as a method of contraception').

[204] The CEDAW stated that: 'each of the violations established reach the required threshold of gravity given the *significant consequences*… for women's health, personal development and economic security, particularly for economically disadvantaged women. The denial of access to affordable sexual and reproductive health services … had *severe consequences not only for the lives and health of many women, but also impacted on their enjoyment of several rights set forth in the Convention* in areas such as employment and education'. Ibid (emphasis added.)

[205] Ibid. para. 48.

[206] See ibid, para. 48 (noting that 'the State party condoned a situation, which lasted for more than 12 years'); para. 26 (noting that the State party 'at times either supported or condoned the policies of the City of Manila'); para. 28 (referring to 'the tacit acceptance by the central Government of the policies issued by the Manila local government'.) As a separate matter, the CEDAW found that the Philippines had failed to establish sufficient safeguards and oversight mechanisms to ensure that decentralization and devolution of powers to the local level in the health sector would not lead to violations of women's sexual and reproductive health and rights. Ibid. paras. 23-25.

Although the CEDAW's approach to the concept of a systematic violation in the inquiries on Mexico and the Philippines appears at odds with its approach in the inquiry on Canada, the general parameters of its interpretation of the Article 8 threshold are now apparent. All three inquiries offer useful illustrations of the process of interpreting the threshold requirement in a particular factual context. Two additional aspects of the inquiry on the Philippines offer guidance for analysis of the term 'systematic' in OP ICESCR Article 11. First, the CEDAW did not consider wide geographic distribution to be a necessary element of the concept of a systematic violation. As in the inquiry on Mexico, the violations examined in its investigation occurred in a large metropolitan area. Second, like the CAT, the CEDAW extended the concept of 'systematic' violations to situations in which local policy or practice conflicts with central State policy that is in line with the State party's treaty obligations.[207]

Analysis of economic, social and cultural rights violations

In its inquiry on Canada, the CEDAW cited data confirming 'that discrimination on socio-economic indicators persists against Aboriginal women'.[208] It treated violations of economic, social and cultural rights as central causal factors for violence against Aboriginal women and grounded its analysis of the murders and disappearances in the historical context of the cultural dislocations suffered by Aboriginal peoples, government policies of forced assimilation and institutionalized discrimination, and the social and economic marginalization of Aboriginal women and their communities.[209] Among the factors considered by the CEDAW in concluding that Canada had failed to exercise due diligence to eliminate gender-based violence was the State party's 'extensive and long-standing knowledge of patterns of vulnerability and risk for Aboriginal women [and knowledge of] the existence of structural patterns of inequality faced by Aboriginal women, notably in education, housing, health and employment'.[210]

The inquiry on the Philippines focused squarely on violations of women's sexual and reproductive health and rights. The violations resulted from a *de facto* ban on modern

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[207] Ibid. para. 35; text at n. 137, above (the CAT's definition of the 'systematic' practice of torture.)
[208] *CEDAW Canada inquiry report* (n. 195 above), para. 111.
[209] Ibid. paras. 112-119, 128-130, 201 and 203. The CEDAW noted that the 'social and economic marginalization of Aboriginal women is reflected in the high incidence of poverty as evidenced in inadequate housing and homelessness, lack of education and employment opportunities, transience and migration, drug and substance abuse, as well as over-representation of Aboriginal children in the child welfare system.' Ibid. para. 112.
[210] Ibid. para. 208.

methods of contraception in all public health facilities run by the Manila local government and from the failure of municipal authorities to allocate resources to ensure the provision of adequate reproductive health services. In analysing the facts, the CEDAW drew on its well-established jurisprudence regarding the scope and content of women's reproductive health and rights.

The CEDAW found that the Philippines had violated women's right to health under Article 12 by failing to 'ensure access to the full range of sexual and reproductive health services and commodities, including information and counselling on modern methods of family planning … [and failing] to remove barriers to ensure women's effective access to sexual and reproductive health services'.[211] In addition, it concluded that the Philippines had violated the following provisions of the Convention: Article 10(h), by failing to provide adequate information about modern contraceptive methods and their use;[212] Article 16(1)(e), by failing to provide women with the education, services and necessary means to decide freely and responsibly on the number and spacing of their children;[213] Article 5, read together with Articles 12 and 16, by permitting the implementation of a policy that reinforced gender stereotypes that had the effect of impairing women's rights under Article 12;[214] and Article 2(c), by failing to establish a system to ensure judicial protection and provide effective judicial remedies for the violations of women's reproductive health and rights experienced by women in the City of Manila.[215]

Although this report was issued in summary form and does not include detailed findings of fact or extended analysis of the State party's obligations, it demonstrates that the application of the 'grave or systematic' threshold to violations of economic, social and cultural rights can be relatively straightforward where the scope and content of the rights and obligations at issue are well-defined and a sufficiently complete fact base has been established. The CEDAW found stand alone violations of Articles 12 and 16(1)(e), as well as breaches of other provisions based on interrelationships among the rights concerned. Its approach emphasised interrelationships among rights with regard to both the causes and the consequences of violations and highlighted the disproportionate impact

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[211] *CEDAW Philippines inquiry report* (n. 197 above), para. 36. These failures were also considered by CEDAW to amount to discrimination and breaches of the State party's duties under Articles 2(d) and 2(f). Ibid. para. 31.
[212] Ibid. paras 38-39.
[213] Ibid. para. 41.
[214] Ibid. paras. 42-43.
[215] Ibid. para. 45.

of the violations on economically disadvantaged women. The CEDAW's findings and recommendations also confirm that 'grave or systematic violations' can encompass all levels of State obligation regarding economic, social and cultural rights.

CAT Article 20

In October 2014, the CAT issued the report of its inquiry on torture in Lebanon.[216] It found that torture is, and has been, systematically practiced in Lebanon.[217] The CAT's analysis of the factors taken into account in determining whether the Article 20 threshold had been reached was consistent with prior inquiries and it reiterated the definition of the systematic practice of torture first set out in its inquiry on Turkey.[218]

[216] *Report of the Committee Against Torture, Summary account of the results of the proceedings concerning the inquiry on Lebanon*, 69 U.N. GAOR Supp. (No. 44), paras. 106-115 and Annex XIII, U.N. Doc. A/69/44 (2014). This inquiry included an on-site visit in 2013.
[217] Ibid. Annex XIII, para. 37.
[218] Ibid. para. 27; *CAT Turkey inquiry report* (n. 15 above), para. 39.

5. Inter-State Procedure

Malcolm Langford,[*] *Cheryl Lorens*[**] *and Natasha Telson*[***]

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;

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(*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.

1. Introduction

The inclusion of an inter-State procedure in the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (Optional Protocol)[1] is curious in light of the comparable under-use of similar mechanisms in other international human rights law. Nonetheless, it is not inconceivable that inter-state litigation could feature in future Optional Protocol practice. Disputes on human rights questions, including social rights, have been ventilated (and with some renewed vigour) within the regional human rights systems and the International Labour Organisation (ILO) and before the International Court of Justice. This suggests that the Optional Protocol could play an important role in addressing certain categories of violations.

The inter-state procedure set out in Article 10 of the Optional Protocol is extremely detailed but appearances are deceptive. A number of important criteria must be satisfied before jurisdiction can be established and the full process instigated. The procedure can be characterised as a double 'opt-in' process. Complaints can only be made by a State against another State if *both* States made declarations recognising the competence of the Committee on Economic, Social and Cultural Rights (Committee or CESCR) to hear inter-state complaints. If so, a communication to the Committee can allege that another State, who has made a similar declaration, is not complying with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESR).

This chapter begins with an overview of the nature and usage of existing inter-State procedure in international human rights law (Section 2), examines the drafting history of of the inter-State procedure in Article 10 of the OP-ICESCR (Section 3), examines the procedural requirements of Article 10 and its ease of application to extra-territorial obligations (Section 4), and concludes with some comment on the possible use of the mechanism in the area of economic, social and cultural rights (Section 5).

[1] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) ('Optional Protocol').

2. Existing Inter-State Procedures and their Usage

Inter-state complaint procedures are available under several international human rights instruments although the form varies.[2] In the two earliest substantive treaties, the International Covenant on Civil and Political Rights (ICCPR)[3] and the Convention on the Elimination of Racial Discrimination (ICERD) 1965,[4] States were granted the authority to establish an *ad hoc* Conciliation Commission for inter-state disputes. In the case of the former treaty, the procedure was of opt-in variety while, in the latter, it was made directly applicable to all ratifying States. However, the effect of the difference should not be over-stated. Even though the friendly settlement procedure can be instigated by one State under the ICERD, both States must consent to the appointment of the commission.

In subsequent international human rights treaties, there have been three different approaches, with no clear trend over time. The first was to simply omit an inter-state procedure from both the substantive treaty and any protocol permitting individual complaints. This was the case for treaties concerning discrimination against women and the rights of persons with disabilities.[5] The second was to entrust, in the substantive treaty, this function to the permanent committee overseeing the treaty. This approach was adopted in the Convention Against Torture,[6] Convention on Migrant Workers,[7] and the

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[2] Article 41 of the 1966 International Covenant on Civil and Political Rights and its Optional Protocol; Articles 21 and 22 of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 11 to 14 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 32 International Convention for the Protection of All Persons from Enforced Disappearance; Articles 11 to 13 International Convention on the Elimination of Racial Discrimination; and 31 to 34 of the Constitution of the International Labour Office (ILO).

[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, Articles 42 and 43.

[4] G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, Article 11.

[5] See 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* Dec. 22, 2000; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 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.

[6] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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 21.

[7] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003, Article 76.

Convention on Enforced Disappearances[8] - and, in all cases, on an opt-in basis. The third was to include the procedure in an optional protocol concerning complaint mechanisms, also as an opt-in procedure. This was the case with the recent third optional protocol to the Convention on the Rights of the Child[9] and the Optional Protocol for the ICESCR.

Despite the longevity of some of these inter-state procedures in international human rights law, particularly in the ICCPR, CAT and ICERD, none are yet to be utilised.[10] The reasons behind this reluctance are manifold with a key factor being the availability of complaint procedures for individuals, which can obviate the need for states to prosecute claims on their behalf. However, the under-usage is also function of political calculus: the apparent political costs of litigation outweigh the benefits in the light of alternative avenues. As Leckie notes that "the implementation of the inter-state complaint procedure is often perceived to be politically motivated, and potentially too damaging and threatening to a state's interests".[11] Likewise, alternative forms of international action are available for States, ranging from soft measures such as diplomatic action and the use of multilateral organisations through to harder measures such as sanctions and military intervention. As Kamminga notes, despite the "increased willingness of states to hold other states accountable for violations of the human rights of the person who are nationals of the offending state", "interceding states have shown a marked lack of enthusiasm for couching their démarches in terms of formal legal claims against the offending state".[12] Beyond political costs, some authors also note the "logistical costs" for states, such as legal research, the marshalling of parliamentary and executive support, coordination amongst executive branches, and the on-going involvement in the procedure.[13]

Nonetheless, inter-state procedures for human rights violations have been utilised elsewhere in the international system (see section . This includes the regional human rights mechanisms, the International Labour Organisation, and the International Court of

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[8] International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006, Article 32.
[9] See Optional Protocol to the Convention on the Rights of the Child on a communications procedure, G.A. Res, 66/138, GAOR 66th Session, U.N. doc. A/RES/66/138 (2011), Article 12.
[10] For earlier analyses of this phenomenon, see S. Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?', *Human Rights Quarterly,* Vol. 10 No. (1988), pp. 249-303 and M. Kamminga, *Inter-State Accountbaility for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992), pp. 127-190.
[11] Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law, ibid. p. 250.
[12] Kamminga, *Inter-State Accountbaility for Violations of Human Rights* (n. 10 above), p. 127.
[13] Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law (n. 10 above), pp. 254-5.

Justice. The usage is far from extravagant[14] and has waned significantly since the early 1980s. Nonetheless, inter-state procedures in all three forums have witnessed a semi-revival in recent years.[15] Moreover, as we shall see, a number of scholars have pointed out the considerable potential of inter-State mechanisms, both generally for human rights and specifically for ESC rights.

2.1 European Court of Human Rights

Of the regional systems, the European Court of Human Rights (the Court) has handled the greatest number of inter-state applications. Between 1956 and 2014, a total of 24 inter-state applications were transmitted to the European system, comprising seventeen different cases and nine different human rights situations.[16] Of the 24 applications, three have resulted in final judgments by the Court and another ended in a friendly settlement.[17] The most recent series of inter-state cases named Russia as the respondent. Three cases were submitted by Georgia between 2007 and 2009[18] while in 2014, Ukraine lodged a complaint against Russia in the wake of the Crimea crisis. In the latter case, the applicant state requested an interim measure requiring that the Russian government should "refrain from measures which might threaten the life and health of the civilian population on the territory of Ukraine".[19] The Court responded on the same day with an order that:

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[14] Article 33, European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 44-46 of the 1969 American Convention on Human Rights; Articles 49 and 55 of the African Charter on Human and People's Rights.

[15] See, e.g., P. Leach, 'Ukraine, Russia and Crimea in the European Court of Human Rights', *EJIL Blog*, 21 May 2014, available at http://www.ucl.ac.uk/european-institute/comment_analysis/commentary/ecthr/rbellamy (accessed 8 July 2014); S. Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 114-149.

[16] European Court of Human Rights Inter-State Applications, available from http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes_inter%C3%A9tatiques_EN.pdf. See also the list in Karen Schlüter, *The European Court of Human Rights as a standard setter for transnational justice*, 6th ECPR Conference University of Iceland 25th – 27th August 2011.

[17] S. Prebensen, 'Inter-State Complaints under Treaty Provisions – the Experience under the European Convention on Human Rights', in G. Alfredsson et al. (eds) *International Monitoring Mechanisms: Essays in Honour of Jacob Th. Moller* (2nd ed, Brill 1999), pp. 442-463.

[18] *Georgia v Russia III*, Application No 61186/09 16 March 2010; *Georgia v Russia II,* Application No 38263/08 13 December 2011; *Georgia v Russia I*, Application No 13255/07 30 June 2009. The third was struck off the list after the issued was resolved but the two previous applications by Georgia, made in 2007 and 2008 have been the subject of interim measure orders and are pending before the Grand Chamber. For an overview, see Leach, 'Ukraine, Russia and Crimea in the European Court of Human Rights', n. 15 above.

[19] *Ukraine v. Russia*, Application no. 20958/14, Judgment (Interim Measures), 13 March 2014.

> With a view to preventing such violations and pursuant to Rule 39, the President calls upon both Contracting Parties concerned to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment).

In his assessment of the inter-State applications lodged under the European Convention, Prebensen charts a familiar distinction in analyses of inter-State litigation.[20] It is between direct cases, which concern a State's nationals or concrete interests, and broader cases which relate to a State's "legal interest in ensuring the observance, in the territories of another State, of Conventions relating to the general welfare".[21]

In the majority of cases, the applicant State had a direct interest in the result, often connected to a specific interest in the outcome or effects of an armed conflict.[22] For instance, in *Ireland v UK*, five coercive techniques of interrogation used by British officials were challenged by Ireland in the context of the sectarian conflict in Northern Ireland.[23] Notably, from the perspective of impact, the techniques were abandoned even prior to the Court's ruling of a violation of Article 3 of the Convention.[24] Of particular relevance, *Cyprus v Turkey (IV)* concerned allegations that overlap with a number of social rights.[25] The European Court found that the refusal by the Turkish-backed authorities in Northern Cyprus to allow displaced Cypriots to return to their homes was a violation of Article 8 of the European Convention and the respect for privacy, family life and the home.[26] Some of the recent cases lodged by Georgia against Russia also include allegations of breaches of this article.

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[20] Ibid.
[21] N. Valticos, 'The International Labour Organisation', in K. Vasak (ed.), *The International Dimension of Human Rights* (Westport, Conn: Greenwood Press, 1982), 377, quoted in Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law (n. 10 above), pp. 277, fn. 92..
[22] For example, *Cyprus v Turkey (I), (II) and (III) ,Application Nos.* 6780/74, 6950/75; 8007/77; *Austria v Italy*, Application No. 788/60; and the *Georgia v Russia* cases (n. 22 above), and, in part, *Denmark v. Turkey* (34382/97) [2000] ECHR 149 (5 April 2000).
[23] Application no. 5310/71, Series A No. 25, European Court of Human Rights. See *also Ireland v. United Kingdom* (II), 5451/72.
[24] Prebensen, 'Inter-State Complaints under Treaty Provisions' (n. 17 above), p. 454.
[25] *Cyprus v. Turkey (IV),* Application no. 25781/94.
[26] Ibid. para. 1. In terms of implementation, Turkey adopted the Law for the Compensation, Exchange and Restitution of Immovable Properties (Law no. 67/2005). *Interim resolution CM/ResDH(2007)25 concerning the judgment of the European Court of Human Rights of 10 May 2001 in the case of Cyprus v Turkey*,

In those cases where there was no direct national interest, such as in the *First Greek Case*[27] and *Second Greek Case*[28] and *Denmark, France, Norway Sweden and the Netherlands v Turkey*,[29] multiple States constituted the applicants.[30] The partial exception was *Denmark v Turkey,* which was driven partly by direct interest (the interrogation techniques used on a Danish citizen) and collective interest (the broader use of these practices in Turkey).[31] In all of these cases, complaints have been made by smaller states, with the exception of France in the first-mentioned case concerning Turkey. Moreover, they all involved concerned widespread and very serious human rights violations. Thus, it may be arguable that in situations where individual complaints do not suffice to rectify systemic violations, inter-state applications could be an effective tool.[32] However, the Greek and Turkish cases above show that the situation must reach a certain level of severity before States with no direct interest will intervene.

2.2 Inter-American and African Systems

The complaints in the other two regional systems fit the category of litigation with a direct State interest. The Inter-American system received an application as recent as 2009 by Ecuador against Colombia.[33] Here, Ecuador claimed Colombia had violated Articles 4.1 (right to life), 5.1 (right to human treatment), 8.1 and 8.2 (judicial guarantees) and 25.1 (judicial protection) regarding the extrajudicial killing of Ecuadorean citizen,

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Committee of Ministers 4 April 2007, 992nd meeting. However, the Committee of Ministers has not commented on implementation any further as the question of the effectiveness of this legislation is currently the subject of a request for a ruling by the Grand Chamber in *Xenides-Arestis v. Turkey* Application no. 46347/99 by both parties

[27] Applications No. 3321, *Denmark v. Greece*; No.3322/67, *Norway v. Greece*; No. 3323/67, *Sweden v. Greece*; No. 3344/67, *Netherlands v. Greece*, Yearbook XI (1968), p. 730.

[28] *Denmark, Norway, Sweden and the Netherlands* v. *Greece*, Application (no. 4448/70). Report adopted by the Commission on 4 October 1976, *Decisions and Reports* (DR) 6, p. 5.

[29] Application Nos. 9940/82; 9942/82; 9944/82; 9941/82; 9943/82, European Commission on Human Rights, Report adopted on 7 December 1985, *International Legal Materials*, Vol. 25, No.2 (March 1986), pp. 308-18. (The case concerned the suspension of parliament and allegations of substantive and procedural breaches of the European Convention on Human Rights during military rule. The case was resolved through a friendly settlement).

[30] For a discussion of these cases, see J. Christoffersen and M. R. Madsen, 'The End of Virtue? Denmark and the Boomerang of the Internationalization of Human Rights', *Nordic Journal of International Law,* Vol. 80 No. (2011), pp. 257-277 and Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law (n. 10 above), pp. 289-297.

[31] Application No. 34382/97, Judgement of 5 April 2000.

[32] Prebensen, 'Inter-State Complaints under Treaty Provisions' (n. 17 above), 459. See also Kamminga, *Inter-State Accountbaility for Violations of Human Rights* (n. 10 above), on this point.

[33] F*ranklin Guillermo Aisalla Molina v. Ecuador*, Case IP-02, Report No. 112/10, Inter-Am.C.H.R., OEA/Ser.L/V/II.140 Doc. 10 (2010).

Franklin Guillermo Aisallo Molina on 1 March 2008 by security forces of Colombia on Ecuadorean soil.[34] The claim was found to be admissible by the Commission.[35]

The African Commission on Human and Peoples Rights has received one inter-state complaint, *Democratic Republic of Congo v the Republics of Burundi, Rwanda and Uganda* under Article 49.[36] The Congo alleged grave and massive violations of human rights committed by the armed forces of the Respondent countries fighting in Congolese provinces where rebel activities have taken place since 2 August 1998. This included allegations of the massacre of hundreds of army personnel and civilians, the conscious spread of HIV through systematic rape of Congolese women and the looting of underground riches.[37] The African Commission found the respondent States in violation of fifteen different provisions of the Charter,[38] urged the withdrawal of all troops from the Congo and noted with satisfaction progress in this direction, and recommended reparation be paid to victims of violations committed during the period of occupation by the respondents.

2.3 International Labour Organisation

Beyond the regional system, the inter-state procedure has been activated within the International Labour Organisation under Article 26 of the Constitution. Between 1960 and 1986, six complaints were initiated with four of them concerning the direct interests of the applicant state. These four concerned three complaints by France against Panama in relation to the maritime industry (concerning medical treatment for a seaman,[39]

[34] Ibid. para 1.
[35] Ibid. paras 164-165.
[36] *Democratic Republic of Congo v the Republics of Burundi, Rwanda and Uganda* 227/99 May 2003.
[37] Ibid. paras 1-7.
[38] Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23, ibid., final para.
[39] *Report by the Officers of the Governing Body ona complaint concerning the observance by Panama of the Shipowner's Liability (Sick and Injured Seaman) Convention, 1936 (no. 55), made by the govenrment of France*, 201st Session of the Governing Body, G.B. 201/23/17.

occupational safety on a ship,[40] and payment of wages for a crew[41]); and a complaint by Tunisia against Libya with respect to the deportation of Tunisian workers.[42]

In a fifth case, a Commission of Inquiry was established after Ghana's 1961 complaint that Portugal was violating the ILO Convention (No. 105) Concerning the Abolition of Forced Labour in its colonial possessions at the time, specifically Mozambique, Angola and Guinea.[43] The Commission found that Portugal had taken numerous steps, particularly *after* the litigation had commenced, to bring its legislation in line with the convention. However, it decided Portugal had not "implemented in full" its obligations and made a series of general recommendations including the prioritisation of support for the recently established labour inspections service.[44]

The sixth case also concerned forced labour but was taken the year later by Portugal against Liberia.[45] The case appears to be motivated by political considerations, particularly Portugal's frustration at the earlier complaint against it by an African State. Nonetheless, the ILO Governing Body chose to treat the case on objective grounds and established a Commission of Inquiry. The report found failures by Liberia in fulfilling the Forced Labour Convention of 1930 (No. 29).

Portugal's 'legal retaliation' arguably generated unintended conseuqneces at the sytmic level. It appears to have had a chilling effect on the willingness of other States to use the inter-state procedure, particularly for cases of *indirect* interest in labour rights violations. Moreover, the 'Article 26 procedure' provides an alternative form of dispute resolution.

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[40] Report of the Officers of the Governing Body on a complaint concerning the observance by Panama of the Officers' Competency Certificates Convention, 1936 (No. 53) and of the Repatriation of Seamen Convention, 1926 (No. 23) and the Food and Catering (Ships' Crews) Convention, 1946 (No. 68); Complaint concerning the observance by Panama of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), 207th Session of the Governing Body, G.B. 207/6/6 (Geneva, June 1978).

[41] Ibid. The latter two cases were considered together.

[42] *Complaint by the Government of Tunisia concenring the observance by the Libyan Arab Jamahiriya of the Protection of Wages Convention, 1949 (No. 95), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Equality of Treatment (Social Security) Convention, 1962*, G.B. 232/17/32 (Geneva, 1986).

[43] *Report of the Commission to Examine the Complaint Filed by the Govenrment of Ghana Concerning the Observance by the Govenrment of Portugal of the Abolition of Forced Labour Convention 1957 (ILO No. 105)*, 45 International Labour Office Official Bulletin 1-253 (Supp. II, 1962).

[44] Ibid. 234.

[45] *Report of the Commission to Examine the Complaint Filed by the Govenrment of Portugal Concerning the Observance by the Govenrment of Liberia of the Forced Labour Convention 1930 (ILO No. 29)*, 46 International Labour Office Official Bulletin 1-253 (Supp. II, 1963). For a detailed description of the case, see Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law (n. 10 above), pp. 285-8.

Here, the ILO Governing Body can instigate a commission of inquiry upon proposals by delegates (states, unions or employees). Since 1961, all commissions of inquiry have been activated in this manner, with recent referrals concerning freedom of association in Belarus (2003), forced labour in Myanmar (1996), and freedom of association in Zimbabwe (2010).[46]

2.4 International Court of Justice

The experience before the World Court reveals a similar pattern to the ILO, but with no clear bias towards a particular category of case. A number of judgments concern human rights violations brought by States with a direct interest: This includes *Bosnia and Herzegovina v Serbia and Montenegro (Genocide Case),*[47] *Democratic Republic of Congo (DRC) v Uganda,*[48] *Croatia v Serbia,*[49] *Diallo v. DRC,*[50] *Georgia v Russia*[51] and arguably *LaGrand Case (Germany v. United States of America)*.[52] In all cases was an inter-state application arguably an highly appropriate form of litigation for the type of violation alleged by the applicant State: In *LaGrand* and *Diallo*, it concerned individuals with no access to complaint procedures while in the other cases it concerned claims of violations against a large number of the population of the applicant State.

Surprisingly, a significant number of cases concern states seeking to defend the diffuse collective interests of all States parties to a human rights treaty. While there is often a partly a historical or regional explanation behind the identity of the applicant State, materialist explanations cannot explain only their instigation of contentious proceedings. These cases include *Liberia and Ethiopia v South Africa* (the performance of South

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[46] See C. Fenwick, 'The International Labour Organisation' in M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 591-612

[47] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), [2007] ICJ Rep p.43.

[48] [2005] ICJ Reports p. 26. (Ugandan forces violated a number of treaties while present on the territory of the Democratic Republic including the ICCPR, the African Charter on Human and Peoples' Rights, and the CRC).

[49] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412

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[51] *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Georgia v Russia)*, ICJ Reports 2011. The Court issued interim measure but later found it lacked jurisdiction: see, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70

[52] I.C.J. Reports (2001), p. 9; ILM (2001) 169. (Foreigners possess individual rights to consular assistance under the Vienna Convention on Consular Relations, which Germany also argued was a human right).

Africa under its mandate for South West Africa, including the social progress of its inhabitants),[53] *Australia and New Zealand v France* (concerning nuclear weapons),[54] and *East Timor* (*Portugal v Australia)* (concerning the respondent's negotiating of treaties with Indonesia that affected the right to self-determination of East Timor) and very recently *Belgium v Senegal* (failure to prosecute a former Chadian leader for ordering torture).[55]

Tellingly, in the judgment in *Liberia and Ethiopia v South Africa*, the Court found, controversially, that the applicants had no direct legal interest in the subject matter and declined jurisdiction. However, this standard was largely reversed in later judgments, in particular *Barcelona Traction,* where the presence of *erga omnes* obligations were acknowledged in both customary *and* treaty law.[56] Nonetheless, the judgment in *Liberia and Ethiopia v South West Africa* may have had a long-lasting chilling effect on the use of the Court for such indirect case. It is only in *Belgium v Senegal* do we see a recent and successful case of this nature.

There are likewise a significant number of recent cases where a multilateral institution makes the referral to the Court (so far the General Assembly, Security Council and WHO).[57] In the *Nuclear Weapons* case, the Court considered the legality of nuclear weapons in light of the right to life and health, finding that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" and that "the right not arbitrarily to be deprived of one's life applies also in hostilities".[58] In an another Advisory Opinion. the Court found that

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[53] *South West Africa, Second Phase, Judgment,* I.C.J. Reports 1966, p. 6.
[54] *Nuclear Tests (Australia* **v.** *France), Judgment,* I.C.J. Reports 1974, p. 253; *Nuclear Tests (New Zealand* v. *France), Judgment,* I.C.J. Reports 1974, p. 457.
[55] *East Timor (Portugal* v. *Australia), Judgment,* I.C.J. Reports 1995, p. 90.
[56] "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.* Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law …; others are conferred by *international instruments* of a universal or quasi-universal character." *Barcelona Traction, Light and Power Company, Limited (Second Phase), Judgment of 5 Feb. 1970, I.C.J. Reports 1970,* p. 3 (32). Emphasis added.
[57] Other than the two discussed in the paragrpah, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, p. 16.
[58] *Legality of the Threat or Use of Nuclear Weapons* (n. 25 above), paras. 29 and 25. By a slim majority it found "that the threat or use of nuclear weapons would generally be contrary to the rules of international law

the wall constructed by Israel in the Occupied Palestinian Territories violated the ICESCR (see discussion below).[59]

Pointedly, some commentators have greeted the ICJ's recent jurisprudence in human rights with high praise. Bjorge contends that the Court's 2010 *Diallo* judgment "marks a sea change" with the Court "forcefully" staking "its claim as an arbiter of human rights to be reckoned with".[60] Former ICJ judge Simma has proclaimed that the "human rights genie has escaped from the bottle",[61] pointing in particular towards the 2012 *Belgium v Senegal* judgment.[62] In a similar vein, Mads Andenas writes that:

> In *Diallo* it becomes much clearer how the open method the ICJ has adopted puts it at the top of the international law system. The development of customary international law by the (Court) is now much more likely to include human rights law, international trade law and other fields of international law which until recently seemed to fragment into autonomous regimes.[63]

Others are more reserved in their rhetoric but equally assured of the profound change.[64] Former President of the Court, Rosalyn Higgins, straightforwardly asserts that human rights are "routinely addressed in judgments of the Court"[65] and Wilde records the ICJ's transformation into a "domestic generalist court" with human rights-inclusive jurisdiction.[66] These positions form part of a broader new apology for the Court on its account of its greater engagement with diverse subjects of international law.[67] While this optimism is somewhat overstated at times,[68] it is worth noting the key and relevant jurisprudence.

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applicable in armed conflict" but that it could be lawful if a State's very survival was at stake (para. 105). It unanimously found a procedural duty "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control". Ibid.

[59] *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* , (2004) ICJ Reports 136, p.193.

[60] Bjorge (2011: 539, 540).

[61] Simma (2012: 25).

[62] Ibid. 22.

[63] Andenas (2012: 137).

[64] See, e.g., the more muted but consistently positive conclusions by Zybari (2008) on the new jurisprudence.

[65] Higgins (2007: 746).

[66] Wilde (2013: 645).

[67] See, e.g. the edited volume, Tams and Sloan (2013), and its concluding chapter.

[68] See M.Langford, 'The New Apologists: the International Court of Justice and Human Rights', *Retfærd* (2015), vol. 48, No. 1, pp. 49-78.

In the 2004 *Wall* Advisory Opinion, the Court was asked "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory".[69] The Court not only affirmed that the barrier was a violation of international human rights law[70] but referred *and* deferred to the jurisprudence of UN human rights treaty bodies and their findings concerning Israel.[71] Accordingly, it held that Israel possessed extraterritorial obligations under the ICCPR, ICESCR and the CRC due to its effective control in the Palestinian territories; and that the chosen route for the wall and its associated régime "gravely" infringed a number of rights of Palestinians" and could not be "justified by military exigencies or by the requirements of national security or public order".[72]

The importance of the Court's reasoning is underscored by Justice Higgins separate opinion. She recoils at the Court's all-too ready embrace of human rights treaties and their jurisprudence. While concurring with the invocation of the right to freedom of movement she finds the application of "programmatic" economic and social rights "strange";[73] and wonders whether it is appropriate for the Court to intrude in the application of all three covenants given that they possess specialist monitoring mechanisms.[74]

In the *DRC v Uganda* judgment of 2005, the applicant state was able to secure a merits judgment against the conduct of one of its neighbours troops on its territory.[75] It represents the first case in the history of the ICJ in which violations of human rights were explicitly mentioned in the *dispositif*, the operative provision of the judgment. Uganda, by the conduct of its armed forces, was found to have "committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population", "destroyed villages and civilian buildings", "trained child soldiers" and "incited ethnic conflict".[76]

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[69] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, 141.
[70] 127-131, 134. 136.
[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, para. 107-113.
[72] Ibid. Para. 137.
[73] Separate Opinion of Justice Higgins, I.C.J. Reports 2004, p. 207 (para. 27)
[74] She does have a fair point that the General Assembly risks exhibiting bias since only selected state parties to a treaty are affected by Advisory Opinions ICJ for special treatment. (para. 26, and also 27)
[75] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment*, I.C.J. Reports 2005, p. 168.
[76] It bears noting that the Court also upheld a counter-claim by Uganda for the maltreatment of Ugandan diplomats and other individuals on the Embassy premises but Justice Simma in a separate opinion was

In 2010, the Court delivered its judgment in *Diallo,* which is the most comprehensive in addressing human rights.[77] The case involved a Guinean national who settled in what is now the DRC in 1964. In 1974, Mr. Diallo founded what became an extremely successful import-export company, Africaire-Zaire but by the 1980s various business partners, particularly state institutions, refused to pay their debts, and in 1988 Mr Diallo found himself briefly imprisoned on charges (later withdrawn) of corruption. In October 1995, an expulsion decree was issued against him and after two further arrests and periods of detention he was expelled on 31 January 1996.

Importantly, the Court adopts a contextual approach to the burden of proof and places it on public authorities if they are best-placed to provide the evidence.[78] Moreover, the Court bases its findings of violation of protections against expulsion and the right to liberty on two human rights treaties ratified by the disputing states and draws on the relevant jurisprudence of the UN Human Rights Committee and the African Commission on Human and Peoples Rights.[79] The Court states that it should "place great weight to the interpretations" adopted by specialist bodies as the point is to achieve "the necessary clarity and essential consistency of international law".[80]

However, the court's approach is not all positive for human rights generally and social rights in particular. For example, the claim concerning the lack of food is brushed aside. According to the Court, Mr Diallo was able to rely on family relatives who had the "liberty" to visit him.[81] However, the UN Human Rights Committee has been emphatic on this point: In *Mukong v. Cameroon,* the Committee stated that "regardless of a State party's level of development" the UN Standard Minimum Rules for the Treatment of

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critical of the Court for failing to frame this as a human rights violation; as diplomatic protection was limited to nationals. The Court rejected the DRC's claim against Congo on jurisdictional grounds with only one dissent – but a separate opinion by five judges criticised the Court's reasoning for the future applications of human rights treaties – something that arguably came to haunt the court two years later in *Georgia v Russia* (see below).

[77] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment*, I.C.J. Reports 2010, p. 639.

[78] Paras. 53-56.

[79] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment*, paras. 63-85.

[80] Ibid. para. 66.

[81] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment*, para. 88.

Prisoners apply, which the Committee notes includes "provision of food of nutritional value adequate for health and strength".[82]

Finally, in its 2012 *Belgium v Senegal* judgment, the Court agreed with Belgium that Senegal had failed "to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed" by the former Chadian dictator Hissene Habre and "submit the case to the competent authorities for the purposes of prosecution".[83] Critically, the Court permitted Belgium to rely on the *erga omnes* dimension of the Convention Against Torture to prosecute the claim without needing to demonstrate a special interest in Senegal's compliance[84] – finally putting to rest the jurisdictional ghost of *South West Africa* and providing a valuable restatement of the broader interest that states can litigate in international adjudicatory procedures.

3. Drafting History of Article 10

The question of whether to include an inter-state procedure arose at various stages in the process that led eventually to the Optional Protocol. As early as in 1993, the CESCR rejected the idea of an inter-state procedure constituting the sole avenue for complaints under a future Optional Protocol. The Committee noted that inter-state procedures were invoked only in 'extremely rare' cases and in 'situations of major significance'.[85] Nonetheless, it conceded that should States show an increased willingness to use inter-State procedures in the future, such a mechanism could be an attractive means of resolving such disputes.[86] It was thus viewed as a potential complement to the individual complaints mechanism.

Yet, in 1997, the Committee refrained from recommending the insertion of an inter-State procedure in its draft Optional Protocol, which it submitted to the UN Commission on Human Rights for consideration. It acknowledged the existence of such mechanisms in other international human rights texts but cited the restraint posted by a double opt-in approach: it could only be invoked when both State parties to a potential complaint has

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[82] *Albert Womah Mukong v. Cameroon* (Communication No. 458/1991), Views of 21 July 1994, para. 9.3.
[83] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, para. 122.
[84] Ibid. paras. 69-70.
[85] UNGC, 'Status of preparation of publications, studies and documents for the World Conference: Contribution submitted by the Committee on Economic, Social and Cultural Rights', UN. Doc A/CONF.157/PC/62/Add.5, Fourth Session (26 March 1993), ibid. 52.
[86] Ibid. para. 53.

accepted the procedure. Even though the provision would provide additional means to address ESC rights, its non-usage in comparable international human rights conventions proved too a strong reason against its inclusion according to the Committee. It also observed that governments were wary of this provision, viewing it as a Pandora's Box.[87]

In the period, 1998-2001, following the submission of the draft protocol to the Commission on Human Rights, the Office of the UN High Commissioner for Human Rights (OHCHR) received comments by Member States on the topic. Amongst these responses, the issue of an inter-State procedure was only first mentioned in 2000. Croatia noted it in passing while discussing the proposed paragraph 3(b) regarding unreasonably prolonged international investigation [88] Prompted by this reference, Georgia recommended that discussions continue on the inclusion of inter-State procedures,[89] observing that that the Covenant principally concerned inter-State relationships and that a similar procedure was included in the ICCPR.

Moreover, in its 2001 report summarising comments from States and NGOs, the International Anti-Poverty Centre paid particular attention to the omission of the inter-State procedure in the draft protocol. Despite noting the infrequent usage under other conventions, the organisation spoke favourably of the procedure and suggested that it be included on an 'opt-in' basis, with the possibility to make reservations.[90] It argued that it was a tool for human rights protection and ensured textual parity between the ICESCR and ICCPR.[91]

In 2004, the open-ended working group commenced its deliberations on an Optional Protocol but the question of an inter-state complaints procedure was not raised until the second session in the following year. Notably, the former member of the Committee on the Elimination of Discrimination against Women emphasised that, although an inter-

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[87] Economic and Social Council, *Draft Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretary-General*, UN. Doc E/CN.4/1997/105, Fifty-third session (18 December 1996), paras. 13-14.
[88] Economic and Social Council, *Draft Protocol to the International Covenant on Economic, Social and Cultural Rights, Report of the High Commissioner for Human Rights*, UN Doc. E/CN.4/2000/49 (14 January 2000), apra. 10.
[89] Ibid. para 13.
[90] Economic and Social Council, *Draft Protocol to the International Covenant on Economic, Social and Cultural Rights, Report of the High Commissioner for Human Rights*, UN Doc. E/CN.4/2001/62 (21 December 2000) [39].
[91] Indeed, the origins of the Optional Protocol partly lie in the campaign for symbolic symmetry between the two covenants. See chapter 2 of this volume.

State procedure was not included in the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), it should not be excluded from the Optional Protocol for ICESCR.[92] Moreover, the Ethiopian representative expressed support for the idea, noting its applicability to obligations regarding international cooperation in the Covenant.[93]

The Chairperson-Rapporteur, Catarina de Albuquerque, took up the suggestion in her analytical report, which was presented at the third session. She noted that inter-State procedure could serve as a possible means whereby the treaty body could offer its good offices and assist States to come to a friendly solution. This would apply between States that had made the required declaration and in relation to matters of international cooperation and assistance.[94] Netherlands responded by stating that international cooperation should be based on "genuine dialogue, partnerships and technical cooperation programmes" and "strongly doubted whether an inter-state complaints mechanism was compatible with this notion".[95] Nonetheless, the Rapporteur included the inter-State procedure in Article 9 of a draft optional protocol, which she presented at the 4th Session.[96] The wording was taken primarily from three other treaties: ICCPR (Article 41); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 76); and the Convention Against Torture (Article 21).[97] The Rapporteur sought to explain that the inter-State procedure had received little attention during the drafting process because it had never previously been used under international human rights instruments.[98]

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[92] Economic and Social Council, *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, Chairperson-Rapporteur Catarina de Albuquerque*, UN Doc. E/CN.4/2005/52 (10 February 2005) para. 39.
[93] Economic and Social Council, *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, Chairperson-Rapporteur Catarina de Albuquerque*, UN Doc. E/CN.4/2005/52 (10 February 2005), para 105.
[94] Economic and Social Council, Analytical Paper by the Chairperson-Rapporteur Catarina de Albuquerque', UN Doc. E/CN.4/2006/WG.23/2 (30 November 2005) [34].
[95] Economic and Social Council, *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, Chairperson-Rapporteur Catarina de Albuquerque*, UN Doc. E/CN.4/2006/47 (14 March 2006), para. 81.
[96] Economic and Social Council, *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Prepared by the Chairperson-Rapporteur Catarina de Albuquerque*, UN Doc. A/HRC/6/WG.4/2 (23 April 2007).
[97] Ibid. para. 31.
[98] Ibid. para. 30.

4. An Overview of the Procedure

4.1 Criteria

A close reading of Article 10 reveals that only two primary criteria must be fulfilled to allow inter-state complaints. First, and as noted earlier, both the State pursuing the inter-State complaint procedure and the State against which the communications are directed must both have "made a declaration recognizing in regard to itself the competence of the Committee" to "receive and consider communications". Of the first fifteen states which ratified the Optional Protocol, four have made such a declaration with regard to Article 10.[99]

Secondly, the state offering communications must claim "that another State Party is not fulfilling its obligations under the Covenant." In one respect, it is a public interest or *actio popularis* mechanism: the complainant State is not required to demonstrate that they have suffered direct harm.[100] However, Kamminga has argued, with reason, that this description is an inaccurate, a poor juxtaposition of domestic standing rules to the international arena. Instead, within the context of a multilateral treaty with interlocking obligations, a State suffers an "injury" if another state fails to comply with its obligation – it is the common form of *locus standi*,[101] a position confirmed in the case law discussed in Section 2 above. In any case, the wording corresponds with similar provisions under the ICCPR and CAT and creates the potential for the broad use of Article 10. It would cover the full gambit of State obligations under the Covenant, which are discussed in chapter 7 of this volume. This would include duties both to progressively realize the

[99] Belgium, El Salvador, Finland and Portgual. For an updated list, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en

[100] For a use of this terminology, e.g., see Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law (n. 10 above), p. 289

[101] "Bringing a claim in response to an alleged infringement of an international human rights obligation and submitting it for adjudication to an international tribunal may well be in the general interest. However, such action cannot be taken just by any state, but only by states bound by the same obligation as the one infringed by the offending state. The applicant state derives its *locus standi* not from an i actio popularies, but simply from suffered an injury to its own rights". Kamminga, *Inter-State Accountbaility for Violations of Human Rights* (n. 10 above), pp. 176-7. For a discussion of standing in non-treaty-based cases, see his discussion at pages 187-189. See also E. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', *American Journal of International Law*, Vol. 96, No. 4 (2002), pp. 798, at 805-806.

rights contained under the Covenant and those of a more immediate nature regarding non-discrimination, the obligation to take steps and ensure a minimum core of the rights.[102]

4.2 Extra-territorial obligations

Significantly, *where* the alleged violations take place and *against whom* are not addressed in Article 10. This stands in contrast to the individual communication mechanism, which is limited to those who fall within the jurisdiction or territory of the contravening State.[103] When this omission is read together with the substantive treaty, it becomes clear that the inter-State procedure opens up for a broad extra-territorial application. This is because Article 2(1) of the ICESCR, which set out the cross-cutting state obligations, also makes no mention of either jurisdictional or territorial limitations to the rights therein. To the contrary, it provides that State parties shall achieve "the full realization of the rights recognized in the present Covenant" both "individually and through *international* assistance and co-operation" (Emphasis added). Moreover, 'international cooperation and assistance' is mentioned several other places in the Covenant, [104] a feature which creates an overall positive requirement for States to exercise international cooperation and assistance in complying with Covenant obligations.[105]

As such, a State filing communications need not limit the alleged violations to actions (or inactions) occurring on a respondent States' territory or within their jurisdiction. Instead, communications may be based on alleged violations: occurring within the applicant State's territory or jurisdiction; the territory or jurisdiction of the respondent State; or within the jurisdiction or territory of a third State or international space. It also creates the potential for the application of the whole panoply of extra-territorial obligations, set out more fully in chapter 7 below. Where the actions of a State have direct or incidental effects on another State's territory or nationals, or individuals or entities under its jurisdiction and subject to its control or influence have such effects, or potentially that a

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[102] *General Comment 3, The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) (CESCR).
[103] Article 2, Optional Protocol.
[104] ICESCR, Articles 11(2), 15(4), 22 and 23. For an in-depth over of the different extra-territorial dimensions of the ICESCR, see the discussion in chapter 7 of this volume and M. Langford, F. Coomans and F. G. Isa, 'Extraterritorial Duties in International Law' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 51-113.
[105] C. Courtis and M. Sepúlveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol?', *Nordic Journal of Human Rights,* Vol. 27 No. 1 (2009), pp. 54-63, at 64.

State fails to use its capacity, as required by the ICESCR, to adopt foreign and development policies consistent with the Covenant, can another State bring a complaint concerning the lack of compliance.

Viewed from the perspective of extraterritorial application, the inter-State mechanism thus amasses considerable potential in terms of reach. This provides not only an avenue of accountability but also an important forum in which to develop jurisprudence on the nature of State's extra-territorial obligations. Indeed, this configuration of protocol and substantive treaty has led Salomon to boldly state that:

> In light of the type of international violations prevalent in this area, inter-State communications under the Optional Protocol (once it enters into force and receives declarations by State parties granting competence to CESCR) may prove to be more numerous and valuable than has been the case under other human rights treaties where States have complained only rarely and either of the treatment of the applicant State's nationals within the respondent State's jurisdiction, or of another State's treatment of its own nationals.[106]

Salomon's optimism regarding the usage of the inter-State procedure for extra-territorial obligations is based on the likelihood that "we could see communications from developing States claiming that developed States, through their conduct, are failing to honour their negative obligations to refrain from violating socio-economic rights abroad" and she gives examples of "biofuels and subsidies, or failing to comply with their positive obligations of international assistance and cooperation, for example, by limiting access to their patented technology and/or medicines essential to the realisation of the right to health of people in other countries." [107] As Craven also observes, "much of the responsibility for poverty and deprivation in the world lies with the developed States' approach to international trade and the economic order. In that sense, responsibility [for poverty and deprivation] should be placed upon the international community and not merely confined to the 'victim state'."[108]

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[106] M. Salomon, 'Deprivation, Causation, and the Law of International Cooperation' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 259-297, at 292.
[107] Ibid.
[108] Ibid.

However, it is far from clear whether a *single* respondent state can bear the responsibility for all states, or a select group such as developed states, for all aspects of extra-territorial obligations. This is both a question of *law* and a question of *procedure*. As to law, the specific extra-territorial obligation to fulfil of a *single* developed state does not require the direct support for ESC rights in a *particular* underdeveloped state. As chapter 7 of this volume makes clear, the obligation is more diffuse and must be seen in connection with the similar obligations carried by other States. However, it is not inconceivable that some aspects of the obligation to fulfil are justiciable. For instance, a developed State's aid or development cooperation policy could be challenged on more indirect grounds by any State, on issues such as the quality of development cooperation and assistance or a significant and unjustifiable retrogression in its level.[109]

As to procedure, the thorny question of division of responsibility may arise for all forms of extra-territorial obligations, for example a territorial State and an extra-territorial State may jointly participate in a violation.[110] If other States are involved in an alleged violation of the ICESCR, the named respondent State may claim that the complaint cannot proceed as other parties also bear responsibility or have an interest in the case. Nonetheless, the International Court of Justice has recognised that not all relevant parties to a dispute need be joined, if the liability of the respondent State can be determined in their absence: "The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case."[111] However, the Court has also held in *Portugal v Australia* that litigation cannot proceed if the question of liability is directly dependent on, or a "prerequisite" for, the determination of the responsibility of another State.[112]

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[109] On this latter argument, see A. Khalfan, 'Division of Responsibility amongst States' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 299-331.

[110] On different scenarios for division of responsibility, see Khalfan, Division of Responsibility amongst States, ibid.; and W. Vandenhole and W. Benedek, 'Extra-trritorial Human Rights Obligations and the North-South Divide', in Langford et. al. *Global Justice, State Duties*, ibid., pp. 332-365.

[111] *East Timor (Portugal* v. *Australia), Judgment,* I.C.J. Reports 1995, p. 90, at para. 34. In *Certain Phosphate Lands in Nauru (Nauru* v. *Australia),* it specifically stated that, "In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application" and "the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim". This was the case even if the judgment had "might well have implications for the legal situation of the two other States concerned" (para. 55).

[112] *East Timor (Portugal* v. *Australia), Judgment,* I.C.J. Reports 1995, p. 90, para. 35. In the preceding paragraph, the Court framed the question as one which would require "a determination that Indonesia's

4.3 Procedure

The procedure for submitting an inter-State complaint is set out in subparagraphs (a) to (h) of Article 10 and is further supplemented by the Committee's Rules of Procedure.[113] The complaining State must bring the matter in question to the attention of the subject State by written communication. The respondent State is afforded three months to provide the complainant State with an explanation, clarification of the matter and, to the extent possible, any reference to procedures or remedies taken or available.[114] If within six months of receiving the initial communication, the matter remains unsettled to the satisfaction of both parties, either State has the right to refer the matter to the Committee upon notice of the Committee and the other party.[115]

It is worth flagging that these pre-adjudication provisions remove the possibility for the OP-ICESCR to be used in sudden emergency or crisis situations with no pre-history of negotiation. This was underscored by the International Court of Justice's 2011 judgment in *Georgia v Russia*. The majority of ten judges found that the Court lacked jurisdiction to consider Georgia's claim that Russia was supporting ethnic cleansing in the South Ossetia region in violation of the Convention on Racial Discrimination (CERD).[116] Georgia had failed to demonstrate that it had made a "genuine attempt to negotiate" before it could trigger the Court's jurisdiction, as provided for in the CERD.[117] The decision is certainly open to criticism. The Court does not discuss the purpose of the Convention, which is to make effective the prohibition on racial discrimination, and the dissenting opinions note that jurisdiction could have been found from a straightforward

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entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor." This would mean that "Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent." According to the Court "Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (Monetary Gold Rernoved from Rome in *1943,* Judgment, *I.C.J.* Reports *1954,* p. 32)."
35. The Court concludes that it cannot, in this case, exercise the juris- diction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent.

[113] *Rules of Procedure of the CESCR under the Optional Protocol*, UN. Doc. E/C.12/49/3 ('Rules of Procedure').

[114] Article 10(a), Optional Protocol.

[115] Article 10(b), Optional Protocol.

[116] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment*, I.C.J. Reports 2011, p. 70.

[117] The test is set out in para. 159.

textual reading of the relevant clause.[118] Nonetheless, the majority's concern with pre-adjudication provisions for amicable settlement of disputes suggests these OP-ICESCR provisions should be ignored at a State's peril.

After the referral, the Committee must ascertain whether:

a) All parties to the communication have made a declaration in accordance with article 10 of the OP.

b) The time limit proscribed in article 10 (a) has expired; and

c) All available and effective domestic remedies have been invoked and exhausted in the matter or that application of such remedies has been unreasonably prolonged.[119]

Thus, when referring the matter to the Committee the complaining State party should present information regarding adherence to subparagraphs (a) and (b) of Article 10, including the text of the initial communication, as well as steps taken to exhaust domestic remedies or any other international investigation or settlement resorted to by the parties in question.[120]

Subject to the requirements under Article 10(c) regarding the exhaustion of domestic remedies, the Committee under subparagraph (d) shall make available its good offices to the parties involved with the view of reaching a friendly solution regarding the subject matter of the communication. The Committee may, if deemed appropriate establish an ad hoc conciliation commission.[121]

When examining a communication made under Article 10, the Committee shall hold closed meetings.[122] However, the Committee, upon consultation with the parties, is authorised to send communiques for use by the media and the general public regarding its activities under Article 10.[123] During its examination, the Committee can call upon the States concerned to supply any relevant and additional information.[124] The State parties

[118] The Court is also very accommodating of the belligerent attitude of the Russia towards negotiation. For a discussion of the possible underlying motives of the Court, see Crawford (2012).
[119] Article 10, Optional Protocol; Rules of Procedure, 42.
[120] Rules of Procedure, 37.
[121] Rules of Procedure, 43.
[122] Article 10(e), Optional Protocol.
[123] Rule 40.
[124] See Article 10(f), Optional Protocol; Rule 44.

shall have the right to be represented when the matter is under consideration by the Committee. Parties may also make oral and written submissions.

4.4 The Committee's Views and Confidentiality

After notice of the communication and subsequent examination, the Committee must submit a report. Should a friendly solution have been reached under subparagraph (d), the Committee is to confine its report to a brief statement of the facts and the solution reached by the parties.[125] However, in the absence of reaching a friendly solution, the Committee's report shall include the relevant facts as well as a record of the written and oral submissions of the parties involved. [126] However, the Committee may only communicate its "views" on the complaint to the parties.

This imposition of confidentially on the Committee's findings represents the most significant limitation of the inter-state procedure alongside the requirement of double opt-in. Such secrecy is a hallmark of earlier and highly constrained quasi-judicial procedures. Prominent examples include the 1503 procedure under the Human Rights Council[127] and the first phase of the National Contact Points under the OECD Guidelines on Multinational Enterprises.[128] The logic and premises of these procedures is grounded in diplomatic negotiation and consensual arbitration as much as independent adjudication. Yet, it is notable that even the latter mechanism was revised in 2011 to allow OECD Contact Points to publicise their decisions.[129] There was arguably a missed opportunity in 2008 to adopt a similar approach under the Optional Protocol.

5. Conclusion: The Potential Use of the Procedure and Limitations

The Optional Protocol provides the basis for States and not just individuals to initiate legal action before the CESCR to ensure compliance with the Covenant. This covers,

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[125] Article10(h)(i), Optional Protocol.
[126] Article 10(h)(ii), Optional Protocol.
[127] Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970.
[128] OECD Guidelines for Multinational Enterprises, Revision of 27 June 2000. See discussion in J. Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises', *Hanse Law Review,* Vol. 4 No. 1 (2008), pp. 71-100.
[129] OECD Guidelines for Multinational Enterprises, Revision of 25 May 2011, Part C: 1-3. For an example of such a decision, see *Shakti & Ors. v. Posco (South Korea), ABP/APG (Netherlands) and Norwegian Bank Investment Management (Norway)* Decision, 27 May 2013 (OECD National Contact Point - Norway). However, the reform of the 1503 procedure by the UN Human Rights Council did not address confidentiality: see Human Rights Council Resolution 5/1, para. 104 ("The reports of the Working Group on Situations referred to the Council shall be examined in a confidential manner, unless the Council decides otherwise.).

firstly, cases of a State's direct interest in ESC rights, such as violations committed against their citizens or residents, in circumstances where those individuals may be blocked in launching litigation for legal, political or economic reasons. Indeed, "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."[130] Secondly, it permits litigation by States of cases that draw solely on broader collective or global interests in seeking to press another State to respect, protect, or fulfil the Covenant rights.

The inter-state complaints procedure thus provides a potentially effective tool in the *enforcement* of obligations under the Covenant and an additional means to develop concrete legal *jurisprudence*. The procedure is notable for its non-inclusion of a jurisdiction clause which opens up considrable space for extra-territorial litigation, given the global orientation of the ICESCR.

Moreover, while the decisions of the Committee are not binding, the legalisation of an inter-State dispute may provide a means for its effective realisation. Prebensen notes the role of the European Court of Human Rights in inter-State disputes and its potential to alleviate rather than exacerbate political differences between States. For instance, in the case of *Ireland v UK*, final adjudication by a Court provided a neutral view which was effective in reaching a solution.[131] Moreover, in the ICJ case of *Belgium v Senegal*, compliance has been rapid and significant. Four days after the judgment, Senegal and the African Union agreed to establish a special court in the Senegalese justice system with AU-appointed judges[132] and within a year prosecutors and experts had visited mass graves and taken statements from 797 direct and indirect victims and 14 key witnesses.[133]

Thus, the use of the inter-state procedure can have the effect of removing a matter from the political arena by tasking a third non-political party with the responsibility for a solution. While the decisions of the Committee are not binding (unlike the European Court's), Leckie's analysis of inter-State litigation before quasi-judicial procedures is

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[130] Courtis and Sepúlveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol?' (n. 105 above), p. 59.
[131] Prebensen, 'Inter-State Complaints under Treaty Provisions' (n. 17 above), 460. He argues also that a final and legally binding judgement by the Court not only carries more weight but leave less room for discretion at the implementation stage
[132] Human Rights Watch, http://www.hrw.org/news/2012/03/09/chronology-habr-case
[133] Ibid.

cautiously optimistic. It reveals a significant number of cases in which States reformed legislation during the course of litigation or reached a friendly settlement.[134] However, there is a major debate on the extent of compliance with States with human rights judgments of the ICJ, which are binding.[135]

There of course are a number of clear limitations to the inter-State procedure. These include the requirement that both disputing States have made an Article 10 declaration; the low numbers of declarations; the partial confidentiality of the procedure; and the challenges in pushing States to file complaints. As Courtis and Sepúlveda note with respect to the latter, "victims are not in a position to require the filing of a communication, which is left to the discretion of the State…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."[136] If the inter-State procedure is to come to life, civil society organisations and a number of States will have to work to overcome these significant limitations. The absence of claims within the international human rights treaty system makes ones doubtful as to the likely use of the prodcecure but the more frequent occurrence of inter-State human rights litigation in other international law forums reveals its underlying potential.

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[134] Leckie, 'The Inter-State Complaint Procedure in Interntional Human Rights Law (n. 10 above).

[135] Cf. T. Ginsburg and R. McAdams, 'Adjudicating in Anarchy: An Expresive Theory of International Dispute Resolution', *William and Mary Law Review,* vol. 45 (2004)**,** pp. 1229-1330 and A. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', *European Journal of International Law,* 18 (2008)**,** pp. 815-852.

[136] Courtis and Sepúlveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol?' (n. 105 above), p. 59, n. 29.

III. SUBSTANTIVE INTERPRETATION

6. Reasonableness and Article 8(4)

Article 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.

Bruce Porter[*]

1. Introduction

Article 8(4) is arguably the heart and pulse of the OP-ICESCR.[1] It is a unique provision that introduces a substantive criterion of 'reasonableness', not contained in the ICESCR and which was developed in response to the central problematic and historic debates regarding the justiciability of economic, social, and cultural [ESC] rights claims. It provides direction as to how the Committee should adjudicate claims of violations resulting from States' failures to adopt reasonable measures to realise Covenant rights, and addresses the critical relationship between individual communications and broader issues of socio-economic policy. At the same time as responding constructively to traditional concerns about the adjudication of ESC rights claims, article 8(4) also remains true to the broader purpose of the OP-ICESCR, which is to provide access to justice and ensure fair and competent adjudication of claims engaging all violations of ESC rights. The result of years of debate, article 8(4) reflects a hard-won consensus. It affirms that access to justice, in cases where ESC rights violations are linked to failures by states to adopt positive measures, requires a robust standard of review of the steps taken by the State Party to realize Covenant rights, based on reliable evidence from a wide range of sources and a clear demarcation of the adjudicative role of the Committee from the policy design and implementation role of the State.

Understood within the context of its drafting history and the debates surrounding the

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[*]Director, Social Rights Advocacy Centre.

[1]UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Sixty-third session, 2008), U.N. Doc A/RES/63/117 (2008).

Open-Ended Working Group mandated to draft the OP-ICESCR, article 8(4) should be read as a clear rejection of attempts to limit the justiciability of claims relating to the substantive obligations of realising rights under article 2(1), or to demarcate particular spheres of state policy-making for greater deference or a reduced level of scrutiny. Article 8(4) aims to ensure that claims under the OP-ICESCR actually provide a new impetus for resolving systemic violations of ESC rights linked to poverty and social exclusion, at the same time as ensuring that individual claimants receive full and fair hearings into their individual circumstances. Recognising the valuable role of individual rights claims in bringing to light the dignity interests and human rights values at stake in socio-economic policy choices lays the groundwork for a new dialectic between rights claims, and policy design and implementation. The true effectiveness and transformative potential of the OP-ICESCR will depend, to a great extent, on how the Committee interprets and applies the directives contained in 8(4) to this dialectic.

Concerns surrounding the creation of an ICESCR complaints mechanism comparable to the First Optional Protocol to the ICCPR have historically focused on the potential for alleged violations of the ICESCR to engage with positive obligations on States to comply with article 2(1) of the ICESCR: the duty to 'take steps ... 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.'[2] Similar concerns also predominated during the debates over the OP-ICESCR at the Open-Ended Working Group. States opposed to the drafting of an Optional Protocol at the outset argued that the positive obligations on governments to adopt programs, enact legislation, and allocate resources necessary to implement rights in a manner that is commensurate with institutional and economic capacity are suited to a periodic review procedure—based on a dialogue between independent experts and State delegations — rather than to human rights adjudication by way of an individual petition procedure. In subsequent debates about the scope of the OP-ICESCR and the standard of review, a central issue was whether approaches to formal adjudication of individual civil and political rights claims could be applied to adjudicating ESC rights claims. States and organisations supportive of a comprehensive Optional Protocol argued for a less restrictive approach to rights adjudication, in which not only discrete state actions would

[2]Ibid., Article 2(1).

be reviewable, but also more general failures to act to implement policies and enact legislation necessary for the realisation of rights. The primary hurdle to drafting and implementing an OP-ICESCR was therefore not simply to extend dominant models of judicial review and rights adjudication developed in the civil and political rights arena into the socio-economic domain, but to reconceptualize adjudication so as to do justice to claims in a new terrain.

The relative dominance of civil and political rights in human rights litigation has encouraged a particular approach to rights adjudication. Traditional approaches to the adjudication of civil and political rights have tended to limit the role of adjudicators to reviewing state action by determining whether particular provisions or actions violate individual rights. Courts and other adjudicative bodies have thus been viewed primarily as referees of state action, charged with deciding whether particular actions are 'out of bounds' or contrary to the rules. This prevailing paradigm has made courts and human rights bodies reluctant to engage with human rights violations linked to states' failures to legislate or act in order to protect or ensure rights or to the broader transformative goals of social and economic human rights. [3]

This negative rights bias has distorted human rights adjudication in the direction of those rights claimants whose rights have been infringed by state actions, at the expense of those whose rights require positive measures, such as those living in poverty or without adequate food, housing, or access to healthcare or education. ESC rights violations, of course, do not always result from failures to take positive measures to realise rights as required under article 2(1). They may also result from discrete and identifiable state action, such as forced evictions or discriminatory exclusion of disadvantaged groups from socio-economic benefits. Similarly, civil and political rights violations may result from failures of states to take positive measures to ensure an independent judiciary, fair trials within a reasonable time, or to remove obstacles to equality and non-discrimination facing disadvantaged groups. It is now well accepted that the positive/negative rights dichotomy is not a viable or coherent distinction between ESC rights and civil and political rights. Nevertheless, the historic step forward in the adoption of a comprehensive OP-ICESCR lies in the recognition that adjudication and remedies must be made

[3] Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the Canadian Charter" in Helena Alviar García, Karl Klare and Lucy Williams (eds), Social and Economic Rights in Theory and Practice: Critical Inquiries (London and New York: Routledge, 2014)

available for violations of ESC rights resulting from states' failures to meet their obligations as articulated in article 2(1). Achieving that purpose meant directly confronting a prevailing bias in favour of negative rights-oriented adjudication and challenging those who wished to restrict the scope of the OP-ICESCR to the more traditional types of claims. The challenge facing the drafters of the OP-ICESCR was to correct the bias of prevailing rights adjudication in order to engage directly with violations emanating from state failures to take appropriate measures, while at the same time maintaining a clear distinction between the adjudicative role of courts or human rights bodies on the one hand, and the role of states to enact policy and implement programs on the other. Article 8(4) is the response of the drafters to that challenge.

