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ACADEMY IN-BRIEF No. 2

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Introduction

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations (UN) in 2008 and entered into force on 5 May 2013.¹ A longstanding demand of civil society,² it is a vital addition to the international human rights protection system that is rooted in the 1948 Universal Declaration of Human Rights (UDHR). It was adopted on 10 December 2008, the UDHR's sixtieth anniversary.³ In the words of the UN High Commissioner for Human Rights, the Optional Protocol closed 'a historic gap in human rights protection under the international system'.⁴

Although the two key international human rights covenants—the ICESCR and the International Covenant on Civil and Political Rights (ICCPR)—were both adopted on the same day (16 December 1966), two very different monitoring systems were created. Whereas a protocol provided a communications mechanism for the ICCPR, no such procedure was envisaged for economic, social, and cultural rights. Until now, it has not been possible to lodge communications at the international level regarding alleged violations of the ICESCR. In 1993, the governments that participated in the World Conference on Human Rights in Vienna declared unanimously that '[a]ll human rights are universal, indivisible, interdependent and interrelated'⁵ and undertook to draft an Optional Protocol

1 An Optional Protocol is a legal instrument that supplements an international treaty. The term 'optional' signals that such instruments do not automatically bind states parties to the original treaty but are subject to independent ratification. In the context of the UN human rights system, certain Optional Protocols enable individuals or groups of individuals to submit complaints, or 'communications', to the bodies entrusted with oversight of human rights treaties (treaty bodies) when it is alleged that rights protected by the treaties have been violated. By this means, treaty bodies acquire a quasi-judicial role, enabling them to provide access to justice at the international level. As of writing, four UN human rights treaties have been supplemented by an Optional Protocol that allows the treaty body to receive communications: the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, and, most recently, the Committee on Economic, Social and Cultural Rights. The Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on Migrant Workers, and the Committee on Enforced Disappearances can receive communications through optional declarations provided for as part of the pertinent treaty.

2 A coalition of non-governmental organizations (NGOs) formed to support the drafting and adoption of the Protocol. Further information: <http://www.escr-net.org/>.

3 UN General Assembly Resolution 63/117, adopted without a vote on 10 December 2008.

4 Statement by the UN High Commissioner for Human Rights, UN doc. A/63/PV.66, 10 December 2008.

5 Vienna Declaration and Programme of Action, Part I, §5, UN doc. A/Conf.157/23, 12 July 1993.

to the ICESCR. Despite this solemn undertaking, it took 15 years to adopt the Protocol and thereby properly establish equality of all human rights.⁶

This In-Brief presents the key features of this new international instrument. It begins by summarising the history of the Optional Protocol's elaboration and adoption. It then discusses and assesses the Protocol's content, emphasizing the communications procedure particularly. The last two sections are devoted to international cooperation and assistance, and to inquiry and inter-state procedures. The text of the Optional Protocol is included in the Annex to this In-Brief.

⁶ Regarding the preparatory work on the Optional Protocol, see, for example, E. Riedel, 'New Bearings in Social Rights? The Communications Procedure under the ICESCR', in U. Fastenrath *et al.*, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, Oxford University Press, Oxford, 2011, pp. 574-589; C. Mahon, 'Progress at the Front: the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol. 8, No 4 (2008), pp. 617-48; M. Scheinin, 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties', *Human Rights Law Review*, Vol. 6 (2006), pp. 131-42; W. Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights*, Vol. 21 (2003), pp. 423-62; 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. 144-78.

A short history of the elaboration of the optional protocol to the ICESCR⁷

The origins of the Optional Protocol can be traced to the creation of an Open-Ended Working Group of the Commission of Human Rights on the Optional Protocol to the ICESCR (the Working Group). During the Working Group's first two sessions in March 2004⁸ and January 2005,⁹ as well as during a third session in February 2006,¹⁰ its mandate was to examine 'the different options regarding the elaboration of an Optional Protocol' and did not include drafting the Protocol's text.¹¹ This vague mandate resulted in discussions that focused on the need for a communications mechanism; the justiciability of economic, social, and cultural rights; and the legal status of the Committee on Economic, Social and Cultural Rights (the Committee).¹²

A breakthrough was achieved with the inauguration of the Human Rights Council in 2006. The Council's creation reflected a genuine political desire to reinforce the international human rights protection system, apparent in two important decisions the Council took in June 2006 at its first meeting: to adopt the UN Declaration on the Rights of Indigenous Peoples,¹³ and to revise the Working Group's mandate in order to enable it to *draft* a Protocol.¹⁴

⁷ This first part draws on a publication by C. Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, CETIM, Geneva, 2008.

⁸ See the report of the first session of the Working Group, UN doc. E/CN.4/2004/44, 15 March 2004.

⁹ See the report of the second session of the Working Group, UN doc. E/CN.4/2005/52, 10 February 2005.

¹⁰ See the report of the third session of the Working Group, UN doc. E/CN.4/2006/47, 14 March 2006.

¹¹ C. de Albuquerque, 'Chronicle of an Announced Birth', *op. cit.*, p. 156.

¹² Vienna Declaration and Programme of Action, pp. 10–20.

¹³ See Human Rights Council Resolution 1/2, 13 November 2006.

¹⁴ See Human Rights Council Resolution 1/3, 13 November 2006.

In 2007 and 2008, the chairperson of the Working Group, Catarina de Albuquerque, presented several drafts of the Optional Protocol.¹⁵ Participating governments discussed these during the Group's last two sessions in July 2007,¹⁶ and again in February, March, and April 2008.¹⁷ The most controversial subjects, discussed in more detail below, included: the range of rights the Protocol would cover; the definition of persons and groups authorized to submit communications; the conditions under which a communication would be deemed admissible; the standard of review that the Committee would employ to determine whether an economic, social, or cultural right had been violated; and how the international obligations of states parties to the Covenant would be taken into account. The majority of governments ultimately favoured an Optional Protocol that would be 'progressive' with regard to victims. This led to successful outcomes for the first four issues. However, the text that the UN finally adopted gives relatively little attention to the international obligations of states parties. It says little about international cooperation and assistance, for example, even though these obligations are explicitly recognized in the ICESCR.

¹⁵ See, in particular, UN doc. A/HRC/8/WG.4/2, 24 December 2007; and UN doc. A/HRC/8/WG.4/3, 25 March 2008.

¹⁶ See the report of the fourth session of the Working Group: UN doc. A/HRC/6/8, 30 August 2007.

¹⁷ See the report of the fifth session of the Working Group, which sat twice, from 4 to 8 February and from 31 March to 4 April 2008: UN doc. A/HRC/8/7, 6 May 2008.

The communications procedure

Article 1 of the Optional Protocol affirms that the Committee on Economic, Social and Cultural Rights is competent to receive and consider communications in accordance with the provisions that follow. This section reviews and comments on those provisions, and traces relevant differences between the ICESCR Protocol's provisions and those of other communications procedures and regional systems. We highlight the Protocol's innovative character.

Which rights can be invoked?

All communications procedures in the UN human rights treaty system provide that communications are admissible if, and only if, they assert that a state which is party to a treaty has violated a right covered by that treaty.¹⁸ Therefore, for a communication to be compatible *ratione materiae* under the Protocol, it must address a right that is protected by the ICESCR. Article 2 of the Optional Protocol provides that all rights set out in the ICESCR can be invoked before the Committee.

The decision to adopt a comprehensive approach, allowing *all* economic, social and cultural rights to be the subject of communications, reflected the will of the majority of governments, which resisted determined efforts by a minority of states, until the last minute, to restrict the rights covered by the Protocol. A review of Working Group sessions reveals that the negotiations that led to this outcome were complicated and heated. Almost from the outset, for example, Switzerland defended an 'à la carte' approach that would have allowed states parties to the Protocol to select the rights in relation to which victims could lodge a communication.¹⁹ Under this approach, a state would have declared at the time it ratified the Protocol whether it wished to select or exclude specific rights.

¹⁸ UN Secretary General, *Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the United Nations system*, UN doc. E/CN.4/2005/WG.23/2, 22 November 2004, §9.

¹⁹ See the report of the Working Group's fourth session, A/HRC/6/8, 30 August 2007, §37. Australia, China, Denmark, Germany, Greece, Japan, New Zealand, Netherlands, Poland, Russia, South Korea, Turkey, United Kingdom, and United States of America supported Switzerland's 'à la carte' approach. On Switzerland's position during the negotiations, and the potential impact of the Optional Protocol on Swiss jurisprudence and Switzerland's position on economic, social and cultural rights, see C. Golay, 'Le Protocole facultatif se rapportant au PIDESC et la Suisse', *Aktuelle juristische Praxis – Pratique juridique actuelle*, Vol. 22 (2013), No. 4, pp. 483-495.

This proposal was heavily criticized by non-governmental organizations (NGOs), commentators, and the majority of member states of the Human Rights Council, on the grounds that it was incompatible with the principles that human rights are interdependent and indivisible.²⁰ It would have established a hierarchy not only among human rights but also among victims. For example, a person might be entitled in one country to seek redress for a violation of trade union rights but not allowed to make the same complaint in another; and in the same country one individual might be permitted to submit a complaint about forced eviction while another might be prevented from complaining about violations of the right to basic medical care. NGOs further objected on the grounds that there was no precedent for such a position in the practice of other UN communications procedures. Other suggestions sought to restrict the Committee's jurisdiction to non-discrimination and gender equality; or the obligations to 'respect' and 'protect' rights.²¹ All these proposals were ultimately rejected.

The issue of self-determination also inspired intense debate. For example, Russia argued that this right—which it claimed was political in nature—could not be invoked as an autonomous right before the Committee.²² The draft Optional Protocol that the Working Group adopted in May 2008 excluded it on this ground.²³ At the last minute, just before the Human Rights Council adopted the Protocol, a coalition of member states led by Algeria and Pakistan succeeded in extending its remit to *all* the rights enunciated in the ICESCR, including self-determination.²⁴ Subject to certain qualifications, this right may therefore be invoked. The Committee's own position is that it should examine communications on self-determination to the degree that economic, social, and cultural rights

20 See the report of the fourth session of the Working Group, UN doc. A/HCR/6/8, 30 August 2007, §30, according to which: 'Belgium, Bolivia, Brazil, Burkina Faso, Chile, Ecuador, Egypt (on behalf of the African Group), Ethiopia, Finland, France, Guatemala, Italy, Liechtenstein, Mexico, Nigeria, Norway, Peru, Portugal, Senegal, Slovenia, South Africa, Spain, Sweden, Uruguay, Venezuela (Bolivarian Republic of), Amnesty International, the CETIM, FIAN, the ICJ, the NGO Coalition and International Women's Rights Action Watch (IWRAP) Asia-Pacific supported a comprehensive approach.... It was noted that an à la carte approach would establish a hierarchy among human rights, disregard the interrelatedness of Covenant articles, amend the substance of the Covenant, disregard the interest of the victims, and defy the purpose of the optional protocol to strengthen the implementation of all economic, social and cultural rights.'

