4 Individual Complaints within the Field of Economic, Social and Cultural Rights – Pro and Contra Arguments

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'the Optional Protocol represents a veritable milestone in the history of universal human rights, making a strong and unequivocal statement about the equal value and importance of all human rights and the need for strengthened legal protection of economic, social and cultural rights. It will move us closer to the unified vision of human rights of the Universal Declaration.'

United Nations High Commissioner for Human Rights, Navi Pillay, in address to the United Nations General Assembly, 10 December 2008

4.1 Introduction

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force on 5 May 2013. The previous laconic wording referred to a normal and accustomed as well as promising development within the field of human rights law. However, the special and unique enforcement and promotion mechanism of these rights in general deserve to be evolved in detail due to the uncertain and problematic ways of their justiciability. A popular, almost commonplace conjecture says that the second generation of human rights[1] cannot be enforced in the same way as those of the first generation, namely civil and political rights. This article will describe the circumstances of the entry into force of the Protocol, then survey the prospects and obstacles of the justiciability of socio-economic rights through the practice of the Committee on Economic, Social and Cultural Rights (hereinafter: Committee). It must hereby be clarified that economic, social and cultural rights as a corpus of human rights are equivalent to the debated term 'second generation of human rights' or 'second-generation human rights' including 'socio-economic

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1 On the generations of human rights, see, K. Vašak, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *UNESCO Courier*, Vol. 30, No. 11, 1977, pp. 316-325 and E. Engle, 'Universal Human Rights: A Generational History', *Annual Survey of International and Comparative Law*, Vol. 12, Issue 1, 2006, pp. 219-268.

rights'. These phrases will be used either as socio-economic rights or economic, social and cultural rights.

Following from its subject matter, the tone and approach of this study is both descriptive and critical, as it takes into account the inherent content of these rights, including elements considered to be adverse to the direct adjudication of economic, social and cultural rights. However, the article seeks to emphasize the research question on the hindrances of justiciability of such rights stemming from their financial character and the positive contribution on the side of the states. The research aims to review the comprehensive assessment on the pro- and contra-justiciability arguments by highlighting (and on the other hand, it is worth noting to avoid the empty and inexpressive predictions on the pending or future complaints) those factors and factual circumstances which can easily hinder the enforcement of the socio-economic rights. The entry into force of the Optional Protocol and subsequently the first pending three complaints (as of July 2015) may give a chance to conclude the first but not final observations on the justiciability of these rights in practice before the competent monitoring human rights body.

4.2 The History of the International Instrument in Question

The individual complaint mechanism was actually familiar to the international community before the 2013 Protocol as the protection system of the civil and political rights included the 1966 Optional Protocol to the International Covenant on Civil and Political Rights (entered into force in 1976).[2] However, while the justiciability of civil and political rights in comparison with economic, social and cultural rights is obvious and well articulated (due to the simple fact that ideally the former requires negative, restraint-based, laissez-faire obligation from states), the desire for an analogous system to protect the economic, social and cultural rights have been pending for decades. The Vienna Declaration and Programme of Action (adopted by the 1993 World Conference on Human Rights, 'encouraged the Commission on Human Rights to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights.'[3]

The first major milestone was the decision of the then newly established body, the Human Rights Council, to set up an Open-ended Working Group in 2006[4] to prepare the draft version of a treaty dealing with the complaint mechanism related to socio-economic rights. After a nearly two-year codification process, the Optional Protocol to the Interna-

2 Regarding the role of this method, see generally, A.R. Harrington, 'Don't Mind the Gap: The Rise of Individual Complaint Mechanisms within International Human Rights Treaties', *Duke Journal of Comparative & International Law*, Vol. 22, 2012, pp. 153-182.