Many of the most critical violations of ESC rights, affecting the most marginalised of groups, result from states' failures to comply with the obligation to take appropriate measures to realise Covenant rights by putting into place plans, policies, and programs that will implement rights over time. The ability of the Committee to adjudicate and remedy claims addressing these critical violations under the OP-ICESCR is thus critical to ensuring access to justice for victims of the most widespread and egregious violations. If the OP-ICESCR were to focus primarily on challenges to discrete provisions, such as discriminatory exclusions from existing social programs or state action leading to homelessness through forced evictions, and leave the decisions regarding the adoption of legislative or programmatic responses to widespread hunger and poverty to the broad discretion of states, the OP-ICESCR would only provide access to justice for complaints that generally fall within the scope of existing civil and political rights complaints mechanisms. The critical exclusions of ESC rights from adjudication that the adoption of the OP-ICESCR was designed to correct would be allowed to continue. Committing to a comprehensive approach that enables rights claimants to address these systemic issues, however, raised inevitable questions about how to ensure competent and effective adjudication of complex policy issues.

The years of debate over the drafting of the OP-ICESCR ultimately produced a consensus that a procedure designed to ensure access to justice for victims of violations of ESC rights must place squarely within its scope the violations of rights that emanate from states' failures to adopt positive measures to realise rights including, where appropriate, legislative measures and budgetary allocations. The idea of incorporating a reference to a standard of review for the assessment of compliance with article 2(1) may have

originated, at least for some states, from a skepticism about the justiciability of obligations of progressive realization, but in the end 8(4) served the opposite purpose – to affirm that positive measures to implement ESC rights were very much within the proper scope and purview of the new complaints procedure. Article 8(4) recognizes the importance of this aspect of the Committee's new mandate and gives direction to the Committee about how it should assess compliance with the substantive obligations under article 2(1) in the context of the examination of communications.

2. The Drafting History of 8(4)

2.1 The Comprehensiveness Challenge

The wording of article 8(4) was a product of final day negotiations, at which time the question of the proper standard of review with respect to article 2(1) of the ICESCR threatened to dissolve consensus over the final draft. The resolution achieved under the pressure of final negotiations, however, drew on a long process of debate, discussion, clarification, and consensus-building.

Discussions at the Open-Ended Working Group surrounding the drafting of the Optional Protocol invariably circled around the issue of the justiciability of claims engaging with states' positive obligations under article 2(1). It became clear early on that states that were either hostile to, or skeptical about the justiciability of ESC rights would play a significant role in the negotiations, even though most had no intention of ratifying the OP-ICESCR. States such as the USA, China, Canada, Australia, and the UK waged their battle against justiciability in three stages: firstly, they opposed the project of drafting a complaints procedure for the ICESCR, arguing that the focus should be on periodic review; secondly, after it became clear that an OP-ICESCR would be drafted, they attempted to limit the scope of the Committee's adjudication under any complaints procedure to more traditional areas of civil and political rights adjudication, such as non-discrimination, or by providing ratifying states with the option of identifying what components of the ICESCR would be covered; and finally, after consensus formed for a comprehensive approach that would not allow for the exclusion of particular rights or components of rights, they advocated for a reduced level of scrutiny and a general deference to states' policy choices in the adjudication of communications engaging article

2(1) and other positive obligations linked to budgetary allocations or legislative measures.[4]

The first meeting of the Open-Ended Working Group in 2004 made it clear that the adoption of a comprehensive complaints procedure ensuring access to justice for violations of ESC rights was far from assured. Some delegations expressed doubts as to whether all economic, social, and cultural rights were equally justiciable. The tripartite typology of obligations, according to which states parties have an obligation to respect, protect, and fulfill economic, social, and cultural rights was frequently invoked as a possible basis for limiting the scope of the complaints procedure by excluding at least some components of the obligations to fulfill from the scope of the procedure.[5] Concerns were expressed by some states about possible interference with budget decisions and policymaking,[6] and others questioned the Committee's competence to review states' social policy to determine violations.[7] A number of delegations proposed an 'à la carte' approach that would allow each state to select only those rights or components of rights that it considered justiciable.[8] Many other delegations, however, favoured a comprehensive approach arguing from the outset that an Optional Protocol should cover all substantive rights contained in the Covenant, and expressing concern that proposals for limiting the scope of the Optional Protocol would deny effective remedies to victims of the most serious violations.[9] It was clear that if the Working Group were to proceed

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[4]Inter-American Institute of Human Rights, International Commission of Jurists, 'Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' English edition, 2010 at 81, Online: http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf.

[5]Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the first session* (First session, 2004), U.N. Doc E/CN.4/2004/44 at paras. 57-66 (2004).

[6]Ibid., para. 22.

[7]Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the second session* (Second session, 2005), U.N. Doc E/CN.4/2005/52, para. 32 (2005).

[8]Working Group, *Report of the first session* (n. 5 above), at paras 24 and 65; Working Group, *Report of the second session* (n. 7 above), at paras. 15, 17, 87, 101-2, 109; Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the third session*, (Third session, 2006), U.N. Doc E/CN.4/2006/47 at paras. 30 and 111 (2006); Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the fourth session* (Fourth session, 2007), U.N. Doc A/HRC/6/8 at paras. 36-7 (2007); Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the fifth session* (Fifth session, 2008), U.N. Doc A/HRC/8/7 at paras. 9, 146 and 226 (2008).

[9] UNCESCR, *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* (n. 5 above), at paras. 65-6.

with drafting at that time, there was a serious risk of an OP-ICESCR that severely limited the mandate of the Committee to engage with the most substantive claims engaging obligations under article 2(1).

2.2 The Emergence of Reasonableness

A fresh breeze of hope was felt at the second session of the Working Group held in 2005. At the outset of the meeting Louise Arbour, the U.N. High Commissioner for Human Rights, spoke to the prevailing concerns that threatened this project, about which she had expressed a strong personal commitment. Drawing on her experience as a judge, including as a Justice of the Supreme Court of Canada, she introduced the concept of reasonableness as a potential resolution to the impasse confronting the Working Group on the issue of justiciability of positive measures, in a manner that drew on familiar concepts from civil and political rights adjudication:

> From my own experience of working with courts and tribunals, I know how delicate the issue of separation of powers can be and how important it is to acknowledge the connections between legal and political processes without blurring the lines that must separate them. However, reviewing claims related to social, economic and cultural rights is not fundamentally different from the functions involved in the review of petitions concerning other rights. As for normal judicial review functions, the key is often in examining the 'reasonableness' of measures adopted by each State - given its specific resources and circumstances - by reference to objective criteria that are developed in accordance with standard judicial experience and with the accumulation of jurisprudence. A petition system at the international level can help provide guidance for the reasonable interpretation of universal norms in the provision of remedies at the domestic level. In many cases, it can also serve to establish if there is already the effective or appropriate implementation of existing laws and policies, rather than to determine the reasonableness of such laws and policies.'[10]

The High Commissioner returned to the theme of reasonableness in subsequent addresses to the Open Ended Working Group. In 2006, she explained to delegates that issues of budgetary allocation are not beyond the competence of

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[10] Louise Arbour, UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour High Commissioner for Human Rights to the Open-Ended Working Group established by the Commission on Human Rights to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights* (Second session, 2005).

courts or adjudicative bodies to review, suggesting that the Covenant 'requires States to use limited resources 'reasonably' and in a non-discriminatory manner'—and to be held accountable for doing so.

> The concept of 'reasonableness' of State action is a well-known legal concept and long used in adjudication of civil and political rights. The growing body of jurisprudence at the national and regional levels illustrates that it can be similarly employed to assess the extent to which States respect their obligations in the area of economic, social and cultural rights. Such rights might not be fully achievable for all on an immediate basis, yet they remain rights. The obligations of States in this domain can be fully enforced while taking into account their resource constraints - and judges have an important role to play in this regard.[11]

The approach suggested by the High Commissioner resonated with emerging domestic jurisprudence from South Africa and elsewhere. Subsequent discussions at the Open-Ended Working Group, and in various other fora on the justiciability of ESC rights, focused more attention on the reasonableness approach proposed by the High Commissioner and others, and began to generate more support for the drafting of a complaints procedure. Growing support for recognising the justiciability of ESC rights led the Human Rights Council, in June of 2006, to change the mandate of the Open-Ended Working Group to commence negotiating the text of an Optional Protocol.

In response to the new mandate, the Chairperson convened a meeting of international experts and, on the basis of their advice, prepared a first draft of an Optional Protocol for the consideration of the Open-Ended Working Group. It was in this draft that a reasonableness standard was first proposed:

> 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.[12]

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[11] Louise Arbour, UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended WG OP ICESCR* (Third session, 2006).

[12] *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

At this stage of the process, however, there was still no consensus in support of a comprehensive approach to the complaints procedure.[13] The states opposed to the OP-ICESCR continued to press on all fronts to limit justiciability. A provision remained in square brackets in the text providing for 'a la carte' options[14] to permit states not only the exclude particular rights from the complaints procedure, but also to exclude the obligations to progressively realise rights as set out in article 2(1).[15] A parallel campaign was initiated by the opposing States to weaken the standard of reasonableness review proposed in the Chairperson's first draft. [16] States such as Canada, the UK, Australia, Poland, China, and the United States 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.[17] They also proposed the substitution of a standard of 'unreasonableness' for the standard of 'reasonableness'.[18] These proposals were linked to affirmations that states should be free to decide for themselves the 'appropriate policy measures and allocation of its resources in accordance with domestic priorities'.[19] A subsequent draft included bracketed proposals replacing reasonableness with 'unreasonableness' and directing the Committee to 'take into account the [broad] margin of appreciation of the State party to determine the optimum use of its resources'.[20] However, delegations which had been more supportive of the Optional Protocol from the beginning generally opposed these proposals.[21]

2007.

[13] Catarina de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights- The Missing Piece of the International Bill of Human Rights', *Human Rights Quarterly* Vol.32, No.1 (2010) pp.144-178, at 158.

[14]UN Committee on Human Rights, *Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Sixty-second session, 2005), U.N. Doc E/CN.4/2006/WG.23/2 at Part 10 (2005).

[15] UN Human Rights Council, *Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights* (Eighth-session, 2008), U.N. Doc A/HRC/8/WG.4/3 (2008)).

[16]Working Group, *Report of the fourth session* (n. 8 above), at para. 33.

[17]Ibid*.,* at para. 37.

[18]UN Committee on Human Rights, *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* (Third session, 2006), U.N. Doc E/CN.4/2006/47 at para. 92 (2006). China, Japan, India, China, Norway, Poland, and the United Kingdom were among the states who supported the 'unreasonableness' criteria. Working Group, *Report of the fourth session* (n. 8 above), at para. 95.

[19]UN Committee on Human Rights, *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* (Eighth session, 2008), U.N. Doc. A/HRC/8/7 at 91 (2008).

[20]UN Human Rights Committee, *Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights* (Eighth session, 2007), U.N. DocA/HRC/8/WG.4/2 (2007).

[21]Ibid*.,* at 114, (Argentina, Bangladesh, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation, and Sri Lanka).

It was argued by supporters of a comprehensive Optional Protocol that the effect of these proposals would be to incorporate into the text of the Optional Protocol the kind of excessive acquiescence to socio-economic decision-making that has traditionally denied adjudication and remedies for ESC rights claims. It was pointed out by the International NGO Coalition for the OP-ICESCR that a standard of review requiring the Committee to consider whether the steps taken were 'unreasonable' was likely to place an insuperable burden on claimants to establish that decisions or policies were demonstrably unreasonable in their formulation or design.[22] The vision of adjudication focused on compliance and the right to reasonable measures taken to realize rights, commensurate with available resources which was the energizing vision of years of advocacy for the OP-ICESCR, would be lost. With an increasing number of delegations persuaded as to the legitimacy of these concerns, the text was amended in a subsequent draft to remove any reference to unreasonableness, as well as removing the adjective 'broad' from the reference to a 'margin of discretion'.[23]

States and NGOs participating in the Open-Ended Working Group approached the idea of a standard of review for claims engaging obligations under article 2(1) from a range of perspectives. The intention of the states skeptical of the Optional Protocol project was generally to limit the scope and application of a complaints procedure in ways that they did not support apply to more traditional spheres of civil and political rights adjudication. Other states 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. Because of the novelty of a complaints process being applied to the unique provisions of article 2(1) of the ICESCR, these delegations argued that States considering ratification, as well as the Committee charged with adjudicating complaints, would benefit from some clarification about the standard of review that would be applied. Other delegations were skeptical about the need for any standard of review, since none had been incorporated into any other UN complaints procedure.

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, the

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[22] Working Group, *Report of the fourth session* (n. 8 above), at paras. 103 and 153.
[23] UN Human Rights Committee, *Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights* (n. 15 above), Article 8.

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'.[24] The CESCR described in its statement a relatively rigorous standard of reasonableness review within which obligations would be assessed in the context of budgetary constraints, but without allowing such constraints to provide justification for inaction, excessive deference to existing policy or legislation, or neglect of the needs of the most disadvantaged and marginalized groups.

> 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 the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.[25]

In its statement the CESCR explicitly adopted a reasonableness standard, stating that it would assess the 'reasonableness' of steps taken. The Committee listed a number of possible factors it would consider in assessing whether the steps taken had been reasonable. These included:

> (a) the extent to which the measures taken were deliberate, concrete, and targeted towards the fulfillment 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;

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[24]Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the 'Maximum of available resources' under an optional protocol to the Covenant* (Thirty-eighth session, 2007), U.N. Doc. E/C.12/2007/1 at para. 3 (2007).
[25]Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the 'Maximum of available resources' under an optional protocol to the Covenant* (n. 24 above), at para. 4.

(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.[26]

The CESCR also stated that it would place a high priority on 'transparent and participatory decision-making at the national level'.[27] Interestingly, the Committee linked participatory decision-making to the provision of a margin of appreciation to states allowing them to tailor policies to particular circumstances through engagement with stakeholders: '[t]o 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'.[28]

As will be described below, the Committee's approach to reasonableness drew considerably on the approach adopted by the South African Constitutional Court in the *Grootboom* case,[29] with a similar emphasis on the protection of vulnerable groups and compatibility of decision-making with broader human rights values. Reasonableness was also an emerging concept at the international level at this time, with the incorporation of the language of reasonableness into the text of the International Covenant on the Rights of Person with Disabilities where, for the first time in an international treaty, it had been clearly stated that a failure to adopt 'reasonable' measures of accommodation constituted, in itself, discrimination in violation of the CRPD.[30]

The Committee's statement was supported by High Commissioner Arbour, who noted the

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[26]Ibid., at para. 8.
[27]Ibid., at para. 11.
[28]Ibid.
[29]*Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) at para. 44.
[30]UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly* (Sixty-first session, 2007), U.N. Doc A/RES/61/106 at Article 2 (2007): '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.

importance of equality values and non-discrimination in the assessment of reasonableness. The High Commissioner again emphasized the way in which reasonableness analysis distinguishes the adjudicative role of the Committee from the policy and program implementation role of states. She noted that where the Committee finds that reasonable measures have not been adopted, it will generally be left to the State Party to determine, through its own processes, the precise means to remedy any violation.

> As the Committee points out in its Statement, the role of an international quasi-judicial review mechanism is not to prescribe policy measures, but rather to assess the reasonableness of such measures in view of the object and purpose of the treaty. For example, a policy that discriminated against women in the provision of essential medicines would clearly not meet such reasonableness criteria. Again, as the Committee points out, a failure to take reasonable measures, if established by the Committee, would give rise to a recommendation that remedial action be taken, while deferring to the discretion of the State party concerned to decide on the means of doing so.[31]

A consensus began to emerge within the Working Group in favour of the inclusion of a reference to reasonableness along the lines proposed by the High Commissioner, which was supported by the diverse perspectives brought to the table by the states. For some states, the inclusion of a reasonableness standard provided assurances that the Committee would not exceed its competence by 'micromanaging' policy choices and resource allocation decisions. For others, a reference to reasonableness in combination with a reference to compliance with Covenant rights was seen as an affirmation that the Committee would engage directly with issues of compliance with article 2(1) in the context of individual complaints, which would ensure access to justice for victims of violations linked to failures of states to adopt positive measures and effective strategies. Moreover, the reasonableness standard of review was seen as providing a reassuring link to jurisprudence at the domestic level.

2.3 The Rejection of Margin of Discretion Doctrine in Favour of a 'Range of Possible Policy Measures'

A lurking, unresolved issue in the debates over the reasonableness standard persisted,

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[31] Louise Arbour, UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended WG OP ICESCR* (n. 11 above).

however, in the form of a proposal to include a reference to 'margin of discretion' in article 8(4), which remained in square brackets throughout.[32] Although this term and the related concept of 'margin of appreciation' have been widely applied in European jurisprudence[33], and has been referred to in other regional systems, the concept has rarely been invoked within the UN treaty body system, and is not found within any UN treaties.[34] It was unclear what the principle would mean in the context of the OP-ICESCR. The CESCR seemed to apply the term in its statement simply to suggest that the Committee would recognise the distinct competence of the state to design and implement programs and policies with appropriate participation from affected stakeholders; this would be uncontentious. However, references to margins of discretion or appreciation are strongly associated in many jurisdictions with the notion of a reduced standard of scrutiny, a broad deference to states in relation to socio-economic policy, and often to a systemic abdication of any effective adjudicative role for courts or quasi-judicial bodies in relation to substantive ESC rights claims linked to budgetary allocations. Some of the delegates proposing a unique reference to a 'margin of discretion' in the OP-ICESCR seemed to want a signal in favour of differential treatment of this class of rights claims in comparison to others through a categorical deference to states' decisions about socio-economic policy. This could seriously affect access to justice for victims of violations of ESCR and promote the type of judicial acquiescence to ESC rights violations that the Optional Protocol was intended to correct.[35] The inclusion

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[32]B. Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review,* Vol.11, No. 2 (2011), pp. 275-327, at 295.

[33]M. Forowicz, 'State Discretion as a Paradox of EU Evolution' *Max Weber Programme* (Florence: European University Press, 2011), pp.1-33.

[34]In *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985), the UN Human Rights Committee, somewhat unfortunately, accepted that national authorities can be granted 'a certain margin of discretion' in relation to public morality standards applied to homosexuality, given the lack of universally applicable standards. The principle has not, however, been applied in any universal or consistent way by the Committee. See for example *Monica Bryhn (represented by Mr. John Ch. Elden) v. Norway*, Communication No. 789/1997, U.N. Doc. CCPR/C/67/D/789/1997 (2 November 1999) at 4.4 where the State Party argues for the acceptance of a margin for the implementation of the right, but the Committee does not apply the principle in its decision in favour of the State Party. The UN Committee on Economic, Social and Cultural Rights has invoked a 'margin of discretion,' or a 'considerable margin of discretion' in general comments from General Comment 12 (1999) onwards, with the exception of General Comment 13 on the Right to Education and General Comment 20 on Non-Discrimination. The Committee also refers to the margin of discretion in its statement on concepts more frequently in the context of General Comments. See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 16* (note 62 above) at para 32.

[35]UN Committee on Human Rights, *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*

of the reference to a margin of discretion was likely to be used by domestic courts in some jurisdictions as a basis for dismissing claims engaging with socio-economic policy choices.

After eloquent submissions from a number of states during the final days of the drafting about these dangers of incorporating a reference to a 'margin of discretion', led by Portugal and Finland and strongly supported by the NGO Coalition for the OP-ICESCR, the Chairperson removed from the draft any reference to 'margin of discretion' or 'margin of appreciation'. The session on the second last day, however, began with a demonstration of very effective lobbying by Canada, backed by the US and a number of other states, insisting that a reference to a 'margin of discretion' or 'margin of appreciation' must be reinserted if they were to support the referral of the draft to the Human Rights Council.[36] It was clear that some kind of alternative language would be necessary to save the protocol.

It was critical at this juncture to distinguish between the two understandings of the margin of discretion at play. Those most concerned about the concept feared that it would be interpreted as meaning that the Committee should exercise deference to what the state considered reasonable, thus abdicating an important component of the assessment of compliance with the Covenant to the state under review. Another interpretation suggested that the reference to a margin of discretion simply meant that the Committee should recognise that where there are a number of options available to the state to achieve compliance, it is up to the state to make the choice of means and not for the Committee to choose what it considers the best policies and programs. What was required, therefore, was wording that confirmed the second interpretation, without suggesting that the Committee would abdicate its mandated role of assessing compliance with the Covenant by simply deferring to the state's decisions regarding what is 'reasonable'.

Lillian Chenwi, a member of the NGO coalition, accessed the *Grootboom* decision on her laptop and referred delegates informally to the wording of paragraph 41 of the decision:

Rights on its third session (n. 18 above), at paras. 92, 95, 130; Working Group, Report of the third session (n. 8 above), at para. 93.

[36]Working Group, *Report of the fifth session*, 23 May 2008, A/HRC/8/7 at para 168. See drafting proposals by the Chairperson-Rapporteur of the Open-ended Working Group, fifth session, 25 March 2008, A/ HRC/8/WG.4/3 at para 173. This amendment mirrored proposals put forward earlier in the session by Canada and New Zealand, to interpret 'reasonableness' to be 'consistent', in 'compliance' or in 'accordance' with Part II of the Covenant: see Draft 4 of Article 8(4), fifth session, 25 March 2008, A/HRC/8/WG.4/3 at paras 90 and 168, online: http://www2.ohchr.org/english/issues/escr/documents_5.htm.

> 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. Many of these would meet the requirement of reasonableness.[37]

The reference to a range of possible measures from which the state can choose did not suggest deference to the state in the assessment of reasonableness itself. Rather, the Constitutional Court of South Africa had simply recognised the role of the state in exercising policy choices and in crafting the precise contours of programs and policies. The chairperson inserted similar wording into a revised text and presented it to the delegates, affirming that in considering the reasonableness of the steps taken, '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.' The Chairperson explained that the intention behind the new wording was to acknowledge that there could be different policies that are compliant with Covenant obligations, and that it would therefore be left to states, and not to the Committee, to make those policy choices.[38] Enough states were satisfied with this proposal that the Chairperson was able to announce on 4 April 2008 that there were no objections to the transmission of the draft[39] for consideration by the Human Rights Council. The text was subsequently adopted without any changes to article 8(4), and thus the reference to margin of appreciation was not included in the final version.

3. Reasonableness Review: the Demarcation of Roles

What are we to deduce from the fact that reference to a 'margin of discretion' was removed from article 8(4) and replaced with an acknowledgement that the state may adopt a range of policies to implement the rights in the Covenant? The most important point to acknowledge is that the final wording of 8(4) certainly addresses the concerns of many states about a blurring of roles of adjudication and governance. 8(4) recognises a

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[37] *Grootboom* (n. 33 above), at para 41.

[38] C. de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights- The Missing Piece of the International Bill of Human Rights', (n. 13above) at 175 (mostly European Union member states, African, and Latin American states).

[39] Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Letter from the Chairperson-Rapporteur, Catarina de Albuquerque, to the Members of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Fifth session, 2008), U.N. Doc. A/HRC/8/WG.4/3 (2008).

clear distinction between the adjudicative role of the Committee and the policy-making role of states, just as High Commissioner Arbour proposed in her opening remarks to the Open-Ended Working Group. As the High Commissioner described it, a reasonableness standard clearly assigns to the courts the role of adjudicating rights claims and reviewing policies and programs alleged to have violated rights, in order to determine if the state has acted reasonably in the context of available resources and other constraints. That role is not to be confused with the role of governments with respect to designing and implementing policies and programs. Deference to states' legitimate policy choices does not entail deference to what the state argues is in relation to compliance with rights under the Covenant.

As suggested by the High Commissioner, assessing reasonableness under the OP-ICESCR must be understood in the context of adjudicating rights claims. It does not require the CESCR to take on the role of an expert body in social policy or to review states' socio-economic policies and programs to assess whether they are reasonable from the standpoint of sound economic or social policy. The assessment of reasonableness in which the CESCR must engage is an issue of human rights adjudication, not social policy assessment. As High Commissioner Arbour had described it, it is a contextual interpretation and application of human rights in particular circumstances. Rights claims and the lived-realities of rights claimants are as much a part of the context in which reasonableness must be assessed as are the policy-making and budgetary realities that the state will bring to light. The dignity issues at stake are brought to life by rights claimants; these must be central to the Committee's assessment of reasonableness. Contextual dignity issues may include, for example, consideration of culturally appropriate housing and access to traditional lifestyles in Indigenous right to housing cases, or the unique circumstances of people with disabilities in relation to the right to sanitation. Each case will have unique considerations that can only be properly understood by fully hearing the voice of the claimants. States, for their part, bear the responsibility of providing to the Committee information about the broader context in which policies have been adopted, and decisions have been made. They must ensure that evidence of competing needs, of limitations on capacity, or of policy concerns that are not part of the experience of the rights claimants are placed before the Committee in the form of objective and reliable evidence. In many cases, the Committee will also want to benefit from the expertise and perspectives of other parties, which are permitted, under the unique wording of article

8(1) of the OP-ICESCR, to provide information and documentation independently of either of the parties.

Under the OP-ICESCR it is the role of the Committee to assess, in light of all of the evidence before it, the reasonableness of the steps taken. Where there is a range of policies or programs through which Covenant rights may be implemented, consistent with the requirements of the Covenant, and properly informed by the dignity interests and experiences of rights claimants, article 8(4) establishes that it is not the Committee's role to decide which policies should be adopted. Rather, the Committee will recommend a course of action necessary for the state to remedy a violation of rights. In most cases, this will at minimum require immediate action by the State Party to enact an effective and coherent strategy, as well as a longer term plan for ongoing dialogue involving governments, rights-claimants, and other affected groups, for the purpose of putting in place monitoring and accountability mechanisms. In many instances, there may be no 'range of policy options' in relation to immediate obligations. An eviction may be required to be halted, a discriminatory policy may have to be rescinded, or immediate needs for housing or food may be required to be provided. These immediate remedies will in most cases be combined with longer term strategic remedies consistent with what the CESCR has described as necessary for reasonable policies and strategies and to realise rights.[40]

It is only in this sense of demarcating the Committee's adjudicative role from the State's implementational role that article 8(4) directs the Committee to defer to the state's expertise and democratic legitimacy to choose from policy options, implement programs, and adopt legislative measures. The assessment of what constitutes reasonable steps to comply with Covenant rights remains the mandated role of the Committee as the adjudicative body, and the Committee should not abdicate its adjudicative role to the state. Former Supreme Court of Canada Justice Ian Binnie made a similar point in relation to domestic separation of powers in assessing 'reasonable limits' under section 1 of the *Canadian Charter of Rights and Freedoms*[41] in a case involving a violation of rights by budgetary restraint measures. Responding to a proposal from the court below

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[40] See discussion of CESCR jurisprudence below.

[41] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 section 1: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

that courts should generally defer to legislatures' assessment of what constitute reasonable budgetary measures rather than engaging in its own assessment, Justice Binnie responded:

> No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.[42]

The same principle of separating the adjudicative and policy-making roles applies to the consideration of reasonableness as mandated by article 8(4). 8(4) recognizes that the Committee ought not to assume the role of designing and implementing policy, which is the proper function of the state; nor, however, should the State be accorded the role of determining what constitutes compliance with the Covenant on the basis of a reasonableness standard which is the proper function of the Committee. The State Party has the opportunity to advocate before the Committee for its view of what constitutes reasonable policy and budgetary allocations, and the claimant has the opportunity to respond with an alternative view. It is the Committee's role to adjudicate the question with independence and neutrality, allotting no more deference to one side than to the other.

The reasonableness standard affirmed in article 8(4) should also be clearly distinguished from a variety of standards of deference applied in judicial review of other adjudicative bodies by domestic courts. Reasonableness in this context may embody the principle that courts ought to defer to the unique competence of administrative decision-makers or of lower courts when those adjudicators or judicial bodies are better situated to make findings of fact or to apply law in their field of expertise. There are also various deferential standards of rationality review according to which decisions of specialized bodies will not be interfered with unless there have been serious errors compromising procedural fairness or rendering decisions patently unreasonable. These principles of deference to lower courts or tribunal do not generally apply under the OP-ICESCR

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[42] *Newfoundland (Treasury Board) v NAPE,* [2004] 3 SCR 381, at para 103.

because the Committee is not reviewing decisions of other adjudicative bodies.[43] In adjudicating complaints of violations of the ICESCR, the Committee may defer to the competence of domestic courts when they have made findings of fact that are relevant to a complaint, as other treaty bodies have done.[44] The Committee will certainly rely on the domestic policy expertise available to the state and to domestic agencies, just as it will rely on the evidence adduced by rights claimants, their experts, or intervening groups about the effect of programs or policies on the dignity interests. Competent assessment of reasonableness will rely heavily on expert evidence and opinion presented both by the author of the petition and by the State Party as well as by third parties. Recognizing the distinctive expertise of domestic experts in relation to the subject matter of the complaint, however, is quite different from exercising deference to either party in relation to the determination of whether the state has acted reasonably to realize the rights in question. Confusion about deference and competency issues largely stems from a confusion of the adjudicative role from the policy design and implementation role. If the CESCR is misconceived as a kind of expert body in social and economic policy, then the problem of its competence to sit in judgment of the decisions of domestic policy experts and governments becomes problematic. If, however, the CESCR is properly conceived of as a body that adjudicates rights claims in light of the best evidence available on both the effect of challenged policies or failures to act, and the justification for these effects and failures, against the human rights standards of the Covenant, then there is no longer a conceptual problem. The Committee must assess the evidence, including opinion evidence provided by the State Party as to why particular measures were, or were not adopted. The Committee must determine what weight to accord evidence and adjudicate independently and fairly whether a right has been infringed or whether, on the contrary, the state has complied with the Covenant in the circumstances. The adjudicative role now accorded to the Committee must not be abdicated to either of the parties, including in the

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[43]Reasonableness as a standard of deference to other administrative bodies should be distinguished from emerging standards of reasonableness in administrative law that require decision-makers to ensure that their decisions are consistent with fundamental human rights. As Liebenberg and Quinot have pointed out, this more substantive conception of reasonableness in administrative law can be applied so as to be compatible with standards of reasonableness applied in ESC rights adjudication (Geo Quinot & Sandra Liebenberg, "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 Stellenbosch Law Review 639-663. In this sense, a reasonableness standard of review of administrative decision-makers would be similar to standards applied by the CESCR in considering whether decisions made by domestic administrative bodies are in accordance with the ICESCR.

[44]UN Human Rights Committee, *Zwaan de Vries v Netherlands Communication No. 182/1984,* U.N. Doc Supp. No. 40 A/42/40 (1987).

determination of what is reasonable in accordance with Covenant rights and available resources.

4. Reasonableness as Substantive Compliance with ESC Rights

The fact that the wording of the reasonableness standard incorporated into the OP-ICESCR was adapted from a paragraph of the *Grootboom* decision of the Constitutional Court of South Africa is of some value in interpreting how it should be applied. While the Committee is in no way bound to follow the jurisprudence of the Constitutional Court of South Africa on reasonableness, it should certainly recognise that the standard of reasonableness around which consensus was reached was heavily influenced by the *Grootboom* ruling. Indeed, it is helpful to distinguish the *Grootboom* decision, which was a key reference point for the drafters, from subsequent jurisprudence of that Court, which was not. There are a number of critical aspects of the approach to reasonableness affirmed by the Court in *Grootboom* that resonate with the Committee's own jurisprudence, and are key to its proper application in the context of the OP-ICESCR. CESCR jurisprudence on reasonableness will be informed by developments in many jurisdictions, but it is helpful to consider some of the foundational principles affirmed in *Grootboom* that made that decision one upon which a consensus position could be framed.

In *Grootboom*, the Court recognised that reasonableness should not be understood solely, or even primarily, as a limit or constraint on socio-economic rights, but rather as a guarantee of rights—a measure of compliance with the obligation of progressive realization, framed by constitutional values and assessed in the context of the dignity interests and the fundamental rights of claimants.[45] The Court affirmed dignity in rights as the foundation of reasonableness review so as to make reasonableness as much about the content of rights in particular circumstances, as about justifying failures to realise them. Resource constraints or limits on institutional capacity may justify certain limits to the immediate enjoyment of socio-economic rights, but available budgets and institutional capacity also create obligations on the state to utilize this capacity reasonably in accordance with the priority that must be accorded to human rights.

[45] *Grootboom* (n. 32 above), at paras. 41-4 and 83. Section 26

> It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. ... Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.[46]

Although some subsequent decisions of the Constitutional Court of South Africa have raised concerns that the Court has focused the assessment of reasonableness too squarely on the rationale provided by governments,[47] the *Grootboom* decision from which the Optional Protocol text draws its inspiration presents a substantive conception of reasonableness based on the obligation to realise socio-economic rights consistently with the foundational value of human dignity.[48] The paragraph from which the wording of the article 8(4) is taken affirms that reasonable policies 'must be capable of facilitating the realisation of the right'.[49] The reasonableness standard affirmed in *Grootboom* thus emphasizes the transformative dimension of socio-economic rights, affirming that the commitment to 'transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order'.[50]

The standard of reasonableness affirmed in the *Grootboom* decision represents a rejection of the deferential standard proposed by states advocating for a reference to a 'wide margin of discretion' in the OP-ICESCR. As Sandra Liebenberg has noted, 'while *Soobramoney* raised the spectre of the Court adopting a thin standard of rationality scrutiny for socio-economic rights claims, the Court in *Grootboom* and *TAC* proceeded to develop a more substantive set of criteria for assessing the reasonableness of the state's acts or omissions.'[51]

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[46]Ibid., at para. 83.
[47]S. Wilson and J. Dugard, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights', *Stellenbosch Law Review*, Vol. 3 (2011), pp.664-682, at 679.
[48]On the importance of the dignity interest in reasonableness review see S. Liebenberg, 'The value of human dignity in interpreting socio-economic rights', *South African Journal on Human Rights*, Vol. 21 (2005), pp. 1-31.
[49]Ibid., at para. 41.
[50]Ibid., at para. 25; See S Liebenberg, 'Towards a transformative adjudication of socio-economic rights', *Speculum Juris,* Vol. 21 (2007), pp. 41-59.
[51]Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co: Claremont, 2010), p. 152.

Critical to the reasonableness standard affirmed in *Grootboom* is the requirement that reasonable policies do not ignore the needs of those who are marginalized, or in desperate circumstances. Just as the CESCR emphasised in its statement to the Open-Ended Working Group that reasonable policies must prioritise those who are marginalised and at greatest risk, so too did the Constitutional Court affirm that "[t]hose whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right."[52] The Court also affirmed in *Grootboom* that a reasonable policy must be consistent with the obligation to progressively realise socio-economic rights, ensuring that barriers to the realisation of the right are eliminated over time and avoiding what the CESCR has called 'deliberately retrogressive measures'.[53]

Liebenberg lists the following additional features identified by the Constitutional Court as characterising a reasonable policy capable of facilitating the realisation of socio-economic rights, many of which were taken up by the CESCR in its Statement to the Open-Ended Working Group:

- It must be comprehensive, coherent and coordinated;
- Appropriate financial and human resources must be made available for the programme;
- It must be balanced and flexible and make appropriate provision for short, medium and long-term needs;
- It must be reasonably conceived and implemented; and
- It must be transparent, and its contents must be made known effectively to the public.[54]

While the Court in *Grootboom* refers to the characteristics of a housing policy in the singular, it recognised that all socio-economic rights are interrelated, such that it is impossible to isolate housing policy from policies and programs implementing the right to social security, food, or an adequate income: 'Socio-economic rights must all be read

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[52] *Grootboom* (n. 32 above), at para. 44.
[53] Ibid., at para. 45.
[54] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co: Claremont, 2010), p. 309.

together in the setting of the Constitution as a whole.'[55] Article 8(4) refers to the Committee's role in assessing the reasonableness of the 'steps taken', in the plural. It is often difficult, and indeed counter-productive to tie violations of ESC rights to a singular policy or provision. Socio-economic rights violations are usually the result of complex interactions of different programs and administrative decisions, acts, and omissions by public actors, and are generally affected by a range of structural factors as well as multiple roles of private actors. Article 8(4) appropriately mandates the Committee to assess whether reasonable steps have been taken, without requiring it to pinpoint a particular policy or measure required or to consider only if a particular provision is reasonable.

As explained in the chapter on remedies in this Commentary, the Committee may often elect to recommend that the State Party, in dialogue with various stakeholders, review the range of policy options available and implement a plan that combines both immediate steps and longer term strategies that engage with multiple policies and programs. In cases that involve a range of options available to the State Party, it will not be necessary or appropriate for the Committee to make specific recommendations about discrete provisions, budgetary allocations, or program design. In some cases, of course, there may be only one reasonable way to remedy a violation, in which case specific recommendations would be entirely appropriate. The over-riding principle that will guide the Committee's choices of remedy will be the purposes of the ICESCR and of the OP-ICESCR. Remedial recommendations must be effective in ensuring the realization of the rights in question, for those who claim them and for others affected.

In the *Grootboom* case, the Court situated the claim in the context of the dignity interests of the claimants, the transformative aspirations of the new South African Constitution, and the need to address the continuation of dramatic socio-economic inequality as a legacy of apartheid. When placed in this context, the task of assessing whether the failure to address the needs of Irene Grootboom and her community did not strain the competence of the Constitutional Court. Addressing the complex interaction of various policies and programs in order to remedy the violation was assessed by the Court in that case to be the proper role of the governmental respondents, with meaningful participation by stakeholders. Rather than undermining the policy-making role of governments, the

[55] *Grootboom* (n.32 above), at para. 24.

adjudicative process enhanced democratic accountability, providing a greater understanding of dignity interests within a cultural and historical context, and ensuring that the experience and 'voice' of claimants was heard. It will be important for the CESCR to similarly demonstrate that the adjudication of rights ensures enhanced transparency, and reinforces democratic and participatory decision-making.

In line with the substantive approach to reasonableness affirmed by the Constitutional Court in *Grootboom*, article 8(4) affirms a distinctive standard for assessing compliance with positive obligations under the ICESCR in the context of individual communications. Reasonableness of steps taken is assessed 'in accordance with the content of the rights in Part II of the Covenant' and the policy measures that the Committee is mandated to assess are those which are required 'for the implementation of the rights set forth in the Covenant.' Article 8(4) thus articulates a standard of compliance with the Covenant that considers not simply the state's justification of its policies based on competing needs or limits on resources but, more fundamentally, whether the steps taken by the state would allow realization of the rights at stake in the particular socio-economic and historical context in a manner that provides full participatory rights and recognises the dignity and rights of those whose claims are at issue. Reasonableness is a contextual inquiry into the content of Covenant rights in particular circumstances, attending equally to both the voice and experiences of claimants, and to the realities, restraints, and difficult choices faced by governments. What is reasonable will depend as much on the nature of the interest at stake and the unique circumstances of the particular claimant or group, as on budgetary constraints, competing needs and policy rationale presented by the state.

5. Jurisprudence of the CESCR on Reasonableness

Beyond the CESCR's 2007 statement on the reasonableness standard under the *Optional Protocol,* there is extensive jurisprudence in the Committee's General Comments and in its Concluding Observations on Periodic Reviews of State Parties that provides clarification as to the requirements of policies and strategies for compliance with article 2(1) of the *ICESCR*. While the approach to reasonableness and the review of policies for compliance with the Covenant will be different in the context of period reviews and General Comments than when it is situated in the context of particular rights claims, the Committee's views on what constitutes reasonable policies will certainly inform its approach to reasonableness in the context of the OP-ICESCR.

In the CESCR's view, all reasonable strategies must be informed by an equality framework that prioritises the needs of disadvantaged groups, and ensures protection from discrimination.[56] States have an immediate and unqualified duty to ensure both formal and substantive equality in the implementation of policies.[57] Strategies must specifically address issues of systemic discrimination and the barriers faced by individuals who have suffered historic discrimination, or who presently suffer from prejudice.[58] There must be 'adequate legislative protection from discrimination either by state or non-state actors'.[59] Reasonable policies are not simply policies that allocate an appropriate level of resources to programs. They should also address the structural and systemic causes of poverty and social exclusion, and should include 'efforts to overcome negative stereotyped images'.[60] Additionally, policies should rely on effective 'coordination between the national ministries, regional and local authorities.'[61] Among other agencies, human rights institutions should play an important role in overseeing implementation strategies by scrutinizing existing laws, identifying appropriate goals and benchmarks, providing research, monitoring compliance, examining complaints of alleged infringements or disseminating educational materials.[62]

Strategies for the realisation of rights should be, themselves, based on rights, and should provide for effective judicial or administrative remedies. A rights framework is both the means and the ends of reasonable policies, programs and strategies. As stated in the CESCR's *General Comment No. 9*, administrative remedies must be accessible,

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[56]UN Committee on Economic and Social Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art 2 para 2)* (Forty second session, 2009), U.N. Doc E/C.12/GC/20 at para. 9 (2009). See also: UN Committee on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles')* (Forty-third session, 1987), U.N. Doc E/CN.4/1987/17 at para. 39 (1987): 'Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination.'

[57]M. Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', *International Journal of Human Rights,* Vol. 15, No. 6 (2011), pp. 969-1012.

[58]UNCESCR, *General Comment 20* (n. 56 above), at para. 8.

[59]Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law' (n. 57 above), p. 976.

[60]UN Committee on Economic, Social and Cultural Rights, *General Comment 6: The Economic, Social and Cultural Rights of Older Persons* (Thirteenth session, 1996), U.N. Doc E/1996/22 at para 41 (1996).

[61]UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The right to water* (Twenty-ninth session, 2002), U.N. Doc E/C.12/2002/11 (2002).

[62]UN Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (Nineteenth session, 1998), U.N. Doc E/C.12/1998/25 at para. 3 (1998).

affordable, timely and effective.[63] Meaningful participation informed by the rights of affected constituencies is a critical procedural component of reasonable policies and programmes. As stated in *General Comment No. 4*, 'both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, [a housing] strategy should reflect extensive genuine consultation with, and participation by, all of those affected.' [64] Strategies for realising ESC rights should operate according to principles of accountability which the Committee has identified as including: transparency, participation, decentralisation, legislative capacity, judicial independence, institutional responsibility for process, monitoring procedures, and redress procedures.[65] Both long- and short-term timelines should be adopted, with particular attention paid to interim steps such as 'temporary special measures [that] may sometimes be needed in order to bring disadvantaged or marginalised persons or groups of persons to the same substantive level as others.'[66]

The CESCR has emphasised that reasonable programs and policies should also include independent monitoring and assessment of budgetary measures. Effective participatory rights and monitoring depend on the transparent allocation and expenditure of resources.[67] The reasonableness of budgetary allotment can be assessed based on information about the percentage of the budget allocated to specific rights under the ICESCR in comparison to areas of spending that are not related to fulfilling human rights. The State Party's resource allocation may also be compared to that of other states with similar levels of development.[68] Substantive elements required of a reasonable policy have been characterised by the 'Four A's':

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[63] UN 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 at para. 9 (1998).
[64]UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The right to adequate housing*(Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114, para. 12 (1991).
[65]UN Committee on Economic, Social and Cultural Rights, *General Comment 12:* Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 at paras. 23, 29 (1999).
[66]UN Committee on Economic, Social and Cultural Rights, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (art 3)* (Thirty-fourth session, 2005), U.N. Doc E/C.12/2005/4 at para. 15 (2005).
[67]UN 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, para. 11 (1990).
[68]Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law' (n. 57 above), at 980-81. See e.g., UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of Congo* (Forty-third session, 2009), U.N. Doc E/C.12/COD/CO/4 at para.16 (2009), where the Committee found that the state's decreased allocation of resources to social sector development,

- Availability (access to relevant services).
- Accessibility (physical and economic accessibility and non-discriminatory access).
- Acceptability (based on qualitative standards)
- Adaptability (flexible and geared to meeting of particular cultural and other needs, as well as responsive to changes in circumstances).[69]

From the CESCR's earliest General Comment adopted in 1989 to clarify states' reporting requirements, it has emphasised that resource and other constraints do not relieve governments from immediate obligations to put in place strategic policies to facilitate the realisation of Covenant rights over time.[70] The Committee emphasised the overriding obligation to develop 'clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant.'[71] There is also a specific obligation 'to work out and adopt a detailed plan of action for the progressive implementation' of each of the rights contained in the Covenant.[72] This is clearly implied, according to the CESCR, by the obligation in Article 2(1) 'to take steps ... by all appropriate means.'[73]

The reasonableness standard in 8(4) will require compliance with the obligation to develop clear strategies and plans, and to monitor progress toward identified goals at the same time as meeting immediate obligations commensurate with the available resources and other historical/contextual challenges. The CESCR explained in *General Comment*

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combined with increased levels of military spending, resulted in a violation of its Covenant obligations; Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n. 32 above) at 290.

[69] Components of the 'four A's' vary with each specific right. See e.g., UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The Role of Education (art 13)* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 at para. 6 (1999); UN Committee on Economic, Social and Cultural Rights, *General Comment 14*: *The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 at para.12 (2000); UNCESCR, *General Comment 15* (n. 61 above) at para. 11.

[70] United Nations Committee on Economic, Social and Cultural Rights, *General Comment 1: Report by States Parties* (Third session, 1989), U.N. Doc E/1989/22 (1989).

[71] Ibid., at para. 4.

[72] Ibid.

[73] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series, Vol. 993, p. 3 at Article 2(1) (Entry into force 3 January 1976).

No. 3, On the nature of States parties obligations (art. 2, para. 1 of the Covenant),[74] that while *Covenant* rights are subject to progressive realisation, there are three overriding obligations which are of immediate effect: the obligation to ensure non-discrimination, and the obligation 'to take steps' and the obligation to ensure access to effective remedies. The reasonableness standard will incorporate both of these immediate obligations. The steps taken, according to *General Comment No. 3*, 'should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.'[75] 'Moreover, the obligations to monitor the extent of the realisation, or more especially of the non-realization, of economic, social, and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.'[76] Legislative measures are almost always desirable and in some cases indispensable. The CESCR notes that it will be particularly interested in whether legislative measures 'create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized.'[77] In General Comments relating to the right to adequate food,[78] the right to social security,[79] the right to work,[80] the right to health,[81] and the right to water,[82] the CESCR calls on states to create targeted national strategies based on human rights principles to ensure the realisation of Covenant rights. In *General Comment No. 18* on the right to work, the CESCR calls for state governments to adopt an 'employment strategy targeting disadvantaged and marginalised individuals and groups,', which includes 'indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.'[83] In *General Comment No. 12* on the right to food, the CESCR 'affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person' and requires states to adopt

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[74]UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1990).
[75]Ibid., at para. 2.
[76]Ibid., at para. 11
[77]Ibid., at para. 6.
[78]UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (art 11)* (Twentieth session, 1999), U.N. Doc E/C.12/1999/5 (1999).
[79]UN Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art 9)* (Thirty-ninth session, 2007), U.N. Doc E/C.12/GC/19 (2008).
[80]UN Committee on Economic, Social and Cultural Rights, *General Comment 18:* Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006).
[81]UNCESCR, *General Comment 14* (n. 69 above).
[82]UNCESCR, *General Comment 15* (n. 61 above).
[83] Ibid., para 31.

'appropriate economic, environmental and social policies…oriented to the eradication of poverty and the fulfillment of all human rights,' as well as 'a national strategy to ensure food and nutrition security for all.'[84] In *General Comment No. 14* on the right to health, CESCR outlines State Parties' core obligation to adopt and implement national health strategies and plans of action based on a 'participatory and transparent process'.[85] National health strategies must include measures of prevention and 'right to health indicators and benchmarks, by which progress can be closely monitored.'[86] Strategies and plans of action must also pay 'particular attention to all vulnerable or marginalized groups' and address the social determinants of health.[87] Similar obligations are enumerated with respect to the development of 'comprehensive and integrated strategies and programmes' to implement the right to water.[88]

In its first decision under the Optional Protocol, *IDG v Spain*[89], the Committee emphasised that ensuring access to effective remedies for Covenant rights is an obligation of immediate effect. Drawing on General Comments 3 and 9 in particular, the Committee stated that the requirement in article 2(1) that states realise Covenant rights "by all appropriate means, including particularly the adoption of legislative measures" includes an immediate obligation to adopt legislative measures to ensure access to effective judicial remedies, "since, as the Committee noted in its general comment No. 9, there cannot be a right without a remedy to protect it".[90]

It is clear from the Committee's jurisprudence in these diverse areas that even in the context of resource constraints and other limitations on capacity, the reasonableness review mandated by article 8(4) will require states to develop targeted and coherent strategies which are, in the words of the Constitutional Court of South Africa, 'capable of facilitating the realization of the right.'[91] As Brian Griffey notes, 'questions remain as to how the 'reasonableness' test will be applied, but the answer must be consistent with

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[84] UNCESCR, *General Comment 12* (n. 78 above), at paras. 4 and 21.
[85] UNCESCR, *General Comment 14* (n. 69 above), at para. 43(f).
[86] Ibid.
[87] Ibid.
[88] UNCESCR, *General Comment 15* (n. 61 above), at para. 28.
[89] *IDG v Spain,* Communication No. 2/2014. Views adopted by the Committee at its fifty-fifth session (1-19 June 2015), para 11.3.
[90] Ibid.
[91] *Grootboom*, note 32 above, at para. 41.

ICESCR obligations and the object and purpose of the *Optional Protocol*.'[92] The transformative and purposive dimensions of the reasonableness standard in 8(4) must provide the over-riding interpretive framework for its application in particular contexts. The Committee's critical role will be to assess whether decisions and policies that may have seemed reasonable to governments when particular rights or interests were overlooked, are reasonable in relation to the primary goal of realizing Covenant rights by all appropriate and reasonable means, with priority accorded to those whose circumstances render their rights most vulnerable to being ignored or neglected.

6. Converging and Overlapping Standards of Reasonableness

While the standard of reasonableness under the *Optional Protocol* to the *ICESCR* should be developed as a distinctive standard consistent with the purposes of the *ICESCR*, there will also be inevitable cross-referencing and cross-pollination among treaty bodies, particularly when they are adjudicating similar issues. When the CESCR is adjudicating complaints of discrimination in relation to access to social benefits, it may wish to bring its approach to reasonableness as a justification for discrimination in line with approaches developed by the UN Human Rights Committee, regional bodies such as the Inter-American Commission and Court, and domestic courts and tribunals that have developed important jurisprudence on substantive equality. Where it is addressing the failures of states to adopt reasonable measures to address the needs of persons with disabilities, the CESCR will want to cross-reference the reasonableness standard under the OP-ICESCR with that being applied to ensure reasonable accommodation of disabilities under the Optional Protocol to the Convention on the Rights of Persons with Disabilitis (OP-CRPD).

The UN Human Rights Committee has affirmed a number of principles of reasonableness that may be helpful to the CESCR in developing its own jurisprudence. The HRC has affirmed that the assessment of reasonableness must be both purposive and contextual, and that a policy must be consistent with the purpose of the *Covenant* read as a whole.[93] These principles have been incorporated into the approach to reasonableness in the sphere of socio-economic rights in domestic jurisprudence, and should also be useful under the

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[92] B. Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n. 32 above), at 304.
[93] United Nations Human Rights Committee, *Sandra Lovelace v Canada, Communication No R.6/24*, (Thirty-sixth session, 1981), U.N. Doc Supp. No. 40 A/36/40 (1981).

OP-ICESCR. In other cases, the Human Rights Committee has considered, in the context of assessing reasonableness: the importance of promoting equality for women and other groups; whether policies have ensured access to basic requirements of subsistence for disadvantaged groups; whether they are consistent with provisions of other international treaties and ILO conventions; and how policies compare with common practice in other countries.[94]

The Committee on the Rights of the Child has similarly affirmed that a strategy to implement children's rights must go beyond a list of good intentions or vague commitments: it must set specific, attainable goals with implementation measures, timelines, and provisions for necessary resource allocation.[95] These norms are in line with those that have been put forward by the CESCR.

Emerging jurisprudence from the OP-CRPD will be of particular importance in determining future directions of reasonableness review, and will be of considerable benefit to the CESCR. The CRPD affirms a right to reasonable measures to accommodate

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[94]United Nations Human Rights Committee, *John K. Love, William L. Bone, William J. Craig, and Peter B. Ivanoff (represented by counsel, Kathryn Fawcett) v Australia, Communication No. 983/2001* (Seventy-seventh session, 2003), U.N. Doc CCPR/C/77/D/983/2001 at paras. 18.2-18.3 (2003). The Committee found that while the International Labour Organisation had built up an elaborate regime of protection against discrimination in employment, mandatory retirement age for airline pilots did not appear to be prohibited in any of their Conventions. It was found that widespread national and international practice was taken into account, and the aim of maximising safety to passengers, crew, and persons otherwise affected by flight travel was a legitimate aim under the International Labour Organisation Covenants; United Nations Human Rights Committee, *Guido Jacobs v Belgium, Communication No. 943/2000* (Eighty-first session, 2004), U.N. Doc CCPR/C/81/D/943/2000 at para. 9.5 (2004). The Committee found that an introduction of a gender requirement in the judicial code was proportionally reasonable when considering the purpose of the requirement to promote equality between men and women in consultative bodies, the means applied, and its modalities; and one of the aims of the law, which is to establish a High Council made up of qualified individuals; United Nations Human Rights Committee, *Hendrika S. Vos (represented by M. E. Diepstraten) v The Netherlands, Communication No. 218/1986* (Thirty-fourth session, 1989), U.N. Doc CCPR/C/35/D/218/1986 at para 12 (1989). The Committee found that the applicant was not discriminated against under the General Disablement Benefits Act when applying a uniform rule that there should be avoidance of overlapping benefits (as she was covered under the General Disablement Benefits Act). This was decided in light of the arguments by the State party of the legislative history, purpose, and application of both Acts and it was found the rule was based on objective and reasonable criteria. United Nations Human Rights Committee*, Mr. Rupert Althammer et al. (represented by counsel, Mr. Alexander H. E. Morawa) v Austria, Communication No 998/2001* (Seventy-eighth session, 2003), U.N. Doc CCPR/C/78/D/998/2001 at paras. 2.3 and 10.2 (2003). The Committee found that an abolition of household entitlements for retired persons (employees) of the Social Insurance Board was not part of the essential entitlements of retirement benefits. This was found to be justified in times of financial constraints and a legitimate motive of social policy because the result is an increase for the children's benefits. See also United Nations Human Rights Committee, *Rubén Santiago HinostrozaSolís v Peru, Communication No. 1016/2001* (Eighty-sixth session, 2006), U.N. Doc CCPR/C/86/D/1016/2001 (2006).

[95]United Nations Committee on the Rights of the Child, *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child* (Thirty-fourth session, 2003), U.N. Doc CRC/GC/2003/5 at paras. 32-33 (2003).

disability, as well as the obligation of states to progressively realise ESC rights. The Committee on the Rights of Persons with Disabilities will thus be applying the reasonableness review standard to individual accommodation requirements, systemic, societal barriers to equality facing people with disabilities, and to failures by states to realise self-standing ESC rights of persons with disabilities. The jurisprudence emerging from these considerations will be of tremendous value to the CESCR as it wrestles with its own historically important mandate.

At the same time, it will be important for social rights advocates and claimants to bring to these other procedures the substantive and transformative approach to reasonableness that has been developed in ESCR jurisprudence and incorporated into 8(4) of the OP-ICESCR. The adoption of the OP-ICESCR represents an historic convergence of civil and political with ESCR rights practice, which draws on developments in diverse fora and from domestic, regional and international sources. The reasonableness standard under the OP-ICESCR will draw nourishment from many sources, and hopefully sprout and take root in many places. What is most critical, however, is that reasonableness be given life and content through the hearing of ESCR claims themselves, and that it be contoured to the broad purposes and transformative aspirations of the ICESCRas these find a place to be heard and given meaning through local struggles for dignity and human rights.

7. Substantive Obligations

Malcolm Langford[*]

1. Introduction

As the Optional Protocol contains no substantive rights, the Committee must apply the substantive provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] The possible only exception to this rule is the reasonableness standard outlined in Article 8(4) of the Optional Protocol.[2] However, even this substantive provision may add little. If reasonableness is understood as a substantive obligation, then Article 8(4) largely repeats and echoes the primary treaty obligation to take "appropriate measures" in Article 2(1) of the ICESCR.[3] Alternatively, if reasonableness is conceived as an adjudicatory standard of review, it mirrors to a large extent the Committee on Economic, Social and Cultural Rights (CESCR) existing doctrine on the margin of discretion. In any case, any claim under the Optional Protocol must relate to the substantive rights and obligations in the primary instrument of the ICESCR. This is particularly relevant in the merits stage but is also a factor in the admissibility stage where the Committee must consider whether a claim concerns Covenant rights.[4]

This chapter will provide an overview of the substantive provisions of ICESCR that may be subject to a procedure instigated under the Optional Protocol. It will pose three questions: What are key rights that can be invoked under the protocol by alleged victims (Section 2)? What are the key obligations and which questions are likely to be contentious? (Section 3) And, what are the permissible limitations to these obligations

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[1] Respectively GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) ('Optional Protocol'); 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 ('ICESCR').

[2] See discussion in previous chapter by Porter.

[3] This is the first form of usage of the term in *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Constitutional Court of South Africa), .

[4] See further the third chapter by Courtis and Rossi in this volume.

(Section 4)? In addressing each of these questions, the relevant and existing jurisprudence of CESCR will be addressed together with selected jurisprudence and sources of law from elsewhere.

One important caveat needs highlighting: not all issues will be covered in great detail. The chapter will largely refrain from investigating the content of particular rights. A significant scholarship on the content of each right exists and can be consulted.[5] Moreover, this chapter does not cover all of the key obligations and the following chapter by Brown, Stein and Chenwi takes up the equality-related obligations in Articles 2(2) and 3 of the ICESCR.[6]

2. Jurisdiction and Covenant Rights

2.1 Individual ESC Rights (Part III of the Covenant)

As an *a la carte* approach was rejected, the relevant rights for the communications procedure are the economic, social and cultural (ESC) rights in the Covenant (see Article 2, Optional Protocol). For the most part, the interpretation of this scope is non-controversial. Most of the relevant rights are contained in Part III of the treaty: States parties 'recognise' a significant range of social rights, including the right to work (Article 6); to just and favourable conditions of work (Article 7); to form trade unions and strike (Article 8); to social security (Article 9), to an adequate standard of living (Article 11(1)); freedom from hunger (Article 11(2)); to the highest attainable standard of health (Article 12) and to education (Articles 13 and 14). Article 15 contains a number of 'cultural' rights including the right to take part in cultural life, enjoy the benefits of scientific progress and to protection of authorship interests in scientific,

[5] See, e.g. O. de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge: Cambridge University Peess, 2010); E. Riedel (ed.) *Social Security as a Human Right: Drafting a General comment on Article 9 ICESCR – Some challenges* (Berlin: SpringerVerlag, 2006); M. Langford and A. Russell (eds.), The Right to Water: Theory, Practice and Prospects (Cambridge: Cambridge University Press, 2015); J. Tobin, The Right to Health in International Law (Oxford: Oxford University Press, 2012); F. Francesco and M. Scheinin (eds.), *Cultural Human Rights* (Leiden: Martinus Nijhoff Publishers, 2008); Y. Donders and V. Volodin (eds.) Human Rights in Education, Science, and Culture : Legal Developments and Challenge, UNESCO, Paris, 2007; W. B. Eide and U. Kracht (eds.), *Food and Human Rights in Development, Vol. II: Evolving issues and emerging applications* (Antwerp: Intersentia, 2006).

[6] Note that there is an often an overlap between Article 2(1) and Article 2(2). While General Comment No. 20 of the Committee provides guidance, the CESCR maintains a strategic ambiguity as to when its equality analysis derives from the respective provisions. See *General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights* (Forty-Second Session, 2009), U.N. Doc. E/C.12/GC/20 (2009).

literary and artistic creations, while Article 10 obliges States to provide assistance to families and children.

The Committee has developed extensive guidance on the normative content of these rights, particularly in its General Comments.[7] In cases under the Optional Protocol, these interpretive guides may be of considerable assistance. Whereas general comments are in one sense not comparable to an ordinary judgment, as they are not developed in the context of a specific case, their contents are shaped primarily by the Committee's experience of reviewing State-party reports. Thomas Burgenthal has likened the practice of adopting general comments to the advisory jurisdiction of courts.[8] The Committee declares the function of the general comments as being, among other things, to:

> [M]ake the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant.[9]

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[7] See: Committee on Economic, Social and Cultural Rights, *General Comment 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991); *General Comment 6, The economic, social and cultural rights of older persons*, (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996); *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997); *General Comment 11, Plans of action for primary education* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999); *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000); *Comment 15, The right to water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003); *General Comment 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author* (Thirty-fifth Session, 2006), U.N. Doc. E/C.12/GC/17 (2006); *General Comment 18, The equal right of men and women to the enjoyment of all economic, social and cultural rights* (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006).
General Comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008); *General Comment 21, Right of everyone to take part in cultural life (*Forty-third session, 20099, U.N. Doc E/C.12/GC/21 (2009).

[8] T. Burgenthal, *International Human Rights in a Nutshell*, 2nd Ed. (St.Paul, MN: West Publishing, 1995) p. 46.

[9] Committee on Economic, Social and Cultural Rights, *Introduction, The purpose of general comments*, U.N. Doc. E/1989/22, annex III at 87 (1989), reprinted in *Compilation of General Comments and General*

This suggests in theory a strong relationship between the insight generated by concluding observations and the content of the Committee's general comments, although such a relationship is not always evident in practice.[10]

In the case of the Optional Protocol procedure, the role of the General Comments will most likely vary. In some instances, they may be highly pertinent while in other cases irrelevant, overly rigid, or too general. The occurrence of the latter scenario should not be surprising. One important role of the Optional Protocol is to provide more substance to both general comments and concluding observations; a function strongly embraced by the UN Human Rights Committee. Thus, it may be important for the CESCR, applicants, and States, to acknowledge this role of the procedure and display openness to new or contextual applications of the rights while seeking interpretive coherence across different legal sources.