21 For a review of the discussions, see, for example, M. Langford, 'Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Nordic Journal of Human Rights*, Vol. 27 (2009), pp. 19–20.

22 Australia, Greece, India, Morocco, and the United States of America supported Russia's position.

23 See the report of the fifth session of the Working Group, UN doc. A/HRC/8/7, 6 May 2008, Annex.

24 See Human Rights Council Resolution 8/2, adopted without a vote on 18 June 2008.

dimensions of the right are engaged.²⁵ To be considered, communications may therefore need to show in precise terms how an alleged violation of the right to self-determination is connected to specific rights protected by the ICESCR, such as the right to food.²⁶ This reflects the practice of the Human Rights Committee where, after considerable hesitation, it has considered communications that address alleged violations of the right to self-determination in light of other rights enshrined in the ICCPR.²⁷

Granting permission to invoke all the rights listed in the ICESCR is in conformity with other UN procedural arrangements. Without exception, these make it possible to invoke at the international level all the rights covered by the treaties they monitor.²⁸ The 1966 Optional Protocol to the ICCPR, for example, states that all civil and political rights covered by the ICCPR may be invoked before the Human Rights Committee;²⁹ Article 14 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination states that all rights recognized in the Convention may be invoked before the Committee on the Elimination of Racial Discrimination;³⁰ the 1999 Optional Protocol to the Convention on the Elimination of Discrimination against Women states that all rights protected by the Convention may be invoked before the Committee on the Elimination of Discrimination against Women.³¹ The same is true of the treaty bodies that monitor the rights of migrant

²⁵ See C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Inter-American Institute of Human Rights/International Commission of Jurists, 2008, p. 41.

²⁶ C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 42; and M. Langford, 'Closing The Gap?', *op. cit.*, p. 20.

²⁷ See Human Rights Committee, *Lubicon Lake Band v. Canada*, Decision (Comm. No. 167/1984), UN doc. CCPR/C/38/D/167/1984, 10 May 1990. See also M. Langford, *ibid.*, p. 20; and C. Courtis, *ibid.*, pp. 40–41.

²⁸ A comparative study of these procedures was presented during negotiation of the Optional Protocol to the ICESCR. See Note by the Secretary-General, *Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the United Nations system*, UN doc. E/CN.4/2005/WG.23/2, 22 November 2004. On the composition and functioning of treaty oversight bodies, see W. Vandehole, *The Procedures before the UN Human Rights Bodies: Divergence or Convergence?*, Intersentia, Antwerp/Oxford, 2004, pp. 7–73.

²⁹ The Optional Protocol to the ICCPR was adopted by the UN General Assembly, Resolution 2200 A (XXI), on 16 December 1966.

³⁰ Article 14(§1) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) states: 'A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.'

³¹ The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by General Assembly Resolution 54/74 on 6 October 1999.

workers and members of their families,³² persons with disabilities,³³ and victims of torture and other cruel, inhuman, or degrading treatment or punishment.³⁴ At the international level, at the time of writing, the operational communications procedure that allows victims to bring a communication for violation of the 1989 Convention on the Rights of the Child has yet to enter into force.³⁵

Who can submit a communication?

Article 2 of the Optional Protocol lists several conditions that a complainant must meet in order to have legal standing to file a communication. It states that communications may be filed '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'.³⁶

The Optional Protocol explicitly states that communications may be presented by individuals or *groups of individuals* or *in the name of* individuals or groups of individuals.³⁷ The Optional Protocol to the Convention on the Elimination of Discrimination against Women and the Optional Protocol to the Convention on the Rights of Persons with Disabilities contain similar provisions, covering groups of individuals as well as individuals.³⁸ Although the wording of the Optional Protocol to the ICCPR refers only to the possibility of individual communications, the Human Rights Committee has also indicated that it will accept communications from groups of individuals.³⁹

32 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 77, adopted by UN General Assembly Resolution 45/158 on 18 December 1990. It entered into force on 1 July 2003.

33 2006 Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted by UN General Assembly Resolution 61/106 on 13 December 2006.

34 2003 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 27/1999 on 9 January 2003.

35 The third Optional Protocol to the Convention on the Rights of the Child, creating a communications procedure, was adopted by the UN General Assembly on 19 December 2011. The Protocol will enter into force upon ratification by 10 states.

36 Optional Protocol to the ICESCR, Article 2. Also see Rules of Procedure of the Optional Protocol to the ICESCR, UN doc. E/C.12/49/3, 3 December 2012, Rule 4.

37 *Ibid.*

38 Optional Protocol to CEDAW, Article 2; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1.

39 See, for example, Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, UN doc. CCPR/C/70/D/858/1999, 27 October 2000.

This provision was nevertheless extensively debated during Working Group sessions. Several possibilities were put forward, including the adoption of a ‘collective communications’ procedure replicating the complaints procedure provided by the European Social Charter mechanism. Under this system, *locus standi* is afforded, not to victims or groups of victims, but to organizations that enjoy special status (trade unions, employers’ organizations, and NGOs). It was suggested that, in the context of the ICESCR, organizations that enjoy consultative status with ECOSOC could fulfil the same role. Under the European Social Charter model, moreover, complaints must address a general situation rather than individual violations.⁴⁰ Following vehement opposition by a number of countries, this narrow approach was rejected in favour of the communications system described above.

The possibility of filing a communication ‘in the name’ of individuals or groups of individuals is a significant step forward. Article 2 of the Optional Protocol to the ICESCR states: ‘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’.⁴¹ A similar possibility is provided only by the Optional Protocol to the Convention on the Elimination of Discrimination against Women,⁴² and it is to be welcomed, because it recognizes the role that national and international human rights organizations can play in representing victims of economic, social, and cultural rights violations before the Committee. As violations of these rights tend to involve poor and marginalized individuals or groups, it is important that victims can be represented by organizations that have access to the Committee.

Making it possible to submit communications without the express consent of alleged victims is also an important step towards obtaining redress for violations of economic, social, and cultural rights. A variety of situations could justify such representation, for example, where alleged victims are vulnerable to intimidation or reprisals, or their location cannot be determined. Representation may also be desirable where collective or large-scale violations occur or where, as is often the case with economic, social, and cultural rights, there has been interference with ‘collective or indivisible goods’.⁴³ In such situations, it is evidently difficult

⁴⁰ See D. J. Harris, ‘Collective Complaints under the European Social Charter: Encouraging Progress?’, in K. H. Kaikobad and M. Bohlander (ed.), *International Law and Power: Perspectives on Legal Order and Justice*, Koninklijke Brill, 2009, pp. 3–24.

⁴¹ Optional Protocol to the ICESCR, Article 2.

⁴² Optional Protocol to CEDAW, Article 2.

⁴³ See C. Courts, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, pp. 48–49.

to obtain the formal consent of all affected individuals. Here too, the practice of the Human Rights Committee has evolved to allow exceptions to the consent requirement. Its jurisprudence recognizes situations in which absence of consent can be justified.⁴⁴

In addition to setting criteria for legal standing, Article 2 requires that authors of communications must be under the jurisdiction of the state responsible for the violation, and that this state must have ratified both the ICESCR and its Optional Protocol. Similar conditions apply to the communications procedures of other treaty monitoring bodies,⁴⁵ so this condition is not novel. However, the decision to adopt this wording did not take into account differences in the text of the ICESCR compared to other treaties. Several commentators have noted that Article 2(1) of the ICESCR contains no indication that territorial boundaries apply to the application of its provisions. In addition, it includes explicit commitments on international cooperation and assistance.

At least theoretically, the wording of Article 2 of the Optional Protocol which refers to ‘individuals or groups of individuals, *under the jurisdiction* of a State Party’⁴⁶ appears to exclude the possibility of filing a communication against states when they violate a protected right beyond their borders. In practice, however, extraterritorial application under the Optional Protocol should not be ruled out. A number of scholars have suggested ways in which states may be bound by their obligations under the Covenant when acting extraterritorially.⁴⁷ The jurisprudence of other international bodies, including the Human Rights Committee⁴⁸ and the International Court of Justice,⁴⁹ shows that it is possible to hold governments to account if they violate the fundamental rights of persons who live outside their borders. Regional bodies, such as the European Court of Human Rights, have

⁴⁴ See, for example, Human Rights Committee, *Mohammed Sahid v. New Zealand*, Comm. No. 893/1999, UN doc. CPR/C/77/D/893/1999, 11 April 2003.

⁴⁵ For example, Optional Protocol to the ICCPR, Articles 1, 2; Optional Protocol to CEDAW, Article 2; CERD, Article 14(1).

⁴⁶ Emphasis added.

⁴⁷ See 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); 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 Law Review*, Vol. 11, No. 1 (2011).

⁴⁸ Human Rights Committee, ‘Concluding Observations: Israel’, UN doc. CCPR/CO/78/ISR, 21 August 2003, §11.

⁴⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, §§109–13.

made analogous observations.⁵⁰ The Committee on Economic, Social and Cultural Rights has itself considered extraterritoriality. In its General Comment 15 on the Right to Water, for example, it made clear that a state should not deprive another state of its capacity to guarantee the right to water of its residents, for example by diverting water courses in a border area.⁵¹ In its Concluding Observations on periodic reviews of states parties, the Committee has clearly indicated that jurisdiction includes ‘any territory over which a State Party has geographical, functional or personal jurisdiction’.⁵² In light of the above, the Committee could choose to accept communications from individuals whose rights under the Covenant have been violated and who live outside the territory of the state party that they allege is responsible.⁵³

Under what conditions can a communication be heard?

When it receives a communication, the Committee will transmit it confidentially to the concerned state party as soon as possible.⁵⁴ The state then has six months to respond. It is expected to submit written explanations or ‘clarifying statements’ on the matter under scrutiny, and indicate what remedies, if any, it has provided.⁵⁵

The Committee will start to examine the communication. It can assess questions relating to admissibility and merits at the same time or consider admissibility separately.⁵⁶ Where the Committee decides that a communication is inadmissible, it communicates its decision and the reasons to the author of the communication and to the state party concerned.⁵⁷

50 See, e.g., European Court of Human Rights (ECtHR), *Loizidou v. Turkey*, Preliminary Objections (App. No. 15318/89), 23 March 1995, §§60–64. ,

51 General Comment No. 15. For a full discussion of references to extraterritoriality in the Committee’s General Comments, see also F. Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights’, *op. cit.*

52 See, for example, Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: Israel’, UN doc. E/C.12/Add.90, 23 May 2003, §§15, 31.