3 See, Res. 8/2 of the Human Rights Council. A/HRC/RES/8/2, 18 June 2008.

4 See, Res. 1/3 of the Human Rights Council (Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights). A/HRC/RES/1/3, 29 June 2006.

tional Covenant on Economic, Social and Cultural Rights was adopted by the United Nations General Assembly during its 63rd plenary session on 10 December 2008. Resolution A/RES/63/117, which was fittingly passed on Human Rights Day, i.e. the 60th anniversary of the adoption of the Universal Declaration of Human Rights, opened for signature almost a year later on 24 September 2009[5] and entered into force on 5 May 2013 after being ratified by the tenth signatory Uruguay.[6]

In accordance with its Article 17, the Optional Protocol shall be open for signature by any state that has signed, ratified or acceded to the International Covenant on Economic, Social and Cultural Rights. As of 10 October 2014, 45 states have signed the Protocol and 20 states have ratified it.[7] Hungary (as a Contracting Party to the International Covenant) has neither ratified nor signed the Optional Protocol (as of October 2014).

The major achievement of the Optional Protocol has been a paradigm shift towards the acceptance and recognition of the enforcement of socio-economic rights through individual complaints. Before 5 May 2013, there had been significant skepticism about the possibility of applying complaints against the violation of socio-economic rights, these being political commitments and entitlements (entailing self-imposed and firm financial as well as institutional capacities of states) rather than negative and protective obligations of states towards the individual, upon which freedom rights are based. Since May 2013, it has been theoretically and practically possible for individuals to submit complaints against states for the breach of their rights granted by the International Covenant on Economic, Social and Cultural Rights (chiefly the 'substantive parts', i.e. Arts. 6-15). Thus, this major achievement is, in itself, a notable step towards the complaint mechanism of social, economic and cultural rights against states before international treaty-based bodies. This is the reason why the entry into force of the Protocol is hereby labelled as a paradigm shift. Furthermore, the introduction of such mechanism could give a huge impetus via its model-like procedure to the domestic justiciability and enforcement of the given rights.

The following chapters shall review the characteristics and enforceability of socio-economic rights, the likely effect of the individual complaint mechanism on such rights and the potential of this protection system, which is new yet not unprecedented: see the 1966 Optional Protocol to the International Covenant on Civil and Political Rights.

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5 On the striving towards the Protocol prior to 2009, cf., 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, 2010, pp. 144-178. and A. Vandenbogaerde & W. Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process', *Human Rights Law Review*, Vol. 10, No. 2, pp. 207-237.

6 See, Art. 18 of the Optional Protocol on the entry into force. The first ten ratifying states are the following: Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain and Uruguay. Afterwards, 10 states (Belgium, Cape Verde, Costa Rica, Italy, Finland, France, Gabon, Luxembourg, Montenegro and Niger) ratified it (until July 2015).

7 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

4.3 Economic, Social and Cultural Rights Enforceable by Judicial and Quasi-Judicial Means?

In order to evaluate the effect of the Optional Protocol, the characteristics and unique vagueness of the economic, social and cultural rights shall first be reviewed.[8] The weakness of the justiciability of such rights will be traced back to the inherent characteristics of socio-economic rights. After analyzing the nature of these rights, this chapter will deal with the factors supporting and impeding the enforcement of economic, social and cultural rights. The present article must hereby admit the statement of Donoho irrespective of the fact that since then (2006) the Optional Protocol entered into force with a small number of State Parties:

> [T]he enforcement remains the weakest component of the international human rights system. Designed around the implausible premise of voluntary state compliance, existing international institutions outside of Europe currently lack the capacity to meaningfully enforce human rights in a world characterized by conflict and diversity.[9]

4.3.1 The Nature of the Economic, Social and Cultural of Human Rights

In order to analyze the nature and character of socio-economic rights,[10] this in-depth survey will include i) a catalogue of these rights; ii) their particular aims and legal characters; iii) the positive contribution of states and iv) the relationship between socio-economic and civil and political human rights. The task can partly be fulfilled on the basis of the 1966 International Covenant on Economic, Social and Cultural Rights[11] and the numerous instruments linked to this system (such as the general comments adopted by the Committee on Economic, Social and Cultural Rights). However, the covenant is still silent about many crucial issues that are unavoidable if one is to give adequate answers to the emerging discrepancies concerning the entirety of such rights. Accurate knowledge of the nature of

8 From the early literature on such rights, cf., E.W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, Vol. 9, 1978, pp. 69-105. Later, a landmark publication on such rights: A. Eide & C. Krause & A. Rosas (Eds.), *Economic, Social and Cultural Rights*, Martinus Nijhoff Publications, Dordrecht, 2001, pp. 3-28.

