CHAPTER 1 INTRODUCTION

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1 A New Mechanism

On 10 December 2008, the United Nations (UN) General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[1] This new treaty mechanism permits individuals or groups of individuals to make complaints to the UN Committee on Economic, Social and Cultural Rights (CESCR or Committee), if they have exhausted domestic remedies and believe a member State has failed to observe its obligations under the Covenant. It also provides for an optional inquiries procedure in cases of grave and systematic violations of Covenant rights. In 2009, the Protocol was opened for signature and ratification and was immediately signed by thirty States. The Protocol came into force on 5 May 2013 and the number of ratifications is steadily growing.[2] As at 1 December 2016, 22 States had ratified the Protocol.

The OP-ICESCR is the result of years of campaigning and advocating by civil society organisations, human rights advocates, stakeholders and supportive States, demanding that economic, social and cultural (ESC) rights be recognised as equal in status to civil and political rights. The separation of ESC rights from civil and political rights, codified in a sister covenant, the International Covenant on Civil and Political Rights (ICCPR),[3] helped institute a historical differentiation between the two sets

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

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

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

of rights. When the ICCPR was adopted in 1966, an optional complaints procedure for alleged violations of civil and political rights was introduced to accompany it. However, the ICESCR, which was introduced and came into force at the same time as the ICCPR in 1976, had no parallel complaints procedure.

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

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

The understanding of civil and political rights has also evolved in recent years and enhanced the foundation for a more unified approach to

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

Rigid distinctions with respect to justiciability, or the types of remedies that are required by the two categories of rights, have increasingly been shown to be impracticable and conceptually flawed.[5] As to justiciability, the prevailing 'modern' or 'constitutional' approach is suspicious of the formalist tradition that permits declarations of *non liquet*; spaces where no law is declared applicable.[6] This approach acknowledges that in some cases that there may be uncertainty over whether legal standards are identifiable and discoverable or whether it is prudential to adjudicate in circumstances where an adjudicator's institutional competence or democratic legitimacy may be limited, but contends that such issues should be raised only at the merits phase. As the US Supreme Court notably stated in 1962, if courts possess jurisdiction over a matter, and an applicant presents a case that is not 'absolutely devoid of merit', they are compelled to conduct a 'discriminating inquiry into the precise facts and posture of the particular case' and refrain from seeking to resolve it through 'semantic cataloguing'.[7] And, already in 1978, the Supreme Court of Washington comprehensively dismissed a series of standard justiciability complaints concerning the right to education in a State constitution.[8] Similar reasoning can be found elsewhere, with the South African court making the point most pithily:

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

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

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

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

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

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

With an ever-increasing number of countries providing constitutional protection of ESC rights[10] and regional human rights monitoring and enforcement systems recognising them as judicially enforceable,[11] it was no longer tenable for the international human rights system to exclude these rights from adjudication and remedy through a complaints procedure.

During the initial negotiations in the UN Human Rights Council (2004-2006), States not supporting the Optional Protocol argued that ESC rights ought not to be considered justiciable, and hence should not be subject to a complaints procedure. When a consensus emerged to proceed with drafting a complaints procedure, these States proposed various ways in which the OP-ICESCR could compromise the broader principles of access to justice for all victims of violations of ESC rights. Proposals were advanced to restrict complaints to certain components of rights such as non-discrimination or minimum core content; to give States the option of selecting which rights would be subject to the Protocol and which would be declared non-justiciable, and to grant States a 'wide margin of discretion' in relation to this category of rights that is not applied to human rights.

In the end, however, all of these proposals were rejected and a more principled and comprehensive approach won the day. The OP-ICESCR was drafted so as to remain essentially true to its purpose of providing access to justice for victims of violations of any and all ESC rights. In this respect, the adoption of the OP-ICESCR arguably represents the historic rejection of human rights divided, of the notion that claimants of ESC rights are not provided with a basic attribute of the concept of rights, that is, access to adjudication and remedies. As Louise Arbour, then UN High Commissioner on Human Rights, stated so eloquently, it represents 'human rights made whole'.[12]

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

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

11 Langford, *Social Rights Jurisåprudence,* ibid.

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

2 The Commentary

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

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

The commentary can make a unique and critical contribution to legal scholarship and practice in three ways.[14] First, the Protocol is new and its provisions have not been subject to sustained analysis. The jurisprudence under the Protocol will represent the first focused case-based jurisprudence on compliance with economic, social and cultural rights to emerge from the UN human rights system. Drawing on experience and relevant jurisprudence under other complaints procedures, both within the UN system and regional systems but recognising the unique nature and potential of the OP-ICESCR, this book aims to lay the foundations for cutting-edge, authoritative jurisprudence. Second, the commentary seeks to provide both standard legal analysis together with the study of the potential and consequences of different approaches and arguments for the