53 Article 1(2) of the Optional Protocol to the ICESCR states: ‘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’.

54 Optional Protocol to the ICESCR, Article 6.

55 *Ibid.*

56 Rules of Procedure under the Optional Protocol to the ICESCR, Rule 11.

57 *Ibid.*, Rule 12.

Article 3 sets out the conditions that must be met for a communication to be considered admissible. In most respects, they are similar to the conditions that other UN human rights treaties apply. At the same time, some notable differences are considered below.

The Committee will deem a communication inadmissible, first, if it is already being examined by another ‘procedure of international investigation or settlement’, a notion that encompasses both judicial and quasi-judicial mechanisms.⁵⁸ Communications of violations of rights under the ICESCR may also be declared inadmissible in some cases if a procedure is underway before an International Labour Organization (ILO) oversight body, or a regional oversight body such as the African Court or Commission of Peoples’ and Human Rights, the Inter-American Court or Commission of Human Rights, the European Committee of Social Rights, or the European Court of Human Rights. In many cases, however, regional procedures do not provide equivalent protections or remedies. Communications procedures developed by the special procedures’ mandate holders of the Human Rights Council do not meet the definition of an international procedure of investigation or settlement.⁵⁹

A communication will equally be considered inadmissible if the Committee has already examined ‘the same matter’. With respect to this condition, the practice of the Human Rights Committee is relevant. While ‘the same matter’ may generally be understood to refer to communications that involve identical facts, individuals, and alleged violations, the Human Rights Committee has adopted the position that, to the extent that the ICCPR provides greater protection than other international instruments, facts already submitted to another international body may be brought to the Human Rights Committee if broader protections are invoked.⁶⁰ The Committee has also stated that the same facts may be brought before it if communications dismissed by other international mechanisms on procedural grounds have not been examined on the merits.⁶¹

Second, the author of a communication must have exhausted all available domestic remedies. This means that he or she must have used legal processes available in the relevant domestic system. The exhaustion of domestic remedies rule is rooted

⁵⁸ Optional Protocol to the ICESCR, Article 3(2); Optional Protocol to the ICCPR, Article 5(2)(a); Optional Protocol to CEDAW, Article 4(2)(a).

⁵⁹ J. Connors, ‘The Optional Protocol to CEDAW, Mitigating Violations of Women’s Human Rights’, Seminar Documentation, International Training Seminar for NGOs and women’s rights activists 13–15 March 2003, Berlin, 2003, p. 19.

⁶⁰ *Ibid.* See also, A. Bayefsky, *How to Complain to the UN Human Rights Treaty System*, Martinus Nijhoff, The Hague, 2003.

⁶¹ J. Connors, ‘The Optional Protocol to CEDAW’, *op. cit.*, p. 19.

in the principle that a state must be given the opportunity to redress an alleged violation using the domestic legal system before its international responsibility can be engaged before regional or international bodies. This rule does not apply if the redress procedures exceed a reasonable period.⁶² The wording of the ICESCR Protocol is noticeably different from that of other comparable procedures and regional systems. Some instruments state that the rule does not apply where domestic remedies are known to be ineffective. Wording to this effect was not inserted in the Optional Protocol, although it is difficult to imagine that the Committee will reject a communication on the grounds that its authors have failed to exhaust remedies that are known to be ineffective. Regional systems and other international mechanisms normally interpret 'ineffective remedies' to mean that they are unlikely to bring any effective redress to the complainant. Existing practice and the jurisprudence of the Human Rights Committee may be helpful here, because the exhaustion of domestic remedies rule is normally assumed to involve only those remedies that have a reasonable chance of being effective. Exceptions that may apply to human rights treaty bodies could be summarized as follows:

- *Cases where domestic remedies were not available*: includes cases in which no *legal* processes are available to protect the rights; where access to the courts or other legal procedures is denied; where legal aid is not available in criminal cases; or where legal assistance that could be obtained is not effective because of fear of reprisals.⁶³
- *Cases where domestic remedies were not effective in bringing relief*: due, for example, to the lack of an independent adjudicator; because existing case law on the subject matter indicates that there is no real possibility of a remedy; because there is a consistent pattern of violations that makes legal proceedings meaningless; because, for other reasons, the proceedings in question are unlikely to bring any effective relief; or because domestic procedures would involve unreasonable delays.⁶⁴

With respect to the burden of proof, if a state challenges the admissibility of a communication on the grounds that domestic remedies have not been exhausted, the onus is on the state to demonstrate that the author failed to use an effective,

⁶² Optional Protocol to the ICESCR, Article 3(1); Optional Protocol to the ICCPR, Article 5(2)(a); CERD, Article 14(7)(a); Optional Protocol to CEDAW, Article 4(1).

⁶³ A. Bayefsky, *How to Complain to the UN Human Rights Treaty System*, *op. cit.*, pp. 45–46.

⁶⁴ *Ibid.*

available remedy, capable of providing redress,⁶⁵ which (to borrow terminology from the European Court of Human Rights) offered ‘a reasonable prospect of success’.⁶⁶ If the government successfully discharges the burden of proof, it is for the author of a communication to demonstrate that the remedies cited by the state were exhausted or that an exception, as listed above, applied to the case.

The exhaustion of domestic remedies condition, although well-established and a common feature of all regional and international mechanisms, may nonetheless represent a challenge for victims of violations of economic, social, and cultural rights and organizations that act on their behalf. These organizations must prove that they have tried all local and national instances without satisfaction before addressing their communications to the Committee. In many states, simple administrative procedures may be engaged in relation to violations of fundamental rights. Where these procedures accept claims that address substantive violations of Covenant rights, they may be included in the exhaustion requirement. In some states, where it is possible to make use of the constitutional court or supreme court (as in Argentina, Colombia, India, and South Africa, for example⁶⁷), these avenues of redress must also have been exhausted. More often, however, constitutional instances do not deal with violations of economic, social, and cultural rights.

Building on the practice of other treaty oversight bodies, the Committee should declare itself competent if domestic court procedures exceed a reasonable period of time or cannot guarantee effective redress to the victims.⁶⁸ This is especially important since the requirement to exhaust domestic remedies is potentially very restrictive when combined with other admissibility criteria. One commentator has gone so far as to describe it as a ‘watershed in terms of stringency’.⁶⁹

65 For comparative insights on these criteria see, for example, ECtHR case law: *Dalia v. France*, Judgment (App. No. 154/1996/773/974), 19 February 1998, §38; *McFarlane v. Ireland*, Judgment (App. No. 31333/06), 10 September 2010; *Vernillo v. France*, Judgment (App. No. 11889/85), 20 February 1991; *Mikolajová v. Slovakia*, Judgment (App. No. 4479/03), 18 January 2011 (final since 18 April 2011); *Sürmeli v. Germany*, Judgment (Grand Chamber) (App. No. 75529/01), 8 June 2006.

66 *Scoppola v. Italy (No. 2)*, Judgment (Grand Chamber) (App. No. 10249/03), 17 September 2009, §71.

67 See C. Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels*, FAO, Rome, 2009; C. Golay, *Droit à l'alimentation et accès à la justice*, Bruylant, Brussels, 2011.

68 The Optional Protocol to CEDAW, Article 4(1), states, for example, that a communication can be examined if it is improbable that the plaintiff will obtain redress through the available domestic instances. The ECtHR has also stated that the rule should be applied ‘with some degree of flexibility and without excessive formalism’, in *Ringelsen v. Austria*, Judgment, (App. No 2614/65), 16 July 1971, §89.

69 M. Langford, ‘Closing the Gap?’, *op. cit.*, p. 21.

Third, a communication should be filed within one year, once domestic avenues of redress have been exhausted, unless it can be shown that this was impossible.⁷⁰ The temporal limit is a novel feature of the Optional Protocol. It is absent from the communication procedures of other UN treaty monitoring bodies. As to regional systems, both the 1950 European Convention on Human Rights and the 1968 American Convention on Human Rights require applicants to lodge complaints with the respective courts within six months from the date at which domestic remedies are exhausted, though their wording is slightly different.⁷¹ The way the start date is calculated in other systems may provide some guidance for the Committee. Through case law, the European Court of Human Rights has established several parameters for gauging compliance with the time limit. For example, the six-month period starts from the date on which the applicant, or his or her representative, becomes aware (acquires ‘sufficient knowledge’) of the final decision at domestic level.⁷² Where no effective remedy is available, the relevant date will be the date on which the act that is the basis of the complaint occurred, or the date when the applicant became aware of it.⁷³ It will be for the Committee to set parameters for calculating the one-year requirement.

In addition to the three criteria outlined above, Article 3 identifies further *procedural* grounds for inadmissibility. It states that anonymous communications⁷⁴ and communications that are not submitted in writing⁷⁵ will not be deemed admissible. The rejection of anonymous communications has triggered some criticism because it could raise additional barriers for some vulnerable or marginalized groups. Notwithstanding the anonymous communications rule, authors may request that their identity be protected in any publication related to the case, including the decision. Where disclosure would put an author at risk, the Committee may also withhold his or her name from the state party, with his or her permission.

⁷⁰ Optional Protocol to the ICESCR, Article 3(2)(a). An exception may be made if the victim can show that it was not possible to present the communication within the allotted time.

⁷¹ In the case of the ECHR, Article 35(1) refers to ‘six months from the date on which the final decision was taken’.

⁷² ECtHR, *Koç and Tosun v. Turkey*, Decision (App. No. 23852/04), 13 November 2008, §6.

⁷³ See ECtHR, *Varnava v. Turkey*, Judgment (Grand Chamber) (App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), 18 September 2009.

⁷⁴ Optional Protocol to the ICESCR, Article 3(2)(g); Optional Protocol to the ICCPR, Article 3; CERD, Article 14(6)(a); Optional Protocol to CEDAW, Article 3.

⁷⁵ Optional Protocol to the ICESCR, Article 3(2)(g).

A communication will equally be declared inadmissible when ‘it is an *abuse of the right* to submit a communication’.⁷⁶ While it is difficult to envisage all cases in which an application may be considered abusive, some insight can be gained from the interpretative practice of the European Court of Human Rights. ‘Abuse’ refers to conduct by an applicant that is contrary to the purpose of the right of application and hinders the proper functioning of the Court or the conduct of proceedings.⁷⁷ Examples might include applications that contain misleading information,⁷⁸ use offensive language, are ‘manifestly vexatious’, or lack a real purpose.⁷⁹ In the face of state requests, the Human Rights Committee has generally been reluctant to declare communications inadmissible on grounds of abuse, unless they are clearly frivolous or absurd.⁸⁰

Article 3 also sets out several requirements relating to the Committee’s jurisdiction. For example, a communication will be declared inadmissible on the grounds that it is incompatible *ratione temporis* if the facts it presents occurred prior to the entry into force of the Optional Protocol for the state party concerned, ‘unless those facts continued after that date’.⁸¹ The decision to introduce an exception to the requirement was made in the Working Group, where the ramifications of such a provision for ongoing or continuous violations provoked a contentious discussion. The Optional Protocols to the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of Persons with Disabilities made a similar choice.⁸² The Committee on the Elimination of Discrimination against Women has interpreted the notion of ‘continuing violations’ with some flexibility when the authors of a communication have presented convincing arguments that the facts in question continued after the date of entry into force.⁸³

Finally, Article 3 declares that a communication will be considered inadmissible if it is ‘manifestly ill-founded, not sufficiently substantiated or exclusively based

⁷⁶ *Ibid.*, Article 3(2)(f) (emphasis added).