9 Cf., D. Donoho, 'Human Rights Enforcement in the Twenty-First Century', *Georgia Journal of International and Comparative Law*, Vol. 35, No. 1, 2006, p. 52.

10 On these rights from the viewpoint of a novel volume of articles, see generally, E. Riedel & G. Giacca & C. Golay (Eds.), *Economic, Social, and Cultural Rights in International Law. Contemporary Issues and Challenges*, Oxford University Press, Oxford, 2014, p. 560.

11 Regarding the 1966 Covenant through the lenses of its almost half century functioning, cf., B. Saul & D. Kinley & J. Mowbray (Eds.), *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials*, Oxford University Press, Oxford, 2014, p. 1360.

these rights is of primary importance, since the assessment of individual complaints will be based upon the same argument as the assessment of the nature and protection of socio-economic rights.

A Catalogue of Economic, Social and Cultural Rights

As a starting point, a list of enforceable rights or rights that may form the basis of complaints shall be comprehensively enumerated. The catalogue of economic, social and cultural rights is utterly heterogeneous and the codified and hereinafter listed rights include other inherent, derived rights. (Concerning their wider content, the general comments of the Committee provide relevant instruments, thus this list is only meant to provide examples.)

- This study intends to persist and assume the exclusive list of socio-economic rights according to the 1966 'second' Covenant (which is based upon the similar list of rights set forth in the Universal Declaration of Human Rights)[12] due to the mere fact that this is the basis on which individual complaints shall be presented in the case of violations, their content verified and segmented by the Committee in official general comments. These rights are the following (such enumerated rights allow the 2008 Optional Protocol be applied and complaints be lodged):[13]
- right to work and its derivatives or satellite rights (Arts. 6 and 7);[14]
- right of trade unions (Art. 8);[15]
- right of everyone to social security, including social insurance (Art. 9);[16]
- right of everyone to an adequate standard of living for oneself and his/her family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Art. 11);[17]
- right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Art. 12);[18]

12 See, Arts. 22-28 of the Universal Declaration of Human Rights.

13 The present catalogue can be found in the Covenant; however, different, effective as well as more precised catalogues appear within the text of certain regional treaties, such as the *European Social Charter* (Arts. 1-19) and the *San Salvador Protocol to the American Convention on Human Rights* (Arts. 6-18).

14 See, *General Comment No. 18*: Art. 6 of the International Covenant on Economic, Social and Cultural Rights. E/C.12/GC/18, 6 February 2006.

15 However, trade union rights are considered to be civil and political rights.

16 See, *General Comment No. 19*: The right to social security. E/C.12/GC/19, 4 February 2008.

17 See, *General Comment No. 7*: The right to adequate housing (20 May 1997); *General Comment No. 12*: The right to adequate food. E/C.12/1999/5, 12 May 1999. On the justiciability of such derivative rights, see, M.J. Dennis & D.P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', *American Journal of International Law*, Vol. 98, No. 3, 2004, pp. 462-515.

18 See, *General Comment No. 5*: Persons with disabilities (1 January 1995); *General Comment No. 6*: The economic, social and cultural rights of older persons (7 October 1996); *General Comment No. 14*: The right to the highest attainable standard of health. E/C.12/2000/4, 11 August 2000; *General Comment No. 15*: The right to water. E/C.12/2002/11, 20 January 2003.

- right to education (Art. 13);[19]
- right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Art. 15).[20]

The majority of the above-mentioned rights is either abstract and vague or seem to be political objectives and demands in legal disguise (including the general comments aiming to unfold the meaning of such abstract goals). Thus, the threshold for accepting individual complaints shall be framed and limited, because it goes without further explanation that the unemployed cannot make complaints against their states referring to the alleged violation of the right to work (Art. 6). The exact meaning and scope of economic, social and cultural rights cannot, consequently, be translated into exact and specific rights of individuals and the obligations of the state as 'supplier and provider.' This obstacle is the main weakness of adjudication within the field under analysis.