2.2 Right to Self-Determination (Part I of the Covenant)

However, one outstanding question exists in relation to jurisdiction: the right to self-determination.[11] This broad article extends beyond the domain of ESC rights but the communications *and* inquiry procedure is limited by the phrase, "economic, social and cultural rights set forth in the Covenant". The right is expressed in Article 1 as follows:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and

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Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 8 (2003), para. 3, quoting its 1989 report to the Economic and Social Council (E/1989/22).

[10] Indeed, some authors consider this desirable since the Committee has the opportunity to reflect more deeply, unshackled by the concluding observations. See M. Craven, *International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1998), p. 90; and M. Sepúlveda, *The Nature of Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), p. 41.

[11] One could potentially raise two other questions as to scope but they would be difficult. The first is whether the non-discrimination obligation in Part II is an independent source of rights, i.e. a free-standing right to non-discrimination. However, the Committee largely rejected this approach in its General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights (Forty-Second Session, 2009), U.N. Doc. E/C.12/GC/20 (2009). The second is whether some of the procedural obligations in the Covenant may be potentially justiciable. For example, is the failure of the State to provide periodic reports under Part III a violation of an ESC right? The argument could be constructed but a closer examination of the wording again reveals an obligation rather than the language of rights.

> international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Even if this right contains elements of civil and political rights dimensions and broader sovereignty rights, there is is a clear ESC rights dimension.[12] Article 1(1) refers expressely to "economic, social and cultural development" while Article 1(2) refers to the use of "natural wealth and resources" and the protection from deprivation of "means of subsistence".

However, this raises the quandary as to whether the right to self-determination is enforceable under the protocol. This is not a question for the *inter-state* procedure:[13] Article 10 of the protocol grounds the jurisdiction of the Committee in the Covenant as a whole. Moreover, for the *inquiry* procedure, the Committee would possess the freedom to investigate compliance with these aspects of the right. However, claiming a violation of the right to self-determination under the *individual communications procedure* raises a particular admissibility hurdle: Only individuals can submit communications and the right to self-determination is a collective right (as discussed in Chapter 3). The remoteness of invoking a collective right to self-determination in the individual communication procedure is underscored by the Human Rights Committee's finding that peoples' rights could not be adjudicated under a procedure restricted to "individuals" or "groups of individuals".[14] The only possibility for jurisdiction might be a claim by *all* individuals in the collective (the 'people'). Even still, Courtis and Rossi note that any such claim would need to demonstrate strong connections with the rights in the Covenant and the obligations in Part II would apply by virtue of the wording of Article 8(4).[15]

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[12] See generally on the right to self-determination, A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1999).
[13] See Chapter 5.
[14] *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).
[15] "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." Note however that this clause was not originally drafted with an eye to the justiciability of the right to self-determination in Part I of the Covenant. After Article 8(4) was agreed on in the Working Group, the

In the event that jurisdiction is found (whether in an individual communication, inquiry, or inter-state dispute), under what circumstances could (at least)[16] the ESC rights dimensions of the right to self-determination be adjudicated subsrantively? A number of contexts may be of particularly relevance: (i) military occupation; sanctions; rights of indigenous peoples.

Military Occupation

The subject of military occupations has arisen during the Committee's periodic review of state performance and raises the prospect of a complaint if the occupying state has ratified the protocol.

In its concluding observation on Morocco, the Committee has consistently registered concern over the self-determination rights of the occupied territories of Western Sahara. This State party has not rejected the general application of the Covenant to these territories and the Committee stated in 1994 concluding observations that:

> As regards Western Sahara, the Committee is concerned that the right to self-determination has not been exercised and expresses its hope that it will be exercised in full compliance with the provisions of article 1 of the Covenant, in accordance with plans approved by the United Nations Security Council. The Committee expresses its preoccupation about the negative consequences of the Western Sahara policy of Morocco for the enjoyment of the economic, social and cultural rights of the relevant population, particularly through population transfer.[17]

In 2000, it repeated its regret that there had not been a "definite solution to the question of self-determination" and encouraged the State to resolve "problems impeding the realization of the referendum on the issue of self-determination in Western Sahara".[18]

In its next periodic report, the State responded ambiguously that "Morocco, faithful to its principles of respect for international law, continues to collaborate with the United

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Optional Protocol was widened to include the right to self-determination in the UN Council of Human Rights. Article 8(4) was left unchanged even though any claim under Part I must now be considered in line with the obligations of Part II.

[16] Note that under the inter-state procecdure all dimensions of the right to self-determination can be invoked.

[17] CESCR, *Concluding Observations: Morocco* (Tenth Session, 1994), UN Doc. E/C.12/1994/5 (1994), para. 10.

[18] CESCR, *Concluding Observations: Morocco*, U.N. Doc. E/C.12/1/Add.55 (2000), para. 35.

Nations in the search for a settlement to the Saharan conflict that will ensure national sovereignty over the whole of Moroccan territory."[19] In response, the Committee pushed further, and in 2006 addressed "reports of the straitened circumstances endured by people displaced by the conflict in Western Sahara, particularly women and children, who apparently suffer multiple violations of their rights under the Covenant".[20]

In relation to Israel, the application of the ICESCR to Israel's military occupation was the subject of contention.[21] In its first report to the Committee, Israel failed to submit information on the realisation of the ESC rights of the Palestinians who lived in the Occupied Palestinian Territories (the West Bank and the Gaza Strip).[22] The Government of Israel only included information on the enjoyment of these rights by Israeli settlers in the Occupied Territories. The Committee, however, was of the view that "the State's obligations under the Covenant apply to all territories and populations under its effective control".[23]

The Committee concluded that the measures taken by Israel in the Occupied Territories had resulted in widespread violations of the ESC rights of the Palestinians.[24] Of particular relevance is that the Committee drew upon the right to self-determination in the Covenant and it noted that Israel must ensure that "in no way may a people be deprived of its own means of subsistence".[25] The CESCR also found

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[19] *Third Periodic Report of Morocco under Articles 16 and 17 ICESCR*, UN Doc. E/1994/104/Add.29, 17 January 2005, para. 20.
[20] CESCR, *Concluding Observations: Morocco* (Thirty-sixth Session, 2006), UN Doc. E/C.12/MAR/CO/3 (2006), paras. 13(b) and 35.
[21] See the Report by Al-Haq, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories* (Ramallah: Al Haq, 2003); M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, Vol. 99 (2005), pp. 119–41.
[22] Initial Report submitted by Israel under Articles 16 and 17 ICESCR, UN Doc. E/1990/5/Add.39.
[23] CESCR, *Concluding observations: Israel* (Nineteenth Session, 1998), UN Doc. E/C.12/1/Add.27, para. 8.
[24] Ibid. paras. 21, 22, and 24. The observations read in part: "The Committee is deeply concerned about the adverse impact of the growing exclusion faced by Palestinians in East Jerusalem from the enjoyment of their economic, social and cultural rights [and] … the continued Israeli policies of building settlements… The Committee deplores the continuing practices of the Government of Israel of home demolitions, land confiscations and restrictions on family reunification and residency rights, and its adoption of policies which result in substandard housing and living conditions, including extreme overcrowding and lack of services, of Palestinians in East Jerusalem …. The Committee notes that … the Government of Israel continues to expropriate Palestinian lands and resources for the expansion of Israeli settlements. …[and] annually diverts millions of cubic metres of water from the West Bank's Eastern Aquifer Basin, the annual per capita consumption allocation for Palestinians is only 125 cubic metres while settlers are allocated 1,000 cubic metres per capita."
[25] Ibid. para. 39.

that its policy of enclosing Palestinians in restricted spaces limited the "movement of people and goods" and cut off "access to external markets and to income derived from employment and livelihood".[26] The Committee called upon the government to undertake to "ensure safe passage at checkpoints for Palestinian medical staff and people seeking treatment, the unhampered flow of essential foodstuffs and supplies, the safe conduct of students and teachers to and from schools, and the reunification of families separated by closures".[27] It urged the State to reassess the Permanent Residency Law in order to avoid separation of families and to cease building illegal settlements, expropriating land, water and resources, demolishing houses and carrying out arbitrary evictions.[28]

Upon request of the CESCR, the Government of Israel submitted additional information,[29] pointing out that it "has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction".[30] The Government distinguished between international human rights law and international humanitarian law, and viewed only the latter as applicable in the Occupied Palestinian Territories. In addition, the Government argued that powers and responsibilities in all civil spheres have been transferred to the Palestinian Council, including those relating to the realisation of ESC rights. In its opinion, "Israel cannot be internationally responsible for ensuring the rights under the ICESCR in these areas."[31] However, the State admitted that some powers and responsibilities "continue to be exercised by Israel in the West Bank and Gaza Strip", according to agreements reached with the Palestinians.[32] In its concluding observations in this additional report, the Committee rejected again the distinction made by Israel between human rights law and humanitarian law. It held that, even during armed conflict, fundamental rights, including those in the ICESCR, must be respected by the occupying power.[33]

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[26] Ibid.
[27] Ibid. para. 18.
[28] Ibid. paras. 40–1.
[29] *Additional information submitted by Israel,* 14 May 2001, UN Doc. E/1989/5/Add.14 (2001).
[30] Ibid. para. 2.
[31] Ibid. para. 3.
[32] Ibid. para. 5.
[33] CESCR, *Concluding Observations: Additional Information Submitted by Israel* (Twenty-sixth Session, 2001), UN Doc. E/C.12/1/Add.69, para. 12.

In its second periodic report, Israel declined again to submit any information on the living conditions of people in the Occupied Territories, other than Israeli settlers.[34] During the oral examination of the report, the Israeli delegation stated that the omission was on account of the fact that the Covenant related to fields for which powers and responsibilities had been transferred from Israel to the Palestinian Authority in 1994. In addition, the government was of the view that the Covenant was a specific, territorially bound treaty which did not apply to areas outside the national territory of a State party. Moreover, it claimed that it did not exercise effective control over those territories.[35]

In its concluding observations, the Committee held the opposite view. It reaffirmed its previous position that "the State party's obligations under the Covenant apply to all territories under its effective control".[36] In the view of the Committee, this meant that Israel was called upon to give full effect to its Covenant obligations in the Occupied Territories. In practice it entailed again, as a matter of priority, an obligation to undertake to ensure safe passage at checkpoints for Palestinian medical staff and people seeking medical treatment, the unhampered flow of medical foodstuffs and supplies, the free movement to places of employment, free access to land and water resources and the safe conduct of students and teachers to and from schools. The CESCR also strongly urged Israel to take immediate steps to ensure equitable access to and distribution of water to all populations living in the Occupied Territories, including the full and equal participation of all parties in the process of water management, extraction and distribution.[37]

In the *Wall* Advisory Opinion, the International Court of Justice confirmed the CESCR's interpretation that the Covenant does apply to the Occupied Territories:

> lt is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights.… In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural

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[34] *Second Periodic Report of Israel under Articles 16 and 17 ICESCR*, UN Doc. E/1990/6/Add.32 (2001).
[35] CESCR, *Summary Record of the 18th Meeting* (Thirtieth Session, 2003), UN Doc. E/C.12/2003/SR.18 (2003), paras. 22–4.
[36] CESCR, *Concluding Observations: Israel* (Twenty-Ninth Session, 2003), UN Doc. E/C.12/1/Add.90 (2003), para. 31.
[37] Ibid. paras. 35, 40 and 41.

> Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.[38]

Thus, for the Committee, the extraterritorial application of not only the right to self-detemrination, but multiple ICESCR rights is required when a State exercises effective control over foreign territory and over populations residing in a foreign territorial entity. The Committee does not explain though what the criterion of 'exercise of effective control' exactly means but from the Israeli/Palestinian and Moroccan cases, military occupation is clearly sufficient.

Economic Pressure: Sanctions and Structural Adjustment

The second scenario is the coercive use of policy and financial instruments that threaten the economic self-determination. Sanctions represent the premier form of this type of extraterritorial action but it could odious loan requirements or crippling trade or investment conditions might also be included.

Bilateral or multilateral sanctions imposed by States or international bodies on another State may have a negative impact on the ESC rights of the people living in the target State. This issue came to the fore when the humanitarian consequences of sanctions imposed by the UN Security Council on Iraq attracted international attention. In 1997, the CESCR responded by devoting an entire general comment to the relationship between economic sanctions and respect for ESC rights. It noted that sanctions:

> [O]ften cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature,

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[38] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* I.C.J. Reports 2004, p. 136 (International Court of Justice), , para. 112.

> they also have a major additional impact on the enjoyment of economic, social and cultural rights.[39]

Sanctions regimes raise questions as to compliance with the extraterritorial human rights obligations of States.[40] The Committee recognises that sanctions may constitute a lawful response by the international community but emphasises that it is:

> essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[41]

In its application of the Covenant to sanction regimes, the Committee held that the provisions of the ICESCR "cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions".[42] According to the Committee, when imposing sanctions, the international community, whether it be an international or regional organisation, an individual State or a group of States, must do its utmost to guarantee the most essential elements of the ESC rights of the people of the target State. This means that, when designing sanctions, the human rights that may be affected must be fully taken into account. In addition, the human rights effects of the implementation of sanctions should be monitored. Finally, the entity that imposes the sanctions has an obligation to respond "to any disproportionate suffering experienced by vulnerable groups within the targeted country".[43]

The language used by the Committee in this General Comment is quite strong; mandatory terms, such as 'must' and 'obligation', are used throughout. Moreover, the Committee's position can be considered rather authoritative. It was reflected later in the ILC Articles on State Responsibility: Article 50 states that "Countermeasures shall not affect … obligations for the protection of fundamental human rights".[44] The Commentaries to the

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[39] *General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights*, (Seventeenth session, 1997), U.N. Doc. E/C.12/1997/8 (1997).
[40] The Committee does not label sanctions imposed by States as acts giving rise to the exterritorial application of the ICESCR. However, it is obvious that this is actually what it is all about.
[41] Ibid. para. 4.
[42] Ibid. para. 7.
[43] Ibid. paras. 12–14.
[44] Article 50, ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Report of the International Law Commission on the Work of its Fifty-third Session* (Fifty-

Articles refer to the CESCR's General Comment No. 8 as an important basis and explication for this duty.[45] However, the CESCR does not refer specifically to the right to self-determination but rather the more generic "economic, social and cultural rights" in the Covenant. Nonetheless, sanctions may raise questions of self-determination if it threatens the free pursuit of "economic, social and cultural development" and deprives a people "of its own means of subsistence" (See Articles 1(1) and 1(2) of the Covenant).

Sanctions may not be the only form of economic pressure that amounts to an interference with the right to self-determination. For instance, the Committee has regularly noted the constraints imposed on developing States by virtue of structural adjustment conditions. This raises the question as to whether donor States, whether bilaterally or multilaterally through membership of international financial institutions, may breach the economic right to self-determination of States. Where conditions are especially onerous, do not reflect reciprocity, and there is an imbalance of power, it may be possible ot mount such a claim.

Gross exploitation of resources may be another form of interference with the right to self-determination. Article 1(2) of the ICESCR refers expressly to the rights of states to freely dispose of "natural wealth and resources". The potential for such an application is illustrated in *SERAC v Nigeria* which involved oil extraction by a foreign multinational corporation. However, the African Commission on Human and Peoples' Rights could only focus on the obligations of a domestic state, which was found to have violated Article 21 of the African Charter on Human and People's Rights (which resonates with the right to self-determination).[46] Nigeria failed to properly protect the Ogoni people against foreign exploitation of resources by a multinational corporation.[47] The same reasoning might also be applied against a foreign state when a domestic state does not consent.

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third Session, 2001), UN GAOR, Supp. No. 10 at 43, UN Doc. A/56/10 (2001) ("ILC Articles on State Responsibility").

[45] Commentaries on ILC Articles on State Responsibility, p. 132.

[46] Article 21 reads: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it…. 5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

[47] *SERAC v Nigeria* Communication 155/96 (African Commission on Human and Peoples' Rights), . It found that the "The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles,

If the right of all peoples to self-determination is not reduced to the liberation of postcolonial nations, we can discern extraterritorial and ESC-oriented rights of peoples that are to be respected and promoted. However, the extent to which other groupings, particularly indigenous peoples and minorities, possess the right to self-determination is obviously controversial. Customary international law is particularly conservative concerning any 'external' right to self-determination, in the form of secession for instance.

Nonetheless, the right to internal self-determination has received increasing recognition.[48] Moreover, the universally accepted UN General Assembly Declaration on the Rights of Indigenous Peoples (2007) provides greater clarity (although it does not cover minorities). The Declaration affirms the general right of indigenous peoples to self-determination, their specific right to autonomy or self-government in matters relating to their internal and local affairs, and their right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions (Articles 3-5). Many of these are directly relevant to the ESC rights dimensions of the right to self-determination. While indigenous groups would face more challenges in bringing a claim based on this right under the individual communications procedure (see discussion above) it constitute a topic for an inquiry or inter-state complaint.

3. Obligations

Various obligations of States are scattered throughout the Covenant but the general obligations are found Part II. In Article 2(1), each State party commits itself to:

> [T]ake 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.

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the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter."

[48] A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (New York: Cambridge University Press, 1999), pp. 102-8.

This phraseology is obviously more convoluted than the equivalent provision of the International Covenant on Civil and Political Rights (ICCPR). Article 2(1) of the ICCPR provides that States parties shall 'respect' and 'ensure' the civil and political rights in that Covenant. Previously, much ado was made about this difference with the suggestion that the ICESCR obligations were merely aspirational.[49] However, drawing on a body of scholarly work and emerging jurisprudence, the Committee has put paid to this simplistic view, providing a coherent understanding of terms such as 'maximum of available resources', 'achieving progressively', 'all appropriate means' and 'legislative measures'. The Committee's work has been extensively discussed elsewhere [50] and the aim of this section is to analytically review the general development of the doctrines on key obligations in the context of the wider scholarship and debate.

3.1 Conduct and Result

In 1977, the International Law Commission cited Article 2(1) of the ICESCR as an example of a provision that gives rise to obligations of result, but gives the State party a choice of means as to the achievement of the result.[51] Interestingly, the ICCPR Article 2(1), which requires the State party to ensure the civil and political rights, has been similarly interpreted: "the obligation leaves the State at least an initial freedom of choice of the means to be used to achieve the result required by the obligation".[52] These obligations are contrasted with obligations of conduct, which are more specific and leave a State no discretion as to the selection of its means of compliance. However, a liability of viewing the obligations as merely those of results is that it may

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[49] See, e.g., E. W. Vierdag, 'The legal nature of the rights granted by the international Covenant on Economic, Social and Cultural Rights. ', *Netherlands Yearbook of International Law,* Vol. IX No. (1978), pp. 69-105, ; C. Tomuschat, 'An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights' in l. Dicke, S. Hobe, K.-U. Meyn, A. Peters, E. Riedel, H.-J. Schütz and C. Tietje (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück* (2005), pp. 815-834, .

[50] See for example, P. Alston and G. Quinn, 'Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' *Human Rights Quarterly*, Vol. 9 No. 1 (1987), pp. 156-229, at 185; R. E. Robertson, '*Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights'*, Human Rights Quarterly, Vol. 16, No.4 (1994), pp. 693-714; Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above); and Sepúlveda, *The Nature of Obligations* (n. 10 above). See also the expert guidelines: 'The Limburg Principles On The Implementation Of The International Covenant On Economic, Social And Cultural Rights', UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135; and 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', January 22-26, 1997, reprinted in *Human Rights Quarterly, Vol.* 20, no. 3 (1998), pp. 691-704.

[51] 'Report of the International Law Commission on its Twenty Ninth Session', *Yearbook of the International Law Commission*, Vol. 2, pp. 20-21 (1977), para.8.

[52] Ibid.

"deprive" the Covenant "of any serious content".[53] According to Craven, if results are to be achieved progressively over time, an unrestricted choice of means would provide "little basis upon which to judge whether or not they were acting in good faith".[54]

In General Comment No. 3, the Committee declared that the Covenant contained legal obligations of both conduct and result.[55] In an earlier article on the nature of obligations under the Covenant, Philip Alston, later to become Chairperson of the Committee, and Gerard Quinn, pointed out that the specific obligation "to take steps" in Article 2(1) is also an obligation of conduct.[56] On account of the unique character of the Covenant (i.e., the notion of 'progressive implementation'), they concluded that the overall general obligation was of a hybrid nature. States would be evaluated as to both types of obligations: whether they have appropriately taken (or refrained from) the necessary action under the Covenant, and the extent to which they have progressively realised the rights with the resources at their disposal.

This conclusion would be almost redundant these days, except that it was revived in a surprising if not bizarre form during the negotiations over the Optional Protocol. An Independent Expert appointed by the Commission on Human Rights, Hatem Kotrane, concluded in 2002 that part of the great difficulty in asserting justiciability of Covenant rights is that they are obligations of *means* (i.e., conduct), not of result, unlike the ICCPR.[57] Despite its inconsistency with both the ILCs and Committee's approach, this was not merely a mistake of terminology. The point was explained in some, albeit brief, detail. Critics of the Optional Protocol then picked it up: Dennis and Stewart endorsed the Expert's views claiming that he "acknowledged the important differences in the understandings of States parties to the two Covenants".[58] Later in the same article, while explaining the West's opposition to the idea of "juridical

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[53] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p.107; see also Sepúlveda, *Nature of Obligations* (n. 10 above), p. 188.
[54] Craven, ibid.
[55] *General Comment 3, The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) (CESCR), para. 1. ("Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result.")
[56] Alston and Quinn, 'Nature and Scope of States Parties' Obligations' (n. 49 above), p. 185.
[57] *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 Eigth Session, Item 10 of the Provisional Agenda, UN Doc. E/CN.4/2002/57, 12 February 2002, paras. 16-20, available at <http://www.hri.ca/fortherecordcanada/documentation/commission/e-cn4-2002-57.htm>
[58] M. Dennis and D. 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?' *American Journal of International Law*, Vol. 98, 2004, pp. 462-515, at 470.

recognition" of Covenant rights, the authors refer to the comments of René Cassin noting that "most economic and social rights, however, could only give rise to obligations to take action".[59]

In addition to overlooking the ILC's classification, these authors also missed the point of a long and involved discussion. In 1987, Alston and Quinn were straining to argue that there *were* some obligations of conduct, since they were "obligations of a more conventional and tangible nature".[60] Furthermore, Craven has shown that the ILC's classification was difficult to sustain in practice: "In the face of the indeterminate and conditional nature of the results to be achieved, the Committee has tended to concentrate on obligations of conduct."[61] Sepúlveda's recommendation that the conceptual framework should be avoided merits attention;[62] the distinction has proven no less a headache in other areas of international law.[63]

3.2 Respect, Protect and Fulfil

In its early general comments, the Committee signalled that State obligations were not limited to positive obligations for the progressive achievement of the rights. In General Comment No. 4 (1991), concerning the right to housing, the Committee affirmed the presence of negative obligations in the Covenant:

> the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

This multi-faceted perspective later found formal expression in the typology of duties to respect, protect and fulfil.[64] It was first introduced in General Comment No. 12 in 1999 and the CESCR has continued to use it in all subsequent general comments:

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[59] UN Doc. E/CN.4/SR.270, at 11 (1952); cited in Dennis and Stewart, 'Justiciability of Economic, Social, and Cultural Rights', ibid. p. 484.
[60] Alston and Quinn, 'Nature and Scope of States Parties' Obligations' (n. 49 above), p. 185.
[61] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p.108.
[62] Sepúlveda, *Nature of States Parties Obligations* (n. 10 above), pp.184-196. The author notes at p.196 that this would require amending the Committee's Outline for Drafting General Comments. In any case, the distinction barely features in the Committee's work.
[63] See P.M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', *European Journal of International Law*, Vol. 10, pp.371-385 (1990), pp.374-378.
[64] This draws on A. Eide (UN Special Rapporteur on the Right to Food), The Right to Food (Final Report) UN.Doc. E/CN.4/Sub.2/1987/23 (1987), paras. 66-69. A similar typology was developed contemporaneously and for different purposes by the American philosopher Henry Shue: see Basic Rights:

> The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (*facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly.[65]

The Committee was not alone in this endeavour. In 1996, South Africa adopted the model in its post-apartheid constitution while the Committee on the Elimination of Discrimination Against Women later adopted the taxonomy.[66] The typology is particularly useful as a pedagogical tool in affirming that ESC rights are similar to civil and political rights because both types of rights involve three types of duties: respect (refrain from impeding), protect (ensure others do not impede), and fulfil (actually provide) the conditions necessary for realising the rights. The typology also attempts to overcome the binary positive/negative dichotomy that has been criticised as a baseline for appropriate judicial intervention.[67]

Since the duties to respect and protect are also familiar attributes of civil and political rights, the Committee may potentially use these two categories to state that *prima facie*, if the obligation under consideration is one of respect or protect, then there is a presumption that resource constraints are an insufficient reason for failing to

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Subsistence, Affluence and US Foreign Policy (Princeton: Princeton University Press, 1980). For the history of this development, see A. Eide, 'State obligations revisited' in W.B. Eide and U. Kracht (eds) *Food and Human Rights in Development, Vol. II: Evolving issues and emerging applications*, . (Antwerp: Intersentia, forthcoming) pp.137-160.

[65] Committee on Economic, Social and Cultural Rights, *General Comment No. 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 15.

[66] Constitution of the Republic of South Africa, Section 7(2); General Recommendation No. 24 (20th session, 1999), paras. 14-17.

[67] For judicial treatments, see *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 10, para.20ff (majority) and para.71ff (L'Heureux-Dubé J). (Supreme Court of Canada); *R v Secretary of State for the Home Department, ex p Limbuela* [2005] UKHL 66 para.92 (Lord Brown): 'I repeat, it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim.' Positive obligations are now an entrenched aspect of international human rights law, including civil and political rights. See e.g. A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

implement the obligation (for instance as is clear in its doctrine that forced evictions are 'prima facie incompatible with the requirements of the Covenant').[68] By contrast, the obligation to protect does require positive action and may on occasion require significant resources and has indicated the obligation can require 'positive budgetary measures'.[69] Nonetheless, the Committee has been of the view that such obligations are usually of immediate effect.

This schema has been highly developed in the Committee's general comments and it is applied in effect in its periodic review. It is useful to pause and consider how the Committee has developed the first two legs of the trichotomy and the next sub-section takes up the question of fulfil.

Obligation to Respect

As enunciated by the Committee, the obligation to respect appears to prevent interferences with (1) the 'autonomy' of social rights as rights enjoyed through some form of 'self-effort' or 'private action' and (2) diminutions in 'legal entitlements' such as laws and practices governing security of tenure, workplace relations, access to natural resources, use of public goods, environmental management, financial and credit regulation, educational standards, etc. Cuts to fiscally financed benefits tend to be dealt with under the duty of non-retrogression (see section 3.6).

In the case of the right to housing, the Committee has devoted an entire general comment to the question and developed a proportionality-like test for assessing claims of forced evictions.[70] For any proposed eviction, the Committee requires that there be substantial justification, due process, including consideration of alternatives, provision of legal remedies. If an eviction proceeds, remedies are to include provision of adequate alternative housing within maximum available resources. This is buttressed by the minimum proviso that no one is rendered homeless as a result of an eviction. Similar conditions were laid down with respect to interferences with the right to water.[71] As can be seen from the requirements, the obligations are not purely of a

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[68] *General Comment No. 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), para. 2.
[69] *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), para. 7.
[70] General Comment No. 7 (n. 7 above).
[71] *General Comment 15, Right to water* Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003) (CESCR), .

negative nature. Like the European Court of Human Rights, the Committee recognises that States must also take positive steps in order to ensure that the obligation to respect is effectively met.[72]

Examples of forced evictions regularly crop up in the Committee's concluding observations, although ithe specificity of their conclusions largely depend on the amount and quality of information provided by non-governmental sources. For instance, the Committee found that planned evictions by the Dominican Republic were not justified,[73] called on Israel to stop land confiscations and housing demolitions,[74] requested Norway to "ensure that asylum seekers are not restricted in their access to education while their claim for asylum is being processed"[75] and called on Belarus to "eliminate the restrictive legislation governing trade unions". [76] The first case submitted to the Committee under the Optional Protocol also concerned forced evictions; however, it dealt with the protective dimension (and is taken up in the next sub-section).

Obligation to Protect

As to the obligation to protect, the CESCR has derived this obligation from the duty to "take steps" in Article 2(1) of the ICESCR: it requires "measures by the State to ensure that enterprises or individuals do not deprive individuals" of their social rights.[77] The Committee has emphasised the importance of establishing "an effective regulatory system" in order to "prevent" abuses, which is to include "independent monitoring, genuine public participation and imposition of penalties for non-compliance".[78]

The right to water provides a useful insight into the Committee's development of the obligation. In its 1995 conclusions on Russia, the Committee raised the problem of pollution of water and its impact on health and food contamination[79] and in 2001,

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[72] See, e.g., *A, B and C v Ireland* [2010] ECHR 2032.
[73] *Concluding observations of CESCR: Dominican Republic*, CESCR E/1991/23, para. 326.
[74] *Concluding observations of CESCR: Israel*, 12 April 1998, UN Doc. E/C.12/1/Add.27, paras. 41.
[75] *Conclusions and recommendations of CESCR: People's Republic of Norway, U.N. Doc. E/C.12/1/Add.109 (2005).*
[76] *Conclusions and recommendations of CESCR: Belarus,* U.N. Doc. E/C.12/1/Add.7/Rev.1 (1996), para. 25.
[77] *General Comment No. 12* (n. 7 above), para. 15.
[78] *General Comment 15* (n. 7 above), para. 24.
[79] 'It is also very concerned that there has been a curtailment of funds to modernize an out-of-date water delivery system which adversely affects the access of the population to clean water.' *Concluding*

recommended that Nepal "ensure that projects involving privatization of water supply provide for continued, assured and affordable access to water by local communities, indigenous people, and the most disadvantaged and marginalized." [80] In General Comment No. 15 it solidified its perspective.[81] After providing examples of State duties to legislate, ensure private actors do not deny equal access and to prevent pollution and inequitable extraction by third parties, the General Comment addresses private actors who provide water services. It specifically requires the State to ensure that the private sector will act consistently with *democratic principles,* such as participation, create a sufficient regulatory framework, including penalties for non-compliance, and ensure that private actors ultimately must take the *necessary steps* to assist in the realisation of the right to water, or at least not frustrate the objective. An earlier draft was stronger – calling for the deferral of privatisation until a regulatory framework was in place – though this was ultimately removed. At the same time, the General Comment opens with the phrase that water is a 'public good', which has been interpreted by some as showing the Committee's unease with private solutions. While the Committee has been criticised for its moderate stance[82] it has been perhaps more stringent in its concluding observations: in the case of Morocco, it expressed concern over "privatization of public services such as water and electricity in urban centres in Morocco, the effect of which is to impose an additional economic burden on families living in shantytowns and thus aggravate their poverty".[83]

The Committee's position on the obligation to protect reflects a wider move in international law, which provides additional ballast for better understanding how the obligation to protect may be adjudicated under the Optional Protocol.[84] The duty to

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observations of the Committee on Economic, Social and Cultural Rights: Russian Federation. 20/05/97. E/C.12/1/Add.13, para. 25. See also para. 38.

[80] Ibid. paras. 41 and 42.

[81] Ibid, paras. 23-24.

[82] But some authors such as Craven have criticised the Committee for not going far enough on the question of privatisation: "one may sense that the Committee may be legislating for its own absence – or excluding its own competence – in the very area in which the discussion of water rights is most acute and in which the Committee's voice is perhaps most needed". M. Craven, 'Some Thoughts on the Emergent Right to Water', in Riedel and Rothen, *The Human Right to Water* (n. 7 above)., pp. 35-46, at 45-46.

[83] *Conclusions: Morocco* (n. 283 above).

[84] See for example, Article 16, Convention Against Torture, and Article 3, International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006. On jurisprudential developments, see below. Note that within some states, restrictive state action doctrines are quite strong: M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008); and J. A. King, 'United Kingdom: Asserting Social Rights in a Multi-Layered System' in M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 276-294.

'ensure' civil and political rights in various treaties has been interpreted to include an obligation to protect,[85] often disaggregated into obligations to "prevent", "sanction", "investigate" and "repair" violations.[86] This duty is not expressed in absolute terms. The European Court of Human Rights has opined that the State must "take reasonable and appropriate measures" or "necessary" measures;[87] the Human Rights Committee has used the adjective "appropriate".[88] Elsewhere, the growing trend is to use the signifier of "due diligence" following the lead of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case.[89]

In concrete cases, a proportionality-like test is used to assess whether the public authorities have taken sufficient action to regulate private actors. According to the European Court of Human Rights, "Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation."[90] Such balancing is often complemented by an examination of the foreseeability of harm,[91]

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[85] See, e.g., *Lopez Ostra v Spain* (1995) 20 EHRR 277 (ECtHR); *Herrera Rubio v. Colombia* Communication No. 161/1983, UN Doc CCPR/C/31/D/161/1983 (2 November 1987) (UN Human Rights Committee); *Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee* UN doc. CCPR/C/USA/CO/3 (2006), para. 13.

[86] *Velásquez Rodríguez Case* Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (Inter-American Court of Human Rights), para. 175. The UN Human Rights Committee adopts precisely the same language in *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant* (Eightieth Session, 2004), UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) (Human Rights Committee), para. 8.

[87] *Lopez Ostra v Spain* (1995) 20 EHRR 277 (ECtHR), paras. 51, 55. See also *Mahmut Kaya v. Turkey* 2000-III, ECHR 129 (ECtHR), para. 86 ("authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"). See also *SERAC v Nigeria* Communication 155/96 (African Commission on Human and Peoples' Rights), paras. 44, 46, 57; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* AHRLR 66A [2000] (African Commission on Human and Peoples' Rights).

[88] *Herrera Rubio v. Colombia* Communication No. 161/1983, UN Doc CCPR/C/31/D/161/1983 (2 November 1987) (UN Human Rights Committee), para. 15.

[89] *Velásquez Rodríguez Case* Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (Inter-American Court of Human Rights), para. 172. Followed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Reports 2007, p. 43 (International Court of Justice), para. 430 and *A.T. v. Hungary* Communication No. 2/2003, Decision on the Merits, UN doc. A/60/38 (Part I) (2005) (UN CEDAW), para. 9.2.

[90] *Lopez Ostra v Spain* (1995) 20 EHRR 277 (ECtHR), para. 51.

[91] *Mahmut Kaya v. Turkey* 2000-III, ECHR 129 (ECtHR), para. 86. See also *Ilascu v. Moldova and Russia* (App. No. 48787/99), Judgment of 8 July 2004 (ECtHR), and interpretation by S. Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 114-149, 142.

proximity of the state to a private actor,[92] a state's capacity[93] or the reasonableness of any burdens, including fiscal costs.[94]

In a contemporaneous decision, *SERAC v. Nigeria*, the African Commission articulated similar obligations after charting the development of the obligation to protect in international jurisprudence.[95] It specifically found that Nigeria had failed to protect Ogoni communities in the Delta region from interferences with the right to food and the use of natural resources by the Shell Oil Company.[96] It also commented that the "obligation to protect" requires states to "prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners" and "where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies."[97]

A judgment on a constitutional 'right to energy' by the Supreme Court of the Philippines provides another significant illustration of a challenge to state inaction in the private sphere.[98] The Supreme Court struck down a deregulation law which permitted the three major oil companies to avoid regulatory permission for price increases.[99] Citing a right to electricity, the Court warned that higher oil prices threaten to "multiply the number of our people with bent backs and begging bowls", and declared that it could not "shirk its duty of striking down a law that offends the constitution" despite the law constituting an "economic decision of Congress".[100] Nonetheless, the Court also indicated how the

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[92] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Reports 2007, p. 43 (International Court of Justice), para. 430.
[93] Ibid.
[94] See comment by the ECtHR in *Lopez Ostra v Spain* (1995) 20 EHRR 277 (ECtHR), para. 51.
[95] *SERAC v Nigeria* Communication 155/96 (African Commission on Human and Peoples' Rights), paras. 44, 46, 57.
[96] Ibid. paras. 66, 58.
[97] Ibid. paras. 61.
[98] Another decision concerning deregulation and privatisation is *Informal Waste Pickers* T-291/09, 2009 (Constitutional Court of Colombia), . The Court suspended a decree and law prohibiting informal waste pickers from access to garbage dumps and landfills as part of the privatisation of waste management services. This exclusion was held to violate rights to livelihood, work, dignity, and development among others. Orders were made to establish procedures to modify the scheme as well as improve the health and education rights of the affected groups. See also the decision on the parameters for the water privatisation in Indonesia in light of the right to water: *Judicial Review of the Water Resources Law (No 7/2004)* No 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (Constitutional Court of Indonesia).
[99] *Tatad v Secretary of the Department of Energy* G. R. No. 124360 (5 November 1997) (Supreme Court of the Philippines).
[100] Ibid. pp. 37-38.

regulation could be restructured in order to allow more free floating prices, which was what eventually happened.[101]

In the Committees's first decision under the Optional Protocol, *I.D.G. v. Spain,* the obligation to protect as central.[102] In 2007, the author of the communication had used most of her savings and taken a mortgage to buy a property. As a result of the global financial crisis, which particularly engulfed Spain, the complainant found herself in difficult economic circurmstances and missed a number of payments. The financial institution refused to negotiate and in 2012 unilaterally commenced proceedings special mortgage enforcement procedures in a Madrid trial court. However, the documents were never served on the complainant as the server could not locate her. In 2013, the Court ordered arrangements be made to auction the property. On 5 April 2013, the complainant, according to her submission, became aware of the process. She pointed out that "there was no public announcement of the posting of the notice, it was not announced in any official organ, and it was not published in the Official Gazette".[103] She filed a motion for reconsideration in Madid trial court and later before the Constitutnal Court, but was unsuccessful in both cases.The Committee began its analsyis by affirming that the human right to adequate housing is fundamental. It recalled its early jurisprudence concerning the right to secure tenure and protection from forced evictions, particularly the requirements from Genral Comment No. 7 that there be "a real opportunity for consultation with those affected" and "adequate and reasonable notice for all affected persons prior to the scheduled date of eviction".[104] Citing further the text of the Covenant concerning the duty to adopt legialtive measures and General Comment 9 on access to effective remedies, it held that "State parties must ensure that the persons whose rigt to adequate housing may be affected by, day, forced evictions or motgage enforcement have acess to an effecttive and appropriate judicial remedy".[105] In the context of the present case, the Committee pointed out that:

> in compliance with the aforementioned obligations, the authorities should take all reasonable measures and make every effort to ensure that the serving of notice of

[101] C. Diakno, 'Interview' in M. Langford (ed.) *Litigating Economic, Social and Cultural Rights* (Geneva: COHRE, 2003), pp. 48-50.
[102] *I.D.G. v Spain* (CESCR) Communication No. 2/2014.
[103] Ibid. para. 2.5.
[104] Ibid. para. 11.2.
[105] Ibid. Para. 11.4.

> the most important acts and orders in an administrative or judicial procedure is conducted properly and effectively so that the persons affected have the opportunity to participate in the proceedings in defence of their rights.
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> Notification by public posting of notice can be an appropriate means of serving judicial notice consistent with the right to effective judicial protection. However, the Committee considers that its use in cases that might involve a violation of human rights such as the right to adequate housing, which require judicial oversight, should be a measure of last resort, particularly when applied to acts that set a procedure in motion. Its use must be strictly limited to situations in which all means of serving notice in person have been exhausted; and must ensure sufficient exposure and long enough notice that the affected person has the opportunity to take full cognizance of the start of the proceedings and can be a party to them. [106]

Applying this standard to the facts of the cases, the Committee found a violation. It acknwloedged the "repeated efforts" of the domestic court to notify the complainaint of the mortgage enforcement procedure. [107] However, it was not satisified that the requirement of adequate effortin the context of a foreclosure procedure, finding that the State had not "exhausted all available means".[108] It was puzzled by the failure to send a ltter to the complaint's address, particularly given that there were no other procedural avensues under Spanish law in which the complainaint could defend her interests.[109]

Moving to remedies, the Committee found that "The State party has an obligation to provide the author with an effective remedy" which included ensuring "that the auction of the author's property does not proceed unless she has due procedural protection and due process".[110] It also made general recommendations to the State that it:

> (a) Ensure the accessibility of legal remedies for persons facing mortgage enforcement procedures for failure to repay loans;
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> (b) Adopt appropriate legislative or administrative measures to ensure that notification by public posting of notice in mortgage enforcement procedures is strictly limited to situations in which all means of serving notice in person have

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[106] Ibid. paras. 12.2-3.
[107] Ibid. Para. 13.3.
[108] Ibid.
[109] Ibid. 13.3-6.
[110] Ibid. Para. 16. It also recommended the reimbursement of the complainant's legal costs.

been exhausted; and that it ensures sufficient exposure and long enough notice that the affected person has the opportunity to take full cognizance of the start of the proceedings and can attend;

(c) Adopt appropriate legislative measures to ensure that the mortgage enforcement procedure and the procedural rules contain appropriate requirements … and procedures to be followed before going ahead with auction of a dwelling, or with eviction, in accordance with the Covenant and taking into account the Committee's general comment No. 7.[111]

Critiques of the typology

Before turning to the obligation to fulfil, it is important to note that the respect/protect/fulfil typology has also been criticised.[112] The first problem is that no legal reasoning was given for the introduction of the typology in General Comment No. 12, whilst all previous categorisations introduced by the Committee were at least given some measure of justification. Furthermore, it is not clear how the obligation to respect relates to the duty of non-retrogression (see further below). In the view of the Committee, the obligation to respect includes not only interference with 'self-help measures', as the Committee originally termed them, and freedom to self-organise access to the Covenant right, but access to government provided schemes.[113]

Most problematic, however, is that the conceptual scheme might be considered an oversimplification of the interconnected nature of certain problems, which is most relevant for the Optional Protocol. A particular State action (e.g., severe cut in welfare allowances) could potentially constitute a breach of the duty to respect, protect or fulfil. Certainly the decision and legal machinations invoke the first notion: affected individuals may well assume that they have some property or vested interest in the government programme, backed by their tax payments.[114] The alteration of legislation suggests that the duty to protect is indirectly under threat, particularly when putting homeless people at the mercy of private actors in the job and housing markets. It will doubtless also be characterised by the State as an issue concerning the government's

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[111] Ibid. Para. 17.
[112] For another critique, see I.E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?', *Human Rights Law Review,* Vol. 5, (2005), pp. 81-103.
[113] For instance, the first example given in General Comment No. 14 (n. 7 above), concerns denial or limitation of equal access to 'preventive, curative and palliative health services'.
[114] See in this vein, C. Reich, 'The New Property', *Yale Law Journal*, Vol. 73, (1963-64), pp. 732-787.

duty to fulfil, and it will plead resource constraints and the need to choose between various priorities under the Covenant. The government will also argue that the duty to respect begins and ends in the 'state of nature', so to speak, and does not vest a property-like interest in every public privilege extended. Indeed, the typology does not feature particularly in the Committee's concluding observations, even though Sepúlveda has done excellent work in reviewing the Committee's concluding observations and classifying situations *post-facto* as falling into the duties to respect, protect and fulfil.[115] As Shue originally noted in a separate article in 1979:

> There is considerable danger that all the difficulties that haunt the dichotomy of positive rights and negative rights will simply move across the rights/duties line and continue to rattle around in the more spacious trichotomy of forbearance duties, protection duties, and assistance duties. One might suspect that forbearance duties are largely 'negative', assistance duties are largely 'positive', and protection duties are intermediate, and one might wonder whether the 'new' conceptualization, even if marginally more adequate, were not fairly superficial.[116]

Thus, we express some caution with the over-use of the typology. In concrete cases, complainants will usually need to specify the more precise and bounded obligations of states.

3.3 Obligations of Immediate Effect and Progressive Realisation

Immediate Obligations

The most persistent myth about the Covenant is that it does not give rise to the obligation to act in a particular way immediately. This misunderstanding often arises because of the formulation of Article 2(1), which requires States to achieve realisation of the rights *progressively* to the maximum of their available resources. The peculiar challenge posed by Article 2(1) is to know what a State must do today to realise a particular individual's right to, for example, the highest attainable standard of health.

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[115] Sepúlveda, *Nature of Obligations* (n. 10 above), pp. 209-246.
[116] H. Shue, 'Rights in Light of Duties', in P. Brown and D. Maclean (eds.), *Human Rights and US Foreign Policy* (Massachusetts: Lexington Books, 1979), pp. 65-82, at p. 76 (note 64), quoted in M. Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden: Martinus Nijhoff Publishers, 2004), p. 33.

While the task at first seems to defy comprehension, the Committee provided in 1991 a fairly clear roadmap in General Comment No. 3:

> While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.[117]

The Committee highlights both the obligation of non-discrimination (Article 2(2)) and the duty to "take steps" (Article 2(1)) as immediate duties which are "is not qualified or limited by other considerations". As to the latter:

> [W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be *deliberate, concrete and targeted* as clearly as possible towards meeting the obligations recognized in the Covenant.[118]

The requirement that States should take 'deliberate, concrete and targeted steps" is comparable to the subsequent finding of the South African Constitutional Court in the well-known case *Grootboom* (2000)[119] and a much earlier judgment of the Supreme Court of New Jersey in *Robinson v Cahill* (1973).[120] In each case, adjudicators refrained from delineating the precise content of immediate obligations; instead they set the parameters for evaluating the steps taken by authorities.

In *Robinson v Cahill*, the Supreme Court of New Jersey was faced with the question as to whether the "state has fulfilled its obligation to afford pupils that level of instructional opportunity" comprehended by the constitutional right to education.[121] According to the Court, the test was whether the state of New Jersey in the United States had a "plan" that would "fulfil" its "continuing obligation".[122] Critically, such a

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[117] General Comment No. 3 (n. 51 above), para. 1.
[118] Ibid. para. 2.
[119] See *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC).
[120] *Robinson v. Cahill* 62 N.J. 473 (1973) (Supreme Court of New Jersey, United States).
[121] The right was introduced in the New Jersey constitution in 1875 and is a right to a "thorough and efficient education".
[122] *Robinson v. Cahill* 62 N.J. 473 (1973) (Supreme Court of New Jersey, United States), at 519.

plan must (1) "define in some discernible way the educational obligation" and (2) provide an appropriate and effective funding mechanism.[123] In this instance, the State was found to have failed on both counts.

Similarly, in *Grootboom,* which concerned the right to access housing, the Court held that the State "must establish a coherent public housing program directed towards the progressive realisation of the right", "capable of facilitating the realisation of the right", and "within the State's available means". [124] The requirement of reasonableness meant that the programme must be "comprehensive, coherent, coordinate", with appropriate allocation of 'financial and human resources", "balanced and flexible" with provision for "short, medium and long-term needs", "reasonably conceived and implemented", "transparent" and made "known effectively to the public".[125] In addition, those "whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored".[126] The Governments housing programme was found wanting since it failed meet the last criteria: it had failed "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[127]

The Committee has given several examples of obligations of immediate effect. Generally speaking, measures that normally implicate the duties to respect and protect, discussed in Sections 3.1 and 3.2 above, are often viewed as generating obligations of immediate effect. [128] As discussed, obligations to protect might not always be immediately feasible if it requires extra resources that might not be immediately available (e.g. additional police forces to protect certain social interests). Other obligations of immediate effect are discussed in the remainder of this section: 3.4-3.8. This includes: adoption of legislation and plans of action; ensuring the minimum essential level for each right; monitoring the realisation of the Covenant rights as part of a duty to provide domestic remedies and accountability mechanisms; and taking

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[123] Ibid.
[124] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Constitutional Court of South Africa), para. 41.
[125] Summarised in S. Liebenberg, 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 75-101, 85.
[126] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Constitutional Court of South Africa), para. 44.
[127] Ibid, para. 99.
[128] Sepúlveda, *Nature of Obligations* (n. 10 above), suggests that negative obligations must always be considered 'of immediate application' (p. 184).

particular steps to meet extra-territorial obligations. Finally, there is the duty to guarantee all of the rights on a non-discriminatory basis and gender equality between men and women, which is discussed in the following chapter.

Progressive Realisation

The duty to take steps is distinct from the duty of progressive realisation: The latter tasks States with achieving measurable progress over time.[129] It is not sufficient for a State to merely point to conduct; results must follow. The Committee elucidated as follows in General Comment No. 3:

> [T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant, which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible toward that goal.[130]

This proactive conception of progressive realization has been affirmed and adjudicated by various courts and quasi-judicial bodies. The Constitutional Court of South Africa confirmed that the socio-economic rights detailed in the Constitution must be made "accessible not only to a larger number of people but to a wider range of people as time progresses".[131] Following explicitly the interpretation of the CESCR, the State was accordingly obliged to "move as

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[129] It is important to emphasise the importance of linguistic clarity on this point. In General Comment No. 12, (n. 61 above), para. 16, the Committee writes somewhat ambiguously that "some *measures* …. are of a more immediate nature, while other measures are of a more long-term character". This is followed in General Comments Nos. 13, 14, and 15 by the expression 'immediate obligations', even though the Committee reiterates the same obligations as in General Comment No. 3. Yet, it should be clear that it is the right, or the entitlement or any sub-entitlement, that is the object of either progressive or immediate *implementation*. The danger of the dichotomy is that once one manages to classify something as a progressive rather than immediate *obligation*, it might lead a State to believe that it does not need to act in any specific way immediately. The duty of progressive realisation is an ongoing or continual obligation: it requires measurable progress. See discussion in Langford and King, *The Committee on Economic, Social and Cultural Rights* (n. 1 above).

[130] Ibid. para.9. Elsewhere, the Committee considered "many of the provisions in the Covenant to be capable of immediate implementation": *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 10.

[131] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Constitutional Court of South Africa), para. 45.

expeditiously and effectively as possible towards that goal" and avoid "deliberately retrogressive measures" which lack justification.[132]

The European Committee on Social Rights has determined that the duty of progressive realisation is justiciable and susceptible to adjudication. In *Autism-Europe v. France*, the Committee permitted the State to plead progressive realisation in certain circumstances despite the immediacy of all obligations in European Social Charter:

> [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".[133]

In this particular case, France was found to have failed the test. Despite the adoption of national legislation in 1975, more than twenty years had elapsed and little progress had been made in providing access to schooling for children with autism.[134]

While the duty to take steps and progressive realisation can be distinguished, they are also related. For instance, the Constitutional Court of Colombia has affirmed that there is an *immediate* obligation to establish the *conditions* for progressive realisation, which includes the development of timetables for progress:

> As a consequence, the constitutional obligations of *programmatic* character, derived from a fundamental right, are violated when the entity responsible for guaranteeing the enjoyment of a right does not even provide a program or a public policy that would permit the progressive advancement in the fulfillment of its corresponding obligations.[135]

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[132] Ibid.
[133] *Autism-Europe v. France* Complaint No. 13/2002, Decision on the Merits (European Committee on Social Rights), para. 53.
[134] Ibid. para. 54. "[N]otwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education of persons with autism." The government continued to use an outdated "restrictive definition of autism than that adopted by the World Heath Organisation" and that there were "still insufficient official statistics with which to rationally measure progress through time". Ibid. .
[135] *Medicines Case* T-760 of 2008 (Constitutional Court of Colombia), para. 3.3.9.

In this case, the Court found that the government had failed to ensure the progressive unification of the subsidized and insured health schemes; a policy the state itself had placed in legislation. The key omission in this case was the lack of a structured timetable by which progressive realisation could be judged: "While it is an obligation of progressive fulfillment, the State currently violates the minimum degree of compliance as it has not adopted a plan, with its own timetable, to advance the unification of the benefit plans."[136]

3.4 Adoption of Legislation and Plans of Action

Adoption of *legislation* should be viewed as an obligation of immediate effect notwithstanding the often delicate political task of ensuring the passage of legislation.

With regard to housing, the Committee has been very specific. It requires the State party to "take immediate measures*"* to ensure security tenure of housing for all,[137] and specifically adopt legislation "against forced evictions". [138] Such legislation on forced evictions should provide the "greatest possible security of tenure to occupiers of houses and land", control "strictly the circumstances under which evictions may be carried out", and apply to both State and non-State actors. Sepúlveda notes that the duty to adopt legislation to protect the right to join unions and strike, and to adopt anti-discrimination legislation in respect of women were identified in the Committee as obligations of immediate effect.[139] General Comment No. 12 contains a call, somewhat indirectly, for legislation on the right to adequate food for infants and young children through maternal and child protection, namely "legislation to enable breast-feeding" and regulate the "marketing of breast milk substitutes".[140]

Within its concluding observations, the Committee does however raise the need for specific legislation. It recommended that Australia "consider enacting legislation on paid maternity leave", [141] Austria "enact legislation to strengthen the protection of persons working under atypical employment contracts",[142] and Nepal "enact or enforce legislation prohibiting customary practices, such as polygamy, dowry, Deuki and

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[136] Ibid. para. 6.1.2.1.1.
[137] General Comment No. 4 (n. 7 above).
[138] General Comment No. 7 (n. 7 above), para. 10.
[139] Sepúlveda, *Nature of Obligations* (n. 10 above), p. 180.
[140] General Comment No. 12 (n. 7 above), para. 30.
[141] *Conclusions and recommendations of CESCR, Australia,* E/C.12/1/Add.50 (2000), para. 28.
[142] *Conclusions and recommendations of CESCR, Austria,* U.N. Doc. E/C.12/AUT/CO/3 (2006), para. 22.

prostitution among the Bedi caste".[143] In Cameroon, it regretted the absence of legislation "which provides for free primary education"[144] and in Ireland legislation that deals with the rights of the physically disabled.[145] In addition, the Committee has generally required a review of existing legislation to ensure conformity with the Covenant rights (though it rarely appears to ask States parties whether they have actually done so).[146] It has increasingly called, somewhat gently, for framework legislation to guide the realisation of each right.[147]

Similarly, the Committee has, from its inception, highlighted that all States can immediately develop a *plan of action or strategy* and take steps to *implement* it.[148] Recent general comments provide significant detail in the manner in which these are to be developed through a human rights approach, which is to include the: setting of targets or goals to be achieved and the time-frame for their achievement; establishment of institutional responsibility for the process; identification of resources available; and creation of accountability mechanisms to ensure implementation. They also call for recognition of the 'the right of individuals and groups to participate in decision-making processes' whether it be a policy, programme or strategy.[149] While it may appear somewhat obvious that states could develop plans of action, it is clear that many States have not sufficiently developed a comprehensive vision for addressing relevant social rights.

During its review of States parties, the issue of plans of action has often been manifest. Morocco was criticised for not adopting "a national strategy and action plan on health" when their State-provided health care did not reach more than 20 per cent of the

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143 *Conclusions and recommendations of CESCR, Nepal,* U.N. Doc. E/C.12/1/Add.66 (2001), para. 43.
144 *Conclusions and recommendations of CESCR, Cameroon*, U.N. Doc. E/C.12/1/Add.40 (1999), para. 27.
145 *Conclusions and recommendations of CESCR, Ireland,* U.N. Doc. E/C.12/1/Add.35 (1999), para. 15. The Irish delegation asserted though 'that the State party is committed to redressing this situation through existing administrative policies and measures'.
146 This is certainly an important exercise. For instance, one study estimated that seventeen Kenyan laws are 'outrightly hostile and unaccommodating' in relation to residents of informal settlements, which account for up to 60 per cent of the population in some Kenya urban centres. See W. Mitullah and K. Kibwana, 'A Tale of Two Cities: Policy, Law and Illegal Settlements in Kenya', in E. Fernandes and A. Varley, (eds.) *Illegal Cities: Law and Urban Change in Developing Countries* **(**Zed Books**,** 1998), pp. 191-212, at 207.
147 See for instance, General Comment No. 12 (n. 55 above), para. 30; General Comment No. 14 (n. 7 above), para. 53; and Committee on Economic, Social and Cultural Rights, General Comment No. 15, (n. 7 above), paras. 46, 50.
148 For housing, see General Comment No. 4 (n. 7 above), para. 12; for food, see General Comment No. 12 (n. 55 above), para. 21; for health, see General Comment No. 14 (n. 7 above), para. 53; for education, see Committee on Economic, Social and Cultural Rights, General Comment No. 13 (n. 7 above).
149 See for instance, General Comment No. 15, (n. 7 above), paras. 47-49. See also General Comment No. 14 (n. 7 above), paras. 53-62.

population.[150] Serbia was congratulated for devising "a strategy to address the HIV/AIDS pandemic" but the Committee noted "the absence of national benchmarks upon which the State party's achievements in this or other areas of health could be assessed".[151] Ireland was encouraged to revisit its "National Health Strategy with a view to embracing a human rights framework" which would include a "common waiting list for treatment in publicly funded hospitals for privately or publicly insured patients".[152]

The clear existence of obligations to develop and adopt national plans of action could be a significant justiciable aspect of the Covenant. The failure to adopt a plan of action gives rise to an identifiable breach. The failure to include important provisions would be an identifiable breach. The failure to consult civil society would be an identifiable breach for at least the inter-state and inquiry procedures and would be at least a factor in determining whether a state has acted reasonably in an individual complaint procedure. Similarly, the failure to take steps to *implement* a plan in good faith would also be an identifiable breach. Most importantly, the issue of resource constraints begins to fade. Once a State has set its own goals and given its own estimate of the availability of its resources, it becomes more difficult to justify inaction on resource grounds (though of course there will remain scope for a state to reassess its resource availability). The role for a reviewing body in such cases becomes familiar.

In addition, the Committee has devoted more attention to indicators/benchmarks as part of international (and national) monitoring and reporting to the Committee,[153] calling on States to develop them in consultation with the Committee.[154] For instance it invited Serbia to "identify disaggregated indicators and appropriate national benchmarks in relation to the right to water, in line with the Committee's General Comment No.15, and to include information on the process of identifying such

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[150] *Conclusions and recommendations of CESCR, Morocco*, U.N. Doc. E/C.12/1/Add.55 (2000), para. 28.
[151] *Conclusions and recommendations of the CESCR: Serbia and Montenegro,* U.N. Doc. E/C.12/1/Add.108 (2005), para. 35.
[152] *Conclusions and recommendations of the CESCR: Ireland,* U.N. Doc. E/C.12/1/Add.77 (2002), para. 35.
[153] Although, General Comment No. 1 also lays down the basic reporting obligations. See Committee on Economic, Social and Cultural Rights, *General Comment No. 1, Reporting by States parties* (Third session, 1989), U.N. Doc. E/1989/22, annex III at 87 (1989), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 8 (2003).
[154] See generally, E. Riedel, 'New Bearings to the State Reporting Procedure', in Sabine von Schorlemer (ed.), *Praxishandbuch UNO* (Berlin: Springer Verlag, 2003), pp. 345–358.

indicators and benchmarks in its next report."[155] However, the process of so-called scoping,[156] where the Committee and the State party agree on benchmarks for the next reporting period, has yet to become embedded in the Committee's practice. Moreover, some debate still exists over the correct way to develop indicators to measure the realisation of the rights in the Covenant.[157] However, indicators can form a useful part of any complaint or defence in a communication under the Optional Protocol.

3.5 Minimum Core Obligations

Building on domestic jurisprudence and scholarly views,[158] the Committee introduced in General Comment No. 3 the idea of minimum core obligations. This was to address the dire situation in which the minimum essential level[159] of the right was being denied:

> [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, 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.... In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[160]

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[155] *Conclusions: Serbia* (n. 88 above), para. 59

[156] General Comment No. 14 (n. 7 above), paras. 57-58; General Comment No.15 (n. 7 above), para.54.

[157] *Cf.* V. Roaf, A. Khalfan and M. Langford, *Indicators for the Right to Water*: *Concept Paper* (Berlin: Heinrich Boell Foundation, Bread for the World and Centre on Housing Rights and Evictions, 2005); and *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, UN. Doc HRI/MC//2006/7 (2006).

[158] P. Alston, 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 332-381, at 352-3: ('A logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a claim to the status of a right (with all the connotations that concept is generally assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the right holders possess non minimum entitlement, in the absence of which a State Party is to be considered to be in violation of its obligations.') See also A. Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach', *Human Rights Law Journal*, Vol. 10 (1989), pp. 35-51, at 43-47.

[159] For a history of the development this idea, see K. Arambulo, *Strengthening the Supervision of the International Convenant on Economic, Social and Cultural Rights: Theoretical and Practical Aspects* (Antwerp: Intersentia, 1999), pp. 136-141.

[160] General Comment No. 3 (n. 67 above), para. 10.

Thus, the effect created by the denial of a minimum core obligation is to create: (1) a prima facie violation;[161] (2) an obligation to use every effort; and (3) to make the satisfaction of the need in question a matter of priority.

Resources defence

These requirements have been consistently included in each general comment on a specific Covenant right. However, there was a brief interlude in which the resource defence was eliminated from the test. In General Comment No. 13 on the Right to Education the obligation is stated without any qualification[162] while in General Comment No. 14, after a detailed statement of core obligations, the Committee takes an entirely new approach. It addresses the resources issues by simply noting that wealthier States should assist developing ones in accordance with Article 2(1), and then stresses that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations … which are non-derogable".[163] This more maximalist approach has provoked criticism, probably with justification,[164] and the position is arguably inconsistent with the limitations provision of the Covenant.[165] In any case, the interlude is over. The Committee's 2007 Statement on Maximum

[161] See Craven's nuanced discussion of what he calls 'the presumption of guilt' in *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p. 143.
[162] General Comment No. 12 (n. 7 above), para. 14.
[163] General Comment No. 14 (n. 7 above), para. 47.
[164] Dennis and Stewart, 'Justiciability of Economic, Social, and Cultural Rights' (n. 43 above), pp. 492-3. See also criticisms by Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights* (n. 76 above), pp. 23-25. The origins of the shift or problems probably lies in the earlier and influential 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, prepared by a group of experts, which states: "Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties." Maastricht Guidelines (n. 36 above), para. 9. The guidelines then state that this is based on the "developing jurisprudence of the Committee" and the 1987 Limburg expert principles (n. 47 above). The first claim is incorrect and the claim concerning the Limburg principles is not necessarily borne out since they only refer to "minimum subsistence rights for all". Dowell-Jones argues that this is complicated further by the partial retreat in General Comment No. 15 on the Right to Water: it refers to non-derogability but also reintroduces the qualification from General Comment No. 3, whereby a State party is permitted to argue that the resources are unavailable. General Comment No. 15 (n. 7 above), paras. 40 and 41.
[165] In another respect, the 'minimum core content' as referred to by Committee members is reminiscent of the 'core content' in German jurisprudence. But there seems to be no consideration of the important textual differences between the German constitution and the ICESCR and that Germany is a developed country. *Cf.* the Constitutional Rights Provisions of the German Basic Law, Article 19(2): 'In no case may the core content of a constitutional right be infringed.' See also Robert Alexy, *Theory of Constitutional Rights* (trans. Julian Rivers) (Oxford: Oxford University Press, 2002) pp.192-196 ('On the Guarantee of an Inalienable Core as a Limit to Limits').