⁷⁷ ECtHR, *MiroJubovs and others v. Latvia*, Judgment (App. No. 798/05), 15 September 2009 (final since 15 December 2009).

⁷⁸ ECtHR, *Varbanov v. Bulgaria*, Judgment (App. No. 31365/96), 5 October 2000.

⁷⁹ ECtHR, *M. v. United Kingdom*, Judgment (App. No. 25087/06), 24 June 2008.

⁸⁰ See discussion in P. R. Gandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, Ashgate, Dartmouth, 1998, p. 198.

⁸¹ Optional Protocol to the ICESCR, Article 3(2)(b).

⁸² Optional Protocol to CEDAW, Article 3(2)(e); Optional Protocol to the CRPD, Article 3(2)(f).

⁸³ See, for example, Committee on the Elimination of Discrimination against Women, *A.T. v. Hungary*, Decision (Comm. No. 2/2003), 26 January 2005.

on reports disseminated by mass media'.⁸⁴ This means that, even if all other procedural admissibility criteria have been met, the Committee may declare a communication inadmissible for reasons related to a preliminary examination of its merits. While the exact scope and meaning of 'manifestly ill-founded' will depend on the nature of the communication, the term identifies cases that do not disclose *prima facie* grounds for believing that a violation has occurred. Under the case law of the European Court of Human Rights, an application will be considered manifestly ill-founded if a preliminary review does not reveal the appearance of a violation of the rights protected by the European Convention on Human Rights. It remains to be seen in what circumstances the Committee will declare a communication inadmissible on this ground, and to what extent it will use this criteria to filter or screen communications. The term 'sufficiently substantiated' implies that an application must contain sufficient evidence to make its claims credible. Although the author of a communication is not required to prove his or her case during the admissibility stage, evidence to show at least a *prima facie* case must be presented. This means that a communication should contain information about the alleged violation that is as detailed as possible.

Declaring that a communication may be inadmissible if it is 'exclusively based on reports disseminated by mass media' introduces a new test. Other mechanisms do not include a similar clause, and its value has been questioned since a communication grounded solely in media reports would probably fail the 'manifestly ill-founded' or 'sufficiently substantiated' criteria anyway.⁸⁵

Article 4 introduces a final element of procedure that also breaks new ground. 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'.⁸⁶ At the regional level, the provision that inspired this insertion is the 'significant disadvantage' clause in Article 12 of Protocol No. 14 to the 1950 European Convention on Human Rights, though it must immediately be noted that the rule is an admissibility criterion for the ECHR but discretionary under the ICESCR Optional Protocol. The concept of 'significant disadvantage' presumes that a violation should reach a minimum 'threshold of severity' to qualify for examination

⁸⁴ See J. Connors, 'The Optional Protocol to CEDAW, Mitigating Violations of Women's Human Rights', *op. cit.*

⁸⁵ See C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 62.

⁸⁶ Emphasis added.

by an international court or quasi-judicial mechanism.⁸⁷ The determination of this minimum threshold is, naturally, dependent on the circumstances of each individual case, although the European Court of Human Rights has distinguished the elements that may be taken into account. These include: the applicant's conduct;⁸⁸ the nature of the right under scrutiny; the seriousness of the alleged violation; and the potential consequences for the applicant.⁸⁹ The discretionary character of the provision emerges clearly, which means that the Committee has ample room for manoeuvre when it decides whether or not a victim has suffered a disadvantage. Some commentators have argued that the inclusion of this provision in the Optional Protocol may raise concerns in discrimination cases, where an excessively narrow and literal reading of the provision could potentially lead courts to compare the situation of the author of a communication with that of other rights-holders.⁹⁰ Other commentators have doubted the provision's value, since the provision introduced by the European Court of Human Rights was specifically designed to alleviate the workload of a heavily overburdened Court.⁹¹

In conclusion, when the Committee decides that a communication is inadmissible, it will communicate its decision to the author of the communication and to the state concerned. According to the Rules of Procedure of the Optional Protocol, the Committee's decision may be reviewed if the Committee receives a written statement, submitted by or on behalf of the author of the communication, which contains evidence for believing that the reasons for inadmissibility no longer apply.

Friendly settlement

Article 7 of the Optional Protocol establishes a friendly settlement procedure, under which 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

87 See European Court of Human Rights Research Division, Research Report on *The new admissibility criterion under Article 35 §3(b) of the Convention: case-law principles two years on*, Council of Europe, 2012.

88 ECtHR, *Shefer v. Russia* (dec.), Judgment (App. No. 45175/04), 30 August 2011.

89 ECtHR, *Giusti v. Italy*, Judgment (App. No. 13175/03), 18 October 2011 (final on 18 January 2012).

90 C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 64.

91 See M. Scheinin and M. Langford, 'Evolution or Revolution? – Extrapolating from the Experience of the Human Rights Committee', *Nordic Journal of Human Rights*, Vol. 27 (2009). The rule has been criticized even at ECHR level, on the grounds that it is vague and adds nothing new. See P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford, 2011, p. 146.

basis of the respect for the obligations set forth in the Covenant'.⁹² Paragraph 2 specifies that '[a]n agreement on a friendly settlement closes consideration of the communication under the present Protocol'.⁹³ If agreement is not possible, the Committee will proceed to determine whether the state has violated the economic, social, or cultural right(s) invoked by the victim(s).⁹⁴ Under the Rules of Procedure of the Optional Protocol,⁹⁵ the Committee may terminate the friendly settlement procedure if it concludes that the matter 'is not susceptible to reaching a resolution or any of the parties does not consent to its application, decides to discontinue it, or does not display the requisite will to reach a friendly settlement based on respect for the obligations set forth in the Covenant'.⁹⁶ No other treaty monitoring body includes a procedure for friendly settlement. Critics have expressed concern that the procedure may be misused by states that act in bad faith, who want to prevent the Committee from examining a communication but do not intend to comply with any agreement reached by conciliation.⁹⁷ That said, failure to comply with a friendly settlement agreement may lead to a further communication being lodged on grounds of non-compliance.

The Committee can, at any time, and before a determination on the merits has been reached, request a state party to take interim measures to avoid irreparable harm to victims of an alleged violation.⁹⁸ This provision meets the need to ensure that rights set out in the ICESCR are not compromised beyond repair while the communication is being examined by the Committee. Analogous measures are provided in the communication procedures of other UN treaty monitoring bodies⁹⁹ and the Inter-American and European human rights systems.¹⁰⁰ Interim measures that have been sought in other systems include requests to stay execution, suspend expulsion orders and extraditions, and provide medical treatment to detainees.¹⁰¹ The ICESCR Optional Protocol differs from other treaties (or rules

⁹² *Ibid.*, Article 7(1).

⁹³ *Ibid.*, Article 7(2).

⁹⁴ Rules of Procedure under the Optional Protocol to the ICESCR, Rule 15(7).

⁹⁵ *Ibid.*, Rule 15(5).

⁹⁶ *Ibid.*

⁹⁷ C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 75.

⁹⁸ Optional Protocol to the ICESCR, Article 5(11); Optional Protocol to CEDAW, Article 5.

⁹⁹ Optional Protocol to CEDAW, Article 5; Optional Protocol to CERD, Article 4.

¹⁰⁰ In the Inter-American human rights system, interim measures are established by Article 63 of the ACHR and the Rules of Procedure of the Inter-American Commission; in the African Commission on Human and Peoples' Rights system, by Rule 111 of the Rules of Procedure; in the European Court of Human Rights by Article 39 of the Rules of Procedure.

¹⁰¹ See M. Scheinin and M. Langford, 'Evolution or Revolution?', *op. cit.*

of procedure) in that interim measures may only be requested in exceptional circumstances. This change reflects the practice of other treaty bodies, which have been reluctant to use interim measures other than exceptionally and in a limited number of circumstances. Additionally, the Protocol makes clear that issuing an interim measure does not imply that any determination has been made on the admissibility or merits of the communication in question.¹⁰² According to the Rules of Procedure, the concerned state can present arguments at any stage of the proceedings, explaining why a request for interim measures should be withdrawn.¹⁰³ The Committee can also withdraw an interim measure at any time, based on information provided by the state party or the communication's author.¹⁰⁴

Potentially, the interim measures procedure could have important effects in the context of economic, social, and cultural rights. It has been suggested, for example, that it might be used to prevent destruction of means of livelihoods, forced evictions, abrupt retrogressive measures, or 'lack of immediate reasonable action' that could make claimants vulnerable to serious denials of their rights.¹⁰⁵

Assessing communications on the merits

If the Committee decides that a communication is admissible, it proceeds to consider its merits and to assess whether or not a violation has occurred under the various articles of the Covenant. In doing so, it will be able to make use of a range of tools. In particular, it may draw on jurisprudence on economic, social, and cultural rights,¹⁰⁶ and on the interpretive tools that the Committee itself has developed over time by means of General Comments, Concluding Observations in the state reporting process, and Statements.

¹⁰² Optional Protocol to the ICESCR, Article 5(2).

¹⁰³ Rules of Procedure of the Optional Protocol to the ICESCR, Rule 7(3).

¹⁰⁴ *Ibid.*, Rule 7(4).

¹⁰⁵ M. Langford, 'Closing the Gap?', *op. cit.*, p. 24.