The Legal Character of Such Rights – Goals of the State, Entitlements or Rights

The vague content of socio-economic rights causes the competent bodies (primarily the Committee) to reinterpret their legal basis and content time and again. The wording of these rights in the 1966 Covenant reminds us of purely political objectives, goals of states – desires of the supreme sovereign, as it were. Programme-designing and policy-standardizing phrasing methods are apparent in the articles on the protected rights. The character of State obligations within the field of socio-economic rights is invoked by Article 2 of the Covenant, as the State 'undertakes to take steps […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.' The unique legal character of such rights is primarily determined by two phases of the previous citation, namely the limit for the State 'to the maximum of its available resources' and the 'progressive realization' of the rights set forth in the Covenant.[21] This study intends to emphasize that three potential interpretation domains can be mentioned relating to this issue: i) firstly, which rights are only goals of the State (without the opportunity to be legally enforced or the violation

19 See, *General Comment No. 13*: The right to education. E/C.12/1999/10, 8 December 1999; *General Comment No. 11*: Plans of action for primary education. E/C.12/1999/4, 10 May 1999.

20 See, *General Comment No. 17*: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. E/C.12/GC/17, 12 January 2006; *General Comment No. 21*: Right of everyone to take part in cultural life. E/C.12/GC/21, 21 December 2009.

21 On the progressive realization in the light of monitoring requirements from the pre-Optional Protocol era, see, A.R. Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 18, No. 1, 1996, pp. 29-36.

redressed), ii) secondly, which are rather entitlements (as a benefaction afforded by the state) without the positive duty with a sanction to ensure them towards individuals; iii) thirdly which socio-economic rights are real rights, whose scope is unambiguous, with states obliged to fulfil them and whose breaches are compensated for. The latter would be the most desired rights in international human rights law.

The author is of the opinion that economic, social and cultural rights are predominantly (though not exclusively) a mixture of the three types. However, it must be stated that the Optional Protocol transformed an essentially two-tier system – aim and entitlement – into a three-tier system (aim-entitlement-right) by providing a real phase for justiciability and enforcement for individuals. Such programme-like rights are very heterogeneous; therefore specifications vary significantly from right to right. For instance, the right to work or education are rather firm goals of states, while the right of everyone to social security and adequate standard of living are essentially entitlement-based 'donations' of the sovereign.

Positive Financial Contribution – Obligation to Recognize and Progressively Implement

The role of states in guaranteeing such rights is interlinked with the preceding two paragraphs. Furthermore, in the 1960s,

> when the permanent economic development seemed to be eternal, there was a definite basis for step by step implementation. Since the late 1970s […] because of the effects of globalisation more and more questions have been raised about the ability of the state to secure social rights properly.[22]

Unlike the civil and political rights – that require a rather negative and self-restrained attitude from states –, social, economic and cultural rights cannot be guaranteed without positive, intense, mainly financial state intervention. This issue raises the three key questions of recognition/identification, progressive implementation and enforcement/fulfilment of such rights.[23] The Covenant and the Optional Protocol demand the respect and recognition of such rights, which are considered to be the simplest tasks by states but the rights respected and recognized at this phase turn out to be merely 'paper rights' for the individual. By ratification, the Contracting Parties identify the above-listed rights and then implement them into their legal system. However, the first step of recognition is a prerequisite of the further agenda in ordaining these rights in practice and it is considered to be the lowest level State obligation aiming to achieve immediate application and implementation within

22 See, G. Kardos, 'Universal Justification for Social Rights', *Miskolc Journal of International Law*, Vol. 6, No. 1, 2009, p. 21.

23 This clear distinction had firstly been elaborated by *Asbjørn Eide* in an official document. See, *The Right to Adequate Food as a Human Right*, Report prepared by Asbjørn Eide, Final Report, E/CN.4/Sub.2/1987/23, 7 July 1987.

its domestic political and legal system. The next two steps (progressive implementation and enforcement/fulfilment) are of crucial importance in showing the way to transforming the identified rights into enforceable state obligations. The methods and levels of state intervention are highly diversified, heterogeneous and uncertain.