Available Resources restates the original position[166] as does General Comment No. 19 on Right to Social Security.[167] There is no mention of non-derogabilty in either.

Thus, the minimum core obligation must be understood in context. A country's resources may be a factor in determining whether the minimum core is feasible but the State bears the burden of proof. Alternatively, the minimum essential level could be seen as rising upwards as resources permit. While addressing starvation may represent a minimum core obligation in one country, eliminating chronic malnutrition might be the core in another; while direct exposure to the elements may breach the core in one country, absence of structurally sound accommodation might do so in another. As to the application ofth eminimum essential level by the Committee, it is certainly nuanced in its concluding observations. For countries in transition, such as Russia, the Committee required "the raising of minimum pension levels" and it criticised Georgia for failing to meet the minimum.[168] To Canada, it recommended that the State "establish social assistance at levels which ensure the realization of an adequate standard of living for all" and interrogated very closely its existing social security schemes.[169] In Senegal, it only urged the country 'to allocate more funds for its 20/20 Initiative, designed as a basic social safety net for the disadvantaged and marginalized groups of society',[170] though it is arguable that it could have required much more of Senegal given ILO research.[171] Thus, the Committee expected a more sophisticated form of social security from the developed State (a social assistance scheme not just an 'initiative') and a safety net that would provide an *adequate* standard of living not a bare *minimum* like in Senegal. Nonetheless, the Committee fails to link its conclusions to its minimum core obligation doctrine. It is not clear whether these concerns are expressed on the basis of a failure to progressively realise the rights or reach a contextualised minimum core obligation.

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[166] *Statement: An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol* UN Doc. E/C.12/2007/1 (2007) (CESCR),
[167] *General Comment 19, The right to social security (art. 9)* (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008). (CESCR),
[168] *Conclusions and recommendations of CESCR: Russian Federation,* U.N. Doc. E/C.12/1/Add.94 (2003); para. 50; *Conclusions and recommendations of CESCR: Georgia,* U.N. Doc E/C.12/1/Add.83 (2002), para. 17.
[169] See further Section 4.1 below.
[170] *Conclusions and recommendations of CESCR: Senegal, U.N. Doc. E/C.12/1/Add.62 (2001).*
[171] *Cash benefits in low-income countries: Simulating the effects on poverty reduction for Senegal and Tanzania*, Issues in Social Protection, Discussion Paper 15, ILO, 2006.

Identifying the minimum core

The particular challenge is the identification of the minimum essential level of each right. Craven questioned whether the Committee could establish 'minimum thresholds' at the international level.[172] Indeed, the South African Constitutional Court rejected the minimum core obligation on the basis that in the case of the right to housing it could not determine the minimum due to the diversity of the needs and groups, noting that "there are those who need land; others need both land and houses; yet others need financial assistance".[173] It also raised concerns about whether the minimum could be realised immediately in the South African context. In addition, Porter amongst others points out the somewhat shaky philosophical foundations of the approach, noting the dangers of what he terms the "misguided search for universal, transcendental components of ESC rights",[174] arguing it is inconsistent with more modern notions of grounding human rights, including civil and political rights, in their historical context where citizens, particularly rights claimants, can argue for the interpretation that is most consistent with their 'dignity related interests'.

Can an international body identify the minimum essential level? Can it be applied in concrete cases in very differently situated countries? The subsequent General Comments do give some degree of specificity in terms of the nature of the essential level (e.g., access to a particular medicine or service) but they generally refrain from attempting to quantify it, preferring to leave it to an evaluation of the specific context, which can be seen in its concluding observations. For instance, the Committee is often focused on whether the country has set a minimum (e.g. a poverty line or level of adequacy for benefits), which they can interrogate for its reasonableness and how it applies in the country.[175]

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[172] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p. 143.
[173] *Grootboom* (n. 71 above), para. 33.
[174] B. Porter, 'The Crisis of ESC Rights and Strategies for Addressing It', in J. Squires, M. Langford, and B. Thiele (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights (Sydney:* Australian Human Rights Centre and University of NSW Press, Sydney, 2005), pp. 48-55.
[175] At the national level, Porter argues though that this problematic dimension of the minimum core obligation is actually used as a weapon against ESC rights as "governments have routinely argued that the inability of experts to agree on a clearly defined poverty line of universal application is proof that courts should not wade into this area of policy". Porter, 'The Crisis of ESC Rights and Strategies for Addressing It' (n. 110 above), p. 51.

The most useful insights into the adjudication of this obligation arguably come from domestic courts, where the origins of the doctrine lie.[176] In Germany, the right to human dignity and the directive principle of the *Sozialstaat*[177] were subsumed and interpreted by the Federal Constitutional Court of Germany many decades ago to establish a right to an *existenzminimum*: the State must ensure "every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life."[178] In the recent *Hartz IV* decision, the Court addressed the question as to whether consolidated and significantly reduced unemployment benefits for adults and their dependents contravened this right to a subsistence minimum.[179] The Court affirmed its previous doctrine that its role was not to determine and quantify the amount but rather determine whether the legislature had sought to afford sufficient weight to the constitutional right to dignity and if its calculative and evidentiary methods were justifiable.[180] Its standard of review is neither deferential nor rationality-based: it is a more enhanced or moderate form of scrutiny akin to reasonableness review.[181] The legislature's methods were faulted by the Court on several points: the selection of expenditure categories for the benefit was partially random; the inflationary index was improperly taken from the pension scheme for the (which was guided by a different rationale); the rate of benefits for dependents was determined in an arbitrary fashion; the

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[176] For a discussion of the challenges of interrpeting the minimum essential level, see K. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *Yale Journal of International Law,* Vol. 33 No. (2008), pp. 113-175.

[177] 'Social state', 'welfare state', 'social welfare state', 'enabling state' – the translations are diverse. See Styliano-Ionanis Koutnatzis, 'Social Rights as a Constitutional Compromise: Lessons from Comparative Experience', *Colombia Journal of International Law,* Vol. 44 No. (2005), pp. 74-133, 113.

[178] *Hartz IV* 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09 (2010) (Federal Constitutional Court of Germany), II(1)(a) (Quotation from the Court's extended English press release). The duty of the state to ensure the *existenzminimum* was established initially in 1951 in a case concerning the level of support for war victim (BVERFGE 1, 97 (104), 1 BvR 220/51 (1951) (Federal Constitutional Court of Germany), and applied in a number of later cases, including challenges to taxation levels that threatened support for families (*Numerus Clausus Case I Case* 33 BVerfGE 303 (1972) (Federal Constitutional Court, Germany),). However, only in *Hartz IV* 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09 (2010) (Federal Constitutional Court of Germany), and *Asylum Seekers Benefits Case* 1 BvL 10/10 (2010) (Federal Constitutional Court of Germany), was the duty also transformed into a subjective right permitting individual challenges. See generally C. Bittner, 'Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010', *German Law Journal,* Vol. 12 No. 11 (2011), pp. 1942-1960, 1942-1944.

[179] See discussion in chapter 1 on the doctrine.

[180] *Hartz IV* 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09 (2010) (Federal Constitutional Court of Germany), .

[181] D. Kommers and R. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 2012), 67. See L. A. Williams, 'The Role of Courts in the Quantitative Implementation of Social and Economic Rights: A Comparative Study', *Constitutional Court Review,* Vol. No. 3 (2010), pp. 141-199, 181-198 for an extensive discussion on this aspect of the judgment.

special needs policy was structured in a rigid fashion. The Court provided the state with a year to make a fresh determination.

The German approach is similar to Sandra Liebenberg's recommendation to the South African Constitutional Court. The Court's reasonableness test, which it applies to the progressive realisation of the right, could also be adapted to cover 'survival interests'. There could be a presumption that government programs do not meet the test of reasonableness if certain minimums are not met.[182]

The minimum core obligation has been applied in the most comprehensive fashion in Colombia. Under the Colombian constitution, only the fundamental rights in Chapter 1 of the Constitution are directly enforceable[183] but the Colombian Constitutonal Court has permitted individuals to invoke the *tutela* writ of protection for summary proceedings for social rights where there is a "connection" with a fundamental right.[184] Establishing a right to *mínimo vital*, the Colombian court borrowed directly from the German Constitutional Court's right to a minimum existence.[185] To invoke this right, a person must be in a situation of manifest vulnerability. This means that the individual has no possibility to remedy the problem on his or her own; that the state has such a remedial capacity; and that the state's inaction or omission will affect an individual's ability to enjoy "minimum conditions of a dignified life".[186] In the case of HIV/AIDS, the Court is less concerned with the budgetary issue if the "life and integrity" of the patient is at risk. The test applies to both public and private health providers[187] and requires that the treatment is prescribed by a physician connected to the relevant institution.

A significant part of the Colombian minimum essential level litigation has been administrative or contractual in nature. Petitioners have invoked the procedure to gain

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[182] See S. Liebenberg, 'Enforcing Positive Social and Economic Rights Claims: The South African Model of Reasonableness Review', in Squires, Langford and Thiele, *Road to a Remedy* (n. 110 above), pp. 73-88.
[183] Article 86. "Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority."
[184] T-002/92 (Constitutional Court of Colombia), .
[185] See discussion of the doctrine in Chapter 1, 6 and 7, particularly the cases: *Child Support I Case* 99 BVerfGE 246 (1998) (Federal Constitutional Court of Germany), *Hartz IV* 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09 (2010) (Federal Constitutional Court of Germany).
[186] M. Sepúlveda, 'Colombia: The Constitutional Court's Role in Addressing Social Injustice' in M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 144-162.
[187] See review of the cases in Sepúlveda, ibid.

access to medicines already included on public or private health plans (two-thirds of health claims),[188] recover unpaid wages,[189] or overturn decisions denying social security benefits on account of erroneous information being provided to applicants.[190] However, in the area of health, the constitutional dimension has been more significant with orders for off-plan medicines. This has made the procedure relatively attractive.[191] Thus, at various points, the Court has attempted to tighten the test. In Decision SU-111/97, it held that petitioners must demonstrate that the situation was exceptional and clearly show that they could not cover the costs.[192]

Minimum core obligations: single or multiple obligations?

One potential source of confusion in the CESCR's jurisprudence has been the gradual bundling or conflating of some 'immediate obligations' under the heading of minimum core obligations, such as the duty to adopt a plan of action or ensure non-discrimination. The source of such an approach is perhaps found in the 'minimum core obligations' school of thought which has not only championed an expansive reading of the minimum core, but the identification of a clear set of minimum standards which are applicable to each State.[193]

The result in the General Comments is a degree of arbitrariness, with some immediate obligations included and others not, such as obligations of respect or obligations to protect. This process of bundling may be symptomatic of a deeper source of potential confusion, namely, whether the original idea of minimum core obligations, concerned as it was with 'minimum essential levels of each right', fits well conceptually with items such as national action plans. It may suggest that there are two distinct concepts rolled into one, namely, (1) the idea of minimum essential resources needed for an

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[188] C. Rodríguez Garavito, 'The Judicialization of Health Care: Symptoms, Diagnosis, and Prescriptions' in R. Peerenboom and T. Ginsberg (eds.), *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (New York: Cambridge University Press, 2014), pp. forthcoming, .

[189] T-308/99 (Consitutional Court of Colombia).

[190] T-227/03 (Consitutional Court of Colombia).

[191] Some have suggested that it is susceptible to abuse by pharmaceutical companies who promote litigation for their drugs. But the evidence is scant: see M. J. Roseman and S. Gloppen, 'Litigating the Right to Health: Are Transnational Actors Backseat Driving' in A. E. Yamin and S. Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, MA: Harvard University Press, 2011), pp. 43-75, .

[192] *Access to Medicines Doctrine Case* SU-111 (Constitutional Court of Colombia), ; K. Young and J. Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa', *Harvard Human Rights Journal,* Vol. 26 No. (2013), pp. 179-216, 188.

[193] See A. Chapman and S. Russell, (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights, (*Antwerp/Oxford: Intersentia, 2002).

individual's survival or basic dignity, and (2) the idea of a heightened obligation to take certain crucial steps, from which derogation is allowed only in the rarest of circumstances. The latter subset may include the former, but it may also be, as the process of bundling noted in this paragraph may illustrate, much larger. Despite these concerns, it is important to note that non-lawyer activists have often expressed appreciation at finding the key obligations in one section in simple bullet-point form.

3.6 Retrogressive Measures

As part of the obligation of taking steps towards progressive realisation, retrogressive measures are examined with heightened scrutiny by the Committee. The Committee has articulated its principle of non-retrogression with some sparseness though carefulness: "any deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".[194]

Dowell-Jones has argued that this principle was "an extremely crude and unsatisfactory yardstick" and failed to "capture the complexity and fluidity of the task of realising socio-economic rights".[195] She concedes that the Committee's concluding observations on the subject have not been dogmatic but arguss that the Committee could give more detailed recommendations and identify which groups should be protected: [196] the concluding observations on Argentina in 1999 are cited as an example. However, the Committee does require that minimum pensions should be paid and not deferred or reduced. [197] The minimum core obligations are clearly red lines for the Committee, which it is anxious to protect in economic and other crises.

In any case, the Committee moved subsequently towards articulating a clearer framework for evaluating the justification for deliberately retrogressive measures. According to the recent General Comment No. 19 on the right to social security:

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[194] Committee on Economic, Social and Cultural Rights, General Comment No. 3 (n. 71 above), para. 9.
[195] Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights* (n. 76 above), pp. 52-54. The author points to the current post-Keynesian paradigm where States can no longer sustain the levels of welfare spending and budget deficits that may have been possible in the 1960s and 1970s
[196] Ibid. pp. 71-81. Her criticism is only partially warranted, particularly given the Committee's limited mandate and the variance in the amount of critical and useful information it receives.
[197] *Conclusions and recommendations of CESCR: Argentina,* U.N. Doc. E/C.12/1/Add.38 (1999), para. 33.

> The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.[198]

In a recent statement, the CESCR also commented upon the resource dimension of the principle of non-retrogression.[199] The key factors to be examined according to the Committee are: a country's level of development; the severity of the alleged breach, in particular whether it impinges upon "the minimum core content of the Covenant"; the country's current economic situation and whether it was experiencing a recession; the existence of other serious claims on the State party's limited resources; whether the State party had sought to identify low-cost options; and whether the State party had sought international cooperation and assistance or rejected offers of resources without sufficient reason.

It is thus clear that while deliberate retrogressive measures are not automatically non-compliant with the Covenant, they engage a particularly strict form of scrutiny or high level of justification. In this sense, the standards for non-retrogression are not dissimilar to those with which it measures interferences with the rights, for example under the obligations to respect and protect, as discussed above in Section 3.2. They require the State to meet a proportionality test.

A good illustration of the application of these principles is the *Disbursement Law Case*.[200] The Constitutional Court of Latvia cites General Comment No. 19 and adopts a proportionality test that resembles the CESCR's criteria. In the wake of the 2007 global financial crisis, new Latvian legislation temporarily cut benefits to current pensioners by ten per cent and working pensioners by seventy per cent. In making its judgment, the

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[198] *General Comment 19, The right to social security (art. 9)* (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008). (CESCR), para. 42.
[199] *Statement: An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol* UN Doc. E/C.12/2007/1 (2007) (CESCR).
[200] *Disbursement Law Case* Case No. 2009-43-01.

Court affirmed that "restrictions" on pensions had a "legitimate end" in solving "financial problems in the social budget" and that in a time of a "major economic recession", the State must be granted "[r]easonable freedom of action" to take swift and concerted action.[201] In particular, such fiscal reductions may stabilise the national economy and prevent "even more significant reductions" in other budget lines, with the court naming healthcare, education and public employment.[202] However, the rollback failed a proportionality test. The Court held that neither the Cabinet nor the Parliament "had carried out an objective and well-balanced analysis" of the "consequences" nor had they considered "less restrictive means for the attainment of the legitimate end".[203] On the evidence, the Court found that the minimum core of the right was threatened for poorer pensioners and the decision to leave untouched other benefits (some generous) resulted in an arbitrary social benefit system.[204] The Court gave the parliament a period in which to rescind the cuts (March 2010) and pay back the estimated €250 million decrease (by 2015).

The Committee itself has engaged with the recent rise in austerity measures. In 2012, the previous Chairperson of the Committee sent a letter to States parties on the topic.[205] He acknowledged that decisions to "adopt austerity measures are always difficult and complex" and "especially when these austerity measures are taken in a recession"[206] but emphasised that:

> any proposed policy change or adjustment has to meet the following requirements: first, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis

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[201] Ibid. para 27.2.
[202] Ibid. .
[203] Ibid. para 30.2.2.
[204] Ibid. para 30.1. It also found that employee pensioners had legitimate expectations to an appropriate transitional period and its overall conclusion was buttressed by the poor legislative and executive deliberations over alternative solutions, which it found were partly fuelled by a false belief that international creditors had demanded pension cuts. It added that agreements signed with international lenders "in and of themselves cannot serve as an argument about the limiting of basic rights"
[205] Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights.
[206] Ibid.

> and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times. Finally, may I highlight that international cooperation is a fundamental obligation for the progressive universal realization of economic, social and cultural rights. In this regard, the Committee has on many occasions underlined the requirement that States parties to the Covenant should respect their obligations in relation to economic, social and cultural rights when making decisions, including on official development assistance, in international financial institutions, such as the World Bank, the International Monetary Fund, regional financial institutions and regional integration organizations.[207]

3.7 Monitoring, Accountability and Remedies

All States are expected to develop the necessary *monitoring and accountability* systems to ensure the observance of rights and that implementing measures are effective. The Committee has given significant emphasis to national level monitoring, particularly the role of national human rights commissions and ombudspersons. In a General Comment on the subject, it noted that one of the roles of commissions should be, "Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society".[208] In the concluding observations of El Salvador, the Committee noted "with satisfaction' the creation in 1991 of the post of Procurator for the Defence of Human Rights under the constitution, which had the competence to conduct inspections and investigations, file complaints and draft recommendations, and also welcomed the creation of local units of this office".[209] The Committee has also paid some attention to the health of other actors in society who play a role in ensuring accountability. For instance, "States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health".[210]

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[207] Ibid.
[208] *General Comment 10, The role of national human rights institutions in the protection of economic, social and cultural rights* (Nineteenth session, 1998), U.N. Doc. E/1999/22 at 18 (1998), para. 3(f).
[209] *Concluding observations of the CESCR: El Salvador,* UN Doc. E/C.12/1/Add.4 (1996), para. 6.
[210] General Comment No. 14 (n. 7 above), para. 62..

In the context of the Optional Protocol procedure, it may be possible to raise the lack of accountability mechanisms as a violation of the Covenant. This would certainly be a justiciable claim in an inquiry or inter-state complaint. It could also be raised in an individual communication if a victim could claim that fulfilment of such an obligation was reasonable means of preventing the specific denial or deprivation of a right. Indeed, in the recent The establishment of effective accountability mechanisms could form part of the Committee's remedial recommendations to States in any communication.

One particular question is whether the provision of judicial remedies must be provided under the ICESCR. In 1991, the Committee determined that appropriate measures under Article 2(1) might include access to judicial remedies and singled out some particular dimensions of the rights that it believed were capable of immediate application by the judiciary.[211] Six years later, the Committee was rather more emboldened, perhaps after its call to receive information on actual jurisprudence.[212] It placed the burden upon States to justify the absence of legal remedies, called for the incorporation of the Covenant in the domestic legal order, and stated that "there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions".[213] In doing so, the Committee indicated that Courts could make orders affecting resource allocation while noting that "the respective competences of the various branches of government must be respected".[214] It also emphasised the judiciary's role in protecting "the rights of the most vulnerable and disadvantaged groups in society", presumably on the basis that their voices might not be heard in a majoritarian democracy.[215]

This demand that states justify the absence judicial remedies has led the Committee to strictly scrutinise on the topic during the periodic review process.[216] The Committee

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[211] General Comment No. 3 (n. 67 above), para. 5. It singled out non-discrimination and equality, right to fair wages and equal remuneration for work of equal value, trade union rights, special measures to protect children, provision of compulsory and free primary education to all, rights of parents to choose alternative schooling to fit religious and oral beliefs, non/interference with educational institutions and the freedom for scientific research and creative activity.
[212] See General Comment No. 4 (n. 7 above), para 16.
[213] General Comment No. 9 (n. 119 above), para. 10.
[214] Ibid.
[215] Ibid.
[216] The Committee stated with some exasperation that "the Covenant has still not been incorporated in the domestic legal order" of the United Kingdom, and it reiterated its "concern about the State party's position that the provisions of the Covenant, with minor exceptions, constitute principles and programmatic

has also commented that such remedies need to be available to all and effectively used – for example through the provision of legal aid.[217] Recent general comments have also asked States to encourage "Judges, adjudicators and members of the legal profession to pay greater attention to violations of Covenant rights"[218] and it has expressed concern with particular domestic judgments.[219] This attention to the importance of judicial review suggests that its absence – in form or substance - could be a topic of a complaint and at least the subject of a remedial recommendation.

3.8 Extraterritorial Obligations

The ICESCR contains no territorial and jurisdictional limitation. As a consequence, the Committee has referred regularly to various "international obligations" or what are commonly called extra-territorial obligations.[220] These obligations concern what duties States parties may owe to persons located in places other than their own territory.[221]

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objectives rather than legal obligations that are justiciable". *Conclusions and recommendations of CESCR: United Kingdom of Great Britain and Northern Ireland - Dependent Territories,* U.N. Doc. E/C.12/1/Add.79 (2002), para. 10. Likewise, in the case of Canada, in 1998, the Committee placed more emphasis on anti-discrimination legislation being applied to economic and social rights. *Conclusions and recommendations of CESCR: Canada*, U.N. Doc. E/C.12/1/Add.31 (1998), para. 46. but in 2006, the Committee was more straightforward asking for "immediate steps … to create and ensure effective domestic remedies for all Covenant rights in all relevant jurisdictions". *Concluding Observations of CESCR: Canada* UN Doc. E/C.12/CAN/CO/4-E/C.12/CAN/CO/5 (2006), para. 40.

[217] In both 1998 and 2006, the Committee called on federal, provincial and territorial governments to promote interpretations of the Canadian Charter and other domestic law in a way consistent with the Covenant to provide civil legal aid and to extend the Court Challenges Programme to include 'challenges to provincial legislation and policies which may violate the provisions of the Covenant' See *Conclusions and recommendations of CESCR: Canada (1998)* (n. 138 above), para. 59; and *Concluding Observations of CESCR: Canada (2006)* (n. 139 above), para. 42.

[218] General Comment No. 15 (n. 7 above), para. 58.

[219] In 2006, the Committee appeared to address the courts of Canada directly, noting that they should 'take account of Covenant rights where this is necessary to ensure that the State party's conduct is consistent with its obligations under the Covenant, in line with the Committee's General Comment No. 9 (1998)' and refer to a particular case of concern, *Chaoulli v Quebec - Attorney GeneralConcluding Observations of CESCR: Canada (2006)* (n. 139 above), para. 36. See also J.A. King, 'Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision', *Modern Law Review*, Vol. 69, (2006) pp.631-643.

[220] For a discussion on terminology, see M. Gibney, 'Terminology: Extraterritorial Obligations' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 32-49,

[221] There is a considerable recent interest on this point: M. Craven, 'The Violence of Disposession: Extra-territoriality and Economic, Social and Cultural Rights', in M. Baderin and R. McCorquodale, *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007), pp.71-88; R. Künnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in F. Coomans and M. Kamminga, (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), pp.201-231; M. Sepúlveda,'Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights*, Vol. 24, (2006), pp.271-303; see also W. Vandenhole, 'Economic, Social and

The textual departure point for such an obligation is Article 2(1), which requires States to take steps, individually and through international cooperation, and in accordance with their maximum available resources, to progressively achieve the rights throughout the world. This is supported and complemented by other articles in the Covenant such as Articles 11, 15, 22 and 23.[222]

These extra-territorial obligations are certainly enforceable under the inquiry and inter-state procedures (see Chapters 4 and 5 for a full discussion). However, the inclusion of jurisdiction as a criterion for the individual communications procedure obviously limits the Committee's power to adjudicate extra-territorial obligations for cases concerning individual victims (see chapter 2 for a full discussion). However, the obstacle is only partial: violations of obligations to 'respect' and 'protect' can be raised where it is possible to demonstrate jurisdiction, i.e. some sort of direct link between the actions or omissions of a State and a denial or deprivation of a right.

Substantively, the Committee has regularly called upon States to refrain from actions that interfere directly or indirectly with the enjoyment of the rights in other countries. Examples have included harmful sanctions and embargoes[223] and the conclusion of damaging international trade agreements or debt service conditions (whether bilateral or through a multilateral agency.[224] States also have the duty to protect people in other countries from the harmful activities of transnational private actors based in their jurisdiction, which may include raids by paramilitary or guerrilla squads, or the more widespread concern of transnational corporate activity.[225] States are further called

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Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?', *International Journal for Children's Rights*, Vol. 15, (2007) (forthcoming).

[222] For an indepth discussion, see M. Langford, F. Coomans and F. G. Isa, 'Extraterritorial Duties in International Law' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 51-113, ; S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerpen: Intersentia, 2006),

[223] General Comment No. 14 (n. 7 above), para. 41; and General Comment No. 15 (n. 7 above), at para. 32.

[224] See General Comment No. 14, ibid. para. 39; General Comment No. 15, ibid. para. 35. For e.g., 'Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.'

[225] See General Comment No. 14, ibid., para. 39, for an oblique reference, and General Comment No.15, ibid., at para. 33, where companies are singled out as a concern: "33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law." Note that the UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rigths Council, are more conservative on the strength of the duty: "States *should* set out clearly the expectation that all business enterprises domiciled in their territory

upon to ensure that their actions as members of international organisations respect, protect and fulfil Covenant rights.[226] Finally, it is 'particularly incumbent' upon states to give the highest priority to minimum core obligations when seeking or providing international cooperation and assistance.[227]

The more difficult issue is whether there is an obligation to provide aid. In its General Comment No. 3 the Committee noted that the "phrase 'to the maximum of its available resources' in Article 2(1) was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance". It went on to highlight the role of international cooperation in helping facilitate the realisation of the Covenant rights, which it saw as both an opportunity and a responsibility of States.[228] In General Comment No.15, the Committee says that where resources are available, States "should facilitate realisation of the right to water in other countries".[229] In General Comment No.14, it writes that States must cooperate to provide disaster relief.[230] Craven points out that during the drafting of Article 2(1), the idea that States could claim assistance from others as a legal right was rejected by general consensus,[231] and the Committee has not yet gone this far. But it certainly recognises a legal obligation even if the nature of the obligations is not as determinate as the obligation on States to realise the rights for residents within their own jurisdiction.[232]

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and/or jurisdiction respect human rights throughout their operations." UN. doc A/HRC/17/31, Annex, para. 2. The expert *Maastrict Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 2011, are more consistent with the Committee's position: "States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances" (para. 25).
c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned."

[226] *Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization*, (1999), UN Doc: E/C.12/1999/9.

[227] General Comment No. 14 (n. 7 above), para.45; General Comment No. 15 (n. 7 above), para. 38; General Comment No. 17 (n. 5 above), para. 40.

[228] In General Comment No. 4, it noted that 'less than 5 per cent of all international assistance has been directed towards housing or human settlements' and that which is provided 'does little to address the housing needs of disadvantaged groups'. It called on States parties, both recipients and providers, to reverse this. General Comment No. 4 (n. 7 above), para. 19.

[229] General Comment No. 15, ibid., para. 34; see too General Comment No.14, ibid. para. 40.

[230] General Comment No.14, ibid.

[231] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p. 147, 144-150.

[232] See discussion in Langford, Coomans and Isa, Extraterritorial Duties in International Law' (n. 173 above), and A. Khalfan, 'Division of Responsibility amongst States' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic,*

Membership of International Organisations

A significant amount of international cooperation and assistance occurs through intergovernmental organisations. Are States are bound by their obligations under the ICESCR when acting as members of decision-making bodies of international governmental organisations? While the Committee had previously made recommendations directly to these organisations in General Comment No. 2,[233] it began to focus on member state participation from its General Comment No. 14 on the Right to Health. Part of the focus was on ensuring that these international organisations respected Covenant rights: "States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health".[234] Examples given included paying more attention to the protection of the rights when influencing lending policies and credit agreements of IMF, World Bank and regional development banks. The language used by the Committee to qualify the nature of this obligation differs. Sometimes it is mandatory ('have an obligation'),[235] in other General Comments it is recommendatory ('should').[236]

The issue has also arisen more frequently in concluding observations on States parties' reports. For example, in the Concluding Observations on Italy, the Committee encouraged the Government, "as a member of international organizations, in particular IMF and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in article 2, paragraph 1, concerning international assistance and cooperation".[237] However, the Committee has not always been consistent.

On a number of occasions, the CESCR has focus on the positive fulfilment of rights as the reason for States parties influencing the behaviour of intergovernmental organisations, calling on them to ensure that these organisations pay greater attention to

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Social, and Cultural Rights in International Law (Cambridge: Cambridge University Press, 2013), pp. 299-331.

[233] *General Comment No. 2, International Technical Assistance Measures (Article 22 of the Covenant*), UN Doc. E/1990/23.

[234] General Comment No. 14, para. 39.

[235] General Comment No. 17, para. 56.

[236] General Comment No. 15, para. 58.

[237] UNCESCR 'Concluding Observations on Italy's Third Periodic Report on Implementation of the Covenant' (23 May 2000) UN Doc E/C.12/1/Add.43, § 20. See also, UNCESCR 'Concluding Observations on Germany's Fourth Periodic Report on Implementation of the Covenant' (24 September 2001) UN Doc E/C.12/1/Add.68, § 31.

the realisation of ESC rights in their policies. This is implicit in its above General Comments but is clearer when considering periodic reports. For example, in the Concluding Observations on Germany the Committee "encourages the State party, as a member of international financial institutions, in particular the IMF and the World Bank, *to do all it can* to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in Articles 2.1, 11, 15, 22 and 23 concerning international assistance and cooperation" (emphasis added).[238] Moreover, although this obligation to protect ESC rights in the framework of international organizations is incumbent upon all States parties, it is evident that developed States, especially those taking part in the governing bodies of the IFIs, have a higher degree of responsibility.[239]

However, it is unimaginable that all the member states of an intergovernmental organisation will be subject to the jurisdiction of the Committee under any of the three procedures. Yet, the extent to which a single State can bear joint and several liability for joint state action or inaction can be controversial.[240] While the International Court of Justice has been willing to impose liability on single states for joint action despite the absence of other states in a proceeding,[241] a case cannot proceed if the rights and obligations of a third State constitute the very subject-matter of the decision requested.[242]

4. Limitations of Covenant rights

Article 4 of the Covenant provides a somewhat familiar form of limitations provision:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the

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[238] UN Doc. E/C.12/1/Add.68, 2001, para. 31. Identical wording appears in the *Concluding Observations of the CESCR on Finland* (UN Doc. E/C.12/1/Add.52, 2000, para. 24) as well as *Belgium* (UN Doc. E/C.12/1/Add.54, 2000, para. 31) *France* (UN Doc. E/C.12/1/Add.72, 2001, para. 32), *Japan* (UN Doc. E/C.12/1/Add.67, 2001, para. 37), *Sweden* (UN Doc. E/C.12/1/Add.70, 2001, para. 24), *Ireland* (UN Doc. E/C.12/1/Add.77, 2002, para. 37) and *United Kingdom* (UN Doc. E/C.12/1/Add.79, 2002, para. 26).

[239] The Maastricht Guidelines on Violations of ESC Rights has referred to a distinction between 'Member States of such organizations, individually or through the governing bodies' and 'countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights', para. 19.

[240] See, e.g., A. Khalfan, 'Division of Responsibility amongst States' in M. Langford, W. Vandenhole, M. Scheinin and W. v. Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013), pp. 299-331, .

[241] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 240.

[242] *East Timor (Portugal v. Australia), Judgment* I. C.J. Reports 1995, p. 90 (International Court of Justice).

> State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Given that many have interpreted the Covenant as giving rise to obligations that only must realised over time, relatively little attention has been paid to the question of limitations of Covenant rights. An exception is the examination of the *travaux préparatoires* carried out by Alston and Quinn.[243] They demonstrate that it was generally accepted in the drafting of the Covenant that Article 4 was introduced to deal with situations involving limitation of Covenant rights that were not justified on the basis of resource constraints.[244]

This position is consistent with the express use of the provision in the Committee's jurisprudence. In its General Comment No. 7 on Forced Evictions, the Committee cites the provision in establishing a proportionality test for interferences with existing housing rights (as discussed in Section 3.1).[245] Support for this view is also found in General Comment No.14, in which the Committee found that limitations of the right to health must be proportional in the sense that the least restrictive means is adopted to achieve the goal.[246] In addition, the International Court of Justice addressed such a situation in its advisory opinion on the legality of the wall constructed in the Occupied Palestinian Territories.[247] However, it unfortunately did not devote much consideration to the issue and instead concluded without much explanation that the limitations imposed by Israel simply failed to promote the general welfare in a democratic society.[248]

The requirement that limitations be "compatible with the nature of [the] rights" is a somewhat more unusual aspect of Article 4. A briefly stated finding by Alson and Quinn suggest this phrase may mean that "some rights, by virtue of their very nature,

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[243] Alston and Quinn, 'Nature and Scope of States parties Obligations' (n. 49 above), pp.192-203.
[244] Ibid. pp.194, 197, 205-206.
[245] General Comment No. 7 (n. 7 above), para. 5. ("Even in situations where it may be necessary to impose limitations on such a right, full compliance with article 4 of the Covenant is").
[246] General Comment No. 14 (n 3 above), para. 29. Cf. General Comment No. 13 (n. 7 above), para. 42 (no reference to proportionality).
[247] *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* , (2004) ICJ Reports 136, at p.193.
[248] Ibid. "The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be 'solely for the purpose of promoting the general welfare in a democratic society".

might be considered not to be subject to any limitations (other than those relating to resource availability in accordance not with Article 4 but with Article 2(1)).”[249] They offer the freedom from hunger as part of the right to adequate food as a potential example. This reading also provides some support to the reading into the Covenant of the minimum core obligation (see sections 3.5) and the emphasis on protection of the minimum essential level of the rights in the principle of non-retrogression (see section 3.6).

The precise relationship between the obligation to realise social rights progressively and the limitation of social rights was discussed in the *Khosa* decision of Constitutional Court of South Africa.[250] The Court observed in passing that in a social rights case, the limitations provision in section 36 of the Constitution would only be relevant if its reasonable requirements differed from those in sections 26 and 27 (which requires States to take reasonable steps to realise various social rights).[251] In that case, the Court simply found that “the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable” within the meaning of section 36 as well as section 27.[252] In the subsequent Constitutional Court case of *Jaftha*, it was assumed without any particular discussion of the point that infringements of negative obligations arising under section 26 may potentially be justified under section 36.[253] Any principle to emerge from the Constitutional Court’s approach is that, at the very least, infringements to the negative obligations in the South African constitution must comply with the generally accepted requirements of proportionality.

5. Conclusion

The substantive nature of any claim under the Optional Protocol must relate to the substantive rights and obligations in the ICESCR. This chapter has provided an outline of the Covenant with a focus on the particular obligations which might be litigated under the various procedures in the Covenant. The principal obligation of States in the Covenant, to take steps to progressive realise the rights within their jurisdiction, can be litigated under

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[249] Ibid. p. 201.
[250] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*, 2004 (6) BCLR 569 (CC).
[251] Ibid. para. 83.
[252] Ibid. para. 84.
[253] *Jaftha v Schoeman and others,Van Rooyen v. Stoltz and others*, 2005 (1) BCLR 78 (CC), para. 34, 35ff.

the individual communications procedure as well as the inquiry and inter-state communication procedure. The chapter has discussed how the Committee has given more flesh to this obligation, particularly through its: delineation of obligations of immediate effect and progressive realisation; its articulation of a trichotomy of respect, protect and fulfil; and its implication of specific obligations such as the adoption and implementations of plans of action and legislation, the securing of a minimum essential level of the rights, the duty of non-retrogression, and the establishment of effective monitoring and accountability mechanisms. This is complemented by the Committee's use of proportionality tests for assessing compliance with negative-like obligations and its invocation of reasonableness as a standard for adjudicating positive obligations.

The chapter has also noted that the right to self-determination and extra-territorial obligations are particularly difficult to litigate under the individual communications procedure. This is not the case though under the inquiry and inter-state communications procedures. Nonetheless, there are exceptions for the individual communications procedures. The ESC rights dimensions of the right to self-determination could be litigated if all or a sufficient number of victims are represented. More probably, the extra-territorial obligations to respect and also protect could be the subject of individual complaints, although these claims require close attention to issues of causation and division of responsibility between states.

8. Equality and Non-Discrimination

Rebecca Brown[*]*, Lilian Chenwi*[**]*, and Michael Ashley Stein*[***]

1. Introduction

A basic principle in the protection of all human rights is non-discrimination and equality, including equality before the law and equal protection of the law without any discrimination. Non-discrimination and equality and economic, social and cultural rights (ESC rights) are inherently interconnected. They are both equally necessary to ensure that societies support all persons toward realising their full potential and to live their lives with dignity. Non-discrimination and equality are therefore essential components in the exercise and enjoyment of ESC rights.[1] Conceptions of equality and non-discrimination that fail to account for the need to have secure and safe shelter, clean and sufficient water, affordable and quality healthcare, free and appropriate education, or meaningful work which provides a living wage, fail to acknowledge that basic human dignity underlies any experience of equality. Further, a conception of ESC rights that fails to recognise the ways in which a person's various identities intersect and interact in accessing and enjoying these rights, as well as in experiencing discrimination, will ultimately fail to accurately address and remedy the violation under examination.

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (the Covenant or ICESCR) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 3 guarantees equal enjoyment of ESC rights to

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[1] Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, CESCR (Forty-second session, 2009), U.N. Doc E/C.12/GC/20 (2009), para. 2.

men and women.[2] Neither Article 3 nor Article 2(2) are stand-alone provisions and must be read in conjunction with each specific right guaranteed under part III of the Covenant.[3] Yet, despite the above provisions, a significant number of ESC rights claims raise issues around discrimination or unlawful or unreasonable distinctions in the law, policy and practice.[4] This chapter of the Commentary will focus on analysing the concepts of equality and non-discrimination as set out in articles 2(2) and 3 of the Covenant and the ways in which these concepts have been interpreted to date. The chapter also discusses a coherent approach to these issues under international human rights law in relation to three specifically recognised grounds for discrimination - gender, disability and race - with the aim of considering the approach for applying this analysis under the Optional Protocol to the Covenant (OP-ICESCR).

2. Overview of Non-Discrimination and Substantive Equality

The principle of non-discrimination is "inherent in the fundamental idea of universal human rights".[5] States therefore have an immediate duty to ensure that they are not directly or indirectly discriminating against certain groups[6] in access to, or fulfilment of, a substantive right.[7] Direct discrimination occurs when a law, policy or practice explicitly provides for different treatment of groups or individuals based on a prohibited reason.[8] Where policies and practices are neutral on their face but have a discriminatory impact or effect on certain disadvantaged groups, this constitutes indirect discrimination and is a

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[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* 3 January 1976.
[3] Committee on Economic, Social and Cultural Rights, *General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights*, CESCR (Thirty- fourth session, 2005) U.N. Doc E/C.12/2005/3 (2005), para. 1.
[4] International Commission of Jurists, *Courts and the legal enforcement of economic, social and cultural rights: Comparative experiences of justiciability*, Human Rights and Rule of Law Series No. 2 (Geneva: International Commission of Jurists, 2008), p. 54.
[5] C. Krause and M. Scheinin, 'The right not to be discriminated against: The case of social security' in T. S. Orlin, A. Rosas and M. Scheinin, *The jurisprudence of human rights law: A comparative interpretative approach* (Turku/Åbo: Institute for Human Rights, 2000), pp. 253-286 at 255.
[6] Eight explicit grounds, and eleven implicit grounds from CESCR *General Comment No. 20* (n. 1 above).
[7] See Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, *The right to the highest attainable standard of health*, CESCR (Twenty-second session, 2000), U.N. Doc E/C.12/2000/4 (2000), para. 12; and *General Comment No. 20* (n. 1 above) paras. 7 and 20 in which the CESCR states that, for instance, '…the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men'.
[8] CESCR, *General Comment No, 20* (n. 1 above) para. 10(a).

violation of the Covenant.[9] In its General Comment No. 9, the Committee on Economic, Social and Cultural Rights (CESCR) stated that "[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[10] The CESCR has also interpreted this obligation as not only requiring the State to prevent discrimination in law and policy, but also to take positive steps to remedy past and structural discrimination, known as substantive equality.[11]

In both General Comments Nos. 16 and 20, the CESCR explicitly adopted a substantive or *de facto* equality approach for its analysis of violations.[12] In particular, in General Comment No. 20, the Committee elaborated that "States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination."[13] The CESCR went on to observe that systemic discrimination "against some groups is pervasive and persistent and deeply entrenched in social behaviour and organisation 'including' legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups."[14] For many groups, including women, persons with disabilities and persons from racial or ethnic minorities, this takes the form of stereotypes which impact an individual's access to ESC rights, in particular, employment, housing, healthcare and social security.[15] The substantive equality approach requires the State to

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[9] V. Abramovich, 'From massive violations to structural patterns: New approaches and classic tensions in the inter-American human rights system', *Sur International Journal on Human Rights,* Vol. 6, No. 11 (2009), pp. 7-37.

[10] CESCR, *General Comment No. 9, The domestic application of the Covenant*, CESCR (Nineteenth session, 1998), U.N. Doc E/C.12/1998/24 (1998), para. 15.

[11] CESCR, *General Comment No. 16* (n. 3 above) para. 7; *General Comment No. 20* (n. 1 above) para. 8(b). See also, A. Chapman and S. Russell (eds.), *Core obligations: Building a framework for economic, social and cultural rights* (Intersentia: Oxford, 2002), p. 6.

[12] Ibid.

[13] CESCR, *General Comment No. 20* (n. 1 above) para. 8.

[14] Ibid. para. 12.

[15] The CESCR pointed to this specifically in its General Comment No. 20, para. 20 when it noted that '[t]he Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights. Since the adoption of the Covenant, the notion of the prohibited ground 'sex' has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.' See also R. Cook and S. Cusack, *Gender stereotyping: Transnational legal perspectives* (Philadelphia: University of

take positive measures to address the context and manifestation of discrimination.[16] Such an approach has been recongised in the the Convention on the Rights of Persons with Disabilities (CRPD) [17] and adopted by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), [18] the Committee on the Elimination of Racial Discrimination (CERD Committee), [19] the Human Rights Committee (HRC),[20] and increasingly by the European Court of Human Rights[21]and the Inter-American Court of Human Rights.[22]

Pennsylvania Press, 2011); for the ESC rights impacts of disability related stereotypes, see, World Health Organization and World Bank, *World Report on Disability* (2011), available at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (last accessed 22 July 2014) at p. 6; A. Silversand M. A. Stein, 'Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification', *University of Michigan Journal of Legal Reform*, Vol. 35 (2002), pp. 81-136 at pp. 83-85; and for descriptions of the ESC rights impacts of race-related discrimination, see, Rapoport Center for Human Rights and Justice, *Forgotten Territories, Unrealized Rights: Rural Afro-Ecuadorians and their Fight for Land, Equality, and Security*, Univ. of Texas, Austin, School of Law (November, 2009), available at https://www.utexas.edu/law/centers/humanrights/projects_and_publications/afro-descendant%20reports/ecuador-eng.pdf (last accessed 24 July 2014) at pp. 17-19; Ilene Hyman, *Racism As A Determinant Of Immigrant Health*, Strategic Initiatives and Innovations Directorate (SIID), Public Health Agency of Canada (30 March 2009, available at http://canada.metropolis.net/pdfs/racism_policy_brief_e.pdf (last accessed 24 July 2014); Commissioner for Human Rights, *Human Rights of Roma and Travellers in Europe*, Council of Europe (February 2012) available at http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf (last accessed 24 July 2014); Yin Paradies, Ricci Harris, Ian Anderson, *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Discussion Paper No. 4, Cooperative Research Centre for Aboriginal Health, Darwin (2008), available at https://www.lowitja.org.au/lowitja-publishing/C004 (last accessed 24 July 2014).

[16] CESCR, *General Comment No. 16* (n. 3 above), para. 7; *General Comment No. 20* (n. 1 above) para. 8(b); Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (16 December 2010),paras. 9 and 24.

[17] CRPD, art. 5(3) and 5(4).

[18], *General recommendation No. 28* (n. 16 above), para. 16; CEDAW, *General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, para. (4)1, U.N. Doc. HRI/GEN/1/Rev.7* at 282 (2004).

[19] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32, The meaning and scope of special measures in the International Covenant on the Elimination of Racial Discrimination* (Seventy-fifth session, 2009) U.N. Doc CERD/C/GC/32 (2009), sec II(A).

[20] Human Rights Committee, *General Comment No. 18, Non-discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994); Human Rights Committee, *General Comment 28, Equality of rights between men and women (article 3)* (Sixty-eight session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

[21] See e.g. particularly in the context of education for Roma children, *DH v Czech Republic,* European Court of Human Rights (ECtHR) (2007), [GC] no. 57325/00; *Oršuš v Croatia*, ECtHR (2010), [GC] no. 15766/03 ; and *Sampanis and Others v Greece*, ECtHR (2008), no. 32526/05 .

[22] See e.g. in *Niñas Yean y Bosico v República Dominicana*, Inter-American Court of Human Rights, (2004) Series C No. 130, the Court held 'that the binding legal principle of equal and effective protection of the law and non-discrimination mandates that the States, in regulating the mechanisms of granting citizenship, should abstain from promulgating regulations that discriminate on their face or in effect against certain sectors of the population when exercising their rights. Moreover, States must combat discriminatory

2.1 Immediate vs Progressive Obligations

One area of innovative work for the CESCR under the OP-ICESCR will be in analysing States' immediate obligations to ensure non-discrimination within the broader context of the often progressive obligations related to ESC rights. The obligation to ensure non-discrimination in itself, as well as in conjunction with all articles of the ICESCR, is an immediate obligation under international law.[23] Beyond the immediate obligations to take steps to implement ESC rights, and to meet a minimum essential level of each right, the CESCR has determined that States have immediate obligations to ensure that these steps are taken on a basis of non-discrimination and that vulnerable groups are prioritised.[24] Further, it will not be deemed discriminatory, but rather it is an additional obligation of the State to take special (positive) measures to remedy historic and structural discrimination against certain groups and ensure equality in fact as well as in law.[25] For example, the CESCR has noted that States must "immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination". [26] Further, the CESCR has acknowledged that under certain conditions these measures may need to be sustained, such as "interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing healthcare facilities".[27] With regard to women, the CESCR has noted that special measures may remain in place until *de facto* equality is achieved.[28]

It will be an important task for the CESCR within the framework of the OP-ICESCR to determine how these immediate obligations not to discriminate, and moreover to ensure substantive equality, fit within the general obligation of progressive realisation within maximum available resources. More space will be given to the discussion of possible approaches to this question below in relation to specific groups, including women, persons with disabilities and racialized groups. For further discussion on the interaction of

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practices at all levels, especially in government, and ultimately must adopt the necessary affirmative measures to ensure effective equality under the law for all persons.'

[23] CESCR, *General Comment No. 20* (n. 1 above) para. 7.

[24] Ibid.

[25] Ibid. para. 9.

[26] CESCR, *General Comment No. 20* (n. 1 above) para. 8(b).

[27] Ibid. para. 9.

[28] CESCR, *General Comment No. 16* (n. 3 above) para. 15.

immediate and progressive obligations in the context of ESC rights and discriminated groups, see chapter 6 of this Commentary by Porter on reasonableness.

3. Recognised Grounds of Discrimination

In the absence of justifications to the contrary, the applicant or group of applicants has the right to self-identify, including in association with the discriminated group.[29] The CESCR has enumerated eight explicit grounds for discrimination based on the non-exhaustive list included in article 2(2) of the ICESCR. These include: "race and colour," sex, language, religion, political or other opinion, national or social origin, property, and birth. Through various general comments, culminating in General Comment No. 20, the CESCR has elaborated eleven additional, implicit or analogous grounds of discrimination and these include: disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation.[30] However, the CESCR has not yet elaborated a coherent framework for determining which other grounds of differentiation, such as those not listed in article 2(2), constitute discrimination.

Where there is discrimination either through laws and policies or their effects, the CESCR will need to consider whether "the justification for differentiation is reasonable and objective". To do this, the burden is on the State to prove the measures are legitimate, compatible with the overall goals and aims of the ICESCR and in an effort to promote general welfare of society.[31] Further, there must be a proportional relationship between the aims of the measure or omission by the State and its impact on the rights-holder.[32] Importantly, the Committee has emphasised that States cannot claim lack of available resources as an objective and reasonable justification unless they can prove they have made every effort to prioritise the elimination of discrimination using all available resources.[33]

In addition to ensuring that a substantive and intersectional approach is taken in evaluating grounds for discrimination, the innovative work of the CESCR has begun to explore and elaborate social and economic status as a ground for finding a violation of the

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[29] CESCR, *General Comment No. 20* (n. 1 above), para. 16.
[30] Ibid. para. 15.
[31] Ibid. para. 13.
[32] Ibid.
[33] Ibid.

obligation of non-discrimination and equality. In its General Comment No. 20, the Committee took an important step in articulating that poverty and social and economic exclusion can constitute a ground for discrimination and inequality.[34] Because of the nature of ESC rights, the issue of poverty underlies almost all experiences of ESC rights violations and as such the CESCR has a unique role in continuing to flesh out poverty as a potential ground for discrimination. A recent report by the United Nations Special Rapporteur on Extreme Poverty analysed criminalisation and discrimination against people on the basis of poverty,[35] illustrating that stereotypes and stigma related to poverty has resulted in policies which penalise and discriminate against poor people. Because of prejudices attached to poverty, many people who need social protection measures, such as food subsidies, free health clinics and public housing, do not come forward to request these benefits, further entrenching themselves and their families in a multigenerational cycle of poverty.[36] Further, States are increasingly enacting legislation which disproportionately penalises the poor, such as regulating conduct in public space, in the name of public safety.[37]

It will be important for the CESCR to take note of discrimination based on poverty not only as an independent ground of discrimination, but also as it relates to the forms of identity-based discrimination on which we focus in this chapter. These three basis for discrimination - race, sex/gender, and disability – have been chosen because of the possibility for coherence and harmonisation of legal standards developing under CEDAW, CRPD and CERD, and also because membership in any of these three groups greatly increases the chances of living in poverty and therefore experiencing violations of ESC rights.[38] Finally, the Committee has begun important work that should be continued

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[34] CESCR, *General Comment No. 20* (n. 1 above) para. 35.
[35] M. Sepulveda, *Report by UN Special Rapporteur on Extreme Poverty to UN General Assembly*, Sixty-Sixth Session, U.N. Doc A/66/265 (2011).
[36] Ibid. para. 9.
[37] Ibid. para. 26.
[38] According to most figures, women constitute 70% of the global poor (UNDP 1995: iii; United Nations 1996a); further, although persons with disabilities make up 10% of the population, they comprise 20% of those living in poverty (United States Agency for International Development, *Second Annual Report on the Implementation of USAID Disability Policy 2* (2000), available at http://pdf.usaid.gov/pdf_docs/PDABT610.pdf (last accessed 24 July 2014); J. Braithwaite and D. Mont, *Disability and poverty: A survey of World Bank Poverty Assessments and implications*, Research paper for the World Bank (February, 2008) available at http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172608138489/WBPovertyAssessments.pdf (last accessed 24 July 2014); and there is evidence in statistics and reports from all regions showing a correlation between 'race' and levels of poverty (Durban Review Conference, *Outcome Document of the Durban Review Conference*, Geneva 20-24 April 2009, available at

exploring issues related to social security, education, water, and health rights, of older persons, children, migrants and indigenous peoples (among other groups) also facing disproportionate and unique experiences of ESC rights violations.[39] General Comment Nos. 5, 6, 16 and 20 have established important groundwork for analysing ESC rights violations in the context of discriminated and marginalised groups. From here, it will be important that the CESCR ensures a substantive equality approach to recognising and remedying ESC rights violations presented before it under the OP-ICESCR and periodic review processes as well as considering additional grounds of discrimination and in analysing the legitimacy of defences to discrimination with ESC rights standards such as maximum available resources.

4. Discrimination and Inequality based on Race

The OP-ICESCR lists "race" in its preamble as one of the prohibited grounds of discrimination, adopting the same list as is found in article 2(2) of the ICESCR. (The reference to "other status" in the OP-ICESCR, however, indicates that other grounds such as disability can be still considered.)

The CESCR's development of ESC rights in relation to race is lacking. CESCR General Comments and statements provide rather scant guidance on how the Committee will deal with ESC rights issues around the in the context of race under the OP-ICESCR. Of importance therefore is an examination of how other treaty bodies have dealt with racial discrimination and inequality in relation to these rights, particularly the CERD Committee, and how that links to the CESCR's general understanding of discrimination and inequality in relation to ESC rights. This would provide the CESCR with some guidance in dealing with the ESC rights of racial groups under the Optional Protocol. Nevertheless, as explained earlier in this chapter, the CESCR has dealt generally with

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http://www.ohchr.org/Documents/Press/Durban_Review_Conference_outcome_document.pdf (last accessed 1 November 2013), para. 8; World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, Durban, South Africa, 31 August - 8 September 2001, at paras. 18, 19, 69 and 74); C. Alando, *Macroeconomics & ethnicity: Monitoring global afro descendant Employment*, Prepared for presentation under the sub-theme 'Statistical Data and Socio-economic Indicators in the field of Employment,' at the Fourth Session of the Experts Working Group on People of African Descent, Office Of The United Nations High Commissioner For Human Rights, Geneva (2004).

[39] CESCR, *General Comment No. 6, The economic, social and cultural rights of older persons*, CESCR (Thirteenth session, 1995), U.N. Doc E/1996/22 (1996); CESCR, *General Comment No. 11, Plans of action for primary education*, CESCR (Twentieth session, 1999), U.N. Doc E/C.12/1999/4 (1999); *General Comment No. 13, The right to education*, CESCR (Twenty-first session, 1999), U.N. Doc E/C.12/1999/10 (1999); CESCR, *General Comment No. 14* (n. 7 above) paras. 22-25.

discrimination and inequality in the enjoyment of ESC rights. The existing standards on discrimination established by the CESCR and the standards on racial discrimination established by the CERD Committee would thus be relevant to the CESCR's approach to adjudicating claims under the OP-ICESCR in relation to discrimination on the grounds of race. However, while the CERD Committee standards would be useful in providing guidance on racial discrimination, the extent to which the CESCR would rely on them remains to be seen. It is important to first understand that race is a complex concept that evolves over time and between societies and to situate "racial discrimination" within this framework. It encompasses characteristics ranging from biological, economic, social and cultural to historical factors, amongst others.[40] The use of the term in international human rights instruments, as emphasised by the CESCR in relation to the terms used in the Covenant "does not imply the acceptance of theories which attempt to determine the existence of separate human races."[41] Its use in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is to be seen as a social construct and a practical embracing concept, and not in a biological sense.[42] The Durban Review Conference strongly rejected theories that attempt to determine the existence of distinct human races.[43] It must be noted that racial classifications per se do not necessarily imply social injustice.[44] In practice, however, they have been associated with economic and social inequality as well as social exclusion;[45] hence the diffidence when it comes to racial classifications. Racial classifications cannot be used as a ground for unjust

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[40] Interights, *Non-discrimination in international law: A handbook for practitioners* (London: International Centre for the Legal Protection of Human Rights, 2011), p. 151.
[41] CESCR, *General Comment No. 20* (n. 1 above) para. 19.
[42] M. Kjarum, 'Combating racial and related discrimination' in C. Krause and M. Scheinin (eds.), *International protection of human rights: A textbook* (Turku/Åbo: Institute for Human Rights, 2009), p. 189.
[43] Durban Review Conference, *Outcome document* (n. 38 above), para. 6.
[44] For example, J. H. Ely, 'The constitutionality of reverse racial discrimination', *The University of Chicago Law Review*, Vol. 41 (1974), pp. 723-741, at 726, where it is acknowledged that racial segregations per se are not necessarily illegal as 'they can be justified, but only on the basis of a compelling state interest'.
[45] South Africa is a good example where racial classifications were associated with policies that entrenched racial inequalities, including inequalities in terms of access to socio-economic goods and services. See S. Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (Cape Town: Juta, 2010), p. 3. The South African Constitutional Court has alluded to the fact that differentiation based on geographical areas may amount to racial differentiation or indirect racial discrimination. Thus, the application of a geographical standard in the provision of socio-economic goods and services, even if neutral on the face of it, may in fact be racially discriminatory (see generally, *City Council of Pretoria v Walker* 1998 (3) BCLR 257; and *Mazibuko and Others v City of Johannesburg and Others* 2008 (4) All SA 471 (W) para. 94).

discriminatory practices or unjust discriminatory policies.[46] In fact, in addition to gender, race is a category that is seen as "highly suspect", implying that using race to make legal differentiations cannot be easily justified unless there is a reasonable pressing need for it.[47] Equality of all races in law and practice is thus a fundamental value in the protection and promotion of human rights.[48] Accordingly, discrimination based on racial grounds is prohibited at both the international and national levels[49] and is regarded as a peremptory norm of international law.[50] In addition to the CERD, considered below, the ICCPR also lists race and property, amongst others, as prohibited grounds of discrimination in its article 2(1). States are required, under articles 20(2) and 26, to adopt laws prohibiting advocacy of national, racial or religious hatred that constitutes incitement to discrimination, and prohibiting racial discrimination and guaranteeing equal and effective protection against racial discrimination, respectively.

4.1 Understanding Racial Discrimination and Inequality

Very few international treaties and standards actually define racial discrimination. Among these is the CERD, the main international treaty at the United Nations level on the prohibition of racial discrimination. It defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[51]

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[46] See art. 2(1) of the UN Declaration on Race and Racial Prejudice, 1978, U.N. Doc E/CN.4/Sub.2/1982/2/Add.1, annex V (1982). See also, generally, United Nations Declaration on the Elimination of All Forms of Racial Discrimination, U.N. G.A. Resolution A/Res/18/1904 (1963).
[47] International Commission of Jurists, *Courts and the legal enforcement of economic, social and cultural rights: Comparative experiences of justiciability* (Geneva: ICJ, 2008), p. 54.
[48] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14, Definition of discrimination*, CERD (Forty-second session, 1993), U.N. Doc A/48/18 (1993), para. 1. See also, K. Tang, 'Combating racial discrimination: The effectiveness of an international legal regime', *British Journal of Social Work*, Vol. 33 (2003), pp. 17-29 at 19.
[49] It is important to note that prior to the adoption of an international treaty dealing specifically with racial discrimination, some national courts had dealt with the issue. A landmark and often cited is the case is that of *Brown v Board of Education* 347 US 483 (1954), in which the US Supreme Court found the existence of segregated schools according to racial criteria to be in breach of the equal protection clause.
[50] Kjarum (n. 41 above), p. 183.
[51] Art. 1 of the International Convention on the Elimination of the Elimination of Racial Discrimination, G.A. res. 2106 (XX), U.N. Doc A/6014 (1965) *entry into force* 4 January 1969. It should be noted that although the definition does not mention religion, it is important to note that religion would be relevant in

The CERD Committee has highlighted certain features of the above definition.[52] It observed that differential treatment is contrary to the CERD "if it has either the purpose or the effect of impairing particular rights and freedoms". The use of "effect" and "purpose" implies that racial discrimination can be direct or indirect.[53] Similarly, the CESCR also recognises that discrimination is prohibited whether it is direct or indirect.[54] Thus a policy may not be discriminatory on the face of it but could be discriminatory in its effect.[55] However, the fact that the "effect" of a policy is favouritism of certain individuals does not necessarily imply discrimination. The question of indirect discrimination was addressed by the CERD Committee in the case of *B.M.S. v Australia*.[56] In this case, a quota system had been imposed in Australia, on the number of doctors trained overseas, by the Minister of Health. This implied that doctors trained in Australian and New Zealand medical schools were favoured as those trained abroad though the latter were also Australian citizens or residents. The CERD Committee did not find this to constitute discrimination on the basis of race or national origin because medical students in Australia do not share one national origin.[57] Indirect discrimination was also addressed in the case of *L.R. et al v Slovakia*[58] discussed subsequently.

It must be emphasised that recognising the adverse effects of indirect discrimination would rarely be a one to one mapping with the group identified by the prohibited ground, as the CERD Committee required in *B.M.S v Australia*. It is in fact important to recognise the adverse effects of indirect discrimination so as to address systemic discrimination linked to ESC rights violations.

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some instances when dealing with racial discrimination, as it is often entwined with race and ethnicity. Accordingly, religion is acknowledged in the preamble to the CERD and article 5 protects the right to freedom of thought, conscience and religion.

[52] See CERD, *General Recommendation No. 14* (n 47 above).

[53] Ibid. para. 1. See also, CERD, *General Recommendation No. 32* (n. 19 above), para. 7, where the Committee states that discrimination in the CERD includes 'purposive or intentional discrimination and discrimination in effect'. See further, R. Hanski and M Scheinin, *Leading cases of the Human Rights Committee* (Turku/Åbo: Institute for Human Rights, 2007), p. 357, where it is explained that mentioning effect together with purpose in the definition of discrimination implies that it can be both direct and indirect.

[54] See Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food*, CESCR (Twentieth session, 1999), U.N. Doc E/C.12/1999/5 (1999), para. 10.

[55] South African jurisprudence is also instructive on the point that legislation can on the face of it, be neutral but discriminatory in its effect (see generally *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (4) BCLR 347 (CC)).

[56] *B.M.S. v Australia*, Communication No.8/1996, CERD, U.N. Doc CERD/C/54/D/8/1996 (1999).

[57] Ibid. para. 9.2.

[58] *L.R. et al v Slovakia*, CERD, Communication No. 31/2003 U.N. Doc CERD/C/66/D/31/2003 (2005).