¹⁰⁶ On national, regional and international jurisprudence with regard to economic, social and cultural rights, see M. Langford (ed.), *Social Rights Jurisprudence, emerging trends in international and comparative law*, Cambridge University Press, Cambridge, 2009; International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, Geneva, 2008; F. Coomans, *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*, Maastricht Center for Human Rights, Intersentia, 2006; J. Squires, M. Langford, B. Thiele (ed.), *The Road To A Remedy. Current Issues in the Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre, Sydney, 2005; C. Fabre, *Social Rights under the Constitution*, Clarendon Press/ The United Nations University, Oxford/Singapore, 2000; P. Hunt, *Reclaiming Social Rights. International and Comparative Perspectives*, Ashgate, Dartmouth, 1996; C. Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels*, *op. cit.*

Although General Comments are not legally binding, they are quasi-legislative, authoritative interpretations of the scope and normative content of Covenant rights.¹⁰⁷ They clarify the obligations of states parties and provide examples of violations of specific rights. Certain General Comments also contain legal tests, standards, and guidelines that help to identify when violations have occurred.¹⁰⁸ To paraphrase the Committee, when the normative content of a Covenant right (as interpreted by the Committee) ‘is applied to the general and specific obligations of States parties ... a “dynamic process” is set in motion which facilitates identification of violations of the right’.¹⁰⁹ While this view is not uncontested,¹¹⁰ most of the General Comments that focus on specific rights contain a paragraph that lists examples of violations of the right in question.¹¹¹ These lists are not exhaustive but they indicate the nature of the state’s obligation to respect, protect, and fulfil the rights to health,¹¹² to food,¹¹³ to water,¹¹⁴ to social security,¹¹⁵ and to work.¹¹⁶

General Comments provide a conceptual framework that the Committee will want to consider but also adapt to individual cases. For the sake of thoroughness, it must also be pointed out that General Comments are not always consistent or coherent.¹¹⁷ Examples of inconsistencies include the Committee’s interpretations

107 See P. Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’, in L. Boisson de Chazournes and V. Gowlland-Debbas (ed.), *The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab*, Martinus Nijhoff, The Hague, 2001, pp. 763–76; U. Khaliq and R. Churchill, ‘The Protection of Economic and Social Rights’, in Keller and Ulfstein (ed.), *UN Human Rights Treaty Bodies*, Cambridge University Press, Cambridge, 2012.

108 H. Keller and L. Grover, ‘General Comments of the Human Rights Committee’, in Keller and Ulfstein (ed.), *UN Human Rights Treaty Bodies*, Cambridge University Press, Cambridge, 2012.

109 Committee on Economic, Social and Cultural Rights, General Comment No. 13, ‘The right to education’, UN doc. E/C.12/1999/10, 8 December 1999, §58.

110 M. Langford and J.A. King, ‘The Committee on Economic, Social and Cultural Rights’, in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, Cambridge, 2009, p. 503.

111 This practice has been adopted from General Comment No. 12 onwards.

112 Committee on Economic, Social and Cultural Rights, General Comment No. 14, ‘The Right to the Highest Attainable Standard of Health’, UN doc. E/C.12/2000/4, 11 August 2000, §§46–52.

113 Committee on Economic, Social and Cultural Rights, General Comment No. 12, ‘The Right to Adequate Food’, UN doc. E/C.12/1999/5, 12 May 1999, §19.

114 Committee on Economic, Social and Cultural Rights, General Comment No. 15, ‘The Right to Water’, UN doc. E/C.12/2002/11, 20 January 2003, §§39–44.

115 Committee on Economic, Social and Cultural Rights, General Comment 19, ‘The Right to Social Security’, UN doc. E/C.12/GC/19, 4 February 2008, §§62–65.

116 Committee on Economic, Social and Cultural Rights, General Comment No. 18, ‘The Right to Work’, UN doc. E/C.12/GC/18, 6 February 2006, §§32–36.

117 M. Langford and J.A. King, ‘The Committee on Economic, Social and Cultural Rights’, in M. Langford (ed.), *Social Rights Jurisprudence, op. cit.*, p. 503.

of minimum core obligations, and ‘other grounds’ of discrimination.¹¹⁸ Their quality also varies; more recent Comments have more detail and depth. Subject to these disclaimers, at the very least General Comments provide a point of departure, a basic interpretative ‘toolkit’ for examining the merits of communications.

Concluding Observations on state party reports may also assist the Committee, though (even more than General Comments) the extent to which they can do so varies greatly.¹¹⁹ An analysis of the evolution of Concluding Observations reveals that, while many are general in nature, some make formal declarations of compliance or non-compliance¹²⁰ and can shed light on what state actions or omissions might qualify as violations (even if they do not speak explicitly in those terms). Finally, in some Statements the Committee has clarified and confirmed its position on issues, or elucidated the meaning of Covenant provisions.¹²¹ While not all Statements contain relevant interpretative tools, because they vary greatly in scope and subject matter, they should therefore be borne in mind. One particularly useful Statement, discussed in more detail below, interprets the obligation to take steps to the maximum of available resources.¹²² Other potentially useful Statements include those on the corporate sector and economic, social, and cultural rights;¹²³ on the right to sanitation;¹²⁴ and on human rights and intellectual property.¹²⁵

The work of Special Procedures also offers guidance on the content of specific rights, notably through their contextual analysis of particular violations. Their country visits are often informed by inputs from victims, local organizations and national experts, and provide contextual detail that more generalized periodic reviews lack.¹²⁶

118 U. Khaliq and R. Churchill, ‘The Protection of Economic and Social Rights’, *op. cit.*, p. 207.

119 W. Kälin, ‘Examination of state reports’, in Keller and Ulfstein (ed.), *UN Human Rights Treaty Bodies*, *op. cit.*, pp. 62–64.

120 M. Langford and J.A. King, ‘The Committee on Economic, Social and Cultural Rights’, in M. Langford (ed.), *Social Rights Jurisprudence*, *op. cit.*, p. 503.

121 U. Khaliq and R. Churchill, ‘The Protection of Economic and Social Rights’, *op. cit.*, p. 208.

122 Committee on Economic, Social and Cultural Rights, ‘Statement - An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under An Optional Protocol To The Covenant’, UN doc. E/C.12/2007/1, 10 May 2007.

123 Committee on Economic, Social and Cultural Rights, ‘Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights’, UN doc. E/C.12/2011/1, 12 July 2011.

124 Committee on Economic, Social and Cultural Rights, ‘Statement by the Committee on Economic Social and Cultural Rights on the Right to Sanitation’, UN doc. E/C.12/2010/1, 19 November 2010.

125 Committee on Economic, Social and Cultural Rights, ‘Statement on Human Rights and Intellectual Property’, UN doc. E/C.12/2001/15, 14 December 2001.

126 See C. Golay, C. Mahon, I. Cismas, ‘The impact of the UN special procedures on the development and implementation of economic, social and cultural rights’, *The International Journal of Human Rights*, Vol. 15, No. 2 (2011), pp. 299–318.

Procedural aspects

Article 8 of the Optional Protocol sets out the procedure for assessing the merits of communications. This comprehensive Article contains unique features as well as elements that are familiar from other communication procedures.

The first three paragraphs state that an assessment will occur in closed meeting and will be based on ‘all documentation submitted to it’, provided that this documentation is submitted to the parties concerned. This includes both the statements and explanations submitted by the parties, and documentation from other sources. Analogous provisions are found in the rules of procedure of other treaty bodies, allowing Committees to seek additional information from other bodies or specialized agencies in the UN system. Unusually, however, the ICESCR Optional Protocol extends the Committee’s reach beyond the UN system. It may consult documentation from ‘other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned’.¹²⁷ When addressing economic, social and cultural rights, where the rights and interests of marginalized groups (and others) may be engaged but may not be represented by either party, it is vital to consider diverse sources of information and expertise.

Article 8(4): an explicit standard of review

The most innovative aspect of the ICESCR Optional Protocol appears in the fourth paragraph of Article 8. Unlike the communication procedures of other UN human rights treaties, this paragraph provides an explicit standard of review. To determine whether or not an economic, social, or cultural right has been violated, the Committee must consider whether measures the state has taken in accordance with Part II of the Covenant are ‘reasonable’, keeping in mind that states parties may adopt a range of possible policy measures to implement rights the Covenant protects.¹²⁸

The inclusion of an *explicit* ‘reasonableness test’ is unique. Other UN human rights treaty bodies apply similar criteria to determine whether a protected right has been violated (in other words, whether a state has failed to comply with its international obligations) but they are free to choose their criteria. The only other explicit reference to ‘reasonableness’ is found in Article 2 of the Convention on the Rights of Persons with Disabilities, which states that failure to adopt

¹²⁷ Optional Protocol to the ICESCR, Article 8(2).

¹²⁸ *Ibid.*, Article 8(4).

‘reasonable accommodation’ measures amounts to discrimination, in violation of the Convention.¹²⁹

It has been noted that the notion of reasonableness is implicit in several provisions of the ICESCR, for example in the phrase ‘appropriate means’, which appears in Article 2(1) of the Covenant.¹³⁰ The text of Article 8(4) sparked intense debate in the Working Group, and agreement on the final wording was reached only after prolonged negotiation. The discussion was mainly influenced by the longstanding argument over the justiciability of economic, social, and cultural rights. Several of the states that participated in the negotiations did not welcome the prospect of being scrutinized by the Committee and criticized for failure to comply with positive obligations under the Covenant. A specific objection was that the Committee might intrude ‘inappropriately’ in matters of national policy, including budgetary questions and resource allocation decisions. This position was expressed with particular force by states whose judicial institutions have consistently deferred to the state on cases that engage economic, social, and cultural rights.¹³¹

The specific standard of review emerged from the efforts of these states to restrict the Committee’s room for manoeuvre, notably when it examined cases that focused on positive obligations. It was suggested, for example, that the provision should explicitly grant states a ‘broad margin of appreciation’¹³² with respect to compliance with obligations under Article 2(1) of the Covenant. An attempt was made to raise the threshold even higher by introducing an ‘unreasonableness’ standard.¹³³ Had they been accepted, both proposals would have made it more difficult to challenge violations of economic, social and cultural rights through the Optional Protocol, setting back the progress that had been made towards recognising the justiciability of these rights. Given that the Optional Protocol was designed to fill a large gap in the international human rights system by introducing a quasi-judicial mechanism in the sphere of economic, social, and cultural rights, introducing provisions that would allow the Committee simply to defer to a state

129 B. Porter, ‘The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins’, *Nordic Journal of Human Rights*, Vol. 27 (2009), p. 46.

130 C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 81.

131 See the detailed discussion in B. Giffey, ‘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.

132 See the report of the third session of the Working Group, UN doc. E/CN.4/2006/47, 14 March 2006, §92.

133 See B. Porter, ‘The Reasonableness of Article 8(4)–Adjudicating Claims from the Margins’, *op.cit.*, p. 40.

party's opinion that it had complied with its obligations under Article 2(1) of the Covenant would have frustrated the instrument's core purpose.¹³⁴

The compromise that ultimately informed the reasonableness standard struck a delicate balance. The Protocol recognized that states are primarily competent to choose how they comply with Covenant obligations, but firmly confirmed that states' conduct is subject to scrutiny by the Committee.¹³⁵ Indeed, reasonableness review has been described as imposing a limit on government discretion while recognizing that 'the breadth of that limit determines the extent to which a supervisory body can examine and prescribe the measures adopted by policymakers to implement their legal obligations'.¹³⁶

Reasonableness review as a standard in national adjudication

In practical terms, the Committee may draw on various sources of jurisprudence when it determines whether measures that governments take to meet their Covenant obligations are reasonable. South African case law is particularly relevant, because South Africa's Constitutional Court and numerous judgments of its provincial high courts have explored the reasonable character of measures taken by the state to respect, protect, and fulfil the rights to health, housing, water, education, and food.¹³⁷ Although South Africa's judicial reasonableness assessments have also been criticized, several commentators have reviewed them positively. One has defined the standard as a 'flexible and context-sensitive basis

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ B. Giffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *op. cit.*, p. 304.