In its General Comment No. 3 on The Nature of States Parties' Obligations,[24] the Committee recognized in 1990 that 'in many instances legislation is highly desirable and in some cases may even be indispensable.'[25] Moreover, the Committee has argued (Para. 4) that legislation is not sufficient: the adoption of administrative, economic, financial, educational and social measures, the establishment of action programs, the creation of appropriate bodies and the establishment of (judicial and quasi-judicial) procedures may equally be necessary.

Regarding the core elements of the financial-based 'all available resources' phrase, the General Comment No. 3, Para. 10 underlines the State obligation to demonstrate 'that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'

Undoubtedly, a similar abstract word usage shall be unfolded in detail, which was more or less pinpointed in two non-binding documents. The non-binding 1987 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter: Limburg Principles) laid down that the achievement of economic, social and cultural rights may be realized in a variety of political settings, and there is no single road to their full realization (Para. 6); however, States parties must at all times act in good faith to fulfil the obligations (Para. 7), and at the national level State Parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant, though legislative measures alone are not sufficient (Paras. 17-18). After 10 years, the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter: Maastricht Guidelines) goes beyond with its 'reasonable calculation' formula, when setting out that:

> the obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. […] The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.[26]

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24 See, *General Comment No. 3*: The nature of States parties' obligations (1 January 1991).

25 Moreover, in the fields such as 'health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in Arts. 6 to 9, legislation may also be an indispensable element for many purposes.' See, *General Comment No. 3*, Para. 3.

26 See, Maastricht Guidelines, Para. 7.

The vague terms of minimum core obligations[27] and universal minimum standards enhance the approximate meaning of these financial and positive obligations, as the violations of the Covenant occur when a state fails to satisfy what the Committee has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.' (Maastricht Guidelines, Paras. 8-9).[28]

In sum, an apt remark clearly shows the controversial role of the positive state contribution: 'if the second […] generations of rights are to be implemented, they require an interventionist government – exactly the type of government that first-generation rights sought to protect against, even avoid.'[29]

Are Economic, Social and Cultural Rights the Prerequisites of Civil and Political Rights?

Neither the prerequisite approach nor the clear separation theory prevails convincingly concerning the relationship of the civil-political and socio-economic rights. The common root, the Universal Declaration on Human Rights contains both under one, though not binding instrument and proposes a collective pool of rights without any hierarchy.

The citing of human needs as a precondition for civil and political rights (e.g. without the protection of an adequate standard of living, no one can enjoy the right of assembly or vote, etc.) seems to be trivial and goes beyond the limits of evaluating a ranking for human rights. The mother right is the right to human dignity and it is worth mentioning that the conditions of existential minimum of dignity derived from the economic, social and cultural rights.

The characteristics of human rights are based upon the history, state attitudes (both relevant and dominant) as well as the nature of obligation of such non-simultaneously established rights rather than on the importance of human rights. This interrelatedness is clearly shown by the 1968 Teheran Conference on Human Rights, where the well-known declaration had been put forward, as 'in our day political rights without social rights, justice under law without social justice, and political democracy without economic democracy no longer have any true meaning.'[30] Even more, at the end of the Cold War period (throughout which the recognition of civil-political and socio-economic rights had been deeply determined by the political affiliation of states in the West[31] and East), the 1993 World Conference on Human Rights held in Vienna reaffirmed the main notion on the

27 Cf., K. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *Yale Journal of International Law*, Vol. 33, 2008, pp. 126-164.

28 On these minimum core obligations, the General Comments adopted by the Committee on certain rights add valuable sources.

29 See, Engle, ibid., 264.

30 See, *The Final Act of the International Conference on Human Rights*, Teheran, 1968. UN Doc. A/Cont 32.

31 On the prolonged human rights agenda as well as the interlinking preferences invoked by the West, see generally, D.J. Whelan & J. Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight', *Human Rights Quarterly*, Vol. 29, No. 4, 2007, pp. 908-949.

connection between human rights that civil, political, economic, social and cultural rights 'are universal, indivisible, interdependent and closely interrelated.'[32]

Nowadays, even after the entry into force of the Optional Protocol, the prerequisite theory of socio-economic rights shall be left out of consideration due to the simple lack of any ranking within human rights law and the irrelevance of comparison. These rights are separately stated in core treaties, have equivalent but separate enforcement mechanisms at global, regional and national level; furthermore, they include different types of sources, aspects of human life, state obligations and sanctions with heterogeneous interests differing in each state. Undoubtedly, human rights overwhelmingly embrace state obligations in favour of the human being, and the essential needs and aims of the people does not require any misleading and misconstrued reduction and purposeless fragmentation within the domain of human rights. In summary, the legitimacy of existing international instruments of human rights cannot be undermined by reference to the uniqueness of enforcing socio-economic human rights; however, the effectiveness of complaint mechanisms and the obligations of states advancing such rights are the substantive issue to analyze.