If the objective of a differentiation is legitimate, for example, if it is for the "purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms" then the differentiation may be permissible.[59] However, "if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim", then the differential treatment will constitute discrimination.[60] For an action to constitute racial discrimination in violation of the CERD, it must have an "unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin".[61] The general recommendations and concluding observations of the CERD Committee, as well as its jurisprudence in relation to ESC rights, considered subsequently, illustrate that the groups that are protected include minorities, non-citizens, regardless of status, indigenous peoples and decent-based groups as well as members of marginalised racial groups in general.[62] Children of minorities and migrant workers have also been seen as a vulnerable group that is often discriminated against on the ground of race.[63] In fact, racial discrimination is seen to have diverse effects on children (such as low attendance and performance levels and social exclusion), which is compounded by their socio-economic and cultural background.[64]

It is important to note that there are gender dimensions to racial discrimination. Hence, while racial discrimination affects both men and women, the CERD Committee has observed that it does not always affect them equally or in the same way and might have

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[59] See CERD, *General Recommendation No. 14* (n. 48 above) para. 2. See also CERD, art. 1(4).
[60] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30, Discrimination against non-citizens*, CERD (Sixty-fifth session 2005) U.N. DocHRI/GEN/1/Rev.7/Add.1 (2005), para. 4.
[61] Ibid.
[62] For further discussion of the beneficiaries of the protection on racial discrimination, see N. Prouvez, 'Committee on the Elimination of Racial Discrimination: Confronting racial discrimination and inequality in the enjoyment of economic, social and cultural rights' in M. Langford (ed.), *Social rights jurisprudence: Emerging trends in international and comparative law* (Cambridge: Cambridge University Press, 2008) pp. 517- 539 at 520-522.
[63] See generally, United Nations Secretary General, *Study on the effects of racial discrimination on the children of minorities and those of migrant workers in the fields of education, training and employment* (Preparatory Committee, First Session, 2000), U. N. Doc A/CONF.189/PC.1/11 (2000).
[64] Ibid. paras. 18-19 and 26.

consequences that affect only women.[65] This thus highlights the need to take into account gender factors and perspectives when dealing with racial discrimination.[66]

4.2 State Obligations in Relation to Racial Discrimination

While the ICESCR is the main treaty at the international level on ESC rights and the CESCR has elaborated on the obligations of States in relation to these rights, the CERD is also instructive in terms of the various obligations on States when dealing with the ESC rights of racial groups. Therefore, the obligations under the CERD in relation to racial groups must be considered in addition to the obligations under the ICESCR in relation to non-discrimination and substantive equality mentioned earlier in this chapter. Article 2(1) of the CERD spells out the obligations on States in relation to racial groups, which is to take *all appropriate means* and *without delay* aimed at the elimination of racial discrimination in all its forms. The obligations under article 2(1) are both of a positive and negative nature. Furthermore, the obligation on States is to eliminate racial discrimination in both the public and private spheres.[67]

Article 5(e) of the CERD is of particular relevance as it requires States to prohibit and eliminate racial discrimination, and ensure equality, in the enjoyment of ESC rights, including:

> (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
>
> (ii) The right to form and join trade unions;
>
> (iii) The right to housing;
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> (iv) The right to public health, medical care, social security and social services;
>
> (v) The right to education and training;
>
> (vi) The right to equal participation in cultural activities;

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[65] Committee on Elimination of Racial Discrimination, *General Recommendation No. 25,Gender-related dimensions of racial discrimination* CERD (Fifty-sixth session, 2000), U.N. Doc A/55/18 (2000), paras. 1 and 2.
[66] Ibid. paras. 3 and 4.
[67] CERD, art. 2(1)(d).

As seen from the jurisprudence considered subsequently, the CERD Committee has further elaborated on these rights in relation to specific groups and on the specific obligations in relation to the rights. For example, with regard to the right to education and training,[68] the CERD Committee has held that States should ensure access to public educational institutions by all irrespective of nationality and avoid segregation in schools and different standards of treatment on grounds of race, colour, descent and national or ethnic origin.[69] States are also required to avoid segregation in relation to access to housing and ensure that vulnerable groups do not face discrimination in and have equal enjoyment of the rights to employment and health.

While segregation in schooling can constitute racial discrimination, non-segregation must be approached with caution, as education policies aimed at assimilation can also amount to racial discrimination. This is the case in situations where an attempt is made to integrate minority and migrant children within the majority yet emphasis is placed on the majority language, culture and history in the curricula.[70] The United Nations Secretary General sees this as one of the most damaging forms of racial discrimination because it can result in the denial of certain rights such as culture, freedom of expression and education.[71] Respect for, and protection of, linguistic rights is thus relevant, as education in national or official languages could result in exclusion of minority ethnic groups. This is in line with State obligations under the ICESCR, as educational measures have been identified by the CESCR as one of the measures that may also be considered appropriate for the purposes of article 2(1) of the ICESCR.[72]

It must be emphasised that the rights in article 5(e) do not constitute an exhaustive list;[73] hence, the rights in the ICESCR for instance become relevant. A restriction of any of these rights must not be incompatible with article 1 of the CERD both in its purpose and effect.[74] The rights must also have been guaranteed at the national level, since article 5, as

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[68] Ibid. art. 7, is also of importance in relation to the right to education and training, as it speaks to the obligation of States to educate the population.
[69] CERD, *General Recommendation No. 30* (n. 60 above), paras. 30 and 31.
[70] See United Nations Secretary General (n. 63 above) paras. 8-10.
[71] Ibid. para. 8.
[72] CESCR, *General Comment No. 3, The nature of states parties' obligations*, CESCR (Fifth session, 1990), U.N. Doc E/1991/23 (1991), para. 7.
[73] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 20, Non-discriminatory implementation of rights and freedoms*, CERD (Forty-eighth session, 1996), U.N. Doc A/51/18 (1996), para. 1.
[74] Ibid. para. 2.

explained by the CERD Committee does not of itself create the rights but assumes their existence and recognition.[75] In *Diop v France*, the CERD Committee held that seeing to the establishment of these rights is beyond its mandate, since its mandate is to monitor their implementation once they have been guaranteed.[76] This statement should not, however, be read as implying that the CERD Committee is not able to play any meaningful role in guiding States in the process of recognition of these rights at the national level as justiciable rights, and this in fact constitutes a key part of its mandate.

Article 5(f) is also of relevance as it deals with access to public places or services, including transport. Looking at the CESCR's interpretation of the right to adequate housing[77] and to health,[78] it is evident that access to transport is relevant to the enjoyment of ESC rights. Also falling within the ambit of article 5(f) is the activity of housing agencies in the private sector, as it is a general service to the public.[79] In the admissibility decision of the CERD Committee in *F.A. v Norway*, though finding the case to be inadmissible, the experts underscored the obligation of States to "take effective measures to ensure that housing agencies refrain from engaging in discriminatory practices and do not accept submissions from private landlords which would discriminate on racial grounds", as a means of giving full effect to their obligations under section 5(e)(iii).[80]

Furthermore, States also have an obligation under article 6 of the CERD to provide effective protection and remedies in cases of racial discrimination. Related to this is article 4 on the obligation of States to adopt immediate and positive measures to punish acts of racial discrimination.[81] In *Durmic v Serbia and Montenegro*, the CERD Committee found a violation of articles 5(f) and 6 of the CERD.[82] In this case, the applicant was refused access to a public place and the State failed to establish whether the

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[75] Ibid. para. 1.
[76] *Diop v France*, Communication No. 2/1989, CERD U.N. Doc CERD/C/39/D/2/1989/Rev. 2 (1991) para 6.4.
[77] Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing*, CESCR (Sixth session, 1991), U.N. Doc. E/1992/23 (1992), para. 8(f).
[78] CESCR, *General Comment No. 14* (n. 7 above) para. 12(b).
[79] *F.A. v Norway*, Communication No. 18/2000, CERD U.N. Doc CERD/C/58/D/18/2000 (2001). The applicant in the case went to a housing agency and paid a fee, granting him access to the agency's lists of vacant accommodation. Persons from certain groups were clearly stated in the lists as undesired tenants by the use of phrases such as 'no foreigners desired', 'whites only', 'only Norwegians with permanent jobs'.
[80] Ibid. para. 8.
[81] Art. 4 is seen as the backbone of the CERD. See Prouvez, (n. 62 above) p. 519.
[82] *Durmic v Serbia and Montenegro*, CERD, Communication No. 29/2003 U.N. Doc CERD/C/68/D/29/2003 (2006).

refusal was on grounds of his national or ethnic origin, in violation of article 5(f).[83] The police had also failed to investigate the case and the judiciary had failed to address the matter. Consequently, the CERD Committee found a violation of article 6 on the basis that the above failure deprived the applicant of the opportunity to establish whether his rights under the CERD had been breached.[84] The case is important as it is illustrative of the point that a breach of article 6 obligations is not dependent on a breach of any of the substantive provisions in the CERD.[85] States are thus required to "promptly, thoroughly and effectively" investigate claims of racial discrimination resulting in rights violations, failing which they would be in breach of their obligation to provide effective remedies to claimants.[86] This holding is of relevance to adjudication under the OP-ICESCR, as the provision of remedies for violations of economic, social and cultural rights is at the core of the effective and full enjoyment of the rights in the ICESCR.

4.2.1 Immediate vs Progressive Obligations

Generally, and as noted above, non-discrimination is an immediate obligation.[87] This implies that States have an obligation to immediately adopt the necessary measures to prevent, diminish and eliminate racial discrimination or the conditions and attitudes that cause or perpetuate substantive or *de facto* racial discrimination in the exercise and enjoyment of ESC rights by racial groups. On the other hand, the realisation of ESC rights, even in the context of racial groups, is subject to progressive realisation as can be seen from the general comments and concluding observations of the CESCR.[88] This has also been confirmed in *Diop v France*, where the CERD Committee held that the rights in article 5(e) of the CERD "are of programmatic character, subject to progressive implementation".[89] Put differently, while the full realisation of the ESC rights in article 5(e) is subject to progressive realisation, the obligation to prevent racial discrimination in the exercise of these rights or remove differential treatment in the process of realising these rights is of immediate effect.

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[83] Ibid. para. 9.5.
[84] Ibid.
[85] Ibid. para. 9.6.
[86] Ibid. para. 10.
[87] CESCR, *General Comment No. 20* (n. 1 above) para. 7.
[88] See for example, CESCR, *General Comment No. 3* (n. 72 above) para. 9.
[89] *Diop v France* (n. 76 above) para.. 6.4.

Special measures

The aim of special measures is to correct racial discrimination or inequality. States are also required to adopt, in the economic, social and cultural fields, special and concrete measures to ensure adequate protection of the rights of racial groups.[90] While it might be necessary to adopt special measures in order to ensure equality in dignity and rights for individuals and groups, States must ensure that the measures do not appear to be unjustifiably racially discriminatory.[91] This is in line with the CERD Committee's view stated above. The CERD Committee has further elaborated on the meaning and scope of special measures.[92] Such measures include what is referred to as affirmative action or measures, or positive action.[93] Notwithstanding the above, the extent to which special measures can be seen as permissible is open to questions. Accordingly, the CERD Committee has identified a number of conditions to be fulfilled when special measures are adopted. The measures must be: (a) appropriate to the situation that they aim to remedy; (b) legitimate and necessary in a democratic society; (c) fair and proportional; (d) temporal; (e) designed and implemented on the basis of need and on the basis of prior consultation with, and active participation of, affected communities.[94] Taking the above into consideration, the CESCR will need to elaborate more fully on the obligation to take positive measures, and not limit itself only to the question of when such measures are permitted, as discussed below with reference to General Comment 29 of the CERD Committee.

4.3 Interpretations of Racial Discrimination in the Context of ESC Rights

This section focuses largely on the jurisprudence of the CERD Committee, but reference is also made, albeit briefly, to jurisprudence from other bodies, where relevant. The CERD Committee has decided cases in which racial discrimination was applied to economic, social and cultural rights such as the right to work, housing and education. The CERD Committee's ability to address racial discrimination in this context is seen as one of its strengths.[95] In one of the leading cases, *L.R. et al v Slovakia*, the CERD Committee found racial discrimination to have occurred in the context of the right to housing, which

[90] ICERD, art. 2(2).
[91] See art. 9(2) of the UN Declaration on Race and Racial Prejudice.
[92] See generally CERD, *General Recommendation No. 32* (n. 19 above).
[93] Ibid. para. 12.
[94] Ibid. paras. 16 and 18.
[95] Kjarum (n. 41 above) p. 202.

was attributable to the State in question.[96] The case concerned the right to adequate housing of Roma. The government had approved a plan to construct low cost housing for Roma inhabitants. This plan was subsequently cancelled based on pressure from anti-Roma groups. The CERD Committee was of the view that the cancellation of the initial plan, an "important policy and practical step towards realization of the right to housing" and its replacement with a weaker measure, amounted to "the impairment of the recognition or exercise on an equal basis of the human right to housing."[97] The State was thus found to be breach of its obligation to ensure equality before the law in the enjoyment of the right to housing.[98] The State was subsequently required to provide an effective remedy to the complainants, including taking measures to ensure that they are placed in the same position that they were before the first plan was adopted.[99]

This case is important in illustrating how the CERD Committee approaches the question of indirect discrimination. The CERD Committee makes clear that, in assessing indirect discrimination, account must be taken of the particular context and circumstances of the case since "by definition indirect discrimination can only be demonstrated circumstantially".[100] Hence, though measures might not appear discriminatory on face value, they might be discriminatory when one looks at the facts and effects. A discriminatory intent is therefore not required. This approach is in line with the CESCR's definition of indirect discrimination, which views such discrimination as referring "to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination".[101] The European Court of Human Rights has also adopted a similar approach. In *D.H. and Others v The Czech Republic*, the Court was of the view that indirect discrimination does not necessarily require a discriminatory intent and can arise from a *de facto* situation.[102] The applicants in this case had been assigned to special schools as a result of their Roma origin. The importance of the case has been emphasised on the basis of providing clarity on how evidence of discriminatory impact should be

[96] *L.R. et al v Slovakia* (n. 57 above) para. 10.8.
[97] Ibid. para. 10.7.
[98] Ibid. para. 10.9.
[99] Ibid. para. 12.
[100] Ibid. para. 10.4.
[101] CESCR, *General Comment No. 12* (n. 54 above) para. 10.
[102] *D.H. and Others v The Czech Republic*, ECtHR (2007) [GC] No. 57325/00, 47 European Human Rights Reports, Vol. 3 (2008) paras. 175 and 184.

treated.[103] In addition, circumstances that point to lack of respect for difference and the existence of social arrangements that reinforce or lead to social exclusion would result in indirect discrimination, as underscored by the European Committee of Social Rights.[104] Taking the above into consideration, it is important for the CESCR to accept that intent is never required for the finding of discrimination. The distinction between direct and indirect should be based on the nature of the effect. In the above case, the effect was on Roma only, so it was direct.

Reverting to the situation post-*L.R. et al v Slovakia* case, though various steps were subsequently taken in Slovakia "to improve the situation of the Roma minority in the fields of education, housing and employment," the CERD Committee, as noted in its concluding observation on Slovakia's State report, still "remains concerned about the continued marginalisation and precarious socio-economic situation of members of this minority, and the discrimination they are faced with, including in the fields of education, housing, health, and employment."[105] The CERD Committee has thus not only paid particular attention to Roma communities in its jurisprudence, but also in its concluding observations and general recommendations. The CERD Committee has also raised concerns over discrimination faced by Roma in the enjoyment of various ESC rights in its concluding observations on other State reports.[106] In addition, in General Recommendation No. 27, the CERD Committee emphasised the obligation of States that have Roma communities to adopt various measures to combat racial discrimination against this group including measures aimed at ensuring the right to education, improving

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[103] J. Devroye, 'The case of D.H. and Others v. the Czech Republic', *Northwestern Journal of International Human Rights*, Vol. 7 Issue 1 (2009), pp. 81-101, at 88.

[104] *European Social Rights Centre v Italy*, paras. 19-20 and 46, Complaint No. 27/2004. The case concerned the denial of Roma in Italy an effective right to housing due to evictions and shortage of and inadequate living conditions in camping sites as well as segregationist housing policies and practices.

[105] Committee on the Elimination of Racial Discrimination, *Concluding observations on the sixth to eighth periodic reports of the Slovak Republic*, CERD, U.N. Doc CERD/C/SVK/CO/6-8 (2010) paras. 5, 11, 16 and 18.

[106] See for example, Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighth and ninth periodic reports of the Czech Republic*, U.N. Doc CERD/C/CZE/CO/8-9 (2011), paras. 11-12, 14, 16-17 and 19; Committee on the Elimination of Racial Discrimination, *Concluding observations on the nineteenth to twenty-first periodic reports of Ukraine,* U.N. Doc CERD/C/UKR/CO/19-21 (2011) para. 14; Committee on the Elimination of Racial Discrimination, *Concluding observations on the sixth and seventh periodic reports of Slovenia*, U.N. Doc CERD/C/SVN/CO/6-7 (2010) paras. 8-10; Committee on the Elimination of Racial Discrimination, *Concluding observations on the fourteenth and fifteenth periodic reports of Italy*, U.N. Doc CERD/C/ITA/CO/15 (2008) paras. 14 and 20.

living conditions, ensuring participation in public life and protection against racial violence.[107]

In another case before the CERD Committee, *Yilmaz-Dogan v The Netherlands*, dealing with the State's obligation to guarantee equality before the law in respect of the right to work and protection against unemployment guaranteed under article 5(e)(i) of the CERD, the CERD Committee found a violation.[108] This case involved the question of intersectional (or multiple) discrimination on the ground of national origin and gender. Double or multiple forms of discrimination is an issue that the CERD Committee has addressed in its jurisprudence and general recommendations. For instance, it is evident from its General Recommendation No. 25, and also illustrated by the *Yilman-Dogan* case, that women may face racial discrimination particularly on the basis of their gender.[109]

The *Yilman-Dogan* case concerned the termination of the employment of a Turkish national living in the Netherlands on the basis of assumptions that foreign women workers with children are often absent from work, particularly their tendency to abuse sick leave. A Sub-District Court endorsed the termination without addressing the alleged racial discrimination in the enjoyment of the right to work. The CERD Committee found the failure to consider the discriminatory circumstances to be in breach of the complainant's right to work.[110] The State was required to ensure that the complainant was employed, and if not, secure alternative employment for her and provide the necessary equitable relief.[111]

The CERD Committee has also dealt with the issue of racial discrimination in the context of the right to work (employment) in its general recommendations, outlining specific obligations of States in this regard. For example, in General Recommendation No. 29, the CERD Committee underscored the obligation of States to take special measures aimed at ensuring that descent-based groups and communities enjoy their right to employment,

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[107] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 27, Discrimination against Roma*, U.N. Doc A/55/18 Annex V (2000).
[108] *Yilmaz-Dogan v The Netherlands*, Communication No. 1/1984, CERD, U.N. Doc CERD/C/36/D/1/1984 (1988).
[109] See generally, CERD, *General Recommendation No. 25* (n. 65 above).
[110] Ibid. para. 9.3.
[111] Ibid. para. 10.

and at eliminating multiple discrimination including descent-based discrimination against women in the area of employment.[112]

Another case that is of importance is *ER v Denmark*, where the CERD Committee found a violation of the right to education guarantee in article 5(e)(v) of the CERD on the basis of racial discrimination based on ethnicity.[113] The case dealt with the issue that students were not offered the same possibilities of education and training due to their ethnic origin. Since the State had failed to carry out an effective investigation in order to determine whether there was racial discrimination in these circumstances, the CERD Committee found the State to be in breach of its obligation to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization" in article 2(1)(d) and its obligation to provide effective protection and remedies under article 6 of the CERD.[114] The State was thus required to give the complainant adequate compensation and adopt measures to give effect to the decision.[115] It should be noted that in relation to the right to education and training, racial discrimination can either be institutionalised in education policy or can result from the action of teachers, students or others in authority.[116]

The jurisprudence of the HRC relating to racial discrimination and ESC rights is lacking, however one case is worth noting. In the admissibility decision of the CERD Committee in *Drobek v Slovakia*, the individual opinion of two experts held that individuals of German origin were discriminated against on the ground of race relating to property.[117] The applicant in the case would have inherited property from his family, yet, pursuant to a decree that allowed for property owned by ethnic Germans to be confiscated, his property was expropriated. Though subsequent legislation allowed for the return of property, the applicant did not cover confiscation under the earlier decree; the result being that the applicant could not reclaim the property. The case was, however found to be inadmissible.[118] It was also emphasised in the individual opinion that article 26 of the

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[112] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 29, Descent* (Sixty-first session, 2002), U.N Doc HRI/GEN/1/Rev.9 (Vol. 11), paras. 6, 12, 15 and 36-38.
[113] *Er v Denmark*, Communication No. 40/2007, CERD, U.N. Doc CERD/C/71/D/40/2007 (2007), para. 7.1.
[114] Ibid. para. 7.4.
[115] Ibid. paras. 9 and 10.
[116] United Nations Secretary General (n. 63 above) para. 5.
[117] *Drobek v Slovakia*, Communication No. 643/1995, U.N. Doc CCPR/C/60/D/643/1995 (1997), see Appendix.
[118] Ibid. para 7.

ICCPR must be respected, legislative acts must meet its requirements, and if a law is discriminatory on any of the grounds set out in article 26, it would violate the Covenant.[119]

5. Discrimination and Inequality Based on Disability

Persons with disabilities comprise a substantial minority group, with the World Health Organization estimating that more than one billion people have a disability.[120] Over eighty percent of those individuals live in the developing world and are subject to material deprivation, accounting overall for twenty percent of the world's poorest persons.[121] This circumstance has been brought about by the historical and dramatic exclusion of persons with disabilities from ESC rights that could ameliorate these conditions, [122] including equal access to education and healthcare, meaningful employment opportunities, accessible and integrated housing, and adequate standards of living, to name only a few.[123]

The exclusion of disabled persons has arisen from both overt prejudice as well as malign neglect. Underlying this exclusion has been a medical model of disability that regards "handicapped" individuals as being inherently (albeit, perhaps unfortunately) excluded from mainstream culture. Due to this medically-based pathology, disabled persons have been systemically excluded from social opportunities across the globe and throughout nearly every society.[124] At other times, disabled persons have been afforded limited participation in opportunities to develop their capabilities, such as having access to education but only within separate schools, or afforded employment options but only those situated in segregated settings.[125] The basic premise of traditional models of

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[119] Ibid. Appendix.
[120] See *World report on disability* (n. 15 above), p. xi.
[121] USAID Disability Policy, (n. 38 above).
[122] See M. A. Stein & J. E. Lord, 'Accessing socio-economic rights: The rights of persons with disabilities' in M. Langford (eds.)*, Equality and socio-economic rights: International law in context* (forthcoming 2017).
[123] See, e.g. M. A. Stein, J. E. Lord and D. W Tolchin, 'Equal access to health care under the un disability rights Convention' in R. Rhodes et al. (eds.), *Medicine and social justice: Essays on distribution and care* (New York: Oxford University Press, 2012), p. 245; J. E. Lord and M. A. Stein, 'Social rights and the relational value of the rights to participate in sport, recreation, and play', *Boston University International Law Journal,* Vol. 27, Issue. 2 (2009), pp. 249-281, at 249.
[124] *See* M. A. Stein, P. J. S. Stein and P. Blanck, 'Disability', in S. N. Katz (ed.), *Oxford International Encyclopedia of Legal History*, vol. 2 (Oxford University Press, 2009), p. 334.
[125] See generally, D. Braddock & S. Parish, 'An Institutional History of Disability'*,* in G. L. Albrecht, K. D. Seelman and M. Bury (eds.), *Handbook of Disability Studies,* (Thousand Oaks, CA: Sage Publications, Inc. 2001), p. 1.

disability is that the individual experiencing disability is the locus of barriers or problems encountered by that person.[126] These models ignore, however, that limitations reside not only in the individual, but arise from the "social, attitudinal, architectural, medical, economic, and political environment"[127] in which he or she lives.

Compounding the dire lived experience of persons with disabilities has been the historic and almost uniform absence of disability from core international human rights treaties,[128] United Nations programming,[129] development and humanitarian schemes,[130] and other enabling international cooperation activities.[131] The ICESCR Optional Protocol follows the non-inclusive path set forth in the ICESCR and fails to specifically recognise disability as a category for human rights protection. Instead, article 2.2 of both the ICESCR and its Optional Protocol enumerate a wide spectrum of identity characteristics against which discrimination is specifically prohibited, but relegate disability-related claims of human rights violations to the realm of "other status."

5.1 CESCR General Comment 5

The CESCR addressed the lacunae on disability-related rights, and specifically ESC rights, through the promulgation of General Comment No. 5.[132] The Committee recognised that disability discrimination is deeply entrenched and universal, ranging from outright denial of educational and employment opportunities to more subtle segregation and isolation from the community, but that each violation affected the full enjoyment of

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[126] As noted by one commentator, "this view of disability. . . puts the blame squarely on the individual." K. Fries, 'Introduction', in K. Fries (ed.), *Staring Back: the Disability Experience from the Inside Out* (New York: Plume, 1997), at pp. 6-7.
[127] I. Zola, 'Toward the Necessary Universalizing of a Disability Policy', *Milbank Quarterly*, Vol. 67 (1989), pp. 401-428 at 401, 406.
[128] The only exception is article 23 of the CRC, which is also notable in a disconcerting way, for conditioning the enjoyment of human rights of some children with intellectual disabilities.
[129] For instance, the Millennium Development Goals. *See* M. A. Stein, C. McClain-Nhlapo and J. E. Lord, 'Disability Rights, the MDGs and Inclusive Development', in M. Langford, A. Sumner and A. Yamin. (eds.), *Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press, 2013).
[130] See, e.g., M. A. Stein and J. E. Lord, 'Human Rights and Humanitarian Assistance for Refugees and Internally Displaced Persons with Disabilities', in I. Grobbelaar-du Plessis and T. Van Reenan (eds.), *Aspects of Disability Law in Africa* (Pretoria: Pretoria University Law Press, 2011), p. 31.
[131] See G. Quinn and T. Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments on the Context of Disability* (Office of the United Nations Commissioner for Human Rights, 2002) (providing exhaustive details of where and how persons with disabilities have been systemically overlooked in the field of human rights).
[132] Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with Disabilities*, CESCR (Eleventh session, 1994), U.N. Doc E/1995/22 (1995), para. 15.

ESC rights.[133] Addressing the obligation to progressively realise rights to the maximum extent of their resources, the General Comment adumbrated that the standard when applied to the context of "such a vulnerable and disadvantaged group" is for States parties to:

> take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[134]

The CESCR recognised the duty to provide reasonable accommodation as a non-discrimination measure,[135] and specifically highlighted the necessity of ESC rights in the realms of social security,[136] protection of family,[137] standard of living,[138] physical and mental health, [139] education, [140] and cultural participation [141] In so doing, General Comment No. 5 offered an instructive gloss on the ICESCR (as well as international human rights law more generally) and served as a point of departure for the drafters of the CRPD.[142]

5.2 The Convention on the Rights of Persons with Disabilities

The CRPD was adopted in 2006 and entered into force in 2008, enumerating a comprehensive human rights framework within the context of disability.[143] Its provisions are holistic, capturing the full spectrum of civil, political, economic, social and cultural rights. [144] Put another way, the CRPD is directed towards prospectively preventing

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[133] Ibid. para. 15.
[134] Ibid. para. 9.
[135] Ibid.
[136] ICESCR, art. 10.
[137] Ibid. art. 12.
[138] Ibid. arts.13-14.
[139] Ibid. art. 15.
[140] Ibid. art. 9.
[141] Ibid. art. 9.
[142] See generally Lord and Stein, 'Accessing Socio-Economic Rights' (n. 122 above).
[143] See M. A. Stein and J. E. Lord, 'The United Nations Convention on the Rights of Persons with Disabilities: Process, Substance, and Prospects', in F. Gomez Isa and K. De Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges* (University of Deusto, 2009), p. 495.
[144] See M. A. Stein, 'Disability Human Rights', *California Law Review*, Vol. 95, Issue 1 (2007), pp. 75-122 at 75.

prejudicial harm through non-discrimination provisions, and also remedying existing inequities arising from past practices via equality measures.[145] By providing a comprehensive rights catalogue, the CRPD is focused on ensuring the substantive equality of persons with disabilities and thereby puts into sharp focus the realisation of all rights, including ESC rights. The treaty, in addition, is unique amongst core human rights treaties for including stand-alone ESCR provisions—such as the right to education and an adequate standard of living—rather than following the traditional course of situating these rights within an "equal enjoyment" framework. The CRPD thus has weighty implications not only for the successful (re)integration of disability rights into the human rights normative framework, but for the further development of ESC rights claims generally.[146]

The CRPD articulates non-discrimination as a general principle in article 3 (General Principles) and as an article of general application in article 5 (Equality and Non-discrimination). "Discrimination on the basis of disability," as set forth in article 2, includes "any distinction, exclusion or restriction on the basis of disability" that "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" and extends to "all forms of discrimination, including denial of reasonable accommodation." Article 2 additionally stipulates that the failure to provide reasonable accommodation is considered a form of prohibited discrimination.

Drawing on article 15 of General Comment No. 5, article 5 of the CRPD defines "reasonable accommodation" as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden" that can ensure disabled persons "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." With this mandate, the CRPD drafters consciously made the linkage between reasonable accommodation and non-discrimination explicit, ensuring its immediate application. Article 5, moreover, provides that specific measures "necessary to accelerate or achieve de facto equality of persons with disabilities" cannot themselves be construed as discriminatory. Consequently, equality measures needed to bring about disability-based changes may explicitly differentiate on the basis of disability. Also,

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[145] M.A. Stein and P.J.S. Stein, 'Beyond Disability Civil Rights', *Hastings Law Journal,* Vol. 58, Issue 6 (2007), pp. 1209-1212.
[146] See Stein and Lord, 'Accessing socio-economic rights' (n. 122 above).

unlike the provision of "temporary special measures" referenced in the CEDAW and the CERD, the CRPD recognises that some measures may be needed for a longer term to achieve *de facto* equality. This represents a significant development for ESC rights claims and an embrace of the notion that special measures serve a vital equality purpose for disadvantaged groups.[147]

While raising tremendous prospects for developing ESC rights jurisprudence, the CRPD, at the same time—and perhaps more so for disabled persons than for other vulnerable population groups—forces a closer examination of the linkage between equality and non-discrimination and the manner that equality measures must meaningfully interact with non-discrimination prohibitions.[148] This is because the historic neglect of disability as a subject of formal human rights protection (as noted above in section 4) has resulted in an absence of sufficient jurisprudence for understanding disability-based ESC rights claims. For example, the CRPD prohibits discrimination and segregation of persons with disabilities, while also positively requiring that States enable disabled people to live independently in their communities. How advocates and litigators, and through them treaty monitoring bodies and courts, are to divine the line between these two realms of rights claims has not been broached, let alone established by either the traditional human rights mechanisms or yet, by the CRPD Committee.[149]

As of this writing, the relatively newly formulated CRPD Committee is just beginning the process of reviewing and issuing recommendations on State reports. If the recommendation issued to Peru is illustrative, then the CRPD Committee has offered both broad encouragement and concretely specific suggestions, at times recommending the application of "sufficient budget" or "appropriate measures" to State-sponsored programmes, and at other points focusing the attention of the State on very concrete steps it ought to undertake to fully honour its duties[150] Thus, when addressing inclusive

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[147] Ibid.
[148] Ibid.
[149] See M. A. Stein and J. E. Lord, 'Monitoring the Committee on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential', *Human Rights Quarterly, Vol.* 31, Issue 3 (2010), pp. 689-728.
[150] U.N. CRPD, 7th Sess., 72d mtg., U.N. Doc. CRPD/C/PER/CO/1 (20 April 2012), *available at* http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/3c57cafa5a800db9c12579f7003aafbd?OpenDocument (last accessed 23 July 2014), with that on health care provision ('The Committee urges the State party in general. The Committee further recommends the State Party to (a) review its legal framework in order to ensure that insurance companies and other private parties do not discriminate against persons with disabilities; (b) apply budgetary resources and the creation of skills among

education, the Committee recommended that Peru "allocate sufficient budget resources to achieve advances" in the inclusive education realm, and "take appropriate measures to identify and reduce illiteracy."[151] By contrast, and in reference to healthcare, the CRPD Committee urged Peru "to elaborate comprehensive health programs in order to ensure that persons with disabilities are specifically targeted and have access to rehabilitation and health services" and also recommended that the State:

> (a) review its legal framework in order to ensure that insurance companies and other private parties do not discriminate against persons with disabilities; (b) apply budgetary resources and the creation of skills among health personnel, in order to effectively comply with the right to healthcare of persons with disabilities, ensuring that hospitals and health centres are accessible to persons with disabilities; (c) provide services of early identification of disabilities, in particular deafness, designed to minimize and prevent further disabilities, including among children.[152]

5.3 Related Recommendations and Jurisprudence

Following the adoption of the CRPD by the General Assembly, United Nations human rights treaty monitoring bodies have notably increased the extent to which they incorporate persons with disabilities into their recommendations and enquiries. This shift is a dramatic improvement over prior practises wherein persons with disabilities were nearly invisible within the UN system,[153] as well as a constructive step towards generally acknowledging the significant impact of discrimination on persons who possess multiple identity categories and their trenchant need for ESC rights. Progress amongst Committees can be seen in three areas: (1) encouraging States to become parties to the CRPD;[154] (2) highlighting the impact of discriminatory practices on persons with disabilities;[155] (3)

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health personnel, in order to effectively comply with the right to healthcare of persons with disabilities, ensuring that hospitals and health centres are accessible to persons with disabilities; (c) provide services of early identification of disabilities, in particular deafness, designed to minimize and prevent further disabilities, including among children'), Ibid. at para. 39.

[151] Ibid. para. 37.

[152] Ibid. at para. 39.

[153] See Quinn and Degener (n. 131 above).

[154] See for example, *Concluding Observations of the Committee on the Rights of the Child: Bhutan*, U.N. Doc. CRC/C/BTN/CO/2, art. 51(d) (2008); *Concluding Observations of the Committee on the Rights of the Child: Georgia*, U.N. Doc. CRC/C/GEO/CO/3, art. 43(a)(2008).

[155] Report of the Committee on the Elimination of Discrimination against Women, U.N. Doc.A/61/38; CEDAW, 34th, 35th & 36th Sess., (2006) at para. 43 (noting with concern the illiteracy rate among women

requesting additional data and information relative to the status of persons with disabilities;[156] and (4) issuing recommendations for improving the circumstances of persons with disabilities.[157]

A review of the Forty-Sixth and Forty-Seventh Sessions of the CESCR demonstrates general advancement by Committees in acknowledging person with disabilities and their ESC rights. In those sessions, the CESCR specifically recommended that States Parties undertake specific ESC rights in relation to persons with disabilities (and others). Several examples illustrate this point. The CESCR urged: Germany to "ensure that the Federal Employment Agency provides services to enable persons with disabilities to secure and

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with disabilities in Cambodia); Ibid., at para. 53 (expressing concern that disabled women in Cambodia 'face multiple forms of discrimination with respect to access to education, employment and health care and are victims of violence.'); ibid., at para. 208 (recommending that Mali 'take appropriate measures, including legislation, to ensure that disabled women are not subject to any form of discrimination.'); ibid. at para. 243 (stating further concern that in Australia, 'the health needs of disabled women are inadequately met due to the lack of special equipment and other infrastructure.'), ibid., at para. 267 (women with disabilities, along with other multisectorial women, 'are at risk of multiple discrimination and sometimes encounter significant discrimination because of stereotypical attitudes, as well as difficulties in accessing social services and obtaining employment commensurate with their education and skills.').

[156] For instance, during its 48th Session, the CRC Committee requested supplemental data and additional information from each State party regarding service provision to children with disabilities. See Committee on the Rights of the Child, *List of Issues to be Taken up in Connection with the Consideration of the Second Periodic Report of Bulgaria,* CRC/C/BGR/Q/2 (14 February 2008) (mentalhealth care programmes and services for children with disabilities); Committee on the Rights of the Child, *List of Issues to be Taken up in Connection with the Consideration of the Third Periodic Report of Eritrea,* CRC/C/ERI/Q/3 (26 February 2008) (programmes providing support for child victims of armed conflict; statistical data on child land mine victims); Committee on the Rights of the Child, *List of Issues to be Taken up in Connection with the Consideration of the Third Periodic Report of Georgia,* CRC/C/GEO/Q/3(26 October 2008) (programmes and services for children with disabilities); Committee on the Rights of the Child, *List of Issues to be Taken up in Connection with the Consideration of the Initial Report of Serbia*, CRC/C/SRB/Q/1 (14 February 2008) (healthcare services for children with disabilities); Committee on the Rights of the Child, *List of Issues to be Taken up in Connection with the Consideration of the Second Periodic Report of Sierra Leone,* CRC/C/SLE/Q/2 (4 July 2007) (child amputees with disabilities; school enrollment of disabled children).

[157] See for example, *Concluding Observations of the Committee on the Rights of the Child*: Djibouti, U.N. Doc. CRC/C/DJI/CO/2, art. 48 (a)-(d) (2008) ('(a) Take all necessary measures to ensure the implementation of legislation relating to the rights of children with disabilities and consider adopting specific legislation on the issue; (b) Make every effort to provide community-based programmes and services, in particular specialized services, for all children with disabilities and ensure that such services receive adequate human and financial resources, with a particular focus on the right to education of children with disabilities; (c) Continue and strengthen awareness campaigns to sensitize the public about the rights and special needs of children with disabilities and encourage their inclusion in society; (d) Provide training for professional staff working with children with disabilities, such as medical, paramedical and related personnel, teachers and social workers.'); *Concluding Observations of the Committee on the Rights of the Child*: United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/GBR/CO/4, art. 53(a)-(e) (2008) ('(a) Take all necessary measures to ensure that legislation providing protection for persons with disabilities, as well as programmes and services for children with disabilities, are effectively implemented; (b) Develop early identification programmes; (c) Provide training for professional staff working with children with disabilities, such as medical, paramedical and related personnel, teachers and social workers; (d) Develop a comprehensive national strategy for the inclusion of children with disability in the society; (e) Undertake awareness-raising campaigns on the rights and special needs of children with disabilities encourage their inclusion in society and prevent discrimination and institutionalization.').

retain appropriate employment and to progress in their occupational field;"[158] Moldova to improve implementation of its national employment scheme as it relates to persons with disabilities;[159] the Russian Federation to intensify its efforts for making employment, education, and participation in cultural activities inclusive of persons with disabilities;[160] Turkey to advance awareness raising about and reasonable accommodation of persons with disabilities; [161] Yemen to undertake "urgent measures" for making education accessible for children and university students with disabilities;[162] Cameroon to "take concrete and effective measures and allocate the resources" to ensure disabled person are included in the labor market, including the promulgation of quotas and the provision of reasonable accommodations;[163] Estonia to effectively realise the right of persons with disabilities to have meaningful and gainful employment;[164] Israel to fully ensure inclusive education;[165] and Turkmenistan to "enhance the provision of social assistance and of welfare benefits to persons with disabilities."[166]

Courts have been slow in developing jurisprudence around ESC rights in the context of disability. Those rulings which have been issued are uneven to the extent that they fail to provide specific guidance on the substantive content of progressive realisation. Thus, although there are a handful of victories that are significant on their face, more frequently these judgments can be viewed as vulnerable to claims of limited application and extrapolation. As such, ESC rights jurisprudence relating to the realm of disability parallels that of social rights jurisprudence more generally, while being notable for the infrequency of adjudicated claims.

Two cases from the African continent illustrate the contrasting approach taken by courts. In *Purohit and Moore v The Gambia,* the African Commission found that conditions prevalent in Gambian institutions "caring" for persons with disabilities violated their right

[158] Report on the forty-sixth and forty-seventh sessions, CESCR, 46th and 47th Sess. (2-20 May 2011 and 14 November – 2 December 2011), art. 91, U.N. Doc. E/2012/22, U.N. Doc E/C.12/2011/3; Supp. No. 2 (2012).
[159] Ibid. at art. 123.
[160] Ibid. at arts. 157, 178, and 180.
[161] Ibid. art. 197(b)-(c).
[162] Ibid. art. 235.
[163] Ibid. art. 297.
[164] Ibid. art. 341.
[165] Ibid. art. 398.
[166] Ibid. art. 419.

to mental and physical health (as well as other rights) enshrined in the African Charter.[167] As to the progressive realisation of those rights, the African Commission stated that States were required "to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realized in all of its aspects without discrimination of any kind."[168] However, the African Commission declined to articulate what might constitute sufficient steps for the Gambia to fulfil its duty of progressive realisation.[169] By contrast, the High Court of South Africa (Western Cape) in *Western Cape Forum for Intellectual Disability v South Africa*,[170] held both the national and provincial governments in violation of the right to education by severely and profoundly disabled children who were barred from school.[171] The Court ordered the governments to (1) direct sufficient funds to organisations providing education for these children; (2) provide transportation for the children to reach the education centres; and (3) develop a plan of action to remedy the underlying violations and report back to the court within a year.[172]

European jurisprudence is likewise uneven in handling disability ESC rights cases. Specifically, the European Court of Human Rights (ECtHR) has been reluctant to articulate such rights, while the European Committee on Social Rights (ECSR) has formulated a more progressive view.[173] In *Marzari v Italy,*[174] for example, the ECtHR was unwilling to recognise a positive State obligation under the European Convention under a right to privacy claim for a wheelchair-user who was evicted from public housing and offered inaccessible alternative accommodation.[175] The ECSR, in comparison, embraced a more advanced view of ESC rights under the revised Social Charter in *Autism Europe v. France.*[176] There, the ECSR ruled that France had failed to meet its obligation

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[167] *Purohit and Moore v The Gambia,* Communication No. 241/2001, Sixteenth Activity Report 2002-2003, Annex VII, para. 84.
[168] Ibid.
[169] Ibid. (suggesting mostly legislative measures as remedies).
[170] *Western Cape Forum for Intellectual Disability v. South Africa,* Case no. 18678/2007 (2011).
[171] Ibid. The substance of the case was aided by article 27 of the Constitution stipulating education as an immediately cognisable right, although the final order lays out a path for its progressive implementation.
[172] Ibid.
[173] A thoughtful overview may be found in C. O'Cinneide, 'Extracting Protection for the Rights of Persons with Disabilities from Human Rights Framework – Established Limits and New Possibilities', in G. Quinn and O. M. Arnardóttir (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff Publishers, 2009), p. 163.
[174] *Marzari v Italy*, ECtHR (1999), [dec.], No. 36448/97.
[175] Ibid.The ECtHR has been consistent in this approach. See, e.g. *Botta v Italy*, ECtHR (1998), No. 21439/93; see also *Zehnalova and Zehnal v Czech Republic*, ECtHR (2002), No. 38621/97.
[176] *Autism Europe v France*, Complaint No. 13/2002, decision on the merits of 4 November 2003.

to children with Autism to exercise an effective enjoyment of the right to education in either mainstream school settings or in specialised educational institutions due to inadequate support. The ECSR elaborated that, "[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 allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and consistent with the maximum use of its available resources."[177]

A handful of domestic State court rulings have been notable in developing disability-based ESC rights. For instance, in *Reyes Aguilera, Daniela v Argentina,* [178] the Argentinean Supreme Court held as unconstitutional a statutory requirement that imposed a twenty year continuous residence requirement for disability-based pension payments.[179] Similarly, in *Eldridge v. British Columbia,*[180] the Canadian Supreme Court held that provincial governments must provide sign-language interpretation in the publicly funded healthcare system.[181]

If a global trend on disability ESC rights jurisprudence can be identified, it is that many of the cases assert claims to standard of living in the form of social welfare benefits and services.[182] On one level, this reflects the easier to assert legal claim of due process (i.e., that the claimant was afforded the same access to administrative mechanisms as similarly situated persons without disabilities) relative to a substantive claim (e.g., are persons with disabilities entitled to a greater share of healthcare resources), as well as the greater incentive or possibility in finding an attorney to bring suit due to the material nature of the remedy. On another level, the trend towards social welfare claims must raise a note of concern that the legal system continues to view persons with disabilities as requiring State support in the form of entitlements (which many do), but has not yet evolved towards considering disabled people as holders and users of rights, such as employment, that can empower their equal social participation.

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[177] Ibid. at para. 53. This approach has been subsequently followed. See, e.g., *MDAC v Bulgaria*, Complaint No. 41/2007, European Committee of Social Rights, Decision of 3 June 2008 (failure to provide an effective right to education for some 3,000 children with intellectual disabilities living in "homes for mentally disabled children" across Bulgaria).
[178] *Reyes Aguilera, Daniela v. Argentina* [CSJN], 4/9/2007.
[179] Ibid.
[180] *Eldridge v. British Columbia,* [1997] 2 S.C.R. 624.
[181] Ibid.
[182] See, e.g., *Phakamile Ranelo v.SA. Social Security Agency*, Case No. (1113/08) [2009] ZAECMHC 7 (4 June 2009) (considering due process requirements in relation to disability pensions).

The CESCR, therefore, has a window of opportunity to help define what progressive implementation of ESC rights and the achievement of substantive equality might mean within the realm of disability (and, by inference, to other protected areas as well). Within the context of disability-related employment rights, the CRPD sets forth an innovative standard that unites addressing disability based discrimination with requirements on the State to take positive action.[183] Specifically, it prohibits exclusion from employment opportunity, identifies –following General Comment 5- the denial of reasonable accommodation as a form of discrimination, and encourages States to take progressive measures towards closing the gap in open labour market and other freely chosen employment opportunities for person with disabilities.[184] Not identified within the borders of the CRPD, is what measures and how much resources a State ought to devote to these programmes. The lack of certainty is natural to that of any human rights treaty, the compliance with which must be ascertained within each State based on resource availability, and socio-legal context, including cultural stigmas that need be broken down as a precursor to social equality and inclusion. For some States, affirmative action will be an effective measure, for others, vocational training, job set-asides, government procurement contracts or hiring quotas, will prove more expedient.[185] The CESCR could provide significant guidance, both within the employment context and beyond, by elaborating on the obligations of States to ensure ESC rights and the required balance between non-discrimination and progressive measures.

6. Discrimination and Inequality based on Sex and Gender

In the CESCR's approach to discrimination, there has been a continued recognition of the relationship of sex and gender with increased vulnerability to ESC rights violations.[186]

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[183] Convention on the Rights of Persons with Disabilities, 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. Article 2 and 5(3); see also, J. E. Lord and M. A. Stein, 'Accessing Socio-Economic Rights' (n. 122 above).

[184] CRPD, article 27.

[185] See generally, J. Heymann, M.A. Stein and G. Moreno, *Disability and Equity at Work* (Oxford: Oxford University Press, 2014).

[186] CESCR, *General Comment No. 4* (n. 77 above); CESCR, *General Comment No. 5* (n. 132 above); CESCR, *General Comment No. 6* (n. 39 above); *General Comment No. 7, The right to adequate housing: forced evictions* CESCR (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV (1998); CESCR, *General Comment No. 11* (n. 39 above); CESCR *General Comment No. 12* (n. 54 above); CESCR, *General Comment No. 13* (n. 39 above); CESCR, *General Comment No. 14* (n. 7 above); *General Comment No. 15, The right to water*, CESCR (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003); CESCR, *General Comment No. 16* (n. 3 above); *General Comment No. 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of*

Since 1994, the CESCR's general comments have taken on a more thorough and analytically robust approach to articulating State obligations to ensure sex and gender equality. The CESCR has included several key issues for sex and gender discrimination in its more recent Comments such as unremunerated domestic labour within the right to social security; reproductive and sexual rights within the broader context of access to quality, affordable and non-discriminatory healthcare and further through the current elaboration of a general comment on sexual and reproductive health and rights, as well as others.[187] General comments have also stressed the State's duty to implement ESC rights through domestic laws and policies that aim to achieve substantive equality, through means such as gender-sensitive resource allocation.[188] The ESC rights general comments have also increasingly delved into the role of harmful traditional practices, non-state actors and international financial institutions in perpetuating gender and sex inequality.[189]

Moving forward under the OP-ICESCR, the CESCR may also want to note some areas of weakness in terms of jurisprudential development. When aggregating the CESCR's Concluding Observations from 1997 - May 2010, and looking at the total observations made in relation to sex and gender discrimination, less than 3 per cent of its concluding observations address the issue of social security; only a little over 5 per cent of the references were made in reference to violations of an adequate standard of living such as food, water and housing; and just under 10 per cent of the observations address the right to education.[190] The CESCR's most extensive observations when looking at sex and gender discrimination are in relation to general discrimination issues under article 3, family life under article 10, and the right to organise and work under articles 6 and 7.[191]

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which he or she is the author, CESCR (Thirty-fifth session, 2005), U.N. Doc. E/C.12/GC/17 (2006); *General Comment No. 18, The right to work*, CESCR (Thirty-fifth session, 2005), U.N. Doc. E/C.12/GC/18 (2006); *General Comment No. 19, The right to social security*, CESCR (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008); CESCR, *General Comment No. 20* (n. 1 above); *General Comment No. 21, The right of everyone to take part in cultural life*, CESCR (Forty-third session, 2009), U.N. Doc. E/C.12/GC/21 (2009).

[187] CESCR, *General Comment No. 14* (n. 7 above); CESCR, *General Comment No. 19* (n. 186 above).

[188] General Comments 5, 6, 19 and 20 address gender disparities in social security access; General Comment 14 focuses on inequalities in health care access and the need for disaggregated data; and General Comment 16 stresses the importance of a balanced representation of women in public office and decision-making positions, with an eye towards policy-making and resources.

[189] CESCR, *General Comment No. 21* (n. 186 above) para. 64; CESCR, *General Comment No. 20* (n. 1 above) para. 11; General, *Comment No. 16* (n. 3 above) paras. 20, 31; CESCR, *General Comment No. 19* (n. 186 above) para. 58.

[190] CESCR, *Committee Concluding Observations from 1997 - May 2010*, Summary of sex and/or gender mentioned, 408 = 100%: article 3, 91 = 22.3% of total; articles 6 and 7, 90 = 22.06%; article 9, 12 = 2.94%; article 10, 101 = 24.75%; article 11, 21 = 5.15%; article 12, 53 = 12.99%; article 13, 40 = 9.80%.

[191] Ibid.

Therefore, in making recommendations related to social security, housing, food, water, and education from a gender perspective, the CESCR will need to rely more on standards developed under the general comments as well as other treaty bodies, particularly the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), until further concluding observations and recommendations in these areas are developed.

6.1 Understanding Sex and Gender Discrimination

In addition to the general definition of discrimination under article (2)2, the CESCR can rely on article 3 of the Covenant, which requires States to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights" in the Covenant. As part of a universal system of human rights, through General Comment 16, the CESCR integrated CEDAW's definition of sex discrimination. Article 1 of CEDAW defines discrimination against women as:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

In the context of sex and gender, one of the most persistent and pervasive forms discrimination and inequality has been through gender stereotypes. In fact, as demonstrated in the analysis below, gender and other identity based stereotypes formed at least part of most of the violations discussed. The CEDAW Committee has gone as far as to say in its General Recommendation 25 that in addition to addressing direct/indirect discrimination and substantive/formal equality, addressing wrongful gender stereotyping is one of the three general obligations of States.[192] The CESCR has also importantly noted that discrimination can be direct[193] or indirect[194] but also that discrimination can

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[192] CEDAW, *General Recommendation No. 25* (n. 17 above); see Cook and Cusack, *Gender Stereotyping*, (n. 15 above), p. 104.

[193] 'Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.' CESCR, *General Comment No. 16* (n. 3 above) para. 12.

occur due to differential treatment or because of assumptions based on gender stereotypes, such as women being unwilling to work long hours due to family obligations.[195] The CESCR recognised the difference between sex and gender and the roles and obligations ascribed to each and that these assumptions can continue to place women at a disadvantage in realising ESC rights due to diminished autonomy, participation and decision-making.[196]

Not every gender stereotype will necessarily be prohibited as a form of direct or indirect discrimination, particularly where the State can show it was justified in the larger context of the aims of the Covenant, the aim was legitimate and means used were proportionate and reasonable. However, in order to make this determination, the CESCR should make the following assessment: was there a difference in treatment based on a gender stereotype; did the treatment negatively impact the claimant's ESC rights; and was the stereotypical difference in treatment justified?[197] To analyse whether there was a difference in treatment, the Committee should look at whether the claim shows evidence of distinction, exclusion or restriction.[198] To assess whether there was a negative impact on the claimant due to the gender-based stereotype, the CESCR should look to both the purpose and effects of the law policy or practice and whether it *impairs or nullifies the recognition, enjoyment or exercise* of women's ESC rights.[199] Finally, in analysing whether the discrimination was justified, the CESCR should consider the impact of the discrimination on the claimant as weighed against the legitimacy of the purpose of the law, policy or practice, and the reasonableness and proportionality of the means chosen.[200]

6.2 State Obligations on Sex and Gender Equality

As discussed earlier, the CESCR's integration of the substantive equality approach to analysing obligations and violations, particularly in the context of sex and gender, has

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[194] "Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender neutral law may leave the existing inequality in place, or exacerbate it." CESCR, *General Comment No. 16* (n. 3 above) para. 13.
[195] Ibid. para. 11.
[196] Ibid. para. 14.
[197] Cook and Cusack, *Gender Stereotyping*, (n. 15 above), p. 104.
[198] Ibid. p. 105.
[199] Ibid. p. 118.
[200] Ibid. p. 123.

been a crucial development. In General Comment No. 16, the CESCR made an important contribution to the recognition that violations of ESC rights impact women disproportionately because of so-called cultural and traditional norms, and because of the intersectional and compounded discrimination experienced by women from racial or ethnic minority groups, women with disabilities, older women, girls, etc.[201] General Comment No. 16 was the first by the CESCR to fully express the State obligations of both formal and substantive equality.[202] In General Comment No. 16, and then more recently in General Comment No. 20, the CESCR concretised that the purpose of using the substantive equality approach to realising ESC rights is to ensure that the actual impacts of a policy or practice are the centre of the analysis.[203] Therefore, in analysing a violation of ESC rights in the context of sex and gender, the actual effects of the law, policy or practice on the woman or group of women bringing the claim must form the basis from which to begin the analysis. As will be discussed in the context of particular cases below, this is increasingly happening in a meaningful way within other UN treaty bodies such as CEDAW, CERD and CRC. General Comments 16 and 20 also define the general and specific obligations of States in addressing sex and gender discrimination, including the tripartite obligations to respect, protect and fulfil.[204]

Special Measures

The CESCR has recognised that the removal of laws or policies that discriminate against women, or implementation of blanket policies to improve access to ESC rights, while important, may often still not be enough to ensure substantive equality and meet State obligations of non-discrimination and equality.[205] Due to structural and historic discrimination against women and more so against certain groups of women, States will likely need to adopt special measures to ensure existing disparities in enjoyment of ESC rights are diminished. These measures are of a temporary nature; however, depending on the nature of the situation being addressed they may need to remain in place over several years.[206] Further, although the measures may have the effect of favouring women, this

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[201] CESCR, *General Comment No. 16* (n. 3 above), para. 5.
[202] Ibid. para. 6.
[203] Ibid. para. 7; CESCR, *General Comment No. 20* (n. 1 above) paras. 8-9.
[204] CESCR, *General Comment No. 16* (n. 3 above), paras.18-21; CESCR, *General Comment No. 20* (n. 1 above).
[205] CESCR, *General Comment No. 16* (n. 3 above), para. 8.
[206] CESCR, *General Comment No. 20* (n. 1 above), para. 9.

differentiation will be considered legitimate as long as they are directed at addressing conditions of *de jure* and *de facto* discrimination against women.

Immediate vs Progressive Obligations in Context of Sex and Gender

Within the context of sex and gender discrimination and inequality, the CESCR will need to further flesh out the ways in which the immediate obligations to ensure non-discrimination interact with the progressive obligations to fulfil ESC rights, particularly when taking a substantive equality approach. For example, realising equality for women in the healthcare setting will often require increasing access to facilities in rural areas, better and affordable transportation to health centres and further training for health professionals on specific needs and rights of women, among other improvements, and if these changes are not made, a situation of indirect and *de facto* discrimination will persist. Although States may be unable to immediately and fully realise all of these components immediately, regardless of resources, the State is obligated to take immediate steps to develop a plan of action for realising ESC rights, as well as prioritising the core aspects of realisation of that right, such as access to essential medicines, information, and a full range of emergency care, in the context of the women's right to health. The standard under 8(4) supports the CESCR to review the reasonableness of the positive measures taken by States within available resources with an eye towards both equality and ESC rights.[207] Under the OP-ICESCR, section 8(4) will likely be a crucial analytical tool in determining those actions which are consistent with progressive realisation and substantive equality.

6.3 Adjudication of Claims under OP-ICESCR based on Sex and Gender

In the CESCR's approach to adjudicating claims under the Optional Protocol, it is critical to note in claims involving inequality or discrimination in ESC rights based on sex and gender, rarely will this be the only operational identity contributing to the discrimination. This is of course because women are only a group to the extent that men are a group, i.e. women are at least 50 per cent of the population. Although women do experience particular discrimination, stereotypes and barriers because of their sex and gender, more commonly, the discrimination and inequality women experience also intersects and

[207] B. Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins', *Nordic Journal of Human Rights*, Vol. 27, No. 1 (2009), pp. 39-53.

interrelates with discrimination based on other grounds such as disability, race/ethnicity, age, migration status, etc.[208] Critically, understanding and recognising the linkages between gender, other identities, poverty and the denial or violation of ESC rights will also be an essential role of the CESCR under the OP-ICESCR. Because of this, the substantive equality approach, which places the particular context of claimants at the centre of the analysis will be crucial in accurately capturing and remedying ESC rights violations experienced by women.[209]

In developing an analysis on violations of women's ESC rights under OP-ICESCR, it will be important to be aware of the jurisprudence of other international bodies such as OP-CEDAW, HRC, CRC, OP-CERD as well as some key national and regional level courts. These bodies have all contributed to a growing jurisprudence on several issues central to adjudication under this Optional Protocol. The first is the understanding and development of the concept of intersectionality (or multiple discrimination) in determining State obligations and capturing the full scope of violations of women's ESC rights. Intersectionality of multiple bases of identity is a foundational concept in ensuring substantive equality. This concept has been developing in relation to sex and gender in the jurisprudence of several UN treaty bodies.

In addition, this concept has been at the centre of many communications considered by other UN treaty bodies.[210]A recent and important example of this analysis appeared in *Alyne da Silva Pimentel v Brazil,* where the CEDAW Committee did several important things to further establish this concept as a basis for analysing ESC rights violations.[211] This case was brought on behalf of an Afro-Brazilian woman who died due to lack of access to adequate emergency obstetric care. In its decision, the CEDAW Committee acknowledged how the particular identity of the victim –a poor, Afro-Brazilian woman -

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[208] CERD, *General Recommendation No. 25* (n. 65 above); Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 18, Disabled women* (Tenth session, 1991), U.N. Doc. A/46/38 (1991); *General Recommendation No. 26, Women migrant workers* (Forty-second session, 2008), U.N. Doc. CEDAW/C/2009/WP.1/R (2008); CEDAW, *General Recommendation No. 27, Older women and protection of their human rights* (Forty-seventh session, 2010), U.N. Doc. CEDAW/C/GC/27.

[209] G. Brodsky and S. Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty'*, Canadian Journal of Women and the Law*, Vol. 14 (2002), pp. 184-218.

[210] *Alyne de Silva Pimentel v. Brazil,* Communication No. 17/2008, Committee on the Elimination of Discrimination against Women (Forty-ninth session, 2011) U.N. Doc. CEDAW/C/49/D/17/2008 (2011); *Sandra Lovelace v. Canada,* Communication No. 24/1977 (Thirteenth session, 1981), U.N. Doc. CCPR/C/OP/1 (1984) at 10.; and *A.S. v. Hungary*, Committee on the Elimination of Discrimination against Women, Communication No. 4/2004 (Thirty-sixth session, 7-25 August 2006), U.N. Doc CEDAW/C/36/D/4/2004 (2006).

[211] Communication No. 17/2008 (Forty-ninth session, 2011), U.N. Doc. CEDAW/C/49/D/17/2008 (2011).

within the broader context of Brazil, interacted to manifest in the violation.[212] From this, the CEDAW Committee went on to note that the State not only needed to adopt relevant policies, but they must be implemented in a way which actually results in greater and more equitable access to health services for all.[213]

However, this is a newer trend. There are also many important cases where this approach was missed. In *Sandra Lovelace v Canada*, the HRC missed an important opportunity to fully capture the intersectional nature of human rights violations in the lives of women. The *Lovelace* case involved an indigenous Canadian woman who was challenging the loss of access to rights and privileges related to her indigenous status when she married a non-indigenous man.[214] Indigenous men did not lose this status if they married non-indigenous women. The HRC analysis focused on the right of religious, ethnic and linguistic minorities to access and enjoy their culture, religion and language,[215]but clearly, the law only operated in denying this right because she was a woman. The HRC choose not to include the underlying issue of sex discrimination in the analysis, potentially to avoid admissibility issues related to the date of the violation,[216] yet it was on the basis of sex that she was denied access to her cultural group and language. Lovelace's identity as both indigenous and as a woman inextricably created the particular violation she experienced.

In *A.S. v Hungary,* a case involving a forced sterilisation of a Roma woman, the CEDAW Committee failed to mention the fact that the claimant was Roma in detailing the violations of the Convention or recommendations to the state.[217] The CEDAW Committee was provided with significant evidence of the systemic discrimination and ongoing pattern of forced sterilisation of Roma women in the region.[218] Therefore, the primary issue in the case was not forced sterilisation of women generally in Hungary, but

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[212] *Alyne* (n. 189 above), para. 7.7.
[213] *Alyne* (n. 189 above), para. 7.6.
[214] *Sandra Lovelace v. Canada,* Communication No. 24/1977 (Thirteenth session, 1981), U.N. Doc. CCPR/C/13/D/24/1977 (1981).
[215] Ibid. para. 13.
[216] A. Bayefsky, 'The Human Rights Committee and the Case of Sandra Lovelace', *The Canadian Yearbook of International Law*, Vol. 20 (1982), pp. 244-265 at p. 263.
[217] *A.S. v. Hungary*, Communication No. 4/2004 (Thirty-sixth session, 2006), U.N. Doc. CEDAW/C/36/D/4/2004 (2006).
[218] Center for Reproductive Rights, *Amicus Submission in A.S. v Hungary* (10 November 2005) at p. 5-6; *Concluding Observations of the Human Rights Committee: Slovakia* (Seventy-eighth session, 2003), U.N. Doc. CCPR/CO/78/SVK (2003), para. 12; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Slovakia* (Sixty-fifth session, 2004), U.N. Doc. CERD/C/65/CO/7 (2004), para. 14.

forced sterilisation of a particular group of women. Because the intersectional nature of the violation was not captured in the expert's analysis, their recommendations were quite general and did not call on the State to take special measures with regard to this highly marginalised group. The CEDAW Committee followed up the next year in concluding observations to Hungary where it did note the particular issue of sterilisation of Roma women,[219] but the failure to do so in the communication procedure was an important missed opportunity to accurately address the violation in that case.

The *Lovelace* case is particularly important for the CESCR to keep in mind as it begins to receive communications under the Optional Protocol as it also serves as a monitoring body for substantive rights, rather than as a primary expert body monitoring the obligation of non-discrimination such as CEDAW, CERD and CRPD. Although the CESCR may choose to focus on analysing the violation of the substantive ESC rights at the heart of the claim, which keeps the process squarely within its mandate, the Committee must also capture the actual impact of the violation on the individual or group of individuals involved, including issues relating to identity of the victim, such as for girls,[220] women with disabilities[221] and racialised and minority women.[222] This is critical in order to accurately detail which State obligations were violated and to create recommendations which respond to the particular context of the case. This cannot be done by restricting the analysis of the violation to only one aspect of its manifestation.