¹³⁷ For South African jurisprudence, see: S. Liebenberg, 'Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review', in J. Squires, M. Langford, B. Thiele (ed.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Sydney: Australian Human Rights Centre, 2005, pp. 73–88; D. Brand, 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale', in F. Coomans, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Maastricht Center for Human Rights, Intersentia, 2006, pp. 207–36; M. Pieterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience', *Human Rights Quarterly*, Vol. 26 (2004), pp. 882–905; M. Tveiten, 'Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience', in W. Barth Eide, U. Kracht (ed.), *Food and Human rights in Development: Legal and Institutional Dimensions and Selected Topics*, Intersentia, 2005, pp. 163–85; C. Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels*, *op. cit.*; and C. Golay, *Droit à l'alimentation et accès à la justice*, *op. cit.*

for evaluating socio-economic rights claims'.¹³⁸ Moreover, the wording of Article 8(4) of the ICESCR Protocol was largely drawn from the seminal *Grootboom* case, decided by South Africa's Constitutional Court. In a frequently cited passage from that case, Justice Jacobo explained that:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.¹³⁹

The judgment spelled out that a reasonableness assessment as described above must take account of available resources. This implies that measures by the authorities, and the speed at which rights are progressively realized, will be assessed in light of the resources that are available. It then listed several requirements of reasonableness that government programmes should meet. Programmes should:

- Be comprehensive, coherent and coordinated.
- Have appropriate financial and human resources.
- Be balanced and flexible and make appropriate provision for short, medium and long-term needs.
- Be reasonably conceived and implemented.¹⁴⁰

In addition, programmes or measures must address those who are in urgent need and prioritize the needs of the most vulnerable members of society.¹⁴¹ Finally, the *Grootboom* judgment affirmed that states have an overarching obligation to realize rights in a manner that is consistent with human dignity.¹⁴²

138 S. Liebenberg, 'Adjudicating social rights under a transformative constitution', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, Cambridge, 2009.

139 Constitutional Court of South Africa, *Grootboom and Others v. Oostenberg Municipality and Others*, (2000) 3 BCLR 277 (CC), §41.

140 S. Liebenberg, 'Adjudicating social rights under a transformative constitution', *op. cit.*, pp. 84–85.

141 See discussion by B. Giffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *op. cit.*, p. 312.

142 B. Porter, 'Reasonableness in the Optional Protocol to the ICESCR', Working Paper, Social Rights Advocacy Centre, 2012. At: <http://socialrightscura.ca/eng/documents/Reasonableness%20in%20the%20OP-ICESCR.pdf>, p. 21. For publication in R. Brown, M. Langford, B. Porter and J. Rossi (ed.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, Pretoria University Law Press, forthcoming.

In several later South African cases involving economic, social, and cultural rights (including *Khosa and Others v. Minister of Social Development*,¹⁴³ *Minister of Health v. Treatment Action Campaign*,¹⁴⁴ and *Mazibuko and Others v. City of Johannesburg*¹⁴⁵), the Constitutional Court further enriched its interpretation of the reasonableness standard. With respect to the design and implementation of measures, for example, it added transparency and participation criteria.¹⁴⁶ In light of the foregoing, it seems evident that the Committee should seek interpretative guidance in South Africa's jurisprudence; this said, some commentators recommend caution, because there are marked differences between the two standards of review.¹⁴⁷ Most notably, it has been suggested that the mention of 'all appropriate means' in Article 2(1) of the ICESCR will widen the scope of the Committee's reasonableness assessment, which in turn will reduce states' margin of discretion when they design and implement public policies.¹⁴⁸

The Committee's guidelines

The Committee has already begun to grapple with this issue and has given some interpretative instructions from both a substantive and procedural standpoint. In a statement to its thirty-eighth session, the Committee listed several criteria that it will apply when evaluating whether steps that states have taken to progressively achieve full implementation of rights contained in the ICESCR are reasonable.¹⁴⁹ These include:

- a. The extent to which the measures taken were deliberate, concrete, and targeted towards the fulfilment of economic, social, and cultural rights.
- b. Whether the state party exercised its discretion in a non-discriminatory and non-arbitrary manner.

143 Constitutional Court of South Africa, *Khosa and Others v. Minister of Social Development & Others* (2004), 6 BCLR 569 (CC).

144 Constitutional Court of South Africa, *Minister of Health v. Treatment Action Campaign* (2002), 5 SA 721 (CC).

145 Constitutional Court of South Africa, *Lindiwe Mazibuko and Others v. City of Johannesburg and Others* (2009), ZACC 28.

146 B. Giffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *op. cit.*, p. 312.

147 *Ibid.*

148 *Ibid.*, p. 315.

149 Committee on Economic, Social and Cultural Rights, 'Statement - An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under An Optional Protocol To The Covenant', UN doc. E/C.12/2007/1, 10 May 2007, §8.

- c. Whether the state party's decision (not) to allocate available resources was in accordance with international human rights standards.
- d. Where several policy options are available, whether the state party adopted the option that least restricts Covenant rights.
- e. The time-frame in which the steps were taken.
- f. Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.¹⁵⁰

The Committee will not operate in a vacuum when it interprets these criteria, because indications on what they imply in practice can again be detected in its General Comments and Concluding Observations.¹⁵¹ A few non-exhaustive examples can be cited. The wording of the first point reflects the text of General Comment No. 3, where the Committee clarified that measures taken by states parties should be 'deliberate', 'concrete', and 'targeted' as clearly as possible to meet the obligations recognized in the Covenant. The action required to satisfy the obligation to take steps is set out in Article 2(1) of the ICESCR which refers to 'all appropriate means, including particularly the adoption of legislative measures'.¹⁵² The Committee has further explained that, in many instances, legislation is 'highly desirable' and in some cases 'indispensable'.¹⁵³

In assessing the reasonable character of measures taken, the Committee may draw inspiration from its General Comments on specific rights, which include guidance on what may constitute deliberate, concrete, and targeted measures in the context of those rights. The Committee has outlined some criteria for such measures, while acknowledging that they will inevitably vary significantly from one state party to another. When it comes to allocating resources in accordance with human rights standards, some potentially useful indicators have been identified in the Committee's Concluding Observations.¹⁵⁴ One indicator compares the

¹⁵⁰ *Ibid.*

¹⁵¹ B. Porter, 'Reasonableness in the Optional Protocol to the ICESCR', *op. cit.*, pp. 24-29.

¹⁵² General Comment No. 3, 'The nature of States parties' obligations', UN doc. E/1991/23, 14 December 1990, §3.

¹⁵³ *Ibid.*

¹⁵⁴ B. Porter, 'Reasonableness in the Optional Protocol to the ICESCR', *op. cit.*, pp. 24-29. S. Joseph and A. McBeth (in *Research Handbook on International Human Rights Law*, Edward Elgar, Cheltenham, p. 53) cite the following Concluding Observations: CESCR, 'Concluding Observations: Philippines', UN doc. E/C.12/1995/7, 7 June 1995, §21; and CESCR, 'Concluding Observations: Senegal', UN doc. E/C.12/1/Add.62, 24 September 2001, §23.

percentage of national budget allocated to specific rights under the Covenant with other areas of expenditure; another compares the resources a state allocates to implement a Covenant right with the resources allocated for the same purpose by other states at the same level of development.¹⁵⁵

The principle that states must take into account the needs of the most vulnerable and marginalized members of society is reiterated in many of the Committee's General Comments.¹⁵⁶ For example, General Comment No. 3 makes it clear that, even when resource constraints are severe, vulnerable members of society must be protected by adoption 'of relatively low-cost targeted programmes'.¹⁵⁷ General Comment No. 12 on the right to food states that, 'even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for *vulnerable population groups and individuals*'.¹⁵⁸ In General Comment No. 14, to illustrate a violation of the right to health, the Committee cites insufficient expenditure or misallocation of public resources that results in the non-enjoyment of the right to health by individuals or groups, particularly those who are vulnerable or marginalized.¹⁵⁹ General Comment No. 20 encourages states, among other possible steps, to adopt temporary special measures to accelerate the achievement of equality.¹⁶⁰

The Committee's Statement, described above, which identifies criteria to assess reasonableness, also makes clear that principles of transparency and participation must inform reasonableness evaluations. The Committee has indicated that it will place 'great importance on transparent and participative decision-making processes at the national level'.¹⁶¹ Here too, the role of transparency and

¹⁵⁵ S. Joseph and A. McBeth, *Research Handbook on International Human Rights Law*, *op. cit.*, p. 53.

¹⁵⁶ See, specifically, General Comment No. 20, 'Non-discrimination in economic, social and cultural rights', UN doc. E/C.12/GC/20, 2 July 2009.

¹⁵⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 3, 'The nature of States parties obligations', UN doc. E/1991/23, 14 December 1990, §12.

¹⁵⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 12, 'The Right to Adequate Food', UN doc. E/C.12/1999/5, 12 May 1999, §28. Emphasis added.

¹⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14, 'The Right to the Highest Attainable Standard of Health', UN doc. E/C.12/2000/4, 11 August 2000, §§52, 40.

¹⁶⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 20, 'Non-discrimination in economic, social and cultural rights', UN doc. E/C.12/GC/20, 2 July 2009, §§38, 9.

¹⁶¹ Committee on Economic, Social and Cultural Rights, 'Statement - An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under An Optional Protocol To The Covenant', UN doc. E/C.12/2007/1, 10 May 2007, §11.

participation in decision-making processes has been described in General Comments on specific rights (such as the rights to health and water).¹⁶²

Clearly, the reasonableness standard will not in every case provide what is needed to assess the merits of a communication. Depending on how the Committee develops it, in some instances assessment based on reasonableness may not be appropriate. The Committee might decide this is so, for example, in cases where a state has violated its immediate obligations, by failing to comply with minimum core obligations, enacting discriminatory measures, or where there has been a ‘failure to take steps’.¹⁶³ Such actions or omissions constitute *prima facie* violations of the right in question and reasonableness considerations will not be pertinent. Alternatively, some commentators argue that granting immediate entitlements, remedies with respect to core entitlements, and non-discrimination protections, should be recognized as components of a reasonable policy framework, which must also include plans and timelines for implementing further elements of rights over time. It is to be expected that the jurisprudence of the Committee on the Rights of Persons with Disabilities will provide some guidance here. For example, recommendations with respect to non-discrimination protections may include obligations to adopt reasonable positive measures to accommodate disability, some of which may require systemic changes over time.¹⁶⁴

The enactment of ‘deliberately retrogressive’ measures will also require strict scrutiny by the Committee. In its Statement on maximum available resources, cited above, the Committee set out a number of parameters for assessing retrogressive measures. They include:

- a. The country’s level of development.
- b. The severity of the alleged breach, in particular whether the situation concerned enjoyment of the minimum core content of the Covenant.
- c. The country’s current economic situation, in particular whether the country was undergoing a period of economic recession.
- d. The existence of other serious claims on the state party’s limited resources, as a result, for example, of a recent natural disaster or internal or international armed conflict.