4.3.2 Pro-Justiciability Arguments – Elements Strengthening the Enforcement of Economic, Social and Cultural Rights

This sub-chapter deals with those elements of individual complaint mechanisms that are considered to be in favour of the effective protection of economic, social and cultural rights.[33]

No one can deny that the entry into force of the Protocol is a milestone achievement by way of introducing a new instrument that allows the launch of claims and complaints by the individual against the state. One of the major criticisms has been the lack of such measures in contrast with the protections of the freedom rights. Since May 2013, the ultimate beneficiaries of such rights (namely individuals) can now take advantage of the same enforcement mechanism within the civil and political rights system. This landmark development gives the Committee on Economic, Social and Cultural Rights substantial

32 The idea of interconnectedness had already been accepted and introduced by the Art. 22 of the Universal Declaration of Human Rights, upon which '[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

33 However, a citation by Henkin must be emphasized and taken into consideration on the issue of the then lack of complaint procedure: 'absence of remedies may weaken the real enjoyment of rights but does not derogate them from their quality as rights.' Cf., L. Henkin, International Human Rights and Rights in the United States, in J.R. Pennock & J.W. Chapman (Eds.), *Human Rights (NOMOS XXIII) Yearbook of the American Society for Political and Legal Philosophy*, New York, University Press, 1981, p. 270.

competences to deliver recommendations and propose government responses to fulfil rights of the individual under the Covenant that have been violated.

The minimum core obligations and the inherent content of the certain rights had been set forth and specified within the text of the general comments, providing a benchmark and a non-binding but relevant interpretation of capital importance on the necessary threshold (beneath this minimum quality and quantity the protection of rights cannot be achieved), implicit meaning and state obligations of certain rights.[34]

On the meaning of the violations regarding socio-economic rights, the 1997 Maastricht Guidelines put down a clarification i) on the obligations to respect, protect and fulfil (Para. 6), ii) the obligations of conduct and of result (Para. 7), iii) the margin of discretion (Para. 8), iv) the minimum core obligations (Para. 9) and the v) availability of resources (Para. 10). These crucial but non-binding elements would strengthen to reveal the essence of these rights, upon which the enforcement by judicial or quasi-judicial ways can be achieved without hindrances.

The roots of the vulnerability and criticism of socio-economic rights and the individual complaint mechanism are similar, in that they are differing reactions to the same characteristics. This why it is so important to refine and clarify the content of socio-economic rights and to specify the implementation methods to be followed by states. The individual complaint mechanism is the ideal way of fulfilling this essential requirement serves as an incentive to induce the state to progressive implementation of its obligations.[35] Undoubtedly, the treaty-based bodies of the specific human rights instruments are the most eligible fora to unfold the exact meaning and enforcement measures of such rights at the international level. The Committee's practices on individual complaints can evidently clarify the role of states as a guide in advancing and strengthening economic, social and cultural rights.[36] The universal interpretation of the Covenant by the Committee can considerably assist state activities by observing and developing such rights in a globally unified way.

In sum, the individual or group complaint may subsequently clarify the exact meaning of these rights in the living practice on the level of state implementation. Until now, a

34 Cf., Limburg Principles, Paras. 25-28. '25. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. 26. Its available resources' refers to both the resources within a State and those available from the international community through international co-operation and assistance. 27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources. 28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.'

35 In order to clarify it, universally accepted indicators are needed, see, e.g. from the scholar literature, J.V. Welling, 'International Indicators and Economic, Social, and Cultural Rights', *Human Rights Quarterly*, Vol. 30, No. 4, 2008, pp. 933-958.