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

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

development of the Protocol in practice. This analysis can be used by claimants, advocates and the Committee to develop jurisprudence which provides effective remedies and tangible enforcement of ESC rights to victims. Third, the publication draws together scholars and practitioners with the relevant expertise on the different provisions of the Protocol and of their counterparts in other complaints procedures. It has benefited from exchange and discussion among these and other experts, brought together for an in-person meeting and subsequently engaging in ongoing dialogue and discussion. Each of the chapters in this book have highlighted and discussed what is most innovative about the OP-ICESCR as well as potential ambiguities and controversies the CESCR may contend with once they begin to receive complaints.

3 Overview of the Protocol and Commentary

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

3.1 Complaints Procedures

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

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

16 See discussion in third chapter of this commentary.

The admissibility criteria for the Protocol largely resemble those contained in other international human rights complaints procedures.[17] However, three drafting choices deserve comment. First, the Working Group removed an increasingly common exception to the exhaustion of domestic remedies rule, namely remedies that 'are unlikely to bring effective relief'.[18] Instead, the older test, as encapsulated in the ICCPR, is maintained. Complainants must have exhausted all available remedies unless they are unreasonably prolonged.[19] Nonetheless, a reasonable interpretation by the Committee, in line with jurisprudence of other UN Committees and regional bodies, should include those cases in which remedies do not exist or are not effective. Second, the Protocol in the UN system is seminal in its inclusion of a time limit: complaints must be submitted upon exhaustion of domestic remedies within one year. The author must otherwise demonstrate that it had not been possible to submit the communication by that deadline. Whereas this deadline is more generous than the six-month cut-off for the European Court of Human Rights and the Inter-American Commission of Human Rights, some claims could be excluded on this basis.[20] Third, Article 4 complements the mandatory admissibility criteria with a negatively-oriented discretion: The Committee can decline to consider a communication 'where it does not reveal that the author has suffered a clear disadvantage' unless the Committee 'considers that the communication raises a serious issue of general importance'. This 'pressure valve' was championed by a small

17 These are set out in Article 3 of the Protocol. Complaints will be inadmissible if all available domestic remedies have not been exhausted unless they are unreasonably prolonged; the complaint is not submitted within one year after the exhaustion of domestic remedies unless the author can demonstrate that it had not been possible to submit the communication within that time limit; the facts of the case occurred prior to the entry into force of the Protocol for the State Party and did not continue after that date; the same matter has already been examined or has been or is being examined under another procedure of international investigation or settlement; it is incompatible with the provisions of the Covenant; it is manifestly ill-founded, not sufficiently substantiated or exclusively based on mass media reports; it is anonymous or not in writing.

18 Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex II, U.N. GAOR, 61st Sess., Supp. No. 49, at 80, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008; Convention Against Torture (CAT), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

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

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

group of States and NGOs as a way for the Committee to control the possibility of a flood of frivolous or undeserving cases.

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

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

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

3.2 Substantive Assessment

Article 8 sets out how the Committee is required to assess complaints. Communications, as they are formally called, are to be examined in closed meetings in light of 'all documentation submitted'. The documentation alluded to is principally from the parties but the Committee can consult third parties, such UN agencies, to obtain further documentation, and the wording was crafted in such a way as to allow the Committee to accept

amicus curiae submissions. Such a submission was submitted in the first case decided by the Committee.[21]

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

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

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

21 *I.D.G. v. Spain* (CESCR) Communication No. 2/2014.
22 *Report of the Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fifth Session*, U.N. Doc. A/HRC/8/7, (6 May 2008), para. 170.

3.3 Remedies and Enforcement

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

With regard to final remedies, Article 9 empowers the Committee to make 'recommendations' to States in connections with its views. The State Party has six months to respond in writing including providing 'information on any action taken in the light of the views and recommendations'. Any further requests from the Committee are to be incorporated in the State reporting procedure. The Committee can also transmit its views or recommendations to various UN institutions, where there is a clear need for technical advice or assistance, particularly for developing countries. Accordingly, a UN trust fund is to be established 'with a view to providing expert and technical assistance to States Parties' although this is 'without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant'.