¹⁶² Committee on Economic, Social and Cultural Rights, General Comment No. 4, ‘The Right to Adequate Housing’, *op. cit.*, §12.

¹⁶³ C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 83.

¹⁶⁴ B. Porter, ‘Reasonableness in the Optional Protocol to the ICESCR’, *op. cit.*, p. 30.

- e. Whether the state party had sought to identify low-cost options.
- f. Whether the state party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.¹⁶⁵

Certain General Comments, such as the one on the right to social security, offer frameworks for assessing retrogressive measures that are tailored for the specific right.¹⁶⁶ Moreover, it should be borne in mind that, with respect to certain rights in the ICESCR, the Committee's evaluation must take specific criteria into account.¹⁶⁷ Taking the right to health as an illustration, Article 12(2) of the ICESCR specifies several steps that states parties should take to achieve its full realization, including 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'.¹⁶⁸

In conclusion, notwithstanding the introduction of a reasonableness review, and allowing for the fact that states are entitled to choose their preferred policy approach, it remains clear that the Committee retains final authority to evaluate state action or inaction and identify violations of economic, social, and cultural rights when they arise. It is, therefore, equally clear that the Committee will have to articulate and give content to its interpretations of the reasonableness standard in specific cases, bearing in mind that these must be consistent with the objective

165 Committee on Economic, Social and Cultural Rights, 'Statement by the 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', UN doc. E/C.12/2007/1, 10 May 2007, §10.

166 Committee on Economic, Social and Cultural Rights, General Comment No. 19, 'The right to social security', *op. cit.*, Paragraph 42 states that, when reviewing retrogressive measures which interfere with the right to social security, it 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 national level.

167 See C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 84.

168 ICESCR, Article 12(2).

of the Optional Protocol and with the rights enshrined in the Covenant.¹⁶⁹ One implication of this is that an overly restrictive or deferential approach would undermine the underlying objective of the Protocol, which is to provide specific avenues of redress for violations of economic, social, and cultural rights.

Remedies

In the same manner as other UN treaty bodies, at the end of the procedure the Committee will communicate its views and recommendations to the government that is accused of having violated the rights invoked in the communication.¹⁷⁰ The fact that it is not able to make legally binding judgments means that, like the other treaty bodies, the Committee has the status of a quasi-judicial body.¹⁷¹

With respect to its recommendations, the Committee on Economic, Social and Cultural Rights has identified four main approaches:

- a. It may recommend remedial action, such as compensation to the victim(s).
- b. It may ask the state party to remedy the circumstances that led to the violation(s) in question. In doing so, the Committee may suggest goals and parameters to assist the state party to identify appropriate measures. These might include: suggesting overall priorities to ensure that resource allocation conforms to the state party's obligations under the Covenant; provision for disadvantaged and marginalized individuals and groups; immediate protection against grave threats to the enjoyment of economic, social and cultural rights; steps to ensure non-discrimination and the participation of affected groups in the design and implementation of remedial strategies; and effective measures to ensure access to justice and effective domestic remedies.
- c. It may suggest, on a case-by-case basis, a range of measures to assist the state party to implement its recommendations, giving particular emphasis to low-cost measures. The state party would nonetheless retain the possibility of adopting its own alternative measures.

169 A number of commentators have made this point, including B. Giffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *op. cit.*, p. 304.

170 Optional Protocol to the ICESCR, Article 9(1); Optional Protocol to the ICCPR, Article 5, §4; CERD, Article 14(7)(b).

171 See W. Vandenhoe, *The Procedures Before the UN Human Rights Bodies: Divergence or Convergence?*, Intersentia, Antwerp/Oxford, 2004, pp. 193–293.

- d. It may recommend a follow-up mechanism to ensure the state party continues to be accountable. For example, it might require the state party to explain in its next periodic report the steps it has taken to redress the violation.¹⁷²

It has been pointed out that the decision to insert reasonableness as a standard of review, coupled with the fact that states may adopt a variety of policy measures to implement Covenant obligations under Article 2(1), may influence the remedies that are appropriate. For example, the Committee may be more inclined to recommend a process for achieving compliance, rather than a specific action or solution.¹⁷³

Because the Committee's recommendations are not legally binding, it can be asked what happens after its views and proposed remedies are delivered. Are recommendations complied with? Are decisions implemented? Speaking of national courts, one author has remarked that '[f]or progressive social rights judgments to have a social impact, they must be authoritative, in the sense that they are accepted, *complied* with and implemented through legislative and executive/administrative action, and translated into *systemic change* through social policy and political practice'.¹⁷⁴ Similar considerations apply to views and recommendations issued under the Optional Protocol; ensuring effective implementation will certainly be a challenging task for the Committee. In this regard, the effectiveness of the Optional Protocol will in part depend on whether a meaningful, constructive dialogue can be established between the Committee and states parties.¹⁷⁵ Follow-up procedures to monitor the implementation of recommendations will play a significant role.

With respect to follow-up, the state party concerned must submit a written response within six months on the measures it will take to give effect to the Committee's recommendations.¹⁷⁶ The Committee can also request the state party to submit information in its subsequent periodic report on any measures it has taken to respond to the Committee's views or recommendations.¹⁷⁷ By

¹⁷² 'Statement by the 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', UN. doc. E/C.12/2007/1, 10 May 2007, §13.

¹⁷³ See B. Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins', *op. cit.*, p. 50.

¹⁷⁴ S. Gloppen, *Public interest litigation, Social Rights and Social policy*, Working Paper produced for the World Bank conference 'New Frontiers of Social Policy', Arusha, 12-15 December 2005. Emphasis added.

¹⁷⁵ B. Giffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *op. cit.*, p. 327.

¹⁷⁶ Optional Protocol to the ICESCR, Article 9(2).

¹⁷⁷ Optional Protocol to the ICESCR, Article 9(3).

these means, the Committee can monitor the implementation of its decisions. Like the Optional Protocol to the Convention on the Elimination of Discrimination against Women, the text of the Optional Protocol to the ICESCR envisages a communication procedure that *explicitly* includes a follow-up process, even though its content reflects the well-established practice of other treaty bodies, which routinely incorporate similar processes in their rules of procedure. Under the ICESCR Protocol's Rules of Procedure, in order to follow up, the Committee will designate a Rapporteur or Working Group to ascertain what measures states parties have taken to give effect to the Committee's views or recommendations, or the decisions that emerge from a friendly settlement.¹⁷⁸ The Rapporteur or Working Group 'may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary'.¹⁷⁹ In addition to written representations and meetings with representatives of the state party, the Rapporteur or Working Group can request further information from various sources, including the author of the communication, victims, and other relevant sources.¹⁸⁰

¹⁷⁸ Rules of Procedure to the Optional Protocol to the ICESCR, Rule 18(5).

¹⁷⁹ *Ibid.*, Rule 18(6).

¹⁸⁰ *Ibid.*, Rule 18(7).

International assistance and cooperation

Of all the international human rights treaties, the ICESCR recognizes most explicitly the key role that international assistance and cooperation play in implementing protected rights. When it becomes a party to the Covenant, a state 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’,¹⁸¹ regardless of jurisdictional or territorial limitations. This commitment stems from the undertaking by states parties to the UN Charter to take joint and separate action to achieve the purposes of the UN, which include universal and effective respect for human rights.¹⁸² In the words of the Committee on Economic, Social and Cultural Rights:

[I]n accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.¹⁸³

Article 14 of the ICESCR Optional Protocol addresses the obligation of international assistance and cooperation, though overall the Protocol accords only modest attention to this issue. It is not possible under the Protocol to file a communication against a third party state that has not fulfilled its obligations,

181 ICESCR, Article 2(1).

182 Article 55 of the 1945 Charter of the United Nations lists a number of economic, social, and cultural rights that the UN will promote with the aim of advancing effective and universal respect for human rights. Under Article 56, member states undertake to take ‘joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55’.

183 Committee on Economic, Social and Cultural Rights, General Comment No. 3, ‘The nature of States parties obligations’, *op. cit.*, §14. A similar obligation is found in the Convention on the Rights of the Child, which prompted the Committee on the Rights of the Child to state: ‘When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation’. General Comment No. 5, ‘General measures of implementation of the Convention on the Rights of the Child’, UN doc. CRC/GC/2003/5, 27 November 2003, §7.

because technically a communication may be filed only by a victim of a rights violation, and not with regard to a state failing in its assistance obligations. Under considerable pressure from developing countries, the Working Group on the Optional Protocol was nonetheless obliged to grapple indirectly with this problem. The final text of the Optional Protocol provides that the Committee may make recommendations to UN agencies and programmes—with the consent of the state party in question—so that these international institutions may support governments in their efforts to implement the Committee’s recommendations.¹⁸⁴ Where a government is found not to have taken reasonable measures to ensure access to adequate housing, for example, and defends itself on the grounds that it lacks resources, the Committee may recommend that relevant UN agencies and programmes assist that government to fulfil its obligations. This clearly recognizes the distinction between a state party’s *inability* to comply with its obligations under the Covenant and *unwillingness* to do so.¹⁸⁵ Moreover, it can be extremely useful to communicate the Committee’s views and recommendations to international bodies in cases where the state concerned has been unsuccessful in obtaining resources through international assistance and cooperation.¹⁸⁶

In the same spirit, the Optional Protocol provides for the creation of a trust fund to assist states parties to realize the rights protected by the ICESCR.¹⁸⁷ During the Working Group’s discussions, certain states objected to the creation of a trust fund, arguing that it would send a negative message and could become a ‘prize’ for states that had not complied with their obligations under the Covenant.¹⁸⁸ Other states objected that such a fund would merely replicate existing ones. To address these criticisms, a final paragraph was inserted in Article 14. This specifies that the Protocol’s provisions ‘are without prejudice to the obligations of each State party to fulfil its obligations under the Covenant’.¹⁸⁹

184 Optional Protocol to the ICESCR, Article 14(1), 14(2).

185 The General Comment that explicitly refers to this distinction is General Comment No. 12, ‘The Right to Adequate Food’, *op. cit.*, §17.