A case where the primary issue was not intersectional discrimination, but rather gender stereotypes, was *Zwaan de Vries v the Netherlands*. In this case, the HRC considered a complaint resulting from gender stereotypes in social security policy-making, although it was not explicitly discussed in their decision.[223] In this case, the complainant was a married woman who was claiming a violation of the right to non-discrimination based on sex due to a provision in the unemployment benefit policy which required married women to prove they were breadwinners or permanently separated from their husbands to qualify for full benefits. To qualify as a breadwinner, married women had to provide proof of the proportion of their contribution to the family's total income. The same was

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[219] *Concluding comments of the Committee on the Elimination of Discrimination against Women: Hungary* (Thirty-ninth session, 2007), U.N. Doc. CEDAW/C/HUN/CO/6 (2007), paras. 30-31.
[220] *Jean Bosico Children* (n. 20 above).
[221] *Gauer v. France*, App. No. 61521/08 (Eur. Ct. of Human Rights, 2011).
[222] *Jean Bosico Children* (n. 20 above).
[223] *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (Twenty-ninth session, 1987), U.N. Doc. Supp. No. 40 (A/42/40) (1987) at 160.

not required of men - all married men who were employed were automatically considered breadwinners. [224] Although the HRC did find a violation of the right to non-discrimination, it failed to mention the gender stereotypes that underlay the violation. Gender and other stereotypes are used to perpetuate and legitimise various forms of discrimination. They often attempt to link particular forms of inequality and discrimination to nature, tradition and culture. Naming gender and other stereotypes during the adjudicatory process is a powerful tool in transforming a private harm into a publicly recognised and authoritatively condemned practice which requires redress.[225]

This trend is beginning to shift, however, and the context in which stereotypes based on sex and gender are beginning to be more frequently recognised and situated in relation to the experience of discrimination and substantive violations of ESC rights. In *María Eugenia Morales de Sierra* decided by the Inter-American Commission of Human Rights in 2001, the issue of gender stereotyping was at the centre of the case.[226] The 1963 Civil Code of Guatemala defined the roles within marriage. Under the law, men were defined as the breadwinner, responsible for financially sustaining the family, and for being the legal representative of the family, including with regards to all marital property. Women conversely, were obligated to care for the children and the home, and only if these duties were satisfied and their husbands consented, were women able to work outside the home. The Inter-American Commission found this to be a violation of the right to non-discrimination based on the gender stereotypes underpinning the law. More recently, in the case *R.K.B. v Turkey*, the CEDAW decided that a case based on discrimination in the workplace was underpinned by gender-based stereotypes– where an employer dismissed a female employee after accusing her of having an affair with a male colleague, but did not also dismiss the male colleague.[227] The CEDAW found that the dismissal of the claimant was based on socio-cultural mores of how married women as opposed to married men are expected to act.[228] It will be important for the CESCR to address these systemic dimensions to individual petitions and for advocates bringing petitions forward, as well as supportive interveners, to ensure that the Committee has reliable evidence as to

[224] *Zwaan de Vries* (n. 202 above), para. 8.2.
[225] Cook and Cusack, *Gender Stereotyping* (n. 15 above), p. 39.
[226] *María Eugenia Morales de Sierra*, Case Nº 11.625, Report on the Merits Nº 4/01, Inter-American Commission on Human Rights, 19 January 2001.
[227] Communication No. 28/2010, U.N. Doc. CEDAW/C/51/D/28/2010 (13 April 2012).
[228] Cook and Cusack, *Gender Stereotyping* (n. 15 above), p. 39.

the nature of stereotypes and systemic patterns that are manifest in the individual violations being challenged.

7. Conclusion

For socially and historically discriminated groups - including persons with disabilities, racialised groups and women - clear lines may rarely exist between the negative and immediate obligations of non-discrimination and the positive and progressive obligations of ESC rights necessary for ensuring equality in fact. Once a group has been situated within a socio-economic context of disadvantage, simply removing active barriers to participation and access to substantive rights will not be enough to ensure realisation of ESC rights. Furthermore, as has been explicitly recognised under the CRPD and in the context of disability, the failure to take positive measures to ensure reasonable accommodation is itself considered discriminatory. Therefore, in the development of jurisprudence under the OP-ICESCR, in the context of ESC rights which largely have a progressive nature, it is imperative for the Committee to clarify how immediate obligations in relation to ensuring substantive equality interact with progressive obligations of ESC rights. Finally, capturing the context and specific nature of the experience of discrimination, including the underlying stereotypes which may have created it, is central to ensuring remedies which address the specific nature and impacts of discrimination for various groups. This dynamic becomes more challenging in the context of those individuals experiencing multiple forms of discrimination arising from intersecting identity status. To ensure the OP-ICESCR offers effective redress to those experiencing ESC rights violations, as well as the opportunity to deepen and clarify ESC rights obligations for States and advocates with regard to equality rights, the Committee must pay significant attention to claims involving intersectional identities, gender or other stereotypes and systemic violations more broadly. Only through a more nuanced and context-specific approach will the CESCR generate jurisprudence which both responds to the situation giving rise to the violation in the first place and generates recommendations specific and relevant enough to provide genuine guidance for States.

IV. REMEDIES AND ENFORCEMENT

9. Interim Measures

Viviana Krsticevic[*] *and Brian Griffey*[**]

1. Introduction

A key feature of the Optional Protocol ("Protocol") to the International Covenant on Economic, Social and Cultural Rights ("Covenant")[1] is its provision for the Committee on Economic, Social and Cultural Rights ("Committee") to request States to adopt "interim measures"[2] in relation to communications brought before it, at any point prior to deciding on their merits. Article 5 provides:

> 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.

The Committee's requests for interim measures will be crucial to guarantee the effectiveness of the individual communications procedure,[3] and the utility of the Protocol

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[1] International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, 993 UNTS 3. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), GA Res. 63/117, 10 December 2008, UN Doc. A/RES/63/117.

[2] This chapter primarily focuses on the request for and provision of "interim measures" under Article 5 of the Protocol, though will also address points of convergence with the "protection measures" required of all States under Article 13 whenever necessary in relation to communications. Article 13 of the Protocol provides: "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."

[3] While the Committee could also foreseeably request interim measures in relation to inter-State communications brought under Article 10 of the Protocol, it is very rare for States to utilize the inter-State complaints procedures of any human rights treaties. For that reason, this chapter mainly examines interim measures in the context of individual communications, though many of the issues identified apply equally to inter-State communications, *mutatis mutandis*.

more broadly as a remedial tool to safeguard the economic, social and cultural rights (ESC rights) provided by the Covenant. When victims are at risk of irreparable damage, interim measures are necessary not only to provide immediate relief while communications are under consideration, but also to guarantee victims' access to effective remedies that are otherwise unavailable at the domestic level, as is central to the object and purpose of the Protocol.

During the drafting of the Protocol, States participating in the Working Group recognized the importance of interim measures to allow the Committee to respond swiftly to urgent situations outside the narrow window of its semi-annual meetings.[4] In addition to the Committee only meeting twice per year for periods of three weeks, the delays intrinsic to the individual communications procedure (often spanning years[5]) demand the possibility of immediate interventions when necessary to avert irreparable harm.

The decision of drafters to provide for interim measures directly in the text of the Protocol – rather than deferring to the Committee to do so in its rules of procedure – underscores a general trend in the use and recognition of interim measures as a critical element of human rights communications procedures.[6] The issuance of some form of interim measures is now foreseen by all United Nations (UN) human rights treaty bodies competent to receive complaints,[7] as well as by all regional human rights judicial and

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[4] See, *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*, UN Doc. A/HRC/6/8, 30 August 2007, paras. 68 and 181-182.

[5] See n. 32 below.

[6] See, Report of the working group on its fourth session (n. 4 above), para. 67; and *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*, UN Doc. A/HRC/8/7, 23 May 2008, paras. 60, 161.

[7] See: Article 5, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000), GA Res. 54/4, UN Doc. A/RES/54/4; Article 4, Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), GA Res. 61/106, UN Doc. A/RES/61/106, Annex II; Committee Against Torture (CAT Committee), *Rules of Procedure of the Committee Against Torture* (9 August 2002), UN Doc. CCPR/C/3/Rev.8 (28 May 2008), Rule 108; Committee on the Elimination of Racial Discrimination, *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* (1 January 1989), UN Doc. CERD/C/35/Rev.3 (28 May 2008), Rule 94.3; Human Rights Committee, *Rules of Procedure of the Human Rights Committee* (22 September 2005), UN Doc. CCPR/C/3/Rev.8 (28 May 2008), Rule 92. Note that the three remaining core human rights treaty bodies are also foreseen to have the competence to request interim measures, following the entry into force of the complaint procedures they are respectively mandated to oversee. See: Art. 6, Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011), GA Res. 66/138, UN Doc. A/RES/66/138; Arts. 30-31, International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force on 23 December 2010), GA Res. 61/177, UN Doc. A/61/177; Art. 77, International Convention on the Protection of the

quasi-judicial bodies.[8] However, the legal effect of requests for interim measures remains controversial, as was reflected in the drafting of the Protocol[9] and has arisen in the communications and jurisprudence of other human rights treaty-monitoring and regional bodies over the years. Nonetheless, those bodies have consistently and increasingly asserted that States are obligated to adopt the requested interim measures when necessary to prevent irreparable damage to alleged victims of communications and to uphold the petition procedure provided for by the respective treaty.[10]

Under the Protocol, interim measures accordingly provide the Committee with a discretionary avenue to identify actions that States need to take to maintain the integrity of the petitions process, including or in addition to the protection measures explicitly required of all States that are party to communications under Article 13.[11] Though other bodies and judiciaries have often issued interim measures to intervene in deportations, executions or other circumstances threatening the rights to life or physical and mental integrity of petitioners, there is also jurisprudence involving requests for interim measures necessary in distinctly ESC rights-related cases.

Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003), GA Res. 45/158, UN Doc. A/RES/45/158.

[8] *Regional judicial human rights bodies*: African Court of Human and Peoples' Rights (Article 35, Protocol on the Statute of the African Court of Justice and Human Rights, 2003); European Court of Human Rights (Rule 39, Rules of Procedure); Inter-American Court of Human Rights (Article 63.2 of the American Convention on Human Rights, 1969, 1144 UNTS 123, entered into force 18 July 1978). *Regional quasi-judicial human rights bodies*: African Commission on Human and Peoples' Rights (Rule 111, Rules of Procedure); European Committee of Social Rights (Rule 36, "Immediate measures", Rules of Procedure, adopted 10 May 2011); Inter-American Commission on Human Rights (Article 25, Rules of Procedure). The new rules of procedure adopted by the European Committee of Social Rights, which provide it with the competence to request interim measures in collective communications brought before it, could offer an important touchstone for the Committee to consider once it begins issuing its own requests for interim measures in the context of collective complaints. *Note*: the newly established Arab Human Rights Committee (under the League of Arab States) and ASEAN Intergovernmental Commission on Human Rights do not review individual complaints, so are not of a quasi-judicial character.

[9] E.g. Report of the working group on its fourth session (n. 4 above), para. 75; Report of the working group on its fifth session (n. 6 above), paras. 66-67, 160, 226, 228-230 and 239.

[10] See Section 5 below.

[11] OP-ICESCR, Article 13 (n. 2 above). As elaborated upon below, the Committee may at any time – whether as part of its requests for interim measures, or in its other communications with States – remind States of their standing obligation under Article 13 to protect anyone at risk of ill-treatment or intimidation as a consequence of communicating with the Committee under the Protocol. Articles 5 and 13 are both vital to ensure that activists, social leaders, witnesses and experts, victims or other individuals or groups involved in petitions are free to communicate with the Committee without fear of retaliation. Under its provisional rules of procedure, the Committee has further observed it may seek explanations or statements from States in response to any "reliable information that a State party has not complied with its obligations under Article 13", and "may request the State party to adopt and take urgently all appropriate measures to stop the breach reported." *See*: CESCR, Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012), UN Doc. E/C.12/49/3 (15 January 2013), Rule 20.

Drawing on those experiences of other international bodies and tribunals for human rights protection, Section 2 examines what types of "exceptional circumstances" threatening "irreparable damage" may require States to adopt interim measures as foreseen by the Protocol, and what evidentiary standards the Committee may use in identifying those needs. Section 3 then outlines the timeframe for interim measures to be requested (by petitioners or the Committee), the process for doing so, and their potential duration. Section 4 explores the scope and content of interim measures under the Protocol, including through examples from other systems' jurisprudence. Finally, Section 5 identifies the legal status of interim measures and the consequences of non-compliance.

2. Circumstances requiring interim measures

The broad language of Article 5 of the Protocol leaves it open to the Committee to determine when "exceptional circumstances" might require interim measures "to avoid possible irreparable damage to the victim or victims of the alleged violations." The Committee will thus need to assess what circumstances are "exceptional" and what type of damage is "irreparable" when evaluating whether or not to request interim measures.

2.1 'Exceptional circumstances'

As the Committee must consider communications on a case-by-case basis, it would be inappropriate to interpret "exceptional circumstances" in a restrictive sense, to mean that a risk of irreparable harm will only exist in rare cases. Rather, the significance of a communication presenting "exceptional" facts must speak more to their urgency than the frequency with which the Committee might identify a need for interim measures. Moreover, the very fact that interim measures are not required in all cases makes any request for them by the Committee "exceptional" in and of itself.

That reading is consistent with the Committee's own views when submitting its first draft optional protocol to the UN Commission on Human Rights in 1997:

> While the Committee does not consider it necessary or desirable to adopt a blanket provision which would apply in all cases, it considers that it should be given the discretion,

> to be used in potentially serious cases involving the possibility of irreparable harm, to request that interim measures be taken.[12]

The "exceptional" request for interim measures can therefore be viewed as a matter of the Committee's discretion, when it deems such measures are necessary to prevent irreparable harm.[13] Article 5 of the Committee's first draft protocol also sketches an appropriate potential approach to determining when the threat of possible irreparable damage to victims merits a request for interim measures:

> If at any time after the receipt of a communication, and before a determination on the merits has been reached, a preliminary study gives rise to a reasonable apprehension that the allegations, if substantiated, could lead to irreparable harm, the Committee may request the State Party concerned to take such interim measures as may be necessary to avoid such irreparable harm.[14] The Committee's own draft provision on interim measures thus articulates how a "reasonable apprehension" that conditions "could lead" to irreparable harm would justify a call for preventive interim measures.

It also importantly suggests that the Committee might engage in a "preliminary study" of the facts submitted in a communication. Here it is relevant that Article 8(1) and (3) of the Protocol expressly allow the Committee to review communications "in the light of all documentation submitted to it," as well as to "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." Such consultation of external information could prove vital in weighing the

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[12] *Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights* ('CESCR report on draft protocol'), UN Doc. E/CN.4/1997/105, Annex (1996), para. 36. *Cf.* OP-ICESCR, Article 13 (n. 2 above), which does provide for such blanket "protection measures" against any form of threat directed at individuals as a result of their participation in the Protocol's communications procedures.

[13] Irreparable "harm" and "damage" were terms used interchangeably during the drafting of the Protocol, but share the same simple meaning. For instance, some States suggested the phrase "exceptional circumstances to avoid irreparable harm" (Report of the working group on its fourth session, n. 4 above, para. 72), while other parties interchangeably referred to "irreparable harm" and "irreparable damage" immediately beforehand (ibid. paras. 67-68). However, the African Group did voice a preference for the term "harm" instead of "damage", though did not articulate its rationale (Report of the working group on its fifth session, n. 6 above, para. 63).

[14] CESCR report on draft optional protocol (n. 12 above), para. 37.

risk of irreparable damage to victims, based on economic, legal, political or other factors worthy of consideration.

However, unlike that 1997 draft provision, Article 5 of the Protocol as adopted does not restrict the Committee's requests for interim measures to the "allegations" included in communications. While interim measures will almost invariably address potential violations of Covenant rights identified in a given communication, the Protocol's final Article 5 importantly allows the Committee to consider requesting interim measures to stem off any threat of "irreparable damage to the victim or victims of alleged violations", even in response to developments well after the submission of the communication (yet prior to deciding on its merits).

2.2 'Possible irreparable damage'

Notwithstanding those windows into how the Committee may identify "exceptional circumstances" that threaten "possible irreparable damage", the Protocol and the Committee's earlier draft are both silent on what would make such damage "irreparable", *per se*.

> Offering some insight, the UN Human Rights Committee (HRC) elaborated upon the meaning of "irreparable damage" for a State that requested clarification of the term after receiving a request for interim measures: The Committee observed that what may constitute 'irreparable damage' to the victim within the meaning of rule 86 cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request [for interim measures] under rule 86 where it believes that compensation would be an adequate remedy.[15]

Under its rules of procedure, the Committee Against Torture (CAT Committee) can likewise request "interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations."[16] In *TPS v. Canada*,[17] the CAT Committee observed that interim measures may include "reasonable" measures

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[15] Human Rights Committee, *Stewart v. Canada*, Communication No. 538/1993, UN Doc. CCPR/C/50/D/538/1993 (1994), para. 7.7.
[16] Rule 108, Rules of Procedure of the Committee Against Torture (n. 7 above).
[17] CAT Committee, *TPS v. Canada*, Communication No. 99/1997, UN Doc CAT/C/24/D/99/1997 (2000).

"essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee."[18] In an individual opinion in the same case, CAT Committee member Guibril Camara proposed that irreparable harm could also include "steps to avoid a violation of the Convention and, therefore, an irreparable damage."[19]

The Inter-American Commission on Human Rights (IACHR) has considered the concept of "irreparable damage" along the same lines, including avoiding irreparable damage to the victim of the alleged violation, and other potential victims, as well as interfering with the end result of the individual petition mechanism.[20] In *Petro v. Colombia*,[21] the IACHR ratified its understanding of the scope of interim measures consistent with its doctrine and that of other protection mechanisms. The decision considers a protective and preventive aspect to "irreparable damage", linking the first to avoiding harm to the right of the petitioner, and the second to securing the right in order not to make the petition mechanism futile.[22]

In other words, "irreparable damage" in the jurisprudence of the CAT Committee, the HRC and the IACHR has been interpreted to include harm that could imperil the effectiveness of the complaints procedure, that could lead to a violation of the respective treaty if not otherwise prevented (whether a potential violation identified in the communication, or in addition to it), or that would not be adequately remedied through compensation.

In the context of ESC rights, it is critical to understand that "irreparable damage" includes not only violations of rights linked to the protection of life and physical integrity – such as health, housing, food, water and sanitation – but also violations of rights to culture,

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[18] Ibid. para.15.6.
[19] Ibid. para.16.1.
[20] IACHR, Rules of Procedure, art. 25.2.c.
[21] IACHR, precautionary measures, *Petro v Colombia*, 5/2014. http://www.oas.org/es/cidh/decisiones/pdf/2014/MC374-13-ES.pdf
[22] The Commission's reasoning is built around the concepts developed initially by the IACtHR which has affirmed: "That under International Human Rights Law, provisional measures are not only precautionary insofar as they preserve a juridical situation, but fundamentally protective because they protect human rights. Inasmuch as the basic requirements of extreme gravity and urgency are met, together with that of preventing irreparable damage to persons, the provisional measures become a true preventive jurisdictional guarantee." IACtHR, Provisional Measures, Case of the Peace Community of San Jose de Apartado, June 2002, par.4.

education or family and basic human dignity, as well as any circumstances that may nullify the end result of the communications procedure. For example, interim measures have been necessary to issue in situations of possible destruction of sites sacred to indigenous communities that are essential for the protection of their culture and existence.[23] Any potential compensation for such violations would likewise be illusory and symbolic. Moreover, irreparable damage could result from either act or omission by authorities – for instance, to realize the necessary conditions to secure the right to education – such that the necessary interim measures to prevent such harm could equally comprise negative or positive measures in a given case.

2.3 Evidentiary standards for adopting interim measures

In sum, the Committee's assessment of whether or not "exceptional circumstances" require States to adopt interim measures in order to avoid "possible irreparable damage" is likely to be based on *prima facie* indications of whether or not such harm would occur without intervention to prevent it. That determination will precede any *prima facie* assessment of the admissibility of the given communication. It is important in that regard that a decision by the Committee to request interim measures to address such circumstances "does not imply a determination on admissibility or on the merits of the communication".[24]

Interim measures are thus thought to balance urgency with accuracy, giving the Committee the opportunity to act without a full-fledged adversarial process and final determination of the facts. In turn, this would suggest a lower standard of proof is necessary to request urgent interim measures, particularly as they are intended to prevent foreseeable damage rather than exhaustively prove violations that have already occurred. Even when petitioners ask the Committee to request interim measures on their behalf, and provide a persuasive factual basis to do so, the Committee's requests for interim measures may be founded on a consistent and convincing narrative of facts that describe a situation that would merit action, backed with potentially limited evidence that can reasonably be collected in the given situation.

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[23] See, e.g.: *Endorois Welfare Council v. The Republic of Kenya* (n. 65 below); and *Awas Tingni Community v. Nicaragua* (n. 67 below); Inter-American Commission on Human Rights, *The Maya-Sitio Community of El Rosario-Naranjo v. Guatemala*, Precautionary Measures of 14 July 2006.
[24] OP-ICESCR, Article 5.2.

During the drafting of the Protocol, some States sought to raise the evidentiary bar higher for what information the Committee could consult as a basis for requesting interim measures,[25] but those efforts were largely defeated. Further enhancing the Committee's agility in its responses to urgent situations, Article 8(1) and (3) leave the door open to draw on a wide range of resources and submissions at all stages of examining communications, including when potentially requesting interim measures even prior to deciding on admissibility.

Drawing on a broad base of available information will further allow the Committee to take into account any patterns of past or ongoing violations documented in a State, both when weighing the need for interim measures in a particular case and potentially in shaping their appropriate content.[26] As the submission of communications to the Committee is premised on the lack of access to effective remedies on the domestic level, such patterns substantiating the need for interim measures could include lack of equal protection under the law,[27] or regular reports of human rights violations suggesting that the State is failing to protect victims from irreparable damage in analogous cases.[28] For example, in a country where there is a pattern of serious threats to the lives of human rights defenders, the Committee might choose to evaluate the situation with less evidence than in a country where no threats or assassinations have been carried out in decades.

Ultimately, based on the timely evaluation of allegations and evidence, the Committee will need to found any requests for interim measures on a reasonable conviction that the facts present *prima facie* the possibility of irreparable damage to victims, petitioners, or

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[25] For instance, some States proposed providing for interim measures to be "based on reliable information". Report of the working group on its fourth session (n. 4 above), para. 78; Report of the working group on its fifth session, (n. 6 above), para. 64.

[26] For instance, the Inter-American Commission on Human Rights included in its rules of procedure a call to consider the context of the information provided by the petitioners of precautionary measures. Article 25.5. "In considering the request the Commission shall take into account its context…". http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp

[27] For instance, the Inter-American Court of Human Rights noted in multiple rulings the lack of laws allowing indigenous peoples in Paraguay to make claims for their traditional lands (e.g. Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of 29 March 2006, Series C No. 146). In *AT v. Turkey*, the CEDAW Committee likewise noted the lack of due diligence of the judiciary, which turned down requests of the victim for interim protection orders: "The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures" (para. 9.5); and "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence" (para. 9.2). CEDAW Committee, *AT v. Turkey*, Communication No. 2/03, UN Doc. CEDAW/C/32/D/2/2003 (2005).

[28] Such as in the numerous deportation and extradition cases concerning the principle of *non-refoulement*.

persons involved in any capacity in communicating with the Committee. In such cases, the Committee's reasonable apprehension that irreparable damage could ensue (based on a clear and credible factual narrative, including any relevant patterns) should motivate it to request States to act promptly in order to prevent such damage, without prejudice to the merits of the case or further re-evaluation of the measures based on subsequent evidence. Even at this preliminary stage, the quality of the Committee's reasoning will be decisive to persuade States that the adoption of interim measures is necessary in a case demanding them, which will also set the tone for further dialogue on communications as the case proceeds, potentially to the mutual benefit of all parties.

3. Timeframe and process for requesting interim measures

Under Article 5 of the Protocol, the Committee is empowered to request interim measures at any time after receiving a communication but before transmitting its decision on the merits in the case. This establishes a finite period within which the Committee can request interim measures; yet, the procedure provides the Committee with considerable flexibility regarding both when within that range it requests interim measures, and for what duration of time it determines they are necessary. Indeed, the Protocol does not specify a maximum duration of interim measures necessary to avoid irreparable harm, meaning the Committee's requests could potentially be operative for years, depending on the situation.

Both the open-ended duration of interim measures and the possibility to request them in response to developments arising during the communications procedure are vital for the effectiveness of the Protocol, as well as potentially beneficial to the later adoption by States of the Committee's final remedial recommendations, the content of which could be influenced by States' effective adoption of necessary interim measures as requested by the Committee.

3.1 Timeframe for requesting interim measures

After receiving a communication, the Committee may request for States to adopt interim measures, either in response to a request that complainants submit with communications or *motu proprio* when the Committee determines independently that such measures are necessary in the circumstances at hand (a possibility that the Protocol is silent on, though clearly allows). The flexibility of the Committee in this respect is essential in light of the

drawn-out process for transmitting and examining communications prior to the issuance of views and recommendations on them.

After victims exhaust domestic remedies or demonstrate they are ineffective (however long that takes), they must then submit their communications within one year and wait for the Committee to consider them.[29] The Protocol then provides States with six months to respond to communications transmitted by the Committee[30] and – following the Committee's decision on and transmission of its views and recommendations to States – another six months to respond and adopt any required remedial measures.[31] This is neither an unusual timeframe for treaty-monitoring bodies, nor rapid relief for those at risk of irreparable damage. Exacerbating those delays could also be a backlog of communications waiting to be considered by the Committee, which is common before UN human rights treaty-monitoring bodies and could add years to the process.[32]

With those delays in mind, it is vital for petitioners to advise the Committee in their initial communications of any known circumstances requiring interim measures (with as much detail as possible), in order to avoid possible irreparable harm while waiting potentially for years for a final decision.[33]

While States are generally responsible to resolve urgent situations internally, based on the principle of subsidiarity, they are also internationally obligated under the Protocol to

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[29] OP-ICESCR, Art. 3.1(a).
[30] OP-ICESCR, Art. 6.2.
[31] OP-ICESCR, Art. 9.2.
[32] In 2011, there was an average backlog of 470 individual communications pending consideration. The UN Human Rights Committee alone had a backlog of 360 cases, with an average delay of three-and-a-half years between registration and a final decision in any given case. The UN Committee Against Torture had an average delay of two-and-a-half years, with 100 cases pending before it. See: Office of the UN High Commissioner for Human Rights (OHCHR), 'The High Commissioner's Treaty Body Strengthening Initiative: Information Note' (15 March 2012). In light of those system-wide backlogs, the newly adopted Optional Protocol to the Convention on the Rights of the Child provides for communications to be expedited if and when States are requested to adopt interim measures (however, communications must still navigate the already lengthy process required by the treaty). See, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, GA Res. 66/138, 19 December 2011, UN Doc. A/RES/66/138, Art. 10.3: "Where the Committee has requested interim measures, it shall expedite the consideration of the communication."
[33] Relatedly, the European Court on Human Rights has likewise indicated "an alarming rise in the number of requests for interim measures (an increase of over 4,000% between 2006 and 2010)", the vast majority of which concern deportation and extradition proceedings. This surge has prompted the Court to clarify and reiterate its standards for such requests, including through a Practice Direction on Requests for Interim Measures, which provides: "requests for interim measures should be individuated, fully reasoned, be sent with all relevant documentation including the decisions of the national authorities and courts, and be sent in good time before the expected date of removal." (European Court of Human Rights, *Info Note no. 138, Rule 39 of the Rules of the Court, Interim measures*, Statement issued on 11 February 2011 by the President of the Court.)

adopt any interim measures necessary to uphold the rights of victims to communicate with the Committee, and to allow those communications to proceed without obstruction or nullification by irreparable harm to those persons on the ground.

As the Committee may request interim measures prior to deciding on the admissibility of communications, such a request can correspondingly precede the Committee's observation of whether domestic remedies have been exhausted. Interim measures could in some circumstances involve the State adopting immediate remedial measures that may otherwise be out of reach to victims, but would still not imply a determination on the admissibility or merits of communications.[34]

While it is worth reiterating that the Committee's requests for interim measures will not prejudice the communications procedure to the benefit of either party, a State's adoption of appropriate measures in response to the Committee's request could bring the State back into partial compliance with the Covenant, and modify what permanent remedial measures are necessary to adopt where violations are found.[35] This is particularly relevant when States may adopt meaningful policy reforms in response to a request for "interim measures", thereby providing a durable solution that may ameliorate problems at the heart of a communication.[36]

In that respect, the duration of requests for interim measures – and of the measures that States adopt – must inform the Committee's decision on when to lift its request.

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[34] As the Inter-American Court of Human Rights has noted on numerous occasions when issuing provisional measures, there are distinctions between domestic injunctions and interim measures requested by international human rights bodies – with the latter comprising not only a judicial guarantee, but also a protection measure to prevent irreparable harm: "the purpose of provisional measures in domestic legal systems (domestic procedural law) is, in general, to preserve the rights of the litigant parties, thereby ensuring that the execution of the eventual judgment on the merits will not be prejudiced by the litigants' actions *pendente lite*. The purpose of provisional measures under international human rights law is more far-reaching: although essentially preventive in nature, they also effectively protect fundamental rights in that they seek to avoid irreparable harm to persons." Inter-American Court of Human Rights (IACtHR), *Colotenango v. Guatemala*, Provisional measures order of 12 July 2007 (includes citations of other provisional measures orders for comparison).

[35] For instance, see the case of the Constitutional Court of South Africa, *Occupiers of 15 Olivia Road and Others v. City of Johannesburg and Others* (2008 5 BCLR 475, CC), in which interim measures play an important part in the realisation of a final remedy. After the parties to the communication engaged each other to reach an agreement on interim measures, the 450 residents of the settlement in question voluntarily moved to better housing, with improved electricity, water and sanitation facilities. See C. Mbazira, *Litigating Soicio-Economic Rights in South Africa: A choice between corrective and distributive justice* (Cape Town: Pretoria University Law Press, 2009), at pp. 175-176.

[36] See, e.g., the Inter-American Commission on Human Rights case of *Jorge Odir Miranda Cortez et al. v. El Salvador* (n. 73 below).

3.2 Duration of interim measures

The Committee's requests for interim measures may last as long as threatening conditions persist, reflecting the urgency of dangers posed that require States to take action. That said, interim measures requested by other bodies typically specify a discrete period of time during which the requests will be effective, subject to review at a later time of any changes in the circumstances addressed by the interim measures.

In cases involving deportations or death sentences, quasi-judicial bodies often request States to adopt interim measures for the duration of proceedings until the final decision on views and recommendations, in order to safeguard the integrity of both those at risk and of the communications procedure.[37] That approach corresponds to the apparent rationale for allowing the Committee to issues requests for interim measures under the Protocol only until determining its views, and with them its final remedial recommendations benefiting from full consideration of the facts of a case.

In contrast, however, other bodies have requested interim measures to last for years based on the facts and circumstances at hand. In the case of *Colotenango v. Guatemala*, the Inter-American Court of Human Rights extended and expanded its order of provisional measures for more than 13 years,[38] including 10 years after the parties to the case reached a friendly settlement.[39] Even upon lifting the order, the Court maintained: "the lifting of the provisional measures does not mean that the State has complied with its conventional obligations […] nor is the State removed from its obligations to continue the

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[37] See, e.g., Human Rights Committee, *Sultanova v. Uzbekistan*, Communication No. 915/2000, UN Doc. CCPR/C/86/D/915/2000 (19 April 2006), at para 1.2; and Human Rights Committee, *Karimov and Nursatov v. Tajikistan*, Communications Nos. 1108/2002 and 1121/2002, UN Doc. CCPR/C/89/D/1108&1121/2002 (3 April 2007), para. 1.2; and CEDAW Committee, *NSF v. United Kingdom*, Communication No. 10/2005, UN Doc. CEDAW/C/38/D/10/2005 (2007), paras. 1.2-1.3; and CEDAW Committee, *Guadalupe Herrera Rivera v. Canada*, Communication No. 26/2010, UN Doc. CEDAW/C/50/D/26/2010 (30 November 2011); and African Commission on Human and Peoples' Rights, Communications Nos. 137/94-139/94-154/96-161/97 (merits); *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, Decision of 31 October 1998, at paras. 19 and 103.

[38] The Court at first ordered measures to protect persons who witnessed an attack by Guatemalan paramilitaries against unarmed protestors in a human rights demonstration in 1993, after other witnesses and their relatives were killed. However, the Court gradually expanded the measures: to include relatives and representatives of witnesses; to enforce arrest warrants against those charged in the murders; to improve oversight and control over the paramilitaries involved in the murders; to allow the participation of those protected in the planning and implementation of appropriate protection measures; and to report back to the court regularly on the measures adopted. See: IACtHR, *Colotenango v. Guatemala*, Provisional measures orders of 22 June 1994 and 12 July 2007.

[39] Inter-American Commission on Human Rights, Report No. 19/97, Friendly Settlement, Case 11.212 (Guatemala), 13 March 1997.

investigations to find and sanction those responsible for the facts."[40] It further assigned the Inter-American Commission on Human Rights "to verify the effective compliance" of the State with its obligations in that regard.[41]

While the Committee must issue any requests for interim measures prior to its decision on merits, nothing in the Protocol prevents those requests from remaining active until circumstances no longer require a State's urgent attention – potentially well after a friendly settlement or the Committee's decision on its views and recommendations in the case, as long as they remain necessary. Even where the requested interim measures are integrated into its ultimate recommendations, the Committee could foreseeably leave its requests for interim measures in effect until those parallel recommendations are adopted.

Similarly, the requirement of States under Article 13 to adopt "all appropriate measures" to prevent ill-treatment or intimidation against individuals due to their involvement in communications is an open-ended obligation, demanding the adoption of such measures whenever and for however long as they are necessary. While interim measures may only be requested in the "interim" prior to finalization of the Committee's views and recommendations in a case, the Protocol does not impose similar time constraints for identifying needed protection measures. This distinction is amply justified by the fact that these measures are closely linked to the ability of victims and others to communicate in any manner with the Committee without obstacles or intimidation. Hence, the Committee may request protection measures either as a form of interim measures or at any point through its other channels of communication with States (even after, or as part of, determining its views and recommendations), to remind States of their constant obligations to identify and adopt "all appropriate measures" for the protection of those involved in a case.

Conversely, when States effectively and proactively adopt the interim measures necessary to avoid irreparable damage to victims, they are typically able to petition for the lifting of any standing request for interim measures soon after they are granted. For instance, the rules of procedure of several bodies competent to request interim measures include

[40] IACtHR, Provisional measures order of 12 July 2007 (n. 34 above), operative para. 2.
[41] Ibid.

precise procedures for the lifting of interim orders.[42] In its provisional rules of procedure under the Protocol, the Committee has likewise recognized it may at any time withdraw a request for interim measures based on submissions received by either party to the communication, and has provided for States to "present arguments at any stage of the proceedings on why the request for interim measures should be lifted or is no longer justified."[43] The provisional rules thus provide flexibility to the Committee as well as guidance to States, which must demonstrate the change of circumstances that justifies the lifting of interim measures. Moreover, there is a presumption that the protection which the adopted interim measures provide will stay in place even if a request is lifted, and that the requesting body would be consulted if the State plans to change protection arrangements at any point.

In the case of *Yordanova and Others v. Bulgaria*,[44] involving the threatened forced eviction of Roma families, the Bulgarian government responded to a request for interim measures by the European Court of Human Rights by suspending the eviction order in question and arranging alternative housing for the complainants.[45] However, the Court nonetheless conditioned the lifting of its request for interim measures, "specifying that the decision was taken on the assumption that the Court and the applicants would be given sufficient notice of any change in the authorities' position for consideration to be given to a further [interim] measure".[46] The Court further emphasized that, as it had "already found that the enforcement of the removal […] would violate the applicants' rights [….], there is no reason to doubt that the respondent Government would comply with the present judgment and would not act in violation of the Convention by removing the applicants on the basis of a deficient order."[47]

In all of the above examples, it is clear that the duration of requests for interim orders may span as long as necessary to avert any form of irreparable damage to the integrity of potential victims or the communications procedure itself, either of which could lead to

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[42] See, e.g.: *Rules of Procedure of the Committee Against Torture* (n. 7 above), Art. 108(6) and (7); *Rules of Procedure of the Committee on the Rights of Persons with Disabilities*, UN Doc. CRPD/C/4/2 (2010), Art. 64(3) and (4); and *Provisional rules of procedure of the Committee on Enforced Disappearances*, UN Doc. CED/C/1/R.1/Rev.1 (2011), Art. 68.
[43] CESCR, Provisional rules of procedure under the Protocol (n. 11 above), Rule 7.
[44] *Yordanova and Others v. Bulgaria*, Application no. 25446/06, Judgment of 24 April 2012.
[45] Ibid. paras. 49-52.
[46] Ibid. para. 53.
[47] Ibid. para. 152.

new violations. When interim orders are lifted, it may be due to a potential violation being averted, or so that they can be replaced by remedial recommendations to repair victims more fully, including by addressing the root causes of violations.[48]

3.3 Process for the Committee to request interim measures

The process for identifying necessary interim measures can have a direct impact on their timeliness and adequacy to prevent irreparable damage. On the other hand, a lengthy process can make urgent measures absolutely ineffective in practice, at great risk to the rights protected under the Covenant. To preserve the effectiveness of the mechanism and the rights of those at risk before it, the Committee may need to act promptly without the extensive written communications it benefits from in the course of regular proceedings.[49] The initial processing of communications should be streamlined, including through the assignment of a Special Rapporteur on new communications as utilized by the Human Rights Committee, to ensure the prompt and unencumbered assessment of conditions requiring interim measures to prevent irreparable damage.

While preserving the flexibility of its approach to diverse circumstances in various communications, the Committee should set terms for its own requests for interim measures in order to ensure their timeliness. It should likewise determine when those requests should include renewable periods of validity, corresponding to further dialogue between the Committee, the alleged victims and the relevant State. In that regard, the Committee may also include in its requests that the State engage potential victims in a collaborative domestic process in order to involve those beneficiaries of interim measures in their planning and implementation, as has been the practice of other bodies.[50]

4. Scope and content of interim measures

Once it has decided that interim measures are necessary to prevent "possible irreparable damage" to the victims of alleged violations, the Committee will need to determine the

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[48] *See* chapter on Remedial Recommendations in this volume.

[49] This is the usual practice from a comparative perspective. *See*, "Policy Paper: Proposals to Improve the Inter-American System of Human Rights: A Comparative Analysis of the Practice of Precautionary Measures"; edited by University of California, Berkeley, School of Law and CEJIL (Buenos Aires: CEJIL, 2012): http://cejil.org/sites/default/files/Policy%20Paper%20N%C2%BA%207_0.pdf.

[50] This is a common practice in the Inter-American System of Human Rights. See, e.g., *Colotenango v. Guatemala*, Provisional measures orders of 22 June 1994 and 12 July 2007 (n. 38 above).

scope and content of its requests for appropriate measures to mitigate specific threats identified.

Notably, for the Committee to request "such interim measures as may be necessary", the Protocol does not require that the harm faced by victims prejudice the Covenant rights the communication alleges to have been violated, but rather only that the alleged victims be the ones at risk. In most cases, the threat of irreparable damage will be conjoined to the allegations communicated, however this offers the Committee considerable leeway in calling for detailed interim measures to protect claimants from threats that may engage a wide range of interrelated human rights. As observed above, other human rights treaty-monitoring bodies have found "irreparable damage" to connote harm that could lead to a violation of the respective treaty, that could otherwise imperil the effectiveness of the complaints procedure, or that cannot be adequately remedied through compensation.[51] All of those varieties of harm, amongst others, could be addressed through interim measures as provided for under the Protocol.

While operating under distinct legal frameworks, other human rights bodies have also called for interim measures to address complex situations involving ESC rights, which offer lessons for the Committee and practitioners on how to craft the content of their requests under the Protocol. Those examples present various levels of precision in the measures requested, sometimes requesting protection well beyond the immediate authors of communications in order to stem off the source of the circumstances threatening irreparable harm. Requests for interim orders in some cases call on State institutions themselves to design and implement specific protections necessary to protect those at risk, at times in collaboration with those affected. In other cases, the human rights body has articulated the specific measures necessary to be adopted in order to prevent the irreparable harm.

In establishing its practice, the Committee will have to determine how to define the content of interim measures and the process to adopt them so that they serve their purpose based on the principle of effectiveness. That means the measures called for should be a point of departure for further dialogue with States and victims, and should advance as much as preserve the petitions procedure. While the Protocol establishes clearly that the

[51] See, Section 2 above.

measures adopted will not prejudge the merits of the case, the facts documented in the processing of interim measures can nonetheless inform the Committee's later determination of its final views and recommendations – including to acknowledge successful interventions by States that have avoided much worse scenarios.

This section highlights some jurisprudence of other human rights bodies worth considering in the formulation of appropriate requests for interim measures in relation to communications brought under the Protocol.

4.1 Content of requests for interim measures on ESC rights

With fewer opportunities to claim ESC rights in the international sphere, the determination of appropriate remedies for ESC rights violations is correspondingly less developed than with respect to other rights. There have likewise been overall fewer requests for interim measures to protect ESC rights, with the majority of such measures instead pertaining to deportation and extradition proceedings or the protection of the rights to life and physical integrity.[52]

However, in addition to some crossover between those cases and ESC rights, the last few years have seen a rise in ESC rights-related communications, including some novel requests for injunctions to safeguard the full spectrum of those rights. Many of the ESC rights-related cases in the UN and European systems have involved efforts to halt forced evictions, particularly of Roma from informal settlements in European countries, in order to uphold those communities' equal rights to privacy, home and an adequate standard of living. Recent cases in the African and inter-American human rights systems have further produced important jurisprudence on the right to health, the right to education, the right to access to information, and the cultural and property rights of indigenous peoples.

In the most significant recent ESC rights case of the European Court of Human Rights, *Yordanova and Others v. Bulgaria*,[53] interim measures not only helped to prevent irreparable harm, but also figured prominently in the decision on merits and remedial orders in the case. The Court's interim measures called on the State not to forcibly evict a

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[52] The vast majority of requests for interim measures from the European Court of Human Rights, the Human Rights Committee and the Committee Against Torture pertain to cases of deportations and extraditions. In the inter-American system also, one estimate of precautionary and provisional measures found some 80 percent pertained to the right to life, as opposed to 20 percent concerning other rights. See: F. González, 'Urgent Measures in the Inter-American Human Rights System', *SUR*, Vol. 7, No. 13 (2010), at p. 62.

[53] *Yordanova and Others v. Bulgaria* (n. 44 above).

long-standing Roma community with informal tenure status, and to provide the Court with "detailed information about any arrangements made by the authorities to secure housing for the children, elderly, disabled or otherwise vulnerable individuals to be evicted".[54] While the Court lifted its request for interim measures soon after issuing them in April 2008, it only did so based on assurances from the State that the claimants would not be evicted until the Court's final ruling on the matter.[55] The court found the case admissible in September 2010, and issued its decision finding in favor of the community in April 2012, demonstrating the crucial role played by interim measures to avoid irreparable harm that could have undermined the petitions process before the final decision four years later. In its ruling, the Court found the State's plan to evict the community members was not based on a legitimate aim, and constituted an undue restriction of their right to respect for home:

> In general, the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This has not been done in the present case.[56]

Both the final decision and the Court's initial use of interim measures – for the first time to prevent a forced eviction – are new ground for the Court,[57] which primarily requests interim measures in cases of deportations and extraditions. It is notable that, due to the State's implementation of the requested interim measures, it avoided committing what the Court made clear it would consider a new violation in relation to the suspended eviction order.

In a similar case in the same State, *Naidenova et al. v. Bulgaria*,[58] the Human Rights Committee issued its first requests for interim measures to prevent forced evictions, which it found would constitute unlawful interference with the home. The case involved an impoverished Roma community in existence in Bulgaria's capital for over 70 years, almost half of whom are minor children, which had been repeatedly threatened with

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[54] Ibid. para. 49.
[55] Ibid. para. 53.
[56] Ibid. para. 133.
[57] In contrast, other interim orders involving Article 8 ECHR have been issued in cases of deportation wherein children would be separated from a parent, thereby threatening irreparable harm to the family. See: *Nunez v. Norway*, Application No. 55597/09, 28 June 2011; and *Neulinger and Shuruk v. Switzerland*, Application No. 41615/ 2007, 6 July 2010.
[58] Human Rights Committee, *Naidenova et al. v. Bulgaria*, Communication No. 2073/2011.

evictions from 2006 to 2012, driving many of its members away. Following the issuance of an execution order on an eviction notice, the Human Rights Committee requested in July 2011 for the State not to evict the Dobri Jeliazkov community members or demolish their dwellings while the communication was under consideration.[59] Despite that request for interim protection measures, however, the State allowed for the community's water to be cut off in May 2012. In response, the Human Rights Committee reminded the State of its previous request for interim measures that remained active, and further requested the State to re-establish water service for the community, noting that while the complainants "have not been forcibly evicted, cutting off the water supply […] could be considered an indirect means of achieving eviction".[60] The precision of the Human Rights Committee's requested interim measures and its responsiveness to critical developments both offer lessons of good practices to the Committee as it addresses similar circumstances in light of communications brought under the Protocol. In November 2012, building on the rationale of its interim measures, the Human Rights Committee issued a permanent injunction to prevent the eviction of the Dobri Jeliazkov community until authorities agreed with the community upon satisfactory alternative housing, and observed that the judgment also applied to all similar cases in Bulgaria.[61]

In a process analogous to requests for interim measures, the Committee on the Elimination of Racial Discrimination (CERD) has also issued timely appeals *motu proprio* under its Early Warning and Urgent Action Procedure,[62] requesting States to adopt urgent measures necessary to protect ESC rights. In 2010 and 2011, CERD

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[59] Letter from the UN Human Rights Treaty Division to the complainants' representatives (Global Initiative for Economic, Social and Cultural Rights), dated 8 July 2011. Available at: http://globalinitiative-ESCrights.org/advocacy/bulgaria-preventing-the-forced-eviction-of-a-roma-community/.

[60] Letter from the UN Human Rights Treaty Division to the complainants' representatives (Global Initiative for Economic, Social and Cultural Rights), dated 9 May 2012. Available at: http://globalinitiative-ESCrights.org/advocacy/bulgaria-preventing-the-forced-eviction-of-a-roma-community/.

[61] *Naidenova et al. v. Bulgaria*, Communication No. 2073/2011, UN Doc. CCPR/C/106/D/2073/2011 (27 November 2012), paras. 15-16.

[62] Under this procedure, CERD has encouraged States to adopt a range of measures relevant to ESC rights. For example, in relation to indigenous peoples' rights to their traditional land and its resources, and to pariticipation in decisions governing its use, see: CERD, *Decision No. 1(67) on Suriname*, UN Doc. CERD/C/DEC/SUR/2 (18 August 2005): "the Committee urges the State party to: Ensure legal acknowledgement of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources; Strive to reach agreements with the peoples concerned, as far as possible, before awarding any concessions; Ensure that indigenous and tribal peoples are granted the right of appeal to the courts, or any independent body specially created for that purpose, in order to uphold their traditional rights and their right to be consulted before concessions are granted and to be fairly compensated for any damage." To review CERD's revised guidelines on the early warning and urgent action procedure, as well as its full jurisprudence under the procedure, see: http://www2.ohchr.org/english/bodies/cerd/early-warning.htm.

initiated communications with the government of the United Kingdom to request the halting of plans to evict the Dale Farm community of Roma and Travellers, which eventually took place in a violent confrontation on 19 October 2011. In its first letter to the State, CERD outlined a detailed array of possible measures that would safeguard the rights of those at risk from the forced eviction being planned:

> The Committee also wishes to urge your Government and institutions to consider suspending any planned eviction until an adequate solution is achieved, with meaningful participation of the Dale Farm community, to guarantee protection of their housing rights, including the provision of suitable and adequate alternative accommodation. It furthermore recommends that a comprehensive survey of risk assessment be conducted to study the immediate and long-term adverse social and economic effects of this eviction, especially for the most vulnerable, including children, before any further action is undertaken. Might your Government decide nevertheless to proceed with the intended eviction, the Committee recommends that the same should be carried out in a humane manner, in accordance with IHRL, and to designate alternative sites that are adequate, suitable for relocation, and compatible with the culture and traditions of the people affected. It also wished to draw the Government's attention in this regard to its General Recommendation No. 27 on Discrimination against Roma.[63]

In a follow-up public statement on Dale Farm the month before the evictions took place, CERD reiterated: "the Committee calls on the State party to suspend the planned eviction – which would disproportionately affect the lives of the Gypsy and Traveller families, particularly women, children and older people, and create hardship – until culturally appropriate accommodation is identified and provided."[64]

While CERD's efforts to communicate with the State in order to intervene and halt the forced eviction were unsuccessful, the detailed list of measures necessary to protect the rights of potential evictees provides examples the Committee and practitioners could draw on when formulating requests for interim measures, including those the Committee might seek to initiate *motu proprio* as the Protocol allows.

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[63] Letter from CERD to the Government of the United Kingdom, dated 12 March 2010. Available at: http://www.essex.ac.uk/human_rights_centre/hrc/projects/dalefarm.aspx.

[64] CERD, Statement on Dale Farm (1 September 2011), 79th session. Available at: http://www2.ohchr.org/english/bodies/cerd/cerds79.htm.

Following a much more successful intervention, the African Commission on Human and Peoples' Rights in February 2010 handed down its first decision to recognize indigenous land rights, in the case of *Endorois Welfare Council v. Kenya*.[65] The *Endorois* case was submitted on behalf of a herding community driven from its ancestral lands to make way for mineral extraction, a nature reserve and tourism, prejudicing the enjoyment of virtually all of the community's ESC rights. Following decades of violations of the Endorois people's rights to property, culture, religion, natural resources and development, the African Commission requested the State to adopt interim measures in May 2004. In a letter addressed to Kenya's president, the African Commission reiterated its request for the State to halt mining activities commencing in the disputed land from which the Endorois were being evicted.[66] The mining activities threatened to further damage the community's main water source, which had already been harmed for years by touristic development, undermining every aspect of their lives – including their sacred relationship to the river considered to be the home of their god. Finally, two years after the African Commission's initial request, the State adopted interim measures to stop the mining in July 2006, preventing further harm to the community's water supply and averting an imminent conflict between the community and investors.

Both the Inter-American Commission and the Inter-American Court of Human Rights have also produced important jurisprudence on indigenous peoples' land rights, including requests for interim measures ("precautionary measures" and "provisional measures" in the respective bodies) to safeguard the enjoyment of their traditional lands and a range of other interrelated ESC rights.[67]

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[65] African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya*, Decision of February 2010.

[66] Letter from the African Commission on Human and Peoples' Rights to the President of Kenya, dated 9 December 2004. Cited by the co-counsel for the Endorois community in A. Korir Sing'Oei, 'The Endorois' Legal Case and its Impacts on State and Corporate Conduct in Africa' (2011). Available at: http://www.natureandpoverty.net/dutch-platform-land-use-planning/find/?eID=dam_frontend_push&docID=1285.

[67] For examples of the Inter-American Commission's numerous precautionary measures calling on States to protect the land rights, resources, health and lives of indigenous peoples, including from abuses by third parties for the duration of proceedings, see: http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp. For examples related, in particular, to forced evictions and displacement, see: *14 Q'echi Indigenous Communities of the Municipality of Panzós, Guatemala*, Precautionary Measures, Order of 20 June 2011; and *21 Families of the Nonam Community of the Wounaan Indigenous People, Colombia*, Precautionary Measures, Order of 3 June 2011. For a recent example from the Inter-American Court, see: *Provisional Measures Regarding the Republic of Ecuador: Matter of the Kichwa Indigenous People of Sarayaku*, Order of the Court of 6 July 2004. The Court

Perhaps the Commission's most notable uses of interim measures to protect ESC rights, beyond the tackling of the rights of indigenous peoples, have been in relation to the rights to health[68] and education[69]. The issue of health has arisen in at least three fields: provision of retroviral drugs, maternal health, and provision of health services in prisons. The issue of education has been addressed in the context of denationalization and discrimination of Dominicans of Haitian descent, more notably in the case of *Yean and Bosico v. the Dominican Republic*.[70]

In *Jorge Odir Miranda Cortez et al. v. El Salvador*,[71] a case involving 27 petitioners who were HIV-positive and claimed the State had violated their rights to life, health, human treatment, equal protection, judicial protection and ESC rights more broadly by failing to provide them with needed antiretroviral (ARV) drugs. The Inter-American Commission

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expanded and extended its Provisional Measures in this case through additional orders issued in June 2005 and February 2010, which remained in effect as of 2011 (*Annual Report of the Inter-American Court of Human Rights, 2011*, at p. 24). In contrast, see also the case of *Awas Tingni Community v. Nicaragua*, in which the Inter-American Court ordered the State to adopt provisional measures a year after its binding judgment in the case, which it then monitored for five years before lifting the order in 2007: "To order the State to adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awas Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it, until the definitive delimitation, demarcation and titling ordered by the Court are carried out." *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Order of the Court of 6 September 2002 (Provisional Measures), operative para. 1.
Though the Committee may only request interim measures under the Protocol until its determination of views and recommendations, these measures recommended after the Court's final judgment show how it could be beneficial for the Committee not to lift its request for interim measures immediately upon its determination of merits – particularly where the measures requested may go beyond the specific allegations in the case to protect claimants from broader threats of irreparable damage, which may be vital to protect those involved in proceedings from threats extending beyond the substantive claims included in their communications.

[68] In the significant case of *'Amelia' v. Nicaragua*, the Commission requested precautionary measures to urgently facilitate necessary cancer treatment for a pregnant woman, which she had been denied on account of the high risk that the treatment could induce an abortion. Within the time specified in the Commission's request, the State responded that it had initiated the treatment. In the case of *B. v. El Salvador*, the IACHR issued precautionary measures for a pregnant woman suffering lupus carrying an anencephalic fetus to ensure that she would have adequate medical treatment for her condition; faced with a rejection of the Commission's order, the measures were submitted to the IACtHR which issued provisional measures on her behalf as well.
See also, for examples of precautionary measures regarding the right to health of persons deprived of liberty, e.g.: *Luis Álvarez Renta, Dominican Republic*, Precautionary Measures, 11 December 2011; *Ananías Laparra Martínez, México*, Precautionary Measures, 18 January 2012; and *Jurijus Kadamovas and others, United States*, Precautionary Measures, 27 December 2011. Available at: http://www.oas.org/en/iachr/decisions/precautionary.asp.

[69] IACHR, *Yean and Bosico, Dominican Republic*, Precautionary Measures, 27 August 1999; *Luisa Fransua, Rafael Toussaint, et al., Dominican Republic*, Precautionary Measures, 10 June 2013.

[70] Ibid.

[71] Inter-American Commission on Human Rights, *Jorge Odir Miranda et al. v. El Salvador*, Report No. 27/09 (Case 12.249), Decision dated 20 March 2009.

supported the petitioners' request for the State to adopt precautionary measures to supply them with ARV drugs and treatment, which the State began to provide after several months following the request, by which time three of the complainants had already died of their conditions. Beyond those involved in the communication, the State also adopted additional "initiatives of a general nature […] on behalf of all persons infected with HIV/AIDS."[72] While the request for the State to adopt interim measures may well have avoided further deaths, the State's good-faith fulfillment of its obligations without delay may also have averted the finding of a violation in the final determination of merits, more than nine years after the submission of the complaint. As the Inter-American Commission found in its final decision:

> In the instant case, the State demonstrated – to the satisfaction of the Inter-American Commission – that it took what steps it reasonably could to provide medical treatment to the persons included in the record. The IACHR finds that, in the circumstances, the measures of the State were sufficiently expeditious to accomplish that aim effectively. It is not possible, therefore, to speak of any direct violation of the right to health of Jorge Odir Miranda Cortez or the other 26 persons identified in Case 12.249, as would have been the case if, for instance, it were shown that the State refused to provide care to any of them. Moreover, during the processing of the instant case the Salvadoran health services progressively broadened free coverage to other persons infected with HIV/AIDS, subject to medical screening. Furthermore, the petitioners have not alleged any backtracking in the sense of suspension of benefits that any of them were already receiving. Based on the foregoing, the IACHR concludes that the Salvadoran State did not violate the right to health of either Jorge Odir Miranda Cortez or the other 26 persons included in the record.[73]

As a result of the proactive system-wide reforms adopted by the State in response to plight of the claimants, the Inter-American Commission found the State to have been in partial compliance with its obligations, and that "the response of the Salvadoran State in this case is consistent with progressive development of the right to health."[74] As such, the case was not referred on to the Inter-American Court of Human Rights for further consideration, notwithstanding a finding that the State had violated the judicial guarantees of the complainants due to delays in their access to justice, as established in the finding

[72] Ibid. para. 20.
[73] Ibid. paras. 108-109.
[74] Ibid. para. 129.

during the admissibility stage that the available remedies had not been sufficiently timely or thus effective.[75]

The lesson for the Committee in all of these examples is that interim orders are agile tools not only to prevent irreparable damage to the claimants in a given case, but also potentially to spur the State to adopt meaningful protection measures on a wider scale, that could avoid harm directly threatening – but stretching well beyond – particular claimants. Interim measures thus have the potential to motivate broader compliance by States with both their positive and negative Covenant obligations, including with respect to the communication at hand.

4.2 Scope of protection offered by interim measures

As the Committee itself has recognized, infringements upon ESC rights in many instances may affect communities, peoples, classes, and other groups of persons – all of whom could reasonably be included in the category of "groups of individuals" on behalf of whom a communication can be submitted under the Protocol. The allowance of groups of individuals to submit claims is of capital importance in the protection of ESC rights, violations of which in many instances affect collectives in a population, such as a village without water, the neighbors of an open air dump, Roma children excluded from the school system, or women discriminated against in a collective bargaining agreement.

Due to the urgency of requesting interim measures, the Committee may need to apply a flexible test to more effectively handle such collective claims and consider agile solutions that can prevent irreparable damage to claimants through reasonable measures that States can adopt (whether through interim relief, not applying a law that prejudices the rights in question,[76] or other measures).

It is clear from the cases touched on above that the need for immediate relief in a communication under review may also highlight the need for broader protection of individuals or groups beyond the claimants. In that regard, the scope of interim measures requested by the Committee may at times merit the inclusion of general protection

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[75] *Jorge Odir Miranda Cortez et al v. El Salvador*, Case No. 12.249 (Admissibility Report No. 29/01), OEA/Ser.L/V/II.111 Doc. 20 rev. en 284 (2000), decision of 7 March 2001, para. 40.

[76] For instance, in *Grioua v. Algeria*, the Human Rights Committee requested the State to suspend a referendum on a draft law that could cause irreparable damage to disappeared persons if enacted, until the Committee determined its final views. *Grioua v. Algeria*, Communication No. 1327/2004, UN Doc. CCPR/C/90/D/1327/2004 (10 July 2007), paras. 1.2, 1.3 and 9.

measures necessary to protect not only the claimants in a given case, but also others indirectly involved in their communications or otherwise under threat due to the circumstances facing the claimants.

In such circumstances when broad protections may be necessary, the Committee is competent under the Protocol to request interim measures *motu proprio* if it chooses to do so,[77] as are several UN human rights treaty-monitoring bodies and the Inter-American Commission and the Inter-American Court.[78]

Perhaps due to the geopolitical history of wide-scale abuses targeting entire communities or peoples in the region of its jurisdiction, the Inter-American Court's jurisprudence is the most developed in issuing interim measures of broad scope, calling for protection of all those potentially threatened by the circumstances motivating – or by retaliation for – contentious cases submitted to it for consideration.

The Court's cases involving protection measures requested to prevent retaliatory attacks on complainants are particularly relevant to interim measures the Committee may request with reference to Article 13 of the Protocol, where such threats are foreseeable. Article 13 of the Protocol requires measures to protect individuals who communicate or cooperate with the Committee, so that they are not subject to "any form of ill-treatment or intimidation" as a consequence of those communications. The Committee should interpret this provision broadly, remaining sensitive to the numerous ways in which States and other actors (often with State acquiescence) have resorted to retaliation or intimidation through physical, psychological or other means.[79] In this sense, many reports on threats to human rights defenders document *de facto* as well as "legal" means of retaliating against individuals, such as threats, arbitrary detentions, bogus criminalization and dismissals of whistleblowers.[80]

In its famous case of *Velásquez-Rodríguez*, the Inter-American Court ordered the Honduran government to put in place security measures to protect "persons such as

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[77] See, Section 3 above.
[78] See, Eva Reiter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersentia, 2010), pp. 103-182.
[79] In the inter-American system, for example, human rights defenders have been threatened and attacked after denouncing states' human rights violations at the international level, as was noted by a coalition of human rights organizations at a hearing held at the Inter-American Commission on 29 March 2011. Summary available at: http://hrbrief.org/2011/03/situation-of-human-rights-defenders-in-the-americas/.
[80] See, e.g., Report of the Special Rapporteur on the Situation of Human Rights Defenders, UN Doc. E/CN.4/2004/94 (13 December 2004).

witnesses" who went before the court, as well as to investigate threats against witnesses, and to prosecute and punish those responsible for the murders that had already occurred, including through the use of forensic investigations.[81] The measures also included a more novel order, obligating the Honduran government publicly "to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights […] is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention."[82] Directed squarely at the government, this provision responded to allegations that Honduran officials had accused those going as witnesses before the Court of being traitors to their country, consequently stoking extremist violence against them.[83]

The jurisprudence of the Inter-American Court has gradually grown more open with regard to how specific and individualized a threat must be for provisional measures to be granted. In the 1991 *Chunimá* case, the Court had found the evidence presented by the Inter-American Commission in its initial request for provisional measures to be insufficient. Nonetheless, the Court still ordered them based on information introduced by the Guatemalan government, which described a general climate of rampant violence in its 30-year "internal armed conflict" that the Court asserted could easily lead to "irreparable damage to persons."[84]

Presented with collective requests for protection by groups of individuals, the Court has issued provisional measures on a broader basis to match the similarly joint threat. In *Digna Ochoa and Plácido*, the Court ordered Mexico to protect not only the individuals at a nonprofit organization who had already been threatened or harmed, but also all "persons who work at or visit the offices," who were in equal danger.[85]

In the *Peace Community of San José de Apartadó* case in Colombia, the Inter-American Court responded to failures by the State to prevent ongoing attacks by paramilitaries over

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[81] IACtHR, *Velásquez Rodríguez*, *Fairen Garbi and Solis Corrales*, and *Godinez Cruz* cases, Provisional Measures, Order of 19 January 1988, operative para. 1.
[82] IACtHR, *Case of Velásquez Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Series C No. 4, para. 45; quoting Provisional Measures of 19 January 1988 (ibid.), operative para. 2.
[83] T. Buergenthal, 'Interim Measures in the Inter-American Court of Human Rights', in R. Bernhardt (ed.), *Interim Measures Indicated by International Courts* (Berlin: Springer Verlag., 1994), p. 82.
[84] Ibid. p. 79; citing IACtHR, *Matter of Chunimá and Guatemala*, Provisional Measures, Order of 1 Aug 1991, para. 6.
[85] IACtHR, *Digna Ochoa and Placido v. Mexico*, Provisional Measures, Order of 17 November 1999, operative paras. 1-2.

the course of years, by extending the initial protection measures from 2000 to include over 1,200 people based on: "their belonging to the Peace Community, their geographical location in the municipality of San José de Apartadó, and the situation of grave danger they are going through because they are members of said Community."[86]

In the *Case of the Jiguamiandó and Curbaradó Communities*, the Court elaborated upon its standard for including within the scope of provisional measures individuals who are unnamed but identifiable based on group characteristics, noting:

> this Court has, on past occasions, ordered the protection of a plurality of persons who have not been previously named but who can be identified and determined and who are in grave danger because they are part of a group or community. The Communities constituted by the Community Council of Jiguamiandó and the families of Curbaradó, have, at the time of the request of these provisional measures, a population of approximately 2,125 people who comprise 515 households, and constitute an organized community, located in a specific geographic location in the municipality of Carmen del Darién, Department of Chocó, whose members may be identified and, because they belong to said community, they all face the same risk of aggression against their personal integrity and life or of being forced out of their land, which, in turn, prevents them from exploiting the natural resources necessary for sustenance.[87]

The Court further ordered that the State allow the beneficiaries of the protection measures or their representatives to participate in the planning and implementation of the measures.[88]

Of special relevance to protection measures the Committee might recommend to States to comply with Article 13 of the Protocol (as part of interim measures or otherwise), the Inter-American Court has also ordered States to adopt provisional measures to prevent irreparable harm resulting from: threats against key witnesses by State agents;[89] death

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[86] Inter-American Court of Human Rights, *Matter of the Peace Community of San José de Apartadó regarding Colombia*, Provisional Measures, Order of 6 February 2008, "considering" paras. 7-8. The Inter-American Commission has similarly issued precautionary measures covering large numbers of people. For instance, following the June 2009 coup in Honduras, the Commission gradually amplified its precautionary measure to progressively include several hundred beneficiaries – primarily to protect their rights to life and personal integrity, as well as other rights in some instances. Available at: http://www.cidh.org/medidas/2009.eng.htm.