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

In the final Chapter, *Cali* examines the issues of enforcement that the CESCR and human rights advocates will confront upon issuance of

recommendations and potential strategies for increasing the likelihood of compliance. Effective implementation and enforcement of CESCR recommendations will be critical to ensuring the legitimacy of the mechanism.[23] Because remedies for ESC rights violations will often require structural changes, Cali suggests potential processes for the CESCR to ensure effective monitoring and enforcement of its decisions, such as a robust approach in exercising its follow up mechanism as well as flexibility in crafting the remedies themselves.

4 Opportunities and Challenges in Practice

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

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

23 See generally, M Langford, C. Rodríguez-Garavito, and J. Rossi, (eds.), *Making it Stick: The Enforcement of Economic and Social Rights Judgments* (Cambridge: Cambridge University Press, 2017).

ICESCR and it will be a central task of the CESCR to ensure that these cases provide important precedent for the realisation of ESC rights.

A value of the OP-ICESCR that has often been emphasised is that it will demonstrate the indivisibility of all human rights and the overlap and shared principles with civil and political rights. In fact, many ESC rights claims which proceed under the OP-ICESCR may be framed under domestic legal provisions as the right to life or to equality, based on more traditional jurisprudence from civil and political rights. Often the particular interests of women, people with disabilities, racialised groups or others facing discrimination are made more visible in an equality framework.[24] There may, therefore, be considerable value in jurisprudence emphasising interdependence, drawing on civil and political rights jurisprudence.

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

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

One consequence is that there are different views on the types of cases that should initially be presented. One approach is to avoid bringing forward claims in the early stages that require the Committee to take a

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

position on the degree of deference to be accorded States in resource allocation. The concern is that in such cases this may risk creating regressive jurisprudence from an excessively cautious Committee, anxious to avoid alarming States considering ratification. However, if cases are strategically chosen only in order to be reassuring to sceptical States, the historic significance of the OP-ICESCR and its potential impact may be lost, and the system risks losing credibility if it is overly dynamic and unpredictable. Positive decisions and remedies on substantive ESC rights claims addressing structural violations may be seen negatively only by States which would in any case not ratify the OP-ICESCR, whereas to other States, and to affected constituencies, such cases may represent the essential 'value added' of the OP-ICESCR. Successful cases in relation to broader policy and resource allocation may serve to provide a model of how useful and effective the adjudication of ESC rights can be.

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

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

Another issue is the requirement of the complainant being an individual victim. The Human Rights Committee has interpreted this requirement so as to preclude the possibility of the *actio popularis* or communications submitted by NGOs and limit the ability to challenge the

general effects of laws or policies.[25] Given that many of the most important systemic claims advanced under domestic legal systems are undertaken by groups, organisations and/or victims challenging the broad effect of policies or government inaction, complainants and the CESCR will need to tread a careful path on the way in which petitions are filed.[26]

Experience under other international complaints mechanisms suggests that questions of burden of proof and availability of information may also be critical to developing jurisprudence under OP-ICESCR. This will likely be of even greater importance under this Protocol, in relation to questions of resource allocation and the application of the reasonableness standard in 8(4).[27] There has been concern in domestic systems, such as that of South Africa, that the burden of showing that a policy is not reasonable has tended to fall on complainants that lack the resources and means to provide such evidence. Further, strategic case development and adjudication under other optional protocols have been seriously impeded by a lack of transparency and accountability. For instance, there is often no access to the complainants' documents or State replies and no oral hearings. Generally, in domestic and regional systems, affected constituencies are aware of important cases going forward, and commentators have the opportunity to write about issues as they work their way through courts. Jurisprudence under other optional protocols have lacked this kind of transparency and openness to broader input under Article 8(3), as well as separation of decisions on admissibility and merits, could be an important contribution of the OP-ICESCR to changing this pattern.

A developing area of international and domestic human rights law is the question of extra-territorial obligations. The ICESCR is based on State *jurisdiction* and not *territory*, thus permitting extra-territorial obligations where a State action or omission is traceable to their jurisdiction. Whereas jurisdiction has traditionally been understood as physical or effective control, the definition is expanding in cases before regional and international courts towards a more purposive and contextual assessment. Litigation under the OP-ICESCR may benefit from work being done in interventions before trade and investment tribunals, in exploring ways to ensure that the obligation to protect rights in international agreements is not neglected under the OP-ICESCR.[28]

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

26 See further the third chapter of this commentary.

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

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

Cognisant of the historic importance of the first cases and early jurisprudence that will emerge under the OP-ICESCR, these as well as the opportunities and challenges discussed in the chapters of this commentary will be important for both Committee members and civil society to remain vigilant of as claims and inquires begin to emerge under this instrument.