36 See, *General Comment No. 10*: The role of national human rights institutions in the protection of economic, social, and cultural rights. E/C.12/1998/25, 10 December 1998.

similar modelling method has not appeared. It must be stated that the lack of this Optional Protocol was rather due to the lack of political intentions for years; hence, this hiatus was not primarily and explicitly linked to the non-justiciability of socio-economic rights in general.

The pro-justiciability arguments shall allude to the existing practice of states and regional bodies. As a matter of fact, there are several current fora that have the competence to receive individual complaints within the field of socio-economic rights (such as the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights as well as the European Committee of Social Rights).[37] In summary, it must be emphasized as an advantage that the Optional Protocol, on the one hand, provides a complaint forum for the individual, while on the other hand, decisions taken by the Committee and the outcomes of the complaint mechanism will serve as precedents to benefit the governments and domestic bodies in charge of human rights (including both directly 'responsible' governments and others subsequently seeking to avoid similar violations). Such a two-fold goal will pave a path to the progressive development of economic, social and cultural rights.

4.3.3 Contra-Justiciability Arguments – Elements Allegedly Weakening the Enforcement of Economic, Social and Cultural Rights

This part of the article reviews the inherent circumstances and capabilities that impede the effectiveness of individual complaints and discusses the hindrances to the wide-scale protection and promotion of socio-economic rights. Beyond the uncertain nature of socio-economic rights as well as the multi-level and debatable state practice of progressive implementation, this sub-chapter focuses on the impact of financial and other external crises that strongly determine the stance of states towards the application and 'granting' of economic, social and cultural rights.

At first sight, these weakening factors appear very evident and persuasive, yet differences with the enforcement of civil and political rights seem negligible in many when considering the frequently obvious commonalities. Therefore, many weakening enforcement arguments can be answered by a rebuttal based upon the same peculiarities of individual complaints as within the field of civil and political rights.

37 E.g, M.F. Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', *Human Rights Quarterly*, Vol. 29, No. 2, 2007, pp. 431-459.

The Vagueness of the Taxative List of These Rights and of the State Obligations (if Any)

Generally, the relevant literature and common opinion tend to accept the commonplace argument that economic, social and cultural rights are very different in nature and in enforcement from the freedom rights; simultaneously the numerous scopes of state obligations are quite obvious. Though accepting this real anomaly, however, in the light of the complaint procedure certain economic, social and cultural rights are not less abstract and vague than a few civil and political rights. Without a doubt, the taxative list of the Covenant and the general comments adopted to the single rights or entitlements provide a clear rebuttal for the vagueness criticism, while such weakness is undoubtedly proven. The required state allocations provided by the sovereign to foster these rights assume the promotional role of the state, since socio-economic rights do not vest the individuals with substantive rights via clarified state obligations ensured with immediate effect.

The Covenant, upon Article 2, expects from the states to take steps, individually and through international assistance and co-operation to the maximum of the available resources[38] in order to achieve progressively the full realization of the rights by all appropriate means. Thus, progressive realization lays down a recognition that 'full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'; however, 'the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.'[39] The Limburg Principles sets out (Para. 21) the obligation to achieve progressively the full realization of the rights as it imposes State Parties 'to move as expeditiously as possible towards the realization of the rights.'

No matter of the further case law of complaint mechanism, such usage of state obligations in a treaty would not abrogate the vagueness of these rights and obligations.

Exposure to Financial Crises, Recession and the Political Stances of the Government

The progressive development of socio-economic rights is strongly exposed to the financial situation and the economic wealth and willingness of the state. Economic, social and cultural rights are relatively expensive rights due to their inherently requirement for institution-building and their service-based nature. Therefore only a limited number of states can afford the best and broadest possible development of such 'borderless' rights. The phenomenon of boundless development opportunities of socio-economic rights is in sharp contrast with civil and political rights, where the notion of gradation is not as typical as the limitless opportunities for the promotion of leading economic and social rights (from

38 Considering the issue of maximum available resources, see, R.E. Robertson, 'Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights', *Human Rights Quarterly*, Vol. 16, No. 4, 1994, pp. 693-714.