[87] IACtHR, *Matter of Communities of Jiguamiandó and Curbaradó (Colombia)*, Provisional Measures, Order of 7 February 2006, *considering* para. 8.

[88] Ibid. *operative* para. 3.

[89] IACtHR, *Case of Kawas Fernández v. Honduras*, Provisional Measures, Order of 29 November 2008.

threats and kidnappings targeting members of civil society;[90] and judicial harassment of individuals by the State.[91]

The above cases are illustrative of how the Committee may consider requesting interim measures of broad scope and mixed content, as appropriate on a case-by-case basis, when the threats to those involved in or affected by communications before the Committee may reach beyond the precise violations alleged by victims.

5. Legal status of interim measures and consequences of non-compliance

5.1 Legal status of interim measures

The legal effect of requests for interim measures was controversial among States during the drafting of the Protocol,[92] as it has been for years in the jurisprudence of other treaty-monitoring and regional human rights bodies. Nonetheless, there is a resounding consensus among the bodies requesting interim measures that States are obligated to implement necessary protections to prevent irreparable damage to victims, both to safeguard their right to bring claims before those bodies and to protect their substantive rights provided by the primary treaty. Debates about the source and nature of those obligations have arisen partly from disputes over some States' failures to adopt necessary protection measures,[93] in some instances resulting in the death of complainants during proceedings and consequently the nullification of their right to petition.

As treaty-monitoring, judicial and quasi-judicial human rights bodies have articulated, States that give their consent to be bound by human rights treaties and corresponding complaint procedures – and thus recognize the competence of the respective bodies to examine cases of alleged violations – are obligated to participate in the complaints

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[90] IACtHR, *Digna Ochoa and Plácido et al. Case (México)*, Provisional Measures, Order of 17 November 1999.
[91] IACtHR, *Constitutional Court Case (Peru)*, Provisional Measures, Order of 7 April 2000.
[92] Report of the working group on its fourth session (n. 4 above), para. 75; Report of the working group on its fifth session (n. 6 above), paras. 66-67, 160, 226, 228-230 and 239.
[93] Illustrating the scale of States' non-compliance with requests for interim measures by the European Court of Human Rights, a study of the first six months of 2012 found that States had accepted the interim measures 60 times in that period, but refused them on 678 other occasions. Available at: http://www.echr.coe.int/NR/rdonlyres/43F2D6A8-8034-4271-9498-AD9EAC707FB6/0/Art39_TabPaysEN.pdf.

procedure in good faith and not to commit actions or omissions that prejudice the outcome of those proceedings while they are pending.

In *Piandiong et al. v. Philippines*,[94] the UN Human Rights Committee cemented its emerging views on States' obligations to implement its requests for interim measures, finding the Philippines to have violated the first Optional Protocol to the ICCPR by executing the authors of a communication in the course of proceedings:

> Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual […]. [A] State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. […] It is particularly inexcusable for the State to do so after the Committee has acted under its rule 86 to request that the State party refrain from doing so.[95]

After reiterating those views in subsequent communications[96] and its concluding observations,[97] the Human Rights Committee pronounced unambiguously in its General Comment No. 33 on the obligations of States under the Optional Protocol to the ICCPR: "Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol."[98]

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[94] Human Rights Committee, *Piandiong et al. v. Philippines*, Communication No. 869/1999, UN Doc. CCPR/C/70/D/869/1999 (2000).
[95] Ibid. para. 5(1) and (2).
[96] E.g., see: Human Rights Committee, *Weiss v. Austria*, Communication No. 1086/2002, UN Doc. CCPR/C/771D/1086/2002 (2002): "The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected." See also, Human Rights Committee: *Mansaraj v. Sierra Leone*, Communication Nos. 839, 840, 841/1998, UN Doc. CCPR/C/72/D/839/1998 (2001); *Ashby v. Trinidad and Tobago*, Communication No. 580/1994, UN Doc. CCPR/C/74/D/580/1994 (2002); *Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/*1051/2002* (2004); *Saidova v. Tajikistan,* Communication No. 964/2001, UN Doc. CCPR/C/81/D/964/2001 (2004); *Shukurova v. Tajikistan*, Communication No. 1044/2002, UN Doc. CCPR/C/86/D/1044/2002 (2006); *Sultanova v. Uzbekistan*, Communication No. 915/2000, UN Doc. CCPR/C/86/D/915/2000 (2006); and *Uteeva v. Uzbekistan*, Communication No. 1150/2003, UN Doc. CCPR/C/91/D/1150/2003 (2007).
[97] Human Rights Committee, *Concluding Observations: Canada*, UN Doc. CCPR/C/CAN/CO/5 (2006), para. 7.
[98] Human Rights Committee, *General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33 (5 November 2008), para. 19.

The African Commission on Human and Peoples' Rights also found its requests for interim measures under its rules of procedure to have a binding effect on receiving States. In the case of *International PEN, et al. v. Nigeria*[99] – involving the alleged arbitrary detention, torture and denial of a fair trial to the victim, prior to his sentence to death – the State secretly executed the victim despite multiple requests for interim measures by the African Commission as it considered a communication on his case. The African Commission denounced the State for "ignoring its obligations to institute provisional measures,"[100] noting in a scathing decision:

> This is a blot on the legal system of Nigeria which will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement.[101]

The CAT Committee has similarly established that States are obligated to implement requested provisional measures to prevent irreparable harm to authors of communications, as part of fulfilling their treaty obligations with respect to the complaints procedure in good faith.

In *Brada v. France*,[102] the CAT Committee elaborated:

> the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying and giving full effect to the procedure of individual complaint established thereunder. The state party's action in expelling the complainant in the face of the CAT Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.[103]

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[99] African Commission on Human and Peoples' Rights, *International PEN et al. v. Nigeria* (n. 37 above).
[100] Ibid. operative para. 1.
[101] Ibid. para. 125.
[102] CAT Committee, *Brada v. France*, Communication No. 195/02, UN Doc.CAT/C/34/D/195/2002 (2005).
[103] Ibid. para. 13.4. See also, CAT Committee: *TPS v. Canada* (n. 17 above), para. 15.6; *Agiza v. Sweden*, Communication No. 233/03, UN Doc. CAT/C/34/D/233/2003 (2005), para. 13.9; and *Cecilia Rosana Núñez Chipana v. Venezuela*, Communication No. 110/1998, UN Doc. CAT/C/21/D/110/1998 (1998), para. 8: "Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee."

The European Court of Human Rights likewise found its own interim measures to be binding on States in the case of *Mamatkulov and Askarov v. Turkey*,[104] involving the extradition of two Uzbek nationals to face criminal charges in their home country. When Turkey extradited the two despite the European Court's standing request for the government to suspend the extradition, the Court observed that, "by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey is in breach of its obligations."[105]

In its reasoning, the European Court drew on the jurisprudence of the Human Rights Committee, the CAT Committee, the Inter-American Court and the International Court of Justice. Like those bodies, the Court found a State's refusal to adopt interim measures to protect claimants from irreparable harm – or otherwise to preserve the integrity of the communications procedure while their complaints are under consideration – constitutes a failure of the State to implement its treaty obligations in good faith, in accordance with the object and purpose of the treaty and its complaint procedure.[106]

In light of such broad recognition that interim measures are intimately tied to the object and purpose of human rights treaties, as well as their conjoined complaint mechanisms, it is reasonable to give equal weight to the Committee's own requests for such measures under the Protocol. Even to those States that would not consider the Committee's requests to be binding in their own right, they should be given serious consideration as authoritative interpretations of what actions or omissions would engender irreparable damage to authors of communications. In keeping with the object and purpose of the Protocol, States are accordingly required proactively to adopt whatever interim measures may be necessary to prevent irreparable damage to authors of communications before the Committee, though that obligation would be equally satisfied by the adoption of alternative measures at States' disposal that would provide equivalent guarantees.

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[104] European Court of Human Rights, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I.
[105] Ibid. para. 129.
[106] Ibid. paras. 121-129. See also: International Court of Justice, *Germany v. United States (LaGrand case)*, Case no. 104 (2001), para. 102. *Cf.*, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order of September 1993, para. 35: "the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; and […] it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent".

5.2 Consequences of non-compliance with interim measures

As interim measures are expressly provided for by the Protocol, it is reasonable to assume that States that fail to adopt them are indeed interfering with the effective work of the Committee, and infringing upon the Committee's mandate under the Protocol. Such an obstruction could result in a violation of complainants' right to petition the Committee, as well as a violation of underlying Covenant rights at the heart of their communications – potentially aggravated by the State's failure to protect those communicating with the Committee as required under Article 13 of the Protocol, whether through action or omission. In practice, failure to adopt the measures requested by the Committee could indeed show, while analyzing the merits of the case, that the State had adopted retrogressive measures or otherwise failed to take all appropriate steps to prevent violations of the right, as required by the Covenant, even in light of the Committee's recommended measures to prevent such violations. In such cases, the Committee can also include vital measures that are similar in content in its ultimate remedial recommendations to States, reflecting the ongoing need for immediate protection.[107]

In keeping with international law more broadly, the legal consequences of non-compliance with requests for interim measures would correspond to the nature of those violations identified, whether in relation to the complaints procedure under the Protocol or rights provided by the Covenant. States found to have violated their obligations under the Protocol, or the Covenant for that matter, would consequently be required to ensure: the continued performance of their obligations; cessation and non-repetition of the violation; and full reparation for the injury caused by that violation, whether material or moral.[108]

6. Conclusion

Through its competence to request States to adopt the interim measures necessary to prevent irreparable damage to alleged victims of ESC rights violations, the Committee will have at its disposal an important new tool to protect ESC rights in the contexts of individual, collective or inter-State communications, as well as under the auspices of the

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[107] See, e.g., *AT v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005).
[108] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (Fifty-third session, 2001), UN Doc. A/56/10, Arts. 29-31.

inquiry procedure of the Protocol. The scope and content of the measures to be requested by the Committee under Article 5 will surely evolve and be shaped by its experience reviewing a wide range of communications submitted under the Protocol. Yet there are crucial lessons that have already been learned through the experiences of other treaty-monitoring bodies – as well as judicial and quasi-judicial regional human rights bodies – about the promises of and impediments to requests for interim measures that are effective in safeguarding ESC rights. The added requirement under Article 13 of the Protocol that States parties adopt all appropriate measures to protect individuals from any form of ill-treatment or intimidation resulting from their communications with the Committee will further strengthen this new protection regime, and safeguard the right of complainants seeking redress for violations that have otherwise lacked a forum on the international level.

While some States continue to stress that the requests, views and recommendations of the Committee will not be binding in and of themselves, a broad body of international jurisprudence has made clear: requests for interim measures to prevent irreparable harm from prejudicing the petition process under the Protocol impose a presumption upon the receiving State that they must take action to avert foreseeable harm – to honor their obligations under the Optional Protocol, as well as to uphold the Covenant rights for which the Protocol serves to facilitate remedies.

10. Remedial Recommendations

Viviana Krsticevic[*] *and Brian Griffey*[**]

1. Introduction

Much of the hope surrounding the adoption of the Optional Protocol ("Protocol") to the International Covenant on Economic, Social and Cultural Rights ("Covenant")[1] has centred on the provision of a universal mechanism for human rights protection that would steadily contribute to overcoming the denial of a whole spectrum of economic, social and cultural rights ("ESC rights") faced by millions around the world, in rich and poor countries alike.

This chapter outlines some of the key challenges facing the Committee on Economic, Social and Cultural Rights ("Committee") and practitioners as they interpret and apply the Protocol, particularly with respect to the crafting of remedial recommendations to States,[2] based on the nature of Covenant obligations and the types of violations identified.

As communications examined by the Committee will be predicated on the lack of effective remedies at the domestic level, the Committee's approach to remedies will have enormous implications for the utility of the Protocol in redressing violations of ESC rights through reparations appropriate to mitigate the damage suffered by the complainants, as well as to break the cycle of future human rights violations.

Remedies in international law serve to repair victims of violations as fully as possible, including through necessary measures of restitution, compensation, rehabilitation,

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[*] Center for Justice and International Law (CEJIL).
[**] OSCE Office for Democratic Institutions and Human Rights (ODIHR). This chapter is written in a personal capacity, and does not necessarily represent the views of the OSCE.

[1] International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), G.A. Res. 63/117, UN Doc. A/RES/63/117 (2008), *adopted* 10 December 2008, *entered into force* 5 May 2013.

[2] This analysis focuses particularly on the recommendations the Committee will transmit with its views in relation to the individual and group communications procedure; however, it is also relevant to remedial considerations under the Protocol's procedures for inquiries, interim measures and inter-State communications. See Part I of this volume.

satisfaction and guarantees of non-repetition.[3] For each violation the Committee identifies under the Protocol, its corresponding remedial recommendations will be critical to fulfil the Protocol's aims: to strengthen the implementation of the Covenant and realisation of the rights it provides, including by providing an incentive for States to improve domestic mechanisms of redress that enable individuals and civil society to claim their rights and participate in their realisation.

As States themselves must implement the Covenant through all appropriate means, the effectiveness of the Committee's remedial recommendations in response to ESC rights violations will depend upon States' capacity and political will to apply them. In that sense, the content of the Committee's remedial recommendations must not only reflect the nature of Covenant obligations and human rights outcomes that States are responsible to realise, but also address the political dynamics of contentious cases and the tenor of the dialogue between the Committee and parties to those communications to help ensure those needed remedial measures are adopted.

Put simply, remedies are both procedural and substantive. While the Protocol presents new procedural obligations for States where remedies are allegedly out of reach, the content of the Covenant rights at stake is well established, particularly by the Committee's numerous general comments and concluding observations on periodic State reports,[4] which the Committee has indicated will serve as a basis for its review of

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[3] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, UN GAOR, General Assembly, *adopted* 16 December 2005, 16th Sess., Agenda item 71 (a), G.A. resolution 60/147, UN Doc. A/RES/60/147 (2006); and D. Shelton, *Remedies in International Human Rights Law* (New York: Oxford University Press, 1999).

[4] While non-binding, the Committee's general comments are persuasive interpretations of Covenant rights and duties, which ECOSOC and the General Assembly invited the Committee to draft "with a view to assisting State parties in fulfilling their reporting obligations". (See, *Resolutions and Decisions of the Economic and Social Council First Regular Session of 1988, New York, 3-27 May* 1988, Res. 1988/4, ECOSOC, 12th plenary meeting, UN Doc. S/RES/1988/4 (1988), para. 13; *Indivisibility and interdependence of economic, social, cultural, civil and political rights,* UN General Assembly, 93rd plenary sess., GA Res. 42/102, UN Doc. A/RES/42/102 (1987), para. 5; and *Rules of Procedure of the Committee on Economic, Social and Cultural Rights*, CESCR, 8th sessions E/C.12/1990/4/Rev.1 (1993), Rule 65. In the absence of an Optional Protocol and a resulting body of jurisprudence, general comments have complemented the Committee's concluding observations on State reports to shed light on the fundamental requirements of steps taken to implement the Covenant, identifying key dimensions of rights that must be realised as well as the nature of potential violations of those rights. (See, *Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* U.N. GAOR, 3rd Comm., 48th Sess., Annex 2, Agenda Item 3,UN Doc. A/CONF.157/PC/62/Add.5, (1993), paras. 93-94.

communications under the Protocol.[5] The Committee's remedial recommendations to States can further draw on a wealth of jurisprudence from national and regional judiciaries, as well as from complaint procedures of other treaty bodies and special rapporteurs, to shed light on the scope of actions States must take to remedy failures to respect, protect or fulfil any Covenant rights raised in communications.

Section 2 of this chapter outlines the remedies required by international law that the Committee may recommend in a given case, based on its substantive interpretation of the Covenant rights violated or impaired. Section 3 explores the Committee's options for determining appropriate remedies based on procedural dimensions of the Protocol, including through dialogue with States and complainants, and through consideration of information from all sources relevant to the crafting of views and recommendations. Finally, in a longer analysis, Section 4 examines the potential scope and content of the Committee's remedial recommendations by looking at what boundaries it has set so far, as well as the experiences of other treaty bodies and judiciaries in crafting recommendations and orders to remedy ESC rights violations, in a variety of contexts and with a range of rights at stake. Necessary dimensions of follow-up and implementation mechanisms are also considered, insofar as they may influence the content of recommendations prior to their subsequent dissemination and enforcement by States, with the participation of victims and other stakeholders.

2. Remedies under International Law and the Optional Protocol

At the heart of human rights law is the well-known Roman legal maxim, "*ubu jus ibi remedium*" (where there is a right, there is a remedy), meaning there is an appropriate remedy to restore any right violated. In that sense, the realisation of human rights and the remedying of violations are opposite sides of the same coin.

The admissibility criterion in the Protocol requiring exhaustion of domestic remedies[6] – a general rule of international law – acknowledges that domestic remedies must be available to remedy violations and are preferable to adjudication on the international

[5] The Committee has indicated that the scope of its review of the "reasonableness" of measures will be consistent with its methodology in the periodic State reporting process: see CESCR Statement, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UN ESCOR, CESCR, 38th sess., UN Doc. E/C.12/2007/1 (2007), paras. 1-2.
[6] *See* chapter on Admissibility in this volume.

level.[7] In order to fully implement their Covenant obligations, States must not only give them legal effect in national laws,[8] but also provide victims with access to an effective remedy.[9] Effective remedies can be administrative, legislative or judicial mechanisms[10] put in place to undo the effects of human rights violations and restore victims as much as possible to their conditions prior to a violation. However, there must always be an opportunity for victims to seek a judicial remedy by a competent, independent and impartial court, within a reasonable amount of time, in case other available remedies prove ineffective.[11] By extension, any remedies ordered by courts must then be enforced by the State. Effective remedies are essential to uphold the rule of law and deter future violations, which are more likely to occur without mechanisms that guarantee accountability for abuses and violations.

When a State party violates a Covenant right, by action or omission, it bears the responsibility to remedy the situation by providing victims with "adequate, effective, prompt, and appropriate remedies, including reparation".[12] Appropriate reparations for victims of human rights violations may include measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[13]

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[7] Soon after completing its own first draft of an optional protocol to complement the ICESCR, the Committee noted this in its General Comment No. 9: "…international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies." *General Comment No. 9, The domestic application of the Covenant*, CESCR, 19th sess. Agenda item 3 (16 November – 4 December, 1998), UN Doc. E/C.12/1998/24 (1998), paras. 3-4 (citing Article 27, Vienna Convention on the Law of Treaties 1969, S. EXEC. DOC. L, 92-1 (1970), 1155 UNTS 331 (*entered* into force 27 January 1980); and Article 8 of the Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810 at 71 (1948), (*adopted* 10 December 1948). The Committee has also observed that the requirement for domestic remedies to be exhausted is predicated on their being effective, such that effective remedies are required to enforce all Covenant rights. See *General Comment No. 3, The Nature of States Parties' Obligations (art. 2, para. 1, of the Covenant)*, CESCR, Fifth session (1990), UN Doc. E/1991/23 annex III (1991), paras. 5 and 14.

[8] General Comment No. 9 (n. 7 above), paras. 4-8.

[9] Ibid. In this respect, note also that States are requested to include in their periodic reports to the Committee an elaboration of which effective remedies exist on the domestic level. See, *Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Annex*, *adopted 44th sess.,* UN Doc. E/C.12/2008/2 (2009), paras. 1 and 3(e).

[10] General Comment No. 9 (n. 7 above), para. 9.

[11] General Comment No. 9 (n. 7 above), paras. 2-3, 9.

[12] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights (n. 3 above), Art. 2(c). See also: *Draft Articles on Responsibility of States for Internationally Wrongful Acts (with Commentaries)*, in: *Report of the International Law Commission on the Work of its Fifty-third Session*, Int.'L Comm'n, UN GAOR 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), Arts. 2 and 31.

[13] For exhaustive elaborations of each of those forms of reparation, see the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights (n. 3 above).

Significantly, however, the scope of remedial recommendations was not a point of considerable debate in the working group that drafted the Protocol,[14] which was instead preoccupied by concerns over the criteria the Committee would apply when assessing the compliance of measures adopted by States with their Covenant obligations.[15] The "reasonableness" standard of review provided by the Protocol,[16] which the Committee will apply in its review of communications alleging violations, recognises the discretion of States to choose among the range of policy options available to them to implement the Covenant effectively. Whatever measures States adopt, however, the Committee is entrusted with the responsibility both to assess whether or not those measures satisfy State obligations,[17] and now also to recommend appropriate remedial measures where it identifies violations through the Protocol.[18]

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[14] Where recommendations were discussed in Working Group sessions, it was primarily in relation to their non-binding status and the draft Article 14 facilitating economic and technical assistance to realise Covenant rights, in response to the Committee's recommendations. (See: *Economic, Social and Cultural Rights, 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*, UN ESCOR, Comm'n on Hum. Rts., 61st Sess., Agenda Item 10, UN Doc. E/CN.4/2005/52 (2005), paras. 22, 47, 105; *Economic, Social and Cultural Rights, 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*, UN ESCOR, Comm'n on Hum. Rts., 62d Sess., Agenda Item 10, UN Doc. E/CN.4/2006/47 (2006) ('*Third Session Report'*), para. 122; *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 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*, UN Human Rights Council (6th Session), UN Doc. A/HRC/6/8 (2007), para. 126; *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 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,* UN Human Rights. Council (8th Session), UN Doc. A/HRC/8/7 (2008), para. 117.

[15] See: B. Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol. 11, No. 2 (2011), pp. 275-327; B. Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins', *Nordic Journal of Human Rights*, Vol. 27, No. 1 (2009), at 39; and C. De Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights', *Human Rights Quarterly*, Vol. 32, No. 1 (2010), pp.144-178.

[16] OP-ICESCR, Article 8.4. *See* chapter on Reasonableness in this volume.

[17] See General Comment No. 3 (n. 7 above), at para 4; General Comment No 9 (n. 7 above), at para 4. For the mandate of the Committee, see *Review of the composition, organization and administrative arrangements of the Session Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ECOSOC, 22nd plenary mtg., ECOSOC Res. 1985/17, UN Doc. S/RES/1985/17 (1985).

[18] See OP-ICESCR, ultimate preamble para.: "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".

The Protocol provides no explicit guidelines for the scope of the Committee's remedial recommendations when it identifies violations, nor for the discretion of States in their adoption of remedial measures in response to the Committee's views. However, the nature of any violations will inevitably inform the precision of the Committee's recommendations, which in turn must outline the parameters and necessary outcomes of the remedial measures States should adopt.

In this respect, while the Protocol may be thin on details regarding the recommendation of remedies, its silence equally recognises the Committee's authority and competence to identify the types of measures required to implement Covenant obligations, as well as the non-binding legal status of the Committee's general recommendations.[19] This reading is consistent with the Committee's own observations in the elaboration of a first draft protocol in 1997, wherein it recognised its capacity based on the practice of other treaty-monitoring bodies to be "specific as to the recommendations that the Committee might make with a view to remedying any violation which it has identified", drawing on any of the range of forms of reparation.[20] It added that:

> Following the Committee's discussions, it is not recommended, however, to include a provision which would expressly obligate the State party concerned to implement the Committee's recommendations, to provide an appropriate remedy or to ensure the provision of adequate compensation where appropriate. While there is much to be said in policy terms for such measures, it is correct, as pointed out during the debates that making such measures legally mandatory would transform the nature of the procedure from a quasi-judicial to a judicial one. In the latter case, more complex procedures in general would be necessary, including a greater variety of procedural safeguards for the parties concerned.[21]

The persuasiveness of the Committee's recommendations of course stems from the binding nature of the Covenant itself, the implementation of which the Committee is mandated to monitor. As such, while States parties – and they alone – are responsible for implementing their Covenant obligations through all appropriate means, a State's

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[19] See n. 4 above.
[20] *Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, Comm'n on Hum. Rts., 53rd sess., Item 14 of the provisional agenda, UN Doc. E/CN.4/1997/105, Annex (1996), para. 46, ('*CESCR report on draft protocol*').
[21] Ibid. para. 47.

rejection of the Committee's recommendations would at a minimum indicate bad faith in its approach to its Covenant obligations,[22] notwithstanding the adoption of comparable measures achieving the same end.

Without explicit guidelines in the Protocol on the crafting of remedial recommendations, the Committee is free to draw considerable guidance from public international law, human rights law, and the Committee's own experience in proposing remedies in the context of its concluding observations. The jurisprudence of national and international judiciaries also offers lessons relevant to remedying violations of Covenant rights, despite distinctions in their approaches to reparations, which are as much due to the different legal instruments and obligations applicable in the respective systems as to their distinct political realities.

As will be outlined in the next section, the Protocol allows for the Committee to draw on those examples from parallel systems when determining the precision of its recommendations, as well as potentially to facilitate the cooperation of respective States with international bodies and mechanisms in the implementation of appropriate remedies.

3. Determining Appropriate Remedies

A key factor in determining sound remedies is the process for their elaboration, based on the nature of the violations they address. Many international bodies go through the process of establishing remedies in relative isolation. However, the Protocol has left the door open for the Committee to engage in dialogue with parties to communications (albeit written, unless otherwise provided for in its rules of procedure), to consider diverse documentation from other institutions and mechanisms in its examination of communications and crafting of appropriate remedial measures, as well as potentially to facilitate cooperation between those institutions and States in the implementation of those measures.

The Protocol explicitly highlights the importance of discourse in the recommendation and implementation of appropriate remedies. Opportunities for dialogue are of vital importance, given the Committee's potential lack of knowledge on the details of some

[22] The presumption that a State should adopt measures corresponding to the Committee's remedial recommendations would also be consistent with the presumption against taking retrogressive or no steps to progressively realise Covenant rights. See CESCR, General Comment No. 3 (n. 7 above), para. 9.

cases, its distance from local realities and institutions, as well as the complexity and number of factors involved in ESC rights-related communications.

At the start of the process, Article 2 of the Protocol foresees that communications may be submitted by or on behalf of alleged victims,[23] thus ensuring that victims and the State are both in privileged positions to be heard fully. Article 7 of the Protocol further provides for the possibility of friendly settlements between the authors of communications and their respective States, in order to remedy alleged violations without proceeding in the complaints procedure where unnecessary: "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."

To ensure the effectiveness and implementation of any remedial recommendations put forth by the Committee, the involvement of the victims is vital at all stages of proceedings: from the information included in the initial submission of communications, to any pursuit of a friendly settlement (even if abortive, which would not prejudice the communication's review), and finally to the determination of the precise remedial measures a State should implement based on the Committee's recommendations. Victims' participation is fundamental to the reparation process, insomuch as it helps to redress the infringement of rights by empowering the individuals or groups deprived of their ESC rights, and facilitates local protection of those rights to prevent future violations. When the Committee examines collective complaints alleging violations that affect communities, groups, or tribal or indigenous peoples, its remedial recommendations may also include ample participation of different categories of affected persons (e.g. women and children or persons with disabilities) as well as recognition of traditional authorities in some cases (such as among indigenous peoples). The explicit inclusion of participation of affected groups in the content of remedial recommendations is commonplace in regional human rights systems,[24] and in some instances is adapted to

[23] This requirement is the same applied to communications brought under the first Optional Protocol to the International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976, per Rule 96 of the Human Rights Committee's rules of procedure. *Rules of Procedure of the Human Rights Committee,* H. Rgts. Comm., UN Doc. CCPR/C/3/Rev.8 (2005).

[24] With regard to the potential inclusion of participatory rights within the content of remedial recommendations, see Section 4 below.

be culturally adequate,[25] as well as to respect the obligation to consult or the need to guarantee consent (including a right to veto) in exceptional cases where applicable.

In the consideration of communications, however, opportunities for open dialogue beyond written submissions would be most likely to occur in the course of engaging in potential friendly settlements. Through its rules of procedure, the Committee could also create additional space for dialogue with and between parties to communications, such as through potential State visits, hearings or other fact-finding procedures, as well as in the content of follow-up procedures or interim measures, on a case-by-case basis.[26]

The Protocol also provides for the participation of the State, which is equally needed in order to fully understand the infringements and to provide responses to determinations of State responsibility. In responding to communications transmitted by the Committee, the Protocol provides in Article 6(2) that the "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". In Article 9, the Protocol further requires States to submit to the Committee within six months "information on any action taken in the light of the views and recommendations of the Committee", and allows the Committee to invite the State to submit further information thereafter for inclusion in the Committee's reports.

It is absolutely necessary to engage the State to fully address the alleged infringement and its potential solutions, for which the Committee can draw on its vast experience in

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[25] For an example of the importance of cultural adequacy in remedial measures to realize human rights, *see* G. Backman, P. Hunt *et al.*, 'Health systems and the right to health: an assessment of 194 countries', *The Lancet*, Vol. 372 (2008), pp. 2047-2085, at 2050: "A Peruvian project that studied indigenous communities with very high maternal mortality found an acute reluctance within the population to use the health facilities offered by the state, partly because they did not take account of local cultural conceptions of health and sickness. In close consultation with the indigenous communities, culturally sensitive facilities and services were introduced, such as sturdy ropes in delivery rooms so that women could give birth squatting and gripping the rope, as they were accustomed to. These changes led an increase in deliveries in local health centres, and the success of these local initiatives helped to generate a corresponding change in national health policy on deliveries in all primary health-care facilities." (Citations excluded.)

[26] Though it might not be feasible with regard to many communications brought under the Protocol, the Committee explicitly provided for the possibility of State visits in its first draft protocol, including to identify appropriate remedial measures suitable to realities on the ground (CESCR report on draft protocol, n. 20 above, para. 43): "The only significant additional element recommended by the Committee concerns including the possibility of a visit to the territory of a State party as part of the Committee's examination of a communication. By providing such an option, to be employed only if the State party concerned wishes to exercise it, the procedure would have the flexibility required to enable the Committee, in cooperation with the State party, to tailor the best approach under the circumstances." (In the Committee's first draft Protocol, Art. 7.3 provided: "As part of its examination of a communication, the Committee may, with the agreement of the State Party concerned, visit the territory of that State Party." Ibid. para. 45.)

dialogue with States in the context of periodic reports submitted to the Committee. There are further opportunities in the crafting of remedial recommendations to identify necessary channels of communication between State authorities and the complainants to ensure the participation of affected parties in the identification and implementation of appropriate remedial measures. It could likewise be useful in some cases to engage those with technical knowledge, such as the Minister of Education or his/her advisor, a local governor or mayor, or others with technical and/or factual knowledge about the solutions needed, in the implementation of general remedial recommendations of the Committee.[27]

The Protocol leaves the door open for the Committee to further engage both States and authors of communications, as well as other affected parties or stakeholders who may have views or expertise on the types of remedies that would be appropriate to address alleged violations of Covenant rights. The process established to determine remedies would benefit from interaction with agencies or experts that could shed light on the underlying causes or consequences of the violation, and help to frame an adequate solution. A practice or rule of procedure in this spirit would be supported by Article 8.1, which is unique to the Protocol in not restricting information to be considered by the Committee to that which has been submitted by the parties, as well as by Article 8.3:

> **Article 8**
>
> **Examination of communications**
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> 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. […]
>
> 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.

The explicit provision in the Protocol for the Committee to consult "all documentation submitted to it", as well as any "relevant documentation" it might gather from a range of other bodies, opens up the possibility of considering facts, contexts and perspectives

[27] For examples on the domestic level, see Section 4 (text at nn. 104-109 below).

beyond those included in specific communications, as well as developments submitted by either party since communications were first put forward. Similar provisions were likewise included in the first draft of an optional protocol outlined by the Committee, on the premise that "it seems unduly restrictive and counterproductive for the Committee not to be able to take into account information which it has obtained for itself from other sources."[28]

Beyond the examination of communications, consulting relevant documentation – including any input the Committee solicits from affected groups, other stakeholders, or relevant international actors – would likewise benefit the Committee in the crafting of its views and corresponding recommendations of precise and appropriate measures to remedy violations.

Finally, a key aspect of the process is that it must be transparent and that the decision must be made public. Publicity makes it possible for the victim and others to understand the views of the Committee, and serves as a measure of redress by establishing an official record of what occurred. It is crucial that the Committee's views be made public in the context of not only communications submitted by individuals or groups, but also its inquiries procedure, which will deal with gross and systematic violations.

In this respect, it is noteworthy that Article 16 concerning "Dissemination and information" affirms that:

> 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.

Indeed, the text of the treaty itself stresses the importance of not only publicity and human rights education, but also the adequate dissemination of the Committee's views and recommendations to groups traditionally excluded from access to information about these issues, such as persons with disabilities. In keeping with this binding procedural obligation of States parties to the Protocol, maximum efforts should be made to adequately include persons and communities that traditionally encounter barriers to

[28] CESCR report on draft protocol (n. 20 above), para. 42.

accessing information crucial to the protection of their ESC rights (such as those who are illiterate or speak a minority language), in order to raise their awareness of their rights and provide a means to claim them.

The Committee can also disseminate more broadly its own findings on communications – or on confidential inquiries into apparent grave and systematic violations – in situations where such public attention could, in and of itself, encourage relevant actors to adopt appropriate remedial measures on the ground.

4. The Scope and Content of Remedies for ESC Rights Violations

Reflecting the openness of the Protocol in this respect, the Committee has not extensively detailed its views on the appropriate scope and content of remedial recommendations it will issue in response to specific types of ESC rights violations it identifies under the Protocol. Nonetheless, the Committee has indicated its readiness to recommend remedial measures addressing any potential violation of Covenant rights raised in communications. The Committee's vast experience issuing recommendations in the context of its concluding observations in the periodic State reporting process[29] will certainly benefit and inform its crafting of appropriate remedies for violations.

While its approach will inevitably develop over the course of reviewing specific communications, the Committee's remedial recommendations will from the start need to offer guidance to States on what forms of redress would satisfy their Covenant obligations – both immediately and in the long term – based on the exigencies of victims' circumstances in light of the binding Covenant obligations reiterated in the Protocol's preamble:

> 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.

[29] Indeed, the final section of the Committee's concluding observations in response to State reports, appropriately titled "suggestions and recommendations", highlights both the substantive and procedural obligations of States under the Covenant, and in many cases also includes precise corresponding recommendations to remedy or prevent potential violations.

With those overarching imperatives in mind, the experience and practice of other treaty-monitoring bodies, as well as national and regional judiciaries, provide the Committee with important perspectives on how to offer recommendations that will effectively facilitate the realisation of Covenant rights at an adequate pace, to the maximum of available resources, and by all appropriate means.

4.1 Individual and General Remedial Measures

When effective remedies are inaccessible at the domestic level and individuals submit communications alleging violations, the Committee's recommendations to States will frequently have to include two tracks of remedies: case-specific "individual measures" to repair victims' injuries, and more expansive "general measures" to prevent future violations, including by ensuring access to effective domestic remedies that were found lacking in the admissibility stage.[30]

In a 2007 statement on how it would evaluate States' compliance with the Covenant through communications submitted under the Protocol, the Committee confirmed that it anticipated making both those lines of remedial recommendations in response to violations. In keeping with the practice of other treaty bodies, the Committee indicated its recommendations would comprise both victim-specific individual measures (such as compensation), as well as general measures aimed at tackling the root causes of violations, as appropriate on a case-by-case basis.[31]

The Committee also noted that its recommendations would specify a range of possible measures to provide necessary remedies, including "low-cost measures" aimed at optimisation of States' resources, though States would have the option of adopting alternative measures to bring themselves back into compliance with the Covenant.[32] When recommending general measures to effect systemic reforms, the Committee said it would moreover suggest "goals and parameters to assist the State party in identifying

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[30] With respect to general remedial measures, it is notable that Article 4 of the Protocol foresees the Committee's capacity to examine and address "serious issue[s] of general importance", even where violations harming individuals may be attributable to widespread conditions: "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."

[31] CESCR Statement (n. 5 above), para. 13. Recall also that the Committee has previously indicated its capacity to specify precise remedies in its recommendations, in keeping with the practice of other treaty bodies (see n. 20 above).

[32] Ibid.

appropriate measures".[33] Those parameters for appropriate measures would prioritise, in particular: resource allocation in conformity with Covenant obligations; provision for disadvantaged and marginalized individuals and groups; protection against grave threats to the enjoyment of ESC rights; and non-discrimination in the adoption and implementation of measures.[34]

The Committee also anticipated "recommending a follow-up mechanism to ensure ongoing accountability of the State party".[35] In that sense, the Committee indicated it would continue to review the adequacy and reasonableness of measures adopted by States, even in their remedial responses to any violations identified in the initial review of communications. By extension, the Committee would thus also continue to consider "the time frame in which the steps were taken" and whether remedial measures restored "the minimum core content of the Covenant".[36]

Based on those forecasts, the Committee clearly recognises its competence to recommend both specific measures and general outcomes necessary to remedy States' failures to respect, protect or fulfil any Covenant right. Those remedial recommendations could thus call on States to progressively realise ESC rights at an adequate pace with the maximum of available resources, to ensure the minimum core content of rights, and to adopt urgent measures to prevent grave threats to ESC rights, all with special attention to the situations of marginalised or vulnerable individuals or groups, who should have opportunities to participate in the realisation of their rights through appropriate remedial measures.

4.2 Forms and Precision of Remedial Recommendations

The Committee's intention to recommend both individual and general remedial measures encompassing any relevant forms of reparation, as appropriate, will be vital to redress victims' injuries as fully as possible. In communications submitted to the Committee, it will likely be necessary to recommend both immediate relief (potentially including restitution, or compensation for irreparable harm) as well as complex remedies with dialogic components, involving affected individuals or groups in the process of

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid. paras. 8(e) and 10(b).

determining measures to achieve adequate and sustainable outcomes through longer-term reforms.[37]

Under international law generally, States are obligated to provide restitution for their internationally wrongful acts, provided it is "not materially impossible" and "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."[38] The role of restitution has been less primary in human rights law, however, as measures of compensation, satisfaction, rehabilitation or non-repetition are often more appropriate remedies in cases involving irreparable harm from human rights violations.[39] As a judge of the Inter-American Court of Human Rights voiced: "Full restitution – which implies full return – is conceptually and materially impossible. […] The compensation component of the reparations system is a result of this inevitable difference between what was and what may be."[40] While restitution to the fullest is the ultimate goal, other measures are also appropriate and necessary in most cases. It is also important to consider that in some critical cases, restitution could be inadequate. The UN Special Rapporteur on Violence against Women has questioned the wisdom of aspiring to the exact same situation when that could itself be a source of inequality or lead to additional human rights violations[41] – for example, in situations of arbitrary deprivation of land where a farm is restituted and then titled solely to the man and not to the couple.

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[37] Opportunities for participation of affected parties are discussed below. For a more comprehensive discussion of these dynamics, and the balancing of immediate corrective remedies and longer-term systemic reforms, see: Roach, K. 'The Challenges to Crafting Remedies for Violations of Socio-economic Rights', in M. Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (New York: Cambridge University Press, 2008) , pp. 46-58, at 46-47.

[38] Draft Articles on Responsibility of States for Internationally Wrongful Acts (n. 12 above), Art. 35. See also, Inter-American Court of Human Rights (IACtHR), *Case of Velásquez-Rodríguez v. Honduras*, Reparations and Costs, Judgment of 21 July 1989, (1989) Series C No. 7, paras. 25-26: "a principle of international law, which jurisprudence has considered 'even a general concept of law', that every violation of an international obligation which results in harm creates a duty to make adequate reparation. […] Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm." For reiterations of this principle in the jurisprudence of the Inter-American Court, see: *Case of Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment of 22 February 2002, IACtHR (2002), Series C No. 91, para. 39; *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of 29 November 2006, IACtHR, (2006) Series C No. 162, paras. 199-200; *Case of La Rochela Massacre v. Colombia* (Merits, Reparations and Costs), Judgment of 11 May 2006, IACtHR, (2006) Series C No. 163, para. 226.

[39] Shelton, *Remedies in international Human Rights Law* (n. 3 above), p. 103.

[40] *Concurring Opinion of Judge Sergio García Ramírez*, *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment of 22 February 2002, IACtHR (n. 38 above), paras. 2-4.

[41] See, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo,* UN Human Rights Council (Fourteenth Session), UN Doc. A/HRC/14/22 (2010) at 85: "Reparations for women cannot be just about returning them to the situation in which they were found

For those reasons, the Committee may have to consider remedial measures that provide redress while placing the victims in a transformed situation, in order to guarantee non-repetition. In some communications brought under the Protocol, at least partial restitution may remain a feasible form of reparation, such as in cases involving forced evictions or unfair dismissals, where there is a possibility of effectively undoing part of the harm done to the individual or group.[42] However, in situations where ESC rights violations are attributable to a State's failure to adopt a national plan or to take necessary steps with adequate resources to realise Covenant rights, or involve multiple infringed rights and irreparable consequences for victims, remedies may require more than one form of reparation, along both the specific and general remedial tracks.

As the Committee has rightly observed,[43] it is consistent with the practice of other treaty-monitoring bodies to issue both those lines of remedial recommendations, identifying needed immediate relief as well as articulating goals and parameters to effect broader systemic reform.

That trend has been clearly illustrated in the jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which uniformly concludes all its written decisions on communications wherein violations are found with both "recommendations concerning the author of the communication", which detail

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before the individual instance of violence, but instead should strive to have a transformative potential. This implies that reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of crosscutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience before, during and after the conflict. Complex schemes of reparations, such as those that provide a variety of types of benefits, can better address the needs of female beneficiaries in terms of transformative potential, both on a practical material level and in terms of their self-confidence and esteem. Measures of symbolic recognition can also be crucial. They can simultaneously address both the recognition of victims and the dismantling of patriarchal understandings that give meaning to the violations."

[42] Nonetheless, even in cases of eviction where partial restitution may be possible, remedies may also involve victims' underlying and interconnected needs, and thus other forms of reparation. For instance, when lawful evictions are carried out, the State is generally required to "take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available." (*General Comment No. 7: Forced evictions, and the right to adequate housing*, CESCR, Sixteenth session, UN Doc. E/1998/22, annex IV at 113 (1997), para. 16.) Where resettlement for development purposes is necessary, States must moreover provide land of equal or better quality guaranteeing "accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education." (*Basic Principles and Guidelines on Development-based Evictions and Displacement*, *Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Hmn. Rts. Council, UN Doc. A/HRC/4/18, Annex 1 (2007), para. 16.) When individuals lack formal titles to their residences, the State should also assist them in gaining legal tenure, and not just refrain from evicting them (ibid. para. 25).

[43] CESCR Statement (n. 5 above), para. 13.

appropriate victim-specific remedial measures, and "general recommendations" of remedies necessary to guarantee non-repetition of the violations. The precision of the CEDAW Committee's recommendations varies from case to case, with both lines of remedial recommendations at times being extremely specific or very broadly construed (in the latter case, leaving it more up to responding States to decide how best to provide effective remedies).

For instance, in its "recommendations concerning the author of the communication", the CEDAW Committee has usually recommended the broad remedies of "appropriate reparation" or "adequate compensation" (for "material" and/or "moral" damage), both "commensurate with the gravity of the violations".[44] However, it sometimes complements those recommendations with more specific remedies such as restitution (e.g. in a case of forced eviction, "housing commensurate in quality, location and size"),[45] rehabilitation ("commensurate with […] the condition of [the victim's] health"),[46] and – in the CEDAW Committee's first and most famous case, on domestic violence – a range of particular remedies including immediate relief, a safe house, child support, legal assistance and other measures to restore and protect the victims' physical and mental integrity.[47]

In its "general recommendations", the CEDAW Committee has also tended to suggest to States quite specific measures to guarantee the non-repetition of violations, including: measures to amend, enact, implement, interpret or repeal certain laws or legal provisions;[48] implementation and evaluation of a national strategy to guarantee non-repetition;[49] measures to ensure the availability of State-funded shelters for victims,[50] or

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[44] See, for instance: *Maria de Lourdes da Silva Pimentel v. Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008 (2011); *Karen Tayag Vertido v. Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010); *VK v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011); *Inga Abramova v. Belarus*, Communication No. 23/2009, UN Doc. CEDAW/C/49/D/23/2009 (2011); *LC v. Peru*, Communication No. 22/2009, UN Doc. CEDAW/C/50/D/22/2009 (2011); *RKB v. Turkey*, Communication No. 28/2010, UN Doc CEDAW/C/51/D/28/2010 (2012); *V.P.P. v. Bulgaria*, Communication No. 31/2011, UN Doc. CEDAW/C/53/D/31/2011 (2012).
[45] *Cecilia Kell v. Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008 (2012).
[46] *LC v. Peru* (n. 44 above).
[47] *AT v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005).
[48] *Karen Tayag Vertido v. Philippines* (n. 44 above); *VK v. Bulgaria* (n. 44 above); *LC v. Peru* (n. 44 above); *RKB v. Turkey* (n. 44 above); *V.P.P. v. Bulgaria* (n. 44 above).
[49] *AT v. Hungary* (n. 47 above).
[50] *VK v. Bulgaria* (n. 44 above).

adequate and affordable access to appropriate health care;[51] specific negative and positive regulations of private health-care facilities[52] and detention facilities[53]; and specific trainings or oversight mechanisms for members of the judiciary, law enforcement, civil society and health providers (including to integrate CEDAW, its optional protocol and the CEDAW Committee's general comments into the domestic legal order).[54] The CEDAW Committee has thus demonstrated the appropriateness and utility of recommending remedial measures involving all forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The UN Human Rights Committee has similarly recommended novel remedies in response to violations in communications brought under the first Optional Protocol to the ICCPR, for instance by identifying necessary "effective remedies" such as the repeal or amendment of offending laws that led to violations.[55] However, it has been less assertive than some other treaty-monitoring bodies, tending to recommend more generally that States ensure victims have access to an effective remedy, including compensation, and provide guarantees of non-repetition – even though States have manifestly failed to do so in the cases at hand, including some with ESC rights implications.[56] In that regard, former Human Rights Committee member Martin Scheinin previously protested in separate opinions that the treaty body had failed to articulate more specific remedial recommendations, such as identifying appropriate amounts of compensation, or uniformly pronouncing when violations are found in death penalty cases that "effective remedies" include commutation or release.[57] However, in its 2012 decision in the case of

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[51] *Maria de Lourdes da Silva Pimentel v. Brazil* (n. 44 above); *Inga Abramova v. Belarus* (n. 44 above); *LC v. Peru* (n. 44 above); *V.P.P. v. Bulgaria* (n. 44 above).
[52] *Maria de Lourdes da Silva Pimentel v. Brazil* (n. 44 above).
[53] *Inga Abramova v. Belarus* (n. 44 above).
[54] *Maria de Lourdes da Silva Pimentel v. Brazil* (n. 44 above); *Karen Tayag Vertido v. Philippines* (n. 44 above); *VK v. Bulgaria* (n. 44 above); *Inga Abramova v. Belarus* (n. 44 above); *RKB v. Turkey* (n. 44 above); *Cecilia Kell v. Canada* (n. 45 above).
[55] See: *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994), para. 10; and *Mümtaz Karakurt v. Austria*, Communication No. 965/2000, UN Doc. CCPR/C/74/D/965/2000 (2002), para. 10.
[56] For a few recent ESC rights-related communications in which the Human Rights Committee found violations yet only recommended broad remedial measures of effective remedies, compensation and non-repetition, see: *Karen Noelia Llantoy Huamán v. Peru*, Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (2005); and *Haraldsson and Sveinsson v. Iceland*, Communication No. 1306/2004, UN Doc. CCPR/C/91/D/1306/2004 (2007).
[57] See: *McLeod v. Jamaica*, Communication No. 734/1997, UN Doc. CCPR/C/59/D/734/1997 (1998); and *Deon McTaggart v. Jamaica*, Communication No. 749/1997, UN Doc. CCPR/C/62/D/749/1997 (1998). Cited also in: S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, 2nd edition (Oxford: Oxford University Press, 2005), p. 24 (n. 99).

Naidenova et al. v. Bulgaria, the Human Rights Committee not only issued a permanent injunction against the threatened forced eviction of a Roma community from its 70-year place of residence, but also specified that an "effective remedy" includes "refraining from evicting [the] community so long as satisfactory replacement housing is not immediately available to them."[58] More generally, the decision asserted that the "State party is also under an obligation to ensure that similar violations do not occur in the future", thus requiring the State to guarantee the immediate provision of adequate alternative housing prior to any future such evictions as well.[59] The Human Rights Committee has also sometimes included strong and precise recommendations in its concluding observations on States' periodic reports, for instance noting the importance of adopting necessary safeguards and consulting affected groups in cases of evictions,[60] and recommending that States adopt positive measures to mitigate the critical health risks facing homeless populations.[61]

The European Court of Human Rights (ECtHR) has also begun to strengthen the protection of housing rights through its remedial orders in cases of forced evictions, which previously were extremely weak and primarily comprised compensation to victims for violations of their right to respect for the home, while failing to order general measures of reform to prevent future such violations.[62] Previously finding no right of affected persons to be provided with suitable alternative housing, the ECtHR has also

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[58] *Naidenova et al. v. Bulgaria*, Communication No. 2073/2011, UN Doc. CCPR/C/106/D/2073/2011 (2012), para. 16.
[59] Ibid.
[60] *Concluding observations of the Human Rights Committee: Kenya*, UN Doc. CCPR/CO/83/KEN (28 March 2005).
[61] *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add. 105 (1999), para. 12.
[62] See, e.g., *Akdivar and Others v. Turkey*, ECtHR (1996) [*Reports of Judgments and Decisions* 1996-IV] no. 21893/93; and *Selçuk and Asker v. Turkey*, ECtHR (1998), [*Reports of Judgments and Decisions* 1998-II] nos. 23184/94, 23185/94. In *Selçuk and Asker v. Turkey*, the ECtHR awarded compensation for both pecuniary and non-pecuniary damages resulting from a forcible eviction and destruction of the complainants' homes, and yet unanimously dismissed their request for just satisfaction. The ECtHR observed that cessation and restitution, where possible, would be left up to the State to implement in dialogue with the Council of Europe's Committee of Ministers: "The Court recalls that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It falls to the Committee of Ministers of the Council of Europe, acting under Article 54 of the Convention, to supervise compliance in this respect (see the above-mentioned *Akdivar and Others* (Article 50) judgment, pp. 723-24, § 47)." Ibid. para. 125. Matters of costs, restitution and compliance with the ECtHR judgment were similarly referred to the Committee of Ministers in *Akdivar and Others*.

shied away from ordering States to fulfil well-established positive obligations[63] in cases of evictions of Roma from informal settlements.[64] However, the ECtHR partially reversed course in its recent decision on *Yordanova and Others v. Bulgaria*,[65] ruling not only to award costs to the Roma who were potential victims of the averted forced evictions, but also that the State should adopt both "individual measures"[66] of cessation as well as "general measures" to guarantee non-repetition of the violation, specifically through:

> amendments to the relevant domestic law and practice so as to ensure that orders to recover public land or buildings, where they may affect Convention-protected rights and freedoms, should, even in cases of unlawful occupation, identify clearly the aims pursued, the individuals affected and the measures to secure proportionality.[67]

Strengthening the protection provided for Roma communities' traditional settlements, the Court found their habitations to constitute a "home" for the purpose of the Convention, and that their eviction could not be considered a legitimate aim "necessary in a democratic society" unless it answered a "pressing social need", as "the principle of proportionality required that due consideration be given to the consequences of their removal and the risk of their becoming homeless."[68]

The UN Committee on the Elimination of Racial Discrimination (CERD) has also issued strong recommendations on housing rights, both through preliminary statements aimed to prevent discriminatory forced evictions from occurring[69] and within its views on communications considered under Article 14 of the Convention on the Elimination of Racial Discrimination. In *LR et al. v. Slovak Republic*,[70] CERD found the State to have violated 27 Roma petitioners' rights to housing and an effective remedy when municipal

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[63] For examples of such positive obligations, see n. 42 above.
[64] See, e.g., *Chapman v. the United Kingdom*, ECtHR (2001-I), [GC] no. 27238/95; *Beard v. the United Kingdom*, ECtHR (2001), [GC] no. 24882/94; *Coster v. the United Kingdom*, ECtHR (2001), [GC] no. 24876/94; *Lee v. the United Kingdom*, ECtHR (2001), [GC] no. 25289/94; and *Jane Smith v. the United Kingdom*, ECtHR (2001), [GC] no. 25154/94.
[65] *Yordanova and Others v. Bulgaria*, ECtHR (2012), [Judgment] no. 25446/06.
[66] Ibid. para. 167.
[67] Ibid. para. 166. Nonetheless, the individual and general measures alike remain for the State to choose and implement in execution of the ECtHR order, subject to supervision by the Committee of Ministers (ibid. para. 163).
[68] Ibid. paras. 123 and 126.
[69] *See* Interim Measures chapter in this volume, on Dale Farm case.
[70] *LR et al. v. Slovak Republic*, Communication No. 31/2003, UN Doc. CERD/C/66/D/31/2003 (2005).

authorities for discriminatory reasons annulled a resolution intended to provide low-cost social housing to Roma families from their community, wherein some 1,800 Roma lived in conditions of abject poverty, many without drinking water, toilets or drainage or sewage systems. CERD's remedial recommendations in the case included that the State provide the petitioners with an effective remedy, restore them to their condition prior to the discriminatory annulment of the social housing resolution, and guarantee non-repetition of the violation – as well as to publicise the decision widely, and follow up within 90 days on the measures taken to give it effect. In response, the State informed CERD that it had translated and disseminated CERD's views amongst State institutions and municipal authorities, the latter of whom scrapped and restarted their plans to review low-cost housing proposals, paying special attention to the realisation of the right to housing for the Roma community in need of relief. Legal proceedings were also initiated against the residents who petitioned for the Roma's exclusion from the previously proposed social housing scheme, which had led to the first resolution's annulment.[71]

This case demonstrates how even the annulment of a resolution calling for social housing to benefit those in need can constitute an impermissible – and in this case discriminatory – retrogressive measure running counter to States' obligation to progressively realise ESC rights. The State's meaningful implementation of CERD's recommendations also highlights how non-discrimination and the prioritisation of vulnerable groups can be simultaneously addressed through recommendations outlining the principled policymaking process required of States to implement Covenant rights through all appropriate measures, as well as the potential role of restitution even with regard to those process requirements.

Likewise, the IACtHR has developed individual as well as general measures in its rich remedies case law.[72] One of the main characteristics of the jurisprudence of the Court is its inclusion of very detailed measures of non-repetition and satisfaction, providing a strong example of how to conjoin remedial orders of needed immediate relief in a specific

[71] *Annual Report of the Committee on the Elimination of Racial Discrimination*, CERD (2005), UN Doc. A/60/18 (2005), para. 449.
[72] See Section 4.5 below for details of specific remedial orders issued by the IACtHR.

case with broader orders of systemic reforms to prevent the repetition of violations in the future.[73]

4.3 Progressive Realisation to the Maximum of Available Resources

As the Committee reviews communications under the Protocol alleging failures to progressively realise Covenant rights at an adequate pace or to the maximum of available resources, the most important case to draw lessons from is perhaps the collective complaint of *Autism-Europe v. France*[74] decided by the European Committee on Social Rights (ECSR). In a strong and unexpected ruling, the ECSR confirmed the alleged violations of both the right to education and the right to social inclusion of persons with autism, whether read alone or through the principle of non-discrimination. In the reasoning of its decision, the ECSR elaborated that:

> Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all. […] [T]he implementation of the [European Social] Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow 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 that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.[75]

While recognising the State's prerogative to adopt its preferred modalities of funding and implementation, the ECSR nonetheless found that the results of those policies clearly

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[73] In relation to its dual tracks of communication-specific and more general remedial recommendations, the CEDAW Committee has likewise cited jurisprudence from the inter-American human rights system in highlighting the importance of systemic reforms to guarantee the non-repetition of identified violations. See, *Maria de Lourdes da Silva Pimentel v. Brazil* (n. 44 above), at paras. 3.13, 5.3 and 5.12.
[74] *Autism-Europe v. France*, Collective complaint No. 13/2002 (4 November 2003).
[75] Ibid. paras. 52-53.

demonstrated that the State had failed to adopt the positive measures required to realise the violated rights on an equal basis, within a reasonable amount of time, and to the maximum of available resources.[76]

The case thus offers a concrete example of how the Committee can identify violations of the immediate and crosscutting Covenant obligation to take steps to the maximum of available resources, towards progressive realisation of Covenant rights by all appropriate means. Moreover, it demonstrates that the Committee can assess those positive obligations without necessarily considering discrimination or other negative obligations in tandem.

Unfortunately, however, of greatest relevance to the crafting of remedial recommendations was the failure of the Council of Europe's Committee of Ministers to recommend to the State any meaningful corresponding measures to remedy the violations found by the ECSR. In the tenor of its role as a political body, the Committee of Ministers simply resolved that it "takes note" of the State's plans to "bring the situation back into conformity" with the Charter, and "looks forward" to the State's next periodic report explaining how "the situation has improved."[77] Five years later in November 2008, following the State's implementation of its *Autism Plan, 2005-2007*, the ECSR observed no meaningful improvements and concluded that all of the previously identified violations appeared to be ongoing.[78]

The lesson from that cautionary tale is that the Committee's remedial recommendations should outline, as much as possible, the range of measures States may need to adopt and the outcomes those measures need to achieve, in order to better facilitate their meaningful and timely implementation.

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[76] Ibid. para. 54: "The Committee considers that the fact that the establishments specialising in the education and care of disabled children (particularly those with autism) are not in general financed from the same budget as normal schools, does not in itself amount to discrimination, since it is primarily for States themselves to decide on the modalities of funding. Nevertheless, it considers, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults."

[77] Council of Europe Committee of Ministers, Resolution ResChS(2004)1 (10 March 2004).

[78] ECSR, 'Follow-up of collective complaint *Autism-Europe v. France* (complaint no.13/2002, decision on the merits of 4 November 2003)', in *Conclusion 2008 (France)* (November 2008), pp. 19-20.

4.4 Reasonable Remedies

The Committee has consistently noted that the scope of discretion afforded to States includes only that range of measures fulfilling Covenant obligations, and does not justify failures to take all necessary steps.[79]

The jurisprudence of the Constitutional Court of South Africa is useful to consider in that respect, insomuch as the court applies a similar "reasonableness" standard of review, and has tended in ESC rights cases to issue declaratory general orders leaving considerable leeway for the government to choose appropriate measures while outlining what "reasonable" remedies should comprise. In the court's famous *Grootboom*[80] ruling, regarding a homeless community forcibly evicted from their informal settlement, the Court ordered the State to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing", including through "reasonable measures such as, but not necessarily limited to [...] relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[81] In *Treatment Action Campaign*[82], the court ordered the State to remove restrictions on an affordable antiretroviral drug and to "permit and facilitate" its use, including through reasonable measures to expand HIV testing and counselling for target groups.[83] In both of those cases, the Court broadly defined the scope of "reasonable" measures, and proposed to the State measures within that range that would remedy the violations identified.[84]

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[79] *General Comment No. 12, Right to adequate food*, CESCR (Twentieth session, 1999), UN Doc. E/C.12/1999/5 (1999), para. 21;*General Comment No. 14, The right to the highest attainable standard of health*, CESCR, Twenty-second session, UN Doc. E/C.12/2000/4 (2000), para. 53; *General Comment No. 15, The right to water*, CESCR, Twenty-ninth session, UN Doc. E/C.12/2002/11 (2003), para. 45; *General Comment No. 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, CESCR, Thirty- fourth session, UN Doc. E/C.12/2005/3 (2005), para. 32; *General Comment No. 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)*, CESCR, UN Doc. E/C.12/GC/17 (2006), para 47; *General Comment No. 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, CESCR, Thirty-fifth session, UN Doc. E/C.12/GC/18 (2006), para. 37; and *General Comment No. 19, The right to social security (art. 9)*, CESCR Thirty-ninth session, UN Doc. E/C.12/GC/19 (2008), para. 66.

[80] *Grootboom and Others v. Oostenberg Municipality and Others* (2000), 3 BCLR 277 (CC).

[81] Ibid. para. 99(2).

[82] *Minister of Health v. Treatment Action Campaign* (2002), 5 SA 721 (CC).

[83] Ibid. operative para. 3(a) and (b).

[84] For more on the scope of "reasonableness", in the context of the Protocol as opposed to the jurisprudence of the Constitutional Court of South Africa, *see* the chapter on Reasonableness in this volume.

Those open-ended declaratory orders show one way the Committee could formulate general recommendations to guarantee the non-repetition of violations identified in individual complaints through systemic reforms, while allowing States flexibility in the measures they choose to fulfil their Covenant obligations. However, when complaints also involve minimum standards of ESC rights that States are obligated to ensure, it is likewise important for the Committee to be correspondingly precise in recommending the remedies necessary to satisfy States' obligations under the Covenant.