186 C. Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *op. cit.*, p. 104.

187 Optional Protocol to the ICESCR, Article 14(3).

188 See M. Langford, ‘Closing the Gap?’, *op. cit.*, p. 27.

189 Optional Protocol to the ICESCR, Article 14(4).

The inquiry procedure and the inter-state procedure

In addition to its communications procedure, the ICESCR Optional Protocol includes two other mechanisms: an inquiry procedure and an inter-state complaints procedure.

Inquiry procedure

Like the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights is entitled to carry out investigations if it receives reliable reports of grave or systematic violations of rights the Covenant protects.¹⁹⁰ However, it may not conduct an inquiry unless the state in question has made a declaration accepting the authority of the Committee to make inquiries.¹⁹¹ In this respect, the ICESCR Optional Protocol differs markedly from the Optional Protocol to the Convention on the Elimination of Discrimination against Women, according to which the Committee may receive information that could give rise to an inquiry unless the State Party in question has declared (when it ratified the Optional Protocol) that it does *not* recognize the competence of the Committee to undertake inquiries.¹⁹²

The procedure for establishing and carrying out an inquiry is set out in Article 11 of the Optional Protocol and in Rules 21–34 of the Rules of Procedure. In a preliminary phase, the Committee will determine whether the information received contains reliable information indicating that ‘grave’ or ‘systematic’ violations have occurred. If it is satisfied on this count, it will invite the state party to submit observations on that information within a set time.¹⁹³ Taking into account the

190 Optional Protocol to the ICESCR, Article 11; Optional Protocol to CEDAW, Article 8; W. Vandenhoele, *The Procedures Before the UN Human Rights Bodies: Divergence or Convergence?*, Intersentia, Antwerp/Oxford, 2004, pp. 303–04. The 1984 Convention against Torture also contains a provision on inquiries. Under Article 20 of the Convention, the Committee against Torture is empowered to carry out a confidential inquiry if it receives reliable information that appears to it to contain well-founded indications that torture is being systematically practiced in a state party.

191 Optional Protocol to the ICESCR, Article 11(1).

192 Optional Protocol to the CEDAW, Article 10(1).

193 Rules of Procedure to the Optional Protocol to the ICESCR, Rule 26.

state's observations and 'other reliable information', the Committee may then decide to appoint one or more of its members to conduct an inquiry. The Rules of Procedure give the Committee flexibility in choosing its methods of inquiry, although it is specified that inquiries must be conducted confidentially. Country visits can be organized, although visits may only take place with the consent of the state party. They may include hearings to enable the Committee to determine facts or issues relevant to the inquiry. It is specified in the Rules of Procedure that the Committee will 'request that the State party to take all appropriate steps to 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 connection with an inquiry'.¹⁹⁴ When the inquiry is concluded, the Committee will transmit its findings, comments, and recommendations to the state party, which is required to respond to them within six months. At the end of this period, the Committee may make further requests for information and may invite the state to detail the measures it has taken to respond to the Committee's findings in the context of the reporting procedure.

Protection measures are also envisaged in the inquiry procedure when the Committee receives reliable information that a state party has not complied with its obligation, under Article 13 of the Optional Protocol, to take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation. In this regard, the Committee may request the state to provide a written explanation or statement clarifying the facts and describing any action the state has taken to fulfil its obligation under Article 13. Thereafter, the Committee 'may request the State party to adopt and take urgently all appropriate measures to stop the breach reported'.¹⁹⁵

The inquiry procedures described above supplement the communications procedure, in that they enable the Committee to address issues that fall outside the scope of communications. Moreover, the formalities for submitting information for the purpose of requesting an inquiry are far less stringent than those that apply to a communication. For example, it is not necessary to list identifiable victims, to submit a formal communication, or to exhaust domestic remedies.

The Committee will need to clarify its interpretation of 'grave and systematic' violations. With reference to the Convention on the Elimination of Discrimination against Women procedure, it has been suggested that separating the two criteria ('grave' or 'systematic') implies that even a single but egregious act may be

¹⁹⁴ *Ibid.*, Rule 31(4).

¹⁹⁵ *Ibid.*, Rule 35.

deemed sufficient to activate an inquiry.¹⁹⁶ What constitutes a ‘grave’ violation may depend on the context under scrutiny, although the Committee can draw upon additional criteria to make a determination, including the nature of the rights that are breached, the impact on the victims, whether victims experienced conditions of particular vulnerability or marginalization, and the role or behaviour of the state.¹⁹⁷ With respect to the term ‘systematic’, the Committee against Torture has provided guidance for determining when torture should be described as systematic, and this may provide useful criteria.¹⁹⁸

Inter-state procedure

The Optional Protocol to the ICESCR, like the ICCPR and the 1965 Convention on the Elimination of All Forms of Racial Discrimination, includes an inter-state communications procedure that permits a state to initiate a procedure against another state party that it considers to be in breach of its obligations under the ICESCR. The Convention on the Elimination of Discrimination against Women and the 2006 Convention on the Rights of Persons with Disabilities, and their Optional Protocols, do not include inter-state procedures. The European, Inter-American, and African regional human rights systems all contain such procedures.¹⁹⁹

Article 10 of the Optional Protocol to the ICESCR states that this procedure may be initiated only if both states have ‘opted-in’, or declared that they accept the authority of the Committee to hear a communication of this nature.²⁰⁰ The opt-in requirement may be problematic to the extent that it deters states from accepting

196 A. Bayefsky, *How to Complain to the UN Human Rights Treaty System*, *op. cit.*, p. 123.

197 For an example of what the CEDAW inquiry procedure considered a grave violation, see Committee on the Elimination of Discrimination against Women, ‘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’, UN doc. CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

198 See the Report of the Committee Against Torture, 48th Session, UN doc. A/48/44/Add.1, 15 November 1993. Paragraph 29 reads: ‘The Committee considers that torture 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.’ Subsequent reports have adopted analogous definitions.

199 ECHR, Article 33; ACHR, Article 45; 1981 African Charter on Human and Peoples’ Rights, Article 47.

200 Optional Protocol to the ICESCR, Article 10; ICCPR, Articles 41, 42; CERD, Articles 11-13.

the competence of the Committee.²⁰¹ The inter-state procedures of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1950 European Convention on Human Rights, and the 1981 African Charter on Human and Peoples' Rights do not require opting-in.

The procedure is set out in Article 10 of the Protocol and in Rules 36–46 of the Protocol's Rules of Procedure. If a state party to the Protocol considers that another state party is not fulfilling its obligations under the Covenant, it may bring the matter to the attention of that state in writing and inform the Committee. Within three months, the receiving state must provide an explanation or clarification, which should include references to 'domestic procedures and remedies taken, pending or available in the matter'.²⁰² If the matter is not settled within six months of the initial communication, it may be referred to the Committee and communicated to the other state. It is important to note that the Committee will declare the complaint admissible only if it is satisfied that all available domestic remedies have been exhausted. A friendly settlement will be encouraged (as in the individual communications procedure). When it examines the communication, the Committee will hold closed meetings, may request additional information, and can receive oral and written submissions from both states. At the conclusion of the procedure, the Committee will submit a final report. If the states parties reach agreement, the report will summarize the facts and the solution. If no solution is forthcoming, the report will set out the facts, include written submissions and records of oral submissions made by the state parties, and note any views and recommendations issued by the Committee.

While this mechanism creates a potentially interesting space for developing the oversight functions of treaty bodies, at the time of writing no inter-state communication had been filed before a treaty body. For the moment, only the European inter-state mechanism has been used several times; complaints in Europe have led to judgments by the European Court of Human Rights.²⁰³ In one instance, an inter-state complaint was brought before the International Court of Justice based on a complaint of a violation of the Convention on the Elimination of All Forms of Racial Discrimination.²⁰⁴

²⁰¹ See M. Langford, 'Closing the Gap?', *op. cit.*, p. 60.

²⁰² Optional Protocol to the ICESCR, Article 10(1)(a).

²⁰³ See, for example, ECtHR, *Ireland v. United Kingdom*, Judgment (App. No. 5310/71), 18 January 1978; and *Cyprus v. Turkey*, Judgment (App. No. 25781/94), 10 May 2001.

²⁰⁴ International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment, 1 April 2011.

Conclusion

The adoption and entry into force of the Optional Protocol to the ICESCR is a major step forward in the international protection of human rights. For the first time since the Universal Declaration of Human Rights was adopted in 1948, it can be said that all human rights can be treated ‘in a fair and equal manner, on the same footing’ in the international human rights system.²⁰⁵ This In-Brief has suggested that the Protocol’s adoption in 2008 and entry into force in 2013 marked the beginning of a process that can give victims of economic, social, and cultural rights violations a voice, and make states more responsive and accountable with respect to their obligations under the ICESCR.

In coming years, the Committee on Economic, Social and Cultural Rights will develop its jurisprudence, interpretative approaches and recommendations for remedy. Though new and challenging tasks await the Committee as it begins to exercise its adjudicative functions, it will not operate in a vacuum. The In-Brief has shown that other UN treaty bodies and regional human rights bodies have valuable experience to share, for example with regard to admissibility criteria. When reviewing the merits of communications, the Committee can also draw on the growing jurisprudence produced by national and regional systems on economic, social, and cultural rights. Finally, the Committee can apply the interpretive tools and guidelines that it has itself developed, primarily in General Comments and Concluding Observations.

To ensure the Optional Protocol’s success, it is essential that governments continue to ratify it, enabling more victims of violations of economic, social and cultural rights to access justice and obtain redress. It is also vital that governments increasingly recognize the authority of the Committee to conduct inquiries and hear inter-state communications. Now that the Protocol is in force, finally, the role of civil society organizations will be crucial, in assisting victims to invoke their rights at local and national levels, and bring complaints to the Committee when domestic procedures are not effective. NGOs can assist victims to participate fully in the Committee’s deliberations, and can play a key role in ensuring that its recommendations are implemented.

²⁰⁵ Vienna Declaration and Programme of Action, Part I, §5, UN doc. A/Conf.157/23, 12 July 1993.

Annex. The text of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

The General Assembly adopted resolution A/RES/63/117, on 10 December 2008

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

The General Assembly,

Taking note of the adoption by the Human Rights Council, by its resolution 8/2 of 18 June 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

1. *Adopts* the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the text of which is annexed to the present resolution;
2. *Recommends* that the Optional Protocol be opened for signature at a signing ceremony to be held in 2009, and requests the Secretary-General and the United Nations High Commissioner for Human Rights to provide the necessary assistance.

Annex

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 Rights¹ 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 Rights² 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.

¹ Resolution 217 A (III).

² Resolution 2200 A (XXI), annex.

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 the present article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Communications under the present 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 the present article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not settled to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of the present paragraph the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Covenant;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, with all due expediency after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

(i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue

between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

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

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

Article 11

Inquiry procedure

1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present 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 of the present article, 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 of the present Protocol.

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 the present 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 the present 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.

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