39 See, *General Comment No. 3*, Para. 9.

the right to work to the right to social services and insurance in a very broad and cost-effective way).

As Arambulo aptly remarks:

> the opposition to an individual complaint procedure seems to be really informed by the fear – seldom explicitly mentioned – of imposing uncontrollable financial burdens upon the States, and is intrinsically linked with the international political conflict, first between East and West, now between North and South.[40]

Undoubtedly, the phrase of 'maximum of its available resources' set forth by the Covenant predominantly presupposes the implementation of such rights, however, these words indicate that the level of the countries' economic development fundamentally allocates their assumed obligations. Hence, pursuant to the General Comment No. 3. Para. 11, the Committee emphasizes that even 'where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.' Moreover:

> [E]ven in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[41]

Since the adoption of the two separate treaties in 1966, the two covenants and therefore the lists of rights have been stigmatized by West-East preferences. Although the separation and division is not as sharp as it used to be, the political-ideological and fiscal inclinations of the ratifying governments are crucial decision-making factors in the participation of the Protocol. While at the time of ratification, most contracting parties had a solid left-leaning government, there is more to be analyzed than the single political position and ideological leaning of the ratifying power.

In the midst of the global financial crisis (July 2009), the United Nations General Assembly adopted a resolution on the world financial and economic crisis and its impact on development, explicitly underlining the necessity of global cooperation among the governments in the form of prompt and responsive actions with due regard to the human and social aspects.[42] However, the resolution neither contains concrete obligations, nor

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40 Cf., K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, Intersentia, Antwerpen 1999, p. 97.

41 See, *General Comment No. 3*, Para. 12.

42 See, UNGA Res. 63/303. *Outcome of the Conference on the World Financial and Economic Crisis and Its Impact on Development*, A/Res/63/303, Sixty-third Session, 95th plenary meeting, 13 July 2009.

mentions the economic, social and cultural rights (it intentionally avoids the human rights-based approach), but it lays upon the required actions of the governments in order to undertake actions aimed at mitigating the negative impacts of the crisis through e.g. safeguarding economic, development and social gains as well as strengthening the role of the United Nations development system. The resolution provides an extensive guideline-based (action plan) soft law basis for governments, while its wider context truly presupposes a certain existence of enforcement system of economic, social and cultural rights.

In sum, the progressive development of rights as an abstract recognition can easily be considered a panacea from the government for the people intended to moderate them and 'calm them down' during a financial crisis, but the individual complaint mechanism may counter this advantage within the form of potential redress and financial compensation. Therefore the state is neither willing nor able to fulfil most economic, social and cultural rights, even as it fears the potential flood of class actions during a recession (e.g. the right to work of the unemployed).

Considerably Different Implementation Approaches at National Level

Uniform and universal interpretation is almost impossible for the Committee, as implementation and progressive development policies vary from state to state (on the contrary, the civil and political human rights have more or less uniform and rather identical content globally). Progressive development as a general aim and goal supported by the Protocol leaves sufficient room for differentiation in the application of such rights at the state level.[43] States' ways of respecting, recognizing and fulfilling socio-economic rights are quite diverse and fundamentally incomparable. Undoubtedly, the Committee on Economic, Social and Cultural Rights can deliver recommendations to the contracting parties; thus states shall be guided to correct and rectify violations of human rights.

However, the weakness can easily be seen as Paragraph 4 of General Comment No. 3 stated that 'States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard'; however, these measures are by no means exhaustive of the obligations of State Parties.

The promotional character of state obligations would not enhance the universal and uniform implementation and enforcement of the socio-economic rights, while

> [I]t is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter

43 See generally, C. Raj Kumar, 'National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights', *Human Rights Quarterly*, Vol. 28, No. 3, 2006, pp. 755-779.

> of international law, the state remains ultimately responsible for guaranteeing the realization of these rights.[44]

The ability and willingness of the State Parties to fulfil their obligations set forth in the Covenant and the Optional Protocol basically determine the implementation, so thus, the meaning of the socio-economic rights in practice. Therefore, the Maastricht Guidelines traced back to 1997 referred to the inability and unwillingness of the states to comply with the Covenant,[45] but since the entry into force of the Optional Protocol this obstacle may be