4.5 Minimum Conditions of Dignity

Analogous to and drawing on the Committee's elaboration of the minimum core content of respective Covenant rights through its numerous general comments, the Inter-American Court of Human Rights has in recent years developed significant jurisprudence on a wide range of reparations appropriate to remedy ESC rights-related violations – particularly to fulfil the minimum levels of ESC rights necessary to ensure a life with dignity. While the IACtHR has yet to define or employ a framework to consider violations of the sole provision of the American Convention on Human Rights that offers direct protection for ESC rights (Article 26),[85] it has developed a robust jurisprudence around the right to life (Article 4) to guarantee basic standards of many ESC rights indirectly, for individuals as well as vulnerable and disadvantaged groups.

In its landmark "Street Children" ruling and several others since, the IACtHR has found Article 4 to obligate States not only to refrain from arbitrarily killing individuals, but also to guarantee the minimum conditions of a "dignified life" (*vida digna*).[86] Under the auspices of the right to a dignified life, the IACtHR has found violations of the rights to education, food, water, health, housing, a healthy environment and the benefits of culture,[87] with special regard to vulnerable groups including children, ageing and older

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[85] However, the IACtHR has acknowledged its jurisdiction to consider and find violations of Article 26, particularly if States introduce unjustified retrogressive measures. See, *Case of Acevedo Buendía et al. ('Discharged and Retired Employees of the Comptroller') v. Perú*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2009, (2009) Series C No. 198, at paras. 101-103.

[86] Also translated as a "dignified existence" or "decent life." *Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala*, Merits, Judgment of 19 November 1999, (1999) Series C No. 63, at para. 144.

[87] *Case of the 'Juvenile Reeducation Institute' v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 September 2004, Series C No. 112, paras. 161, 172-174 (education, health); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of 17 June 2005, Series C No. 125, paras. 50.93-50.100, 163 *et seq*., and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of 29 March 2006, Series C No. 146, paras. 168, 173-178 (education, food, water, health, housing, a healthy environment, and the benefits of

persons, persons with disabilities, indigenous peoples, and those coming from marginalised sectors of society or extreme poverty.

To gauge what levels of ESC rights realisation are required to safeguard human dignity, the IACtHR has employed a variety of international standards and specialised treaties, including: the Committee's general comments on Covenant obligations; ILO conventions; UN rules, principles, and agency standards; and other inter-American instruments,[88] such as the Protocol of San Salvador.[89] In several recent decisions, the IACtHR has also connected judicial and due process guarantees to the obligations of States to protect the right to life and related ESC rights by regulating essential public and private services, such as through medical malpractice legislation and investigations,[90] laws governing mental health treatment,[91] and special measures for vulnerable groups in detention facilities.[92]

Amongst the remedies the IACtHR has ordered to redress ESC rights violations in the respective cases were: pecuniary and non-pecuniary damages; educational and vocational programs; medical and psychological treatment;[93] prior consultation of indigenous peoples in matters affecting their territory;[94] identification and restitution of indigenous peoples' traditional lands, within a maximum of three years; provision of vital services and goods until such restitution was realised; creation of development programs to ensure indigenous communities' immediate and future ESC rights needs; adoption of all legislative, administrative and other measures necessary to guarantee affected indigenous peoples' property rights over their traditional lands in a reasonable amount of time; and the establishment of an effective legal mechanism for indigenous communities to claim

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culture [tied also to the right to property, Article 21]); and *Case of Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment of 4 July 2006, Series C No. 149, paras. 120-122 (health).

[88] *Juvenile Reeducation Institute* (ibid.), para. 172; *Yakye Axa* (ibid.), paras. 163, 165-169; *Ximenes-Lopes* (ibid.), paras. 104-105, 111, 128.

[89] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), OASTS No. 69 (1988), entered into force 16 November 1999. The Protocol notably refers to the "*vida digna*" in Articles 13 (right to education), and 6, 7 and 9 on work conditions and social security.

[90] *Albán-Cornejo et al. v. Ecuador* (Merits, Reparations, and Costs), Judgment of 22 November 2007, Series C No. 171, paras. 96, 108-109, 116 et seq.

[91] *Ximenes-Lopes* (n. 87 above), paras. 99, 140-142.

[92] *Juvenile Reeducation Institute* (n. 87 above), para. 251.

[93] *Juvenile Reeducation Institute* (n. 87 above), operative paras. 11 *et seq*.

[94] *Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Merits and reparations, Judgment of 27 June 2012, (2012) Series C No. 245; and *Case of the Saramaka People. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2007, (2007) Series C No. 172.

restitution of their traditional lands in the future.[95] The IACtHR also ordered a State to announce within six months a short-, medium- and long-term national policy reflecting its international obligations, including a national plan outlining appropriate implementation measures and the allocation of resources to implement it – notably, in consultation with civil society.[96]

Advancing human rights claims based on the vital needs and dignity of victims – particularly when part of marginalised or otherwise vulnerable groups – is inextricably linked to participatory rights, as well as the right to an effective remedy, the right to information and truth, and where relevant the principle of non-discrimination. As the IACtHR has established in a number of decisions:

> In cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. […] With regard to the participation of the victims, the State should guarantee that at every stage of the proceedings the victims have the opportunity to present their concerns and evidence, and that these be completely and seriously analyzed by the authorities before determining the facts, responsibility, penalties, and reparations.[97]

The IACtHR has also emphasised the right to prior consultation of indigenous peoples in matters that affect their territory, rights or subsistence.[98]

4.6 Follow-Up Mechanisms and Participatory Rights

The inclusion of follow-up mechanisms and participatory rights in the Committee's remedial recommendations will be crucial to improve the effectiveness and rate of their implementation by States. Without proper implementation of the Committee's recommendations, the utility of the Protocol to redress violations of ESC rights would be severely limited.[99]

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[95] *Sawhoyamaxa* (n. 87 above), operative paras. 6-12; *Yakye Axa*, operative paras. 6-13.
[96] *Juvenile Reeducation Institute* (n. 87 above), operative para. 11.
[97] *La Rochela v. Colombia* (n. 38 above), para. 195; citing, *inter alia*, *Ximenes Lopes* (n. 87 above), para. 193.
[98] *Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador* and *Case of the Saramaka People. v. Suriname* (n. 94 above).
[99] See Chapter 11 on Enforcement by *Cali* in this volume.

The Committee is well acquainted with the importance of participation and engagement by local actors to carve out space for political dialogue and the implementation of effective remedies on the ground. To follow up on recommendations in its own concluding observations on States' periodic reports,[100] the Committee extends invitations to non-governmental organisations (NGOs) to monitor and report back to the Committee on their implementation by States,[101] and has similarly included participatory rights amongst its recommendations in concluding observations.[102]

In February 2010, the African Commission on Human and Peoples' Rights delivered a landmark ESC rights decision in the case of *Endorois Welfare Council v. Kenya*,[103] which provides a strong example of how to facilitate the participation of affected groups in both the content and implementation of remedial recommendations, particularly in collective complaints that may entail several interrelated ESC rights violations. The Endorois case was submitted on behalf of a herding community driven from its ancestral lands to make way for a nature reserve and tourism, prejudicing the enjoyment of arguably all of the community's ESC rights. In its first ruling to directly recognise indigenous land rights, the Commission found interlinked violations of the rights of the Endorois as a people to their property, culture, religion, natural resources, and development – with dire impacts on the rights to education, health and work of community members. The Commission's remedial recommendations vitally included providing the Endorois with ownership of and access to their traditional lands and natural resources, compensation for their decades

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[100] For more on remedial parallels in the Committee's concluding observations, see n. 29 above.

[101] Human Rights Committee member Michael O'Flaherty notes: "The operation and impact of this practice, unique in treaty body procedures, is not reported on by the Committee [on Economic, Social and Cultural Rights]." M. O'Flaherty, 'Concluding Observations of UN Human Rights Treaty Bodies', Vol. 6, No. 1, *Human Rights Law Review* (2006), pp. 27-52, at 51 (citing Economic and Social Council, Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, UN Doc. E/2001/22 (2001), Annex V, para. 27).

[102] See, e.g., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, 12/08/1999*, CESCR, UN Doc. E/C.12/1/Add.4 (1999), para. 44: "The Committee recommends that [...] the State party supervise and regulate the role of military or paramilitary forces in order to guarantee that development and social assistance programmes are implemented *with the active participation of the populations concerned* and without the interference of armed forces" (emphasis added). See also, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Georgia, 12/19/2002*, CESCR, UN Doc. E/C.12/1/Add.83 (2002), para. 31: "[T]ake effective measures, *in consultation with relevant civil society organizations*, to improve the situation of internally displaced persons, including the adoption of a comprehensive programme of action aiming at ensuring more effectively their rights to adequate housing, food and water, health services and sanitation, employment and education" (emphasis added).

[103] *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Decision of February 2010.

of losses, benefits to be derived from any future development plans, and participation (including through dialogue) in the effective implementation of remedial measures, to be followed by a report on the implementation of those recommendations within three months.

The Protocol provides a few features that the Committee could use to follow up on its own recommendations, including when it recommends States to facilitate consultation, prior informed consent, or other forms of participation by victims, affected persons or stakeholders. Articles 9 and 12 of the Protocol provide for the Committee to communicate its views and recommendations to States and victims involved in individual communications and the inquiry procedure, and potentially to encourage their further dialogue with one another in the implementation of remedial measures. Article 9 expressly requires States to respond and outline what if any remedial measures they adopt with respect to the Committee's views and recommendations on individual communications, and the Committee may invite States to do so in response to inquiries as well. Following any of the procedures, Article 16 of the Protocol further requires States to disseminate the Committee's recommendations widely and in a fashion that is broadly accessible, a firm starting point for additional dialogue that the Committee may include in the content of its recommendations.

Article 14 of the Protocol is also potentially significant to both the content of the Committee's recommendations and their implementation, including through the participation of local actors. With the consent of the respective State, the Committee can transmit its views and recommendations to "United Nations specialized agencies, funds and programmes and other competent bodies" where there is "a need for technical advice or assistance" in response to communications or inquiries, or for "international measures" to help States realise Covenant rights. As the Committee may also consider information produced by those bodies in its examination of communications submitted under the Protocol, the potential engagement of international institutions in the remedial stage is a logical as well as potentially effective way to encourage swift implementation.

Particularly where the Committee recommends general remedial measures, the technical assistance foreseen by Article 14 (and under Part IV of the Covenant, for that matter) may provide an incentive for States to implement urgent systemic reforms, as well as a modality to engage affected individuals or groups and relevant stakeholders in the process. A UN agency, domestic NGO or government agency could, for example, have

the technical means necessary to provide for a permanent solution called for by the Committee, such as the provision of clean water to a community or structural reforms in public services.

This strategy is also explored at the domestic level, where courts engage independent experts or civil society groups in monitoring efforts that are critical for the implementation of an order. Some examples include the appointment of Supreme Court Commissioners in India to track the implementation of interim orders relevant to the landmark right-to-food case across the country, [104] and the enlistment by the Constitutional Court of Colombia of a follow-up commission to supervise implementation of a judgment on internally displaced persons, including through public hearings with stakeholders from the government and civil society to oversee the execution of a structural order.[105] More recently, in 2008, the Constitutional Court of Colombia further required the government to achieve its stated goal of universal health insurance coverage by 2010, specifically by unifying two health insurance schemes and optimising use of scarce resources.[106] The court required that process to be participatory and based on evidence collated through relevant indicators and benchmarks. [107] To implement its decision and determine the benefits of the unified scheme, the court further required the government to facilitate the "direct and effective participation of the medical community and the users of the health system," especially those affected by the reforms. [108] In 2009, the court assigned a special "Review Panel" to oversee

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[104] The broad and complex authority of the Commissioners is carried out through, but not limited to, the following: a) analysis of state performance using macro data; b) rigorous participatory research; c) respond to emergencies; d) ensure the functioning of an effective micro-level grievance redress system; (e) ensure dissemination of information by State Governments; f) articulate alternative demands regarding state policy especially on hunger; g) prepare periodic state reports; h) establish a permanent monitoring mechanism for hunger-related issues and; i) ensure accountability for failures of state functionaries. *See* Supreme Court Commissioners website, available at: http://www.sccommissioners.org/.

[105] Agencia Oficiosa en Tutela [Writ for the Protection of Fundamental Rights] (*author translation*), Colombian Constitutional Court, Judgment T-025/2004, available at: http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm. See also, Auto 109/07 (Resolution 109 of 2007 by the Constitutional Court of Colombia in the Writ for the Protection of Fundamental Rights of Internally Displaced T-025/2004).

[106] Colombian Constitutional Court, Judgment T-760/2008.

[107] Colombian Constitutional Court, Judgment T-760/2008, at sec. 6.1. See, A. E. Yamin and O. Parra-Vera, 'Judicial protection of the right to health in Colombia: From social demands to individual claims to public debates', *Hastings International and Comparative Law Review*, Vol. 33, No. 2 (2010), pp. 101-129, at p. 117. Available at: http://xa.yimg.com/kq/groups/3763827/1491719588/name/Yamin-Parra.HICLR.2010.pdf.

[108] Ibid.

implementation of those complex structural reforms through the review of qualitative and quantitative information submitted in quarterly reports.[109]

While the above domestic oversight mechanisms were ordered and overseen by courts, their function is nonetheless clear: to manage the implementation of remedial orders involving complex structural reforms, in line with principles of participation, equity and transparency. On the international level, the Inter-American Court has similarly stressed the importance of domestic follow-up mechanisms to implement needed reforms, and in some cases has ordered the establishment of a specific mechanism to monitor compliance with the reparations ordered.[110]

The Committee could feasibly recommend analogous follow-up and implementation mechanisms to be devised through cooperation between respective States, domestic stakeholders and (if necessary) any relevant international organisations equipped to provide technical advice in the realisation of such structural reforms in line with relevant human rights principles. Notably, violations of Covenant rights are not prerequisites for the Committee to transmit its views and recommendations, refer under-funded States to relevant international bodies for technical assistance under Article 14 of the Protocol, or otherwise facilitate international cooperation and assistance in accordance with Part IV of the Covenant.

Thus, even in cases where the Committee does not find a violation, *per se*, of the Covenant due to anomalous resource constraints (for instance, in the immediate aftermath of a natural disaster), the State would nonetheless remain equally obligated to move as expeditiously as possible toward the full realisation of Covenant rights.[111] Following the examination of such communications, the Committee can still issue and transmit appropriate remedial recommendations to support those efforts. Where applicable, those recommendations may utilise Article 14 to provide a politically neutral avenue to facilitate their implementation in keeping with Covenant obligations. Since the Committee has previously observed it would constitute a *prima facie* violation of the

[109] Yamin and Parra-Vera (ibid.), pp. 120-121.
[110] See, e.g.: *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, (2005) Series C No. 134, para. 311.
[111] General Comment No. 3 (n. 7 above), paras. 9-10.

Covenant for a State not to accept needed international assistance,[112] the inclusion of follow-up procedures related to Article 14 could thus play an important role in both the crafting and implementing remedial recommendations in response to extreme circumstances, where some form of international assistance may be necessary.

As is clear, in situations that merit the Committee's intervention, institutional mechanisms or reforms will generally be necessary to redress violations on the local level. In that sense, the Committee should include implementation strategies amongst its precise remedial recommendations to help responsible institutions restore any Covenant rights found to have been infringed upon. Requesting follow-up reports, as provided by the Protocol, is equally important to promote dialogue and measure progress in the implementation phase. The establishment and use of a follow-up communications procedure, like the Special Rapporteurs on Follow-up assigned by the Human Rights Committee and Committee Against Torture, would likewise benefit the implementation of the Committee's recommendations, including by allowing the Committee to stay seized on the resolution of communications and involved in dialogue with the State and other relevant parties in doing so.

In its first decision under the Optional Protocol, the Committee has signalled a commitment to ensuring both individual and structural remedial recommendations, and to ongoing engagement with States regarding effective follow-up measures. In *IDG v Spain*,[113] the Committee found that adequate notice had not been provided in relation to a mortgage foreclosure, significantly affecting the author's right to a defence so as to entail a procedural violation of the right to housing. The Committee made remedial recommendations with respect to the author and additionally recommended structural remedies under the heading of "General Recommendations." With respect to the author, the Committee recommended that the State ensure that the auction of her property not proceed without due procedural protection and that she be reimbursed for legal costs of related to the communication. The Committee's "general recommendations" drew on the remedial jurisprudence of other Committees, according to which remedies for individual

[112] See, CESCR Statement (n. 5 above), para. 10; and P. Hunt, *Report of the Special Rapporteur on the right to health, Addendum: Mission to Uganda*, UN Doc. E/CN.4/2006/48/Add.2 (2006), paras. 79-81.
[113] *IDG v Spain,* Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1-19 June 2015).

violations may include measures to prevent similar violations in the future.[114] The Committee therefore recommended that the State adopt measures to ensure access to effective legal remedies, ensure personal service of notice of default and adopt appropriate legislative or administrative measures to ensure that all affected persons have the opportunity to attend default or other proceedings. With respect to follow-up measures, the Committee requested the State party to submit to the Committee, within a period of six months, a written response, including information on follow-up measures.

5. Conclusion

On the 60th anniversary of the Universal Declaration of Human Rights in 2008, the ceremonious adoption of the Protocol came with a promise: that it would provide a way for victims of ESC rights violations to seek remedies when otherwise lacking on the domestic level. Under the Protocol, once the Committee examines alleged violations of Covenant rights, its views and recommendations to States will pronounce authoritatively whether the facts at hand constituted a violation, and what measures those States must adopt to restore the victims and their rights in keeping with Covenant obligations.

While the Committee's remedial recommendations will certainly evolve as its body of jurisprudence develops, they should not assume a restrictive posture that would lead States to limit their realisation of Covenant rights. Just as the Committee will examine both the process and outcome of actions or omissions by States in order to assess their reasonableness to realise Covenant rights, the remedies the Committee recommends must include both the individual measures necessary to restore victims fully, and, where applicable, general measures to address the root causes of violations. Individual remedies should include all forms of reparation: measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Recommendations of both structural reforms and individual remedies are particularly important to respond to ESC rights violations, which often affect an entire group. Even when reviewing individual communications, the Committee's recommendations can address ESC rights violations with a far-reaching impact through general measures to prevent their repetition. General measures could likewise address process requirements where violations involve the slow pace of progressive realisation, failure to devote

[114] Ibid., at para 17.

adequate funds, or structural discrimination. Such an approach would correspondingly mitigate the potential for the clogging of the Protocol's individual complaints mechanism, as has happened with other treaty bodies' complaint mechanisms. It could furthermore assist States to progressively realise the Covenant rights in question more effectively, and on a broader scale without discrimination.

On a case-by-case basis, the Committee will need to assess whether States must restore or transform victims' situation to guarantee their enjoyment of Covenant rights and prevent future violations. However, this assessment should not happen in a vacuum. Drawing on the Protocol's provisions allowing dialogue between the Committee and States, complainants and other relevant stakeholders, the Committee should adopt an expansive view when proposing appropriate measures to remedy violations, especially when rooted in generally substandard conditions. The provision of follow-up mechanisms and for the participation of victims and affected groups in the content of remedial recommendations would further strengthen their implementation, and by extension that of the Covenant and the rights it provides – the fundamental purpose of the Protocol.

11. Enforcement

Basak Cali[*]

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 a written response to the Committee within six months which shall include 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 measures the State Party has taken in response to the Committee's views or recommendations, if any. If deemed appropriate by the Committee, this can be included in the State Party's subsequent reports under articles 16 and 17 of the Covenant.

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.

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1. Introduction

This chapter aims to provide an interpretation of the enforcement provisions of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (OP-ICESCR). These are primarily found in Article 9 (individual communications) and Article 12 (the inquiry procedure). Articles 13 and 14 also include enforcement aspects, and will be touched upon in the light of Articles 9 and 12.[1]

The central argument of this chapter is that the enforcement provisions of the OP-ICESCR need to be interpreted holistically in view of the Covenant's object and the purpose, and within the wider context of international law practice on the enforcement of human rights judgments. This is congruous with the general framework of interpretation as outlined in the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT). Article 31 instructs interpreters to adopt a 'holistic' approach so as to give effect to the purpose and intention of the treaty.[2]

This holistic framework of interpretation provided by the VCTL translates into three important requirements in the context of Articles 9 and 12. Firstly, the interpretation of the follow-up clauses must be interpreted in the light of the object and purpose of establishing an Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR). These clauses set out a framework for developing a procedure to follow-up to the decisions ("Views" and "Recommendations") of the Committee on Economic, Social and Cultural Rights' (CESCR); and should be viewed as providing a means to ensuring effective enforcement. Secondly, the follow-up clauses should be understood in the context of remedies associated with the adjudication of economic, social and cultural rights. Such remedies range from individual compensatory remedies to restitution and from legislative change to complex policy reform with distributive consequences. The enforcement regime set out in Articles 9 and 12 should allow flexibility in addressing this variety. Thirdly, the interpretation of Articles 9 and 12 in

[1] Article 16 of the OP-ICESCR on 'dissemination and information' is also part of the wider enforcement framework of the Optional Protocol, which this chapter will discuss in the light of the other enforcement provisions.

[2] Article 31, Vienna Convention on the Law of Treaties, S. EXEC. DOC. L, 92-1 (1970), 1155 U.N.T.S. 331 (*adopted* 23 May 1969, *entered* into force 27 January 1980), [hereinafter VCLT].

themselves should be seen within of the broader enforcement regime within the United Nations Treaty system. A trend has emerged since the 2000s in which increased emphasis is put on the follow-up of Views (as well as of Concluding Observations) and the use of the rules of procedure of the Treaty Monitoring Bodies to offer institutionalised means of doing so.

In the case of Articles 13 (protection measures) and 14 (international assistance and co-operation), the effectiveness principle further requires the CESCR to implement monitoring procedures to assist enforcement not merely theoretically, but also in practice.

The chapter is structured as follows. In Section 2, a discussion of the general interpretive considerations underpinning the interpretation of the OP-CESCR enforcement clauses. In particular, it will be shown that the central and animating concern for interpreting the enforcement clauses is a concern for the effective implementation of the Committee's Views. In other words, State Parties, the Committee, international organisations, non-governmental organisations and litigators should interpret Articles 9 and 12 in a pro-active manner in order to increase the likelihood of effective implementation.

The requirement of pro-active interpretation invites creative attention to procedures. Follow-up provisions should be interpreted in a way that establishes a partnership between States, international organisations, non-governmental organisations and the Committee in the implementation of Views. My commentary will go on to focus on developments within the UN treaty monitoring system regarding follow up procedures. It evidences a steady trend towards interpreting the follow up clauses of United Nations Treaty Bodies in a pro-active way, even in instances in which these follow-up clauses are not specified in the form of stand-alone provisions.

In section 3, I turn my attention to the procedural framework most likely to advance the effective enforcement of economic, social and cultural rights under Article 9 and Article 12. The central argument in this Section is that the Committee should identify those procedures which have the best prospect of ensuring the implementation of its Views. In particular, this means striking the right balance between the level of specificity required in setting out remedies and the space in which both States and other relevant, competent domestic stakeholders are left to manoeuvre in the implementation process. In the final Section of this chapter, I specify the duties of all actors - the Committee, the Secretariat of the Committee, States, applicants, and international and non-governmental organisations

– that have a stake in the implementation of the enforcement clauses in Articles 9 and 12 in the light of the chapter's foregoing discussions.

2. General Considerations

2.1 Articles 9 and 12 and the Purpose of the Optional Protocol

The preamble to the OP-ICESCR states that the aim of the Protocol is to facilitate the achievement of the purposes of the ICESCR and the implementation of its provisions.[3] These are identical to the purposes set out in the preamble of the Optional Protocol to the International Covenant on Civil and Political Rights.[4] In the case of the OP-ICESCR, however, these purposes take on a special significance due to the lack of strong international judicial review in the field of economic, social and cultural rights. Also relevant in this case are the objections advanced against the justiciability of economic, social and cultural rights internationally, despite national jurisprudence that has developed, particularly in the last two decades.[5] The OP-ICESCR therefore has the additional purpose of showing that the rights embodied in the ICESCR have equal status with civil and political rights internationally, despite differences in constitutional arrangements, welfare and industrial relations systems between the State Parties.[6]

Given this background, the expectations of the OP-ICESCR as a whole are twofold. Firstly, it is expected that the OP-ICESCR will enable the ICESCR to develop a more robust international jurisprudence on economic, social and cultural rights through individual (or collective) applications.[7] The Committee is thus expected to contribute to

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[3] The central paragraph of the Preamble States '*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'.

[4] International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171 (*adopted* 16 December 1966, *entered into force* 23 March 1976).

[5] See, *Report of the First Session of the Open Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (E/CN.4/2004/44), 15 March 2004, paras 58-66 at http://daccess-ods.un.org/TMP/1298478.39474678.html, accessed on 13 April 2012. On a survey of national jurisprudence, see Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press 2008).

[6] See for example, the Statements of Finland, Indonesia, Mexico and Norway in the *Second Session of the Open Ended Working Group on an Optional Protocol to the International Covenant on Economic Social and Cultural Rights* (E/CN.4/2005/52) 14 February 2005, paras 10, 11, 14, and 15 at http://daccess-ods.un.org/TMP/1034592.98610687.html, accessed on 13 April 2012.

[7] Indeed many participants in the drafting process recognised this 'jurisprudential value' during the drafting history of the OP-ICESCR. See, para 23 of the *First Session Report* (n. 5 above); Statement of Finland para

the development of the scope of both the rights themselves and the conditions under which their infringement constitutes a violation in concrete situations. This jurisprudence-building task assigned to the OP-ICESCR is crucial in strengthening the standards of judicial review for economic, social and cultural rights. It aims to empower domestic courts to encourage the application of an economic, social and cultural rights filtering process by their legislatures, and to offer operational guidelines to the executive in planning economic, social and cultural policy.[8] Individual cases therefore play a key role in demonstrating the *application* of the ICESCR.

Secondly, it is expected that the OP-ICESCR will provide the ICESCR with a 'remedial jurisprudence' which would make the enforcement of economic, social and cultural rights decisions more concrete from the perspective of the applicants as well as the enforcers. The Views of the Committee on violations will guide States through appropriate measures to remedy human rights violations in the field of economic, social and cultural rights. As with the expectation of substantive jurisprudential development, the expectation of the development of more concrete remedies stems from a global lack of knowledge of both the repertoire of remedies for economic, social and cultural rights and correct procedures in reaching the determination of such remedies.[9] The OP-ICESCR can therefore level the playing field on both the jurisprudential and implementation front, putting an end to the perceived status discrepancy between the ICCPR and the ICESCR.[10]

2.2 Remedies and Rights

It is important to note, however, that the relationship between jurisprudential comprehensiveness and the development of concrete remedies in the field of economic, social and cultural rights are not two separate, isolated purposes. Rather, the actual

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10 of the *2nd Session report* (n. 6 above), and the address of Louise Arbour, the High Commissioner for Human Rights of 6 February 2006 to the *3rd Session of the Open Ended Working Group* at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6011&LangID=E, accessed on 10 April 2012.

[8] See for Example, the ESCR-NET BOOKLET, ' Why should States ratify the OP-ICESCR?' http://www.escr-net.org/resources/resources_show.htm?doc_id=1475393. Accessed on 31 May 2011.

[9] There is of course comparative jurisprudence in this regard. Such jurisprudence, however, is too context specific to offer guidelines to all States. The Views of Quasi-Judicial Interpretive Bodies also carry more weight compared to decisions of foreign courts given that the ratification of a treaty brings with it a good faith obligation to give effect to that treaty. On the interpretive authority of human rights treaty bodies, see also, Başak Çalı, 'The Interpretive Authority of Human Rights Bodies: An Indirect Instrumentalist Defense' in Geir Follesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of Human Rights Treaties* (Cambridge: Cambridge University Press, 2013) pp. 141-164.

[10] See, para 19 *First Session Report* (n. 5 above).

implementation of judgments through remedies is an integral part of jurisprudential comprehensiveness. This is a direct result of the nature of appropriate remedies for economic, social and cultural rights.[11] Economic, social and cultural rights attract simple, individual and corrective remedies (remedies that prohibit a conduct or order a conduct to be reinstituted) as well as complex individual and general remedies that require further positive action with resource implications. Complex remedies often have a dialogic component, requiring deliberation between stakeholders to reach the most reasonable and acceptable solution to a violation.[12] They also require delivery over a period of time rather than immediately.[13] More often than not, determining that an economic, social and cultural rights violation has occurred will require multi-dimensional remedies of both a general and an individual nature. This will in turn have immediate and long-term implications (see the two preceding chapters).

An example of this would be a decision for a particular country that requires a State to extend emergency medical treatment to non-citizens. If this was initially denied by the State to a non-citizen claimant, the View would most likely require the State to allow claimants access to such treatment (most likely in the form of provisional measures) and also to discontinue the conduct in other cases. The obligation to discontinue conduct, i.e. allowing access to emergency medical treatment, has systematic and budgetary consequences for the State.

Consider another example in which remedies are not only multi-dimensional, but potentially in competition with one another. Such a case might concern the limited availability of HIV medication. If the Committee finds that such limited availability cannot be reasonably justified, the remedy demanded is not only complex and general. The Committee also needs to decide whether the claimant should receive an immediate individual remedy (i.e. the provision of such medication) or whether she should wait and benefit from a medium or long-term strategy that would improve access. In other words,

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[11] For a comprehensive discussion of this, see Kent Roach, 'The Challenges to Crafting Remedies for Violations of Socio-economic Rights' in *Social Rights Jurisprudence* (n. 5 above pp. 46-58).
[12] See for example, *Autism Europe v. France, Complaint No. 13/2002*, the European Committee on Social Rights, Decision on the merits of 4 November 2003, § 53.
[13] This is of course the case for all international human rights law. The point here is that economic, social and cultural rights *are more likely* to attract complex remedies than other types of rights. In the field of civil and political rights, see for example, Phillip Leach, *Responding to Systemic Human Rights Violations: An analysis of the 'Pilot Judgments' of the European Court of Human Rights and Their Impact at the National Level* (Intersentia, 2010).

the Committee must decide whether to employ a two-track remedial strategy combining 'more immediate relief for successful litigants with longer-term processes designed to achieve systemic reform for both the litigants and similar groups'.[14]

In such cases it is easier to detect how enforcement issues spill over to the jurisprudential phase. In the example above, the question of whether the applicant – the HIV patient – should be granted access to medicine immediately or whether she should benefit from such medication as part of the systemic remedies lies at the core of the adjudication. The appropriate interpretation of the facts of the case becomes an integral component of the remedies demanded. Thus, in economic, social and cultural rights cases the post-decision implementation phase and the jurisprudential phase are integral to each other. The way in which a View is interpreted is also indicative of how remedies will be designed.

This inter-dependent relationship between interpretation and enforcement needs to be reflected in how the procedural requirements of Article 9 are interpreted. Different decisions that attract different remedies, or combinations of remedies will require different modes of follow-up by the Committee. In addition, the Committee will have a high stake in the way cases involving complex and dialogic remedies are resolved. Enforcement practices that are successfully tested at domestic level will form the 'remedy jurisprudence of the Court' for future cases. This relationship also applies to inquiry procedures in which the grave or systematic violations under examination may be examples of larger problems. Similar groups, not covered by the inquiry in question, may also be subject to the same types of violations.

A central lesson of this analysis is that the enforcement provisions in Articles 9 and 12 must be interpreted in a flexible way in order to accommodate the different follow-up requirements that flow from different types of remedies. The Committee should not impose the same types of procedural rules of follow-up to all types of remedies. For example, a View that requires consultation with relevant stakeholders (dialogic remedies) for proper implementation cannot be followed-up in the same way as a View that requires a State to prohibit certain conduct in domestic law. In the case of the former, information about whether the State is consulting with the appropriate stakeholders, whether the consultations are appropriate and whether there are clear mechanisms for incorporating

[14] Roach (n. 11 above at 57).

the results of the consultations should all form part of the monitoring process. In the case of the latter, the Committee needs information regarding whether its request to prohibit certain conduct is firmly placed on the legislative agenda.

Equally, State authorities might need more leeway in deciding the remedies that can be used in cases with distributive consequences. However, the Committee may decide, on a case-by-case basis, that State authorities should not enjoy such leeway, taking into account the gravity of a violation or the urgency of redress. Follow-up procedures should therefore not use a 'one size fits all' formula, even at the level of constructing rules of procedure. Instead, the Committee should explain to State Parties the general contours of the flexibility approach to follow-up based on the nature of the remedies (e.g. simple, complex, dialogic, individual, general, immediate, medium/long term) and the nature of the violation (gravity and/or urgency).

A grave or urgent violation would require of the Committee a more frequent and hands-on follow-up in comparison to a violation that is structural, but not urgent. It is of course at the Committee's discretion to assign these categorisations to the cases before it and to send consistent signals to States regarding the types of follow-up it will carried out. Such categorisations of cases forms part of the 'remedial jurisprudence' of the Committee, which exists alongside with its 'substantive jurisprudence'. If the Committee were to put disproportionate focus on the latter at the expense of the former, it would fail to do justice to the long and hard journey that has led to the OP-ICESCR's adoption.

The attention to remedial jurisprudence and corresponding differentiation in terms of follow-up is also crucial in establishing the legitimacy of the CESCR's adjudicatory process. A consistent objection to the judicial review of economic, social and cultural rights is that the political decision-making process should not be replaced with a judicial one; judicial bodies have neither the expertise nor the democratic legitimacy to make such complex and distributive decisions.[15] It is also for this reason that the Committee should demonstrate to States (and the various domestic authorities within States) that it is not imposing remedial solutions on them, but is rather creating a framework for acceptable and unacceptable remedial solutions within democratic decision-making processes.

[15] See generally, Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative and Constitutional Law* (Princeton University Press, 2009).

2.3. Effectiveness and Pro-Active Interpretation

Given the indirect role that Articles 9 and 12 play in the realisation of the purposes of the OP-ICESCR, what principle should guide the interpretation and the operationalisation of these provisions? I argue that the principle of effectiveness, a key principle in the interpretation of international human rights law, should also guide the interpretation of remedial jurisprudence and the corresponding follow-up procedures.

The principle of effectiveness (*ut res magis valeat quam pereat*) is well-known in the interpretation of substantive provisions in international human rights law. Although all human rights treaties have their own distinct context and wording, there is significant convergence around the notion that these treaty provisions must be made 'effective, real and practical' for individuals as right-holders under international law.[16] Effectiveness is an overarching approach to human rights treaty interpretation that measures the success of treaty interpretation by way of its 'practical effect'.[17] Furthermore, each human rights treaty has deeply engrained doctrines that aim to increase such an effect. Examples include the interpretive principles of 'autonomous concepts', 'living instrument' and 'practicality' in the ECtHR context;[18] the 'responsiveness to African circumstances' in the case of the African Commission on Human and People's Rights;[19] the consideration of the 'real situation' for the Inter-American Court of Human Rights;[20] and the 'dynamic instrument doctrine' put forward by the Committee against All Forms of Discrimination against Women.[21]

In the context of enforcement and follow-up provisions of human rights treaties, the effectiveness principle subjects the interpretation to the same test: the procedural framework should make the realisation of Views 'effective, real and practical' to the greatest extent possible. This requires that follow-up clauses be interpreted in a pro-active

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[16] The European Court of Human Rights explains its mission as making '[the European Convention on Human Rights] safeguards practical and effective'. *Loizidou v. Turkey*, ECtHR (1995) Series A, No. 310, 99, 102.

[17] *Airey v. Ireland*, ECtHR (1981) Series A, No. 32, 305.

[18] *Tyrer v. United Kingdom*, ECtHR (1978) Series A, No. 26 , 15-16 [31]; *Chassagnou and others v. France*, ECtHR (1999) DR 1999-III, [100].

[19] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) / Nigeria* (Decision on Communication No 155/96) African Comm'n on Human and Peoples' Rights (2001) [68].

[20] *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion) Inter-American Court of Human Rights (17 September 2003) Series A No 18 [121].

[21] *General Recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary social measures*, CEDAW (thirty-ninth session), UN Doc HRI/Gen/1/Rev.7 270 (2004), [3] ('The Convention is a living instrument').

rather than a passive fashion and that the framework for follow-up should facilitate implementation.

The pro-active interpretation of Article 9 must be differentiated from the 'judicial paradigm', often present in the enforcement practice. This paradigm holds that adjudicatory bodies offer a detailed remedial section in their decisions, and demands compliance based on the argument that State institutions ought to respect the decisions of judicial institutions. The judicial paradigm has concerns with the 'watering down' of judicial decisions by political or policy institutions in the implementation phase, holding that the more detailed and stronger remedies are, the lower the risk of subversion of judicial decisions. The strongest form of the judicial paradigm can be observed in the decisions of the Inter-American Court of Human Rights. This court lays down specific remedies and holds regular judicial hearings to monitor their enforcement.[22]

The pro-active interpretation framework is distinct from the judicial paradigm: while it holds that the follow-up of enforcement must offer guidance to States about what is expected of them in more specific terms than reiterating their general obligations, it also recognises the need to be flexible in how remedies are identified. It therefore aims to create partnerships with States rather than to dictate precise outcomes. The latter is difficult territory as the Committee has to be firm in its reasoning to prevent States from 'watering down' judgments. It also needs to allow States to develop ownership of enforcement and implementation processes.

In applying the effectiveness principle to enforcement provisions, it must be noted that a pro-active interpretation of enforcement articles in itself does not guarantee full implementation. The aim of pro-active interpretation, however, is to remove obstacles to implementation to the greatest extent possible by guiding and supporting States in the enforcement process.

Notwithstanding the support the 'judicial' paradigm often garners amongst lawyers and jurists, the need for a pro-active approach to enforcement is confirmed by political and sociological approaches to international law. They operate from the premise that the law

[22] See, e.g., T. Melish, 'Inter-American Court of Human Rights: Beyond Progressivty' in M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 372-408.

not only needs to be normative, but should also assist in problem-solving.[23] In the enforcement of human rights decisions, normativity in itself will not bring effective implementation. In most cases, even States that are willing to enforce human rights decisions are in need of assistance or support of a procedural framework to enable enforcement. The lack of international jurisprudence in the case of economic, social and cultural rights gives further weight to the argument for actively assisting States in the post-decision implementation process. The OP-ICESCR adjudication ought to show not only that economic, social and cultural rights are justiciable, but also that judgments can be realistically implemented by States.

An active interpretation framework is therefore not just a matter of putting pressure on States that are unwilling to implement decisions, but also of offering assistance to those that are unable to implement them.[24] In the case of the OP-ICESCR, the implementation of the Committee's first decision has crucial importance for the contribution that it will make to the jurisprudence of economic, social and cultural rights, as well as to 'remedial jurisprudence' and to the culture of enforcement.

2.4 Enforcement in the Context of Existing Treaty Body Practice

In international human rights treaty law, enforcement in practice has traditionally come as an afterthought at the United Nations treaty body mechanisms. There are several reasons for this. Firstly, during drafting processes much energy is spent on the admissibility procedure and competence provisions of a quasi-judicial body in terms of normative content. The Optional Protocol to the International Covenant to Civil and Political Rights has a strikingly brief enforcement clause. Article 5(4) simply states that 'The Committee shall forward its views to the State Party concerned and to the individual.' Secondly, given that human rights treaty bodies are not courts *per se* and that their Views are not legally binding on States *qua* Views, enforcement is regarded as a domain of full State discretion. It is partly for this reason that ICCPR Article 5(4) states that the Committee's role is to 'forward' its Views to the Parties concerned.

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[23] Çalı and Koch, Lessons Learned from the Enforcement of International Civil and Political Judgments in Langford et al (eds.), *Making it Stick: The Enforcement of Economic and Social Rights Judgments* (forthcoming 2014).

[24] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).

However, the recent practices of treaty monitoring bodies show that all human rights treaty bodies have begun to adopt a pro-active approach to the follow-up of Views. This is confirmed both by the de facto practice of the treaty monitoring bodies, the amendments made to the rules of procedure and the 'follow-up of Views' clauses that are included in the drafting of optional protocols to the treaty monitoring bodies. The OP-CEDAW, for example, contains a similar article to that of Articles 9 and 12 of the OP-ICESCR with respect to follow-up.[25]

The Human Rights Committee (HRC), which does not have a special article on enforcement in its Optional Protocol, took a pro-active lead in developing a follow-up procedure. This introduced three important pro-active standards: a) specification of remedies in the Views of the Committee in standardised language;[26] b) the introduction of time limits for States to inform the Committee with respect to compliance with its Views; and c) the introduction of a special rapporteur specifically tasked with follow-up.

In 1990, the HRC established a detailed procedure for follow-up of its Views under the Optional Protocol (OP) to the ICCPR. By amending its own Rules of Procedure it created the mandate for the Special Rapporteur for Follow-up on Views, with a two-year (renewable) term.[27] The procedure dictated that each State, within ninety days of the Views of the Committee, provide information to the Human Rights Committee regarding action to be taken. The Human Rights Committee has also described the role of the Special Rapporteur on Follow-up of Communications in detail:

> (a) To recommend to the Committee action upon all letters of complaint henceforth received from individuals held, in the Views of the Committee under the Optional Protocol, to have been victims of a violation, and who claim that no appropriate remedy has been provided;
>
> (b) To communicate with States parties, and, if he deems appropriate, with victims, in respect of such letters already received by the Committee;

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[25] Articles 7 and 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, A/RES/54/4, 2131 UNTS 83, (*adopted* 6 October 1999, *entered into force* 22 December 2000).

[26] *Follow-up procedure of the Human Rights Committee and the Committee against Torture*, UN. Doc. CERD/C/67/FU/1 of 7 June 2005.

[27] *Report of the Human Rights Committee,* Human Rights Committee (45th Sess.), (A/45/40) (1990), Annex XI 'Measures adopted at the thirty-ninth session of the Human Rights Committee to monitor compliance with its Views under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights'.

(c) To seek to provide information on any action taken by States parties in relation to views adopted by the Committee to date, when such information had not otherwise been made available. To this end, the Special Rapporteur will communicate with all States parties and if he deems appropriate, victims in respect of whom findings of violations have been made, in order to ascertain what action, if any, has been taken. This information, when collected, will also be made available in a future annual report;

(d) To assist the Rapporteur of the Committee in the preparation of the relevant sections of the annual report that will henceforth contain detailed information on the follow-up of cases;

(e) To advise the Committee on the appropriate deadline for the receipt of information on remedial measures adopted by the State party found to have violated provisions of the Covenant;

(f) To submit to the Committee, at suitable intervals, recommendations on possible ways of rendering the follow-up procedure more effective.[28]

These features (both establishing time limits for State reactions to Committee Views and appointing a Special Rapporteur on decisions) were subsequently adopted by the Committee against Torture in 2002 and 2011[29] and the Committee Against all Forms of Racial Discrimination in 2005.[30]

Currently only the Convention against Torture and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW) have public inquiry procedures. Whilst the OP-CEDAW has a dedicated provision to follow-up on public inquiries, designating a six month time-frame for

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[28] Ibid.

[29] *Rules of Procedure*, Committee against Torture, (*adopted* by the Committee at its first and second sessions and amended at its thirteenth, fifteenth, twenty-eight and forty-fifth sessions), CAT/C/3/Rev.5 (2011).

[30] New rule 95, paragraphs 6 and 7, of the rules of procedure of the CERD, adopted by the Committee plenary on 15 August 2005.

6. The Committee may designate one or several Special Rapporteurs for Follow-Up on Opinions adopted by the Committee under article 14, paragraph 7, of the Convention, for the purpose of ascertaining the measures taken by State Parties in the light of the Committee's suggestions and recommendations.

7. The Special Rapporteur(s) may establish such contacts and take such action as is appropriate for the proper discharge of the follow-up mandate. The Rapporteur(s) will make such recommendations for further action by the Committee as maybe necessary; he or she will report to the Committee on follow-up activities as required, and the Committee shall include information on follow-up activities in its annual report.

responding to comments and suggestions, [31] the 2011 CAT Rules of Procedures calls upon States Parties to respond without 'reasonable delay'.[32]

The practice of United Nations treaty bodies with respect to pro-active follow-up procedures shows that any active interpretation by the CESCR with regard to Articles 9 and 12 is within the bounds of existing and emerging treaty body practice. The practice also illustrates that the various committees have not adopted a 'generic' approach to the interpretation of follow-up clauses or the adoption of rules of procedure. Whilst for example, the Human Rights Committee and the Committee against Torture have opted for setting a ninety day time-limit for responses to Views, the CEDAW has a six month time limit. The Committee against Torture has no time limit for responding to comments and suggestions stemming from inquiry procedures. Furthermore, although the follow-up meetings of the Committee against Torture take place in private sessions, the Human Rights Committee carries out such meetings in public sessions. The level of detail with respect to remedies provided in the Views of these committees also reveals differences. There is emerging evidence that the Human Rights Committee developing a flexible remedy approach to individual complaints.[33] Such differences in the procedural follow-up frameworks reflect the history of individual communications within each Committee and the rules of procedure that each has developed over the years. However, the general contours of existing practice are significant. They show that the pro-active approach to interpreting enforcement provisions is consistent with overall practice and that the CESCR should devise both formal and informal follow-up procedures to best facilitate the effective implementation of economic, social and cultural rights under its Optional Protocol.

3. The Framework for Follow-Up

Section 2 of this commentary has shown that it is within the competence of the Committee on Economic Social and Cultural Rights to pro-actively interpret its enforcement provisions, both as a matter of realising the implementation of ICESCR provisions and as a matter of treaty-body practice. In this Section, I explore the most

[31] Article 9 of OP-CEDAW, (n. 25 above).
[32] Rule 89 (n. 29 above).
[33] See *Follow-up Progress Report of the Human Rights Committee on Individual Communications*, Human Rights Committee (Ninety-ninth Session: 12 to 30 July 2010), CCPR/C/99/3 (14 September 2010).

appropriate framework for follow-up of Views on economic, social and cultural rights violations.

3.1. The Relationship between Remedies and Recommendations

Given that economic, social and cultural rights attract a diversity of remedies, ranging from simple, complex to dialogic, and from individual to systemic and from immediate to medium/long term, the Committee should specify in the main part of its Views which type of remedy (or combination thereof) is involved in the case under consideration. Such a discussion should come under a specific sub-heading in each View, in order to enable the easy location of the 'remedy' aspects of the View by State actors, the applicant and civil society. The specification of the remedies' dimensions in decisions will allow for more implementation guidance to the State Party and offer a clear direction for subsequent follow-up.

3.2 Flexibility in Setting out Remedies in the Content of the View

The approach to clarifying remedies should be one of flexibility. The Committee should avoid micro-managing the enforcement process by providing a list of specific remedies in each and every case. In the same breath, statements regarding adequate or inadequate remedies expressed in its Views should provide sufficient direction to States. In particular, there should be a clear discussion of whether two-track remedies are needed in a given case.

Preferably, the CESCR should not adopt a fully declaratory approach with respect to remedies in the content of a View. This is the regime design at work at the European Social Charter collective complaints mechanism. The independent and expert-based European Committee of Social Rights of the European Social Charter offer clearly reasoned reports as to why they find a violation of the European Social Charter, but ultimately pursue a declaratory approach to remedies.[34] Under Article 9 of the Additional Protocol to the European Social Charter, the task to make specific Recommendations for the enforcement of a report of the expert committee rests with the Committee of Ministers: an inter-governmental body of the Council of Europe. It enjoys discretion

[34] Cf. Article 8 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9.XI.1995, ETS 35, (*open for signature* 9 September 1995, *entry into force* 1 July 1998). Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm. Accessed on 3 March 2014.

when making remedy Recommendations and allows significant breathing space to States concerning implementation. At times, this includes contesting the Views of the expert committee.[35] As a UN-wide mechanism which contributes to the adjudication and subsequent implementation of economic, social cultural rights globally, Views should offer all stakeholders carefully set out assistance towards implementation.[36]

The Committee should use a case–by-case approach when deciding the level of detail that needs to be provided to a State on the exact scope of the remedy. Depending on the nature of the case, the Committee should specify the acceptable range of remedies and explain in its Views the relationship between the content of the decision and the acceptable range of remedies put forward. This would allow for the development of remedy jurisprudence over time. It would also ensure the meaningful participation of State Parties in devising appropriate remedies. Once the Committee has built up a jurisprudence of successfully implemented remedies, it may consider specifying the precise remedy in cases which raise identical issues.

3.3 Identification of the Implementation Partners in the Content of the View

Where applicable, the Committee should identify the relevant State authorities and agencies, as well as stakeholders and other affected groups, who need to be involved in the enforcement and implementation of the View.

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[35] See for example, *Resolution CM/ResChS(2014)1Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012*, Committee of Ministers, (2014). Available at https://wcd.coe.int/ViewDoc.jsp?id=2157051&Site=CM. Accessed on 23 April 2014. Here, the Committee of Ministers:
1. takes note of the report of the European Committee of Social Rights and of the information communicated by the Swedish delegation on the follow-up to the decision of the European Committee of Social Rights (see Appendix to the resolution);
2. notes Sweden's concerns, as they appear in the Appendix to the present resolution, and recognises that the decision of the European Committee of Social Rights in this case raises complex issues in relation to the obligation of EU member States to respect EU law and the obligation to respect the Charter;
3. looks forward to Sweden reporting of any possible evolution in the issue.

[36] This is without prejudice to lessons that may be learned from the European Social Charter Collective Complaints Mechanism with regard to adjudicating social rights. See also, D. J Harris, 'Collective Complaints under the Social Charter: Encouraging Progress?' in K.H. Kaikobad & M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* (Leiden: Martinus Nijhoff Publishers, 2009), pp. 3–24.

3.4. Time Limits for Enforcement

State Parties are currently required to respond to the Views of the Committee in individual cases and in inquiries within six months of the decision. The Committee should also consider setting time limits for follow-up of enforcement of particular remedies. The approach to setting time limits should be flexible, informal and take place in consultation with the State Party, and if relevant with affected stake-holders and claimants. In proposing time limits for follow-up, the Committee should consider:

a) the complexity of the case;

b) the complexity of inter-ministerial or agency co-ordination that is required to give effect to the View;

c) the necessity of international measures for the enforcement of the Views;

d) the time it takes to pass legislation before the State's parliament;

e) the time it takes for stakeholders to participate, if required, in the process of defining the appropriate scope of remedies;

f) the gravity of the violation; and

g) the urgency of the remedy from the perspective of the individual application(s).

3.5. The Appointment of Special Rapporteur(s) for Follow-Up

In line with standard practice that has emerged within the United Nations treaty bodies monitoring system, the Committee on Economic Social and Cultural Rights should appoint special rapporteur(s) for the follow-up of its Views. Given the potential complexity of individual cases and the corresponding expertise required, the Committee should retain the ability to appoint members of the Committee with relevant expertise to report on follow-up of Views.

3.6. The Terms of Interaction between State Parties and the Special Rapporteur(s)

Given the lack of international jurisprudence on remedy in the field of economic, social and cultural rights, the Special Rapporteur(s) for the follow-up of Views should hold an informal consultative meeting with State representatives within the first six months after

the View is delivered. The purpose of this informal meeting would be to enable the State Party to 'give due consideration to the Views of the Committee, together with its Recommendations' as stated in paragraph 2 of Article 9, and to identify whether any international assistance is needed, as provided for in Article 14. These informal consultations should take place between the Special Rapporteur(s) and the relevant domestic ministries or State agents with the appropriate authority to agree on the most suitable measures to remedy the violation.

In this meeting, the Special Rapporteur and the State representatives should come to an agreement on an itemised 'Action Plan' for the implementation of the View.[37] The State should also provide information to the Special Rapporteur on any action taken. This action plan should specify:

1. the relevant institutions and their roles in implementation;
2. whether the implementation institutions require any additional capacity, including technical assistance, in accordance with Article 14;
3. whether the participation of claimant(s) or stakeholders and other affected groups is required;
4. the timetable for implementation of each item;
5. the role if any, of other States in assisting implementation of the View; and
6. whether the State requires technical assistance from the United Nations Office of the High Commissioner or any other relevant agency for the implementation of the Views in accordance with Article 14.

3.7 The Itemised Action Plan

The itemised action plan should list one implementation task per item to allow for follow-up. The more detailed the terms of each item, the easier it will be to follow-up these items. The action plan document should be made public six months after the delivery of the View. In exceptionally complex cases, the announcement of the action plan may be delayed or phased into separate documents. Action plan documents should indicate the

[37] It was the Committee of Ministers of the Council of Europe, the body responsible for the monitoring of the enforcement of the judgments of the European Court of Human Rights, that introduced the practice of 'Action Plans' for the supervision of human rights judgments.

types of remedies required. They should further break down general remedies into concrete commitments and specify the agencies (domestic and/or international) which will be involved in implementing these remedies, as well as those stakeholders or other affected groups who will participate in the determination of remedies. This will help to avoid 'enforcement confusion' at the domestic level, and enable the effective division of labour between different State organs, including the domestic judiciary, in the realisation of economic, social and cultural rights. The Committee should use the action plan agreed between the Follow-Up Special Rapporteur and State representatives to assess progress with enforcement and implementation.

Itemised action plans are important tools with which to praise State Parties when a specific item is fulfilled. They also offer concrete tools for criticism and pressure by the Committee, non-governmental organisations and other States.

The follow-up of a communication should only be 'closed' when all the items on the action plan are completed. However the Special Rapporteur can 'close' the monitoring of specific items in the action plan based on the information provided by States, applicants and/or non-governmental organisations. Either the Special Rapporteur or the State Party can ask the Committee to announce that the enforcement of all Recommendations in a particular case has been successfully completed.

It is advised that a similar procedure is followed with regard to Article 12.

3.8 Follow-Up of Views via Reporting Obligations

Article 9(3) allows for further follow-up of the measures that a State Party takes in its subsequent reports under Articles 16 and 17 of the Covenant. Paragraph 1 of Article 12 also provides for this.

It is recommended that the enforcement of decisions under the OP-ICESCR is not subsumed under general reporting obligations. This can be prevented by having a specific section on enforcement of Views in the State Reports and Concluding Observations. The enforcement of Views should also be clearly presented in annual reports and on the website of the CESCR. The visibility of the enforcement of Views in the Committee's work further allows non-governmental organisations to submit additional or alternative information to the Committee on the progress of implementation.

3.9 Non-Enforcement Proceedings

Article 9 does not envisage non-enforcement proceedings, nor does it propose a mechanism for this. This begs the question whether non-enforcement of a View itself is a new violation of the OP-ICESCR? Under the OP, an automatic presumption of non-compliance leading to a new violation cannot be argued for. There may, however, be an indirect relationship between the measures taken to enforce a View and a new violation of the Covenant, where the measures taken form the material basis of a new violation. (See discussion of admissibility in chapter 3 on Complaint Procedures.)

3.10 Protection Measures

Article 13 requires State Parties to protect claimants from any type of ill-treatment or intimidation as a consequence of their communication. Though not explicitly stated in the Article itself, when cases concerning such ill-treatment or intimidation do occur, the Committee should monitor the measures taken by the State Party to end or prevent such action. Follow-up Special Rapporteur(s) should request information from the State Parties, as frequently as is deemed necessary, with regard to the protection measures. Any failure to take adequate protection measures should be made public by the Committee at any point during the examination of the communication.

4. Enforcement Partners

The previous section set out what an effective implementation procedure would look like in the light of the object and purposes of the OP-ICESCR and the general procedural framework set out in Articles 9, 12, 13 and 14. This section aims to identify the relevant responsibilities of the enforcement partners in ensuring an effective implementation strategy. The enforcement partners are the Committee, State authorities, the claimant, the Secretariat of the Office of the High Commissioner for Human Rights, stakeholders and other affected groups, international organisations and non-governmental organisations with mandates to the effective realisation of economic, social and cultural rights.

4.1. The Committee on Economic Social and Cultural Rights

The most onerous tasks with respect to the smooth functioning of enforcement procedures fall to the Committee. This is because the CESCR has both substantive and procedural responsibilities in the OP-ICESCR. The CESCR needs to develop the

requisite substantive jurisprudence alongside its remedy jurisprudence. It also needs to ensure a high quality of reasoning when explaining in its Recommendations to States and how much freedom the State possesses in the implementation process. In its follow-up tasks the Committee should seek to create conditions most amenable to implementation, ensuring that States are not left alone but are adequately guided and supported during the actual implementation process. The informal consultations between the Special Rapporteur and State representatives, the agreement of an itemised action plan and the subsequent follow-up of all the items in the plan are key procedural responsibilities that fall to the Committee. In short, the Committee has duties to make the enforcement process reasonable and transparent for all concerned.

4.2. State Parties

State Parties have responsibilities to co-operate in good faith with members of the Committee, and in the enforcement phase, with the Special Rapporteur for Follow-up. Informal consultations with the Special Rapporteur and the devising of an action plan for implementation are key to the implementation of a View. The action plan not only makes the process of implementation transparent internationally, it also enables domestic organs and agencies to co-ordinate their action and enables identification of key implementing agencies or institutions for each View. In the case of economic, social and cultural rights, it is likely that, alongside the legislature and the judiciary, a diverse number of ministries may be involved in implementation, such as ministries of health, finance, education, social security or agriculture. The action plan, therefore, is not a concession of sovereignty on the parts of States, but a tool for the domestic co-ordination of action.

The Committee may recommend that State Parties appoint an implementation co-ordinator. This would of course be subject to domestic resources. Such a Recommendation takes into account the fact that foreign ministries are the agencies least likely to be involved or to have expertise in the implementation of economic, social and cultural rights Views. During the implementation phase, States should be represented by the most relevant agencies, to the extent that this is possible.

State Parties also have the duty to give effect to their commitments for implementation and to provide information to the Committee on progress achieved and, if applicable, reasons for lack of progress.

4.3. Claimant(s) and Authors of Communications

Claimants and the authors of communications have a two-fold role in the implementation of Views. Firstly, if a violation is found, individuals should explicitly put forth in their submissions to the Committee the types of remedies that would be adequate to redress the violation, both in terms of restoring the rights of individuals and ensuring that future violations of a similar nature do not take place. The more detailed the discussion provided during this phase, the greater the chance that the Committee will reflect on these remedies in its Recommendations. This requires a focus on implementation to be part of the litigation strategy right from the onset of the case. It also encourages the early involvement of non-governmental organisations in the litigation process.

Secondly, claimants and the authors of communications have responsibilities to provide information to the Special Rapporteur on Follow-Up on progress or lack thereof with respect to the itemised action plan.

4.4 Non-Governmental Organisations

Non-governmental organisations should seek to be involved in cases, if possible, in their early litigation stages. This would allow for input concerning appropriate remedies and whether consultations with stakeholders or civil society should be an integral part of the remedy structure. Non-governmental organisations also have a central role to play in the post-decision phase monitoring of the implementation of the action plan, and in communicating with the Special Rapporteur for Follow-Up and the Committee as a whole.

Non-governmental organisations should include a special section on the implementation of Views in their shadow reports and should also flag lack of implementation by other review mechanisms, most notably the Universal Periodic Review and the Special Procedures of the Human Rights Council.

4.5 International Inter-Governmental Organisations

Article 14 explicitly sets out a role for international inter-governmental organisations. This is triggered by the transmission of the Views and Recommendations of the Committee based on the State Party consent. This procedure prompts two types of duties. The first is the duty of assistance on the part of international inter-governmental organisations, such as the United Nations Development Programme, or the World Bank.

This is a duty to consider whether these organizations can channel technical advice or assistance to the State Party in order to enhance the enforcement process. The second is the duty to consider taking direct measures. This is provided in the second paragraph of Article 14, in which the Committee may also raise 'the advisability of international measures likely to contribute to assisting' the State in achieving progress. Direct international measures can include both positive and negative action on the part of international inter-governmental organisations. For example, in a case that concerns infringement of housing rights due to foreign direct investment supported by the World Bank, the appropriate international measure falling to the World Bank might be to withdraw support from the investment project. Article 14 clarifies that the duties of international inter-governmental organisations do not come at the expense of the duties of States to enforce the decisions. In other words, the actions taken by the inter-governmental international organisations must support those taken by States.

4.6 Other States

Other State Parties to the ICESCR, as well as non-state parties, also have responsibilities during the implementation phase. State Parties to the ICESCR should review whether they are in a position to assist a State with its implementation duties and how such assistance can be secured. This would be particularly relevant with respect to decisions concerning the least developed States. States that are not parties to the ICESCR also have monitoring responsibilities within the context of the Universal Periodic Review of the Human Rights Council. Lack of implementation of Views that are pertinent to the analysis of a country's human rights situation should be part of the written comments or Recommendations of States during the Universal Periodic Review.

4.7. The Secretariat of the Committee on Economic, Social Cultural Rights and the Office for the High Commissioner for Human Rights

The Secretariat of the Committee on Economic Social and Cultural Rights has important responsibilities to help the Committee to build its remedy jurisprudence and collect best practices of implementation. The Secretariat can also enable institutional memory by keeping a register of how identical cases are dealt with and the range of acceptable implementation options, taking into account the diversity of domestic institutional arrangements.

4.8 The Office for the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights should play two key roles in the enforcement process. The first is the role of assistance provided to the State Parties and the Committee in identifying appropriate avenues for technical assistance during the informal consultations. Secondly, the Universal Periodic Review branch should include information on Views of the CESCR, the status of action plans in the stakeholder reports for Universal Periodic Review, as well as in the mandates of field-presences and any other country-specific or thematic monitoring work and oversight carried out by the organs of the Human Rights Council.

4. Conclusion

The gradual and careful development of remedial jurisprudence and its effective monitoring are fundamental to the success of the OP-ICESCR. The OP-ICESCR sets out a basic framework for follow-up procedures. In order to ensure the effective monitoring of the enforcement of its decisions, the Committee has to be creative in its interpretation of the follow-up clauses. Such creativity is not a simple matter. It should inform the follow-up practices of the Committee both in the creation of its rules of procedure and in its informal interactions with State Parties, international inter-governmental organisations, non-governmental organisations and claimants. As the chapter has shown, other treaty bodies are increasingly more pro-active in interpreting their follow-up and enforcement clauses. The Committee must be part of this development and contribute to it.

This chapter has shown that creative and pro-active interpretation of follow-up clauses is on par, in terms of importance, with the principle of effectiveness, which underlies the interpretation of international human rights treaties. It is only logical that substantive human rights law jurisprudence should be reflected in its procedural aspects. Effectiveness, however, is an overarching principle. Its ramifications for the interpretation of enforcement procedures are unique to each human rights treaty. Given the multidimensional nature of the remedies that economic, social and cultural rights attract, the Committee should be flexible in order to offset the risks of non-enforcement. It must develop well-reasoned remedial jurisprudence and strike a fair balance between State Party ownership of implementation, the identification of the range of acceptable remedies

in a particular case and the participatory rights of claimants, stake holders and other affected groups.

Annex 1: 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 measures 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 Partiesconcerned 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.

Annex 2: International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27

Preamble

The States Parties to the present Covenant,

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,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

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.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the

rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the

principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

(a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the 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 Covenant to all States referred to in article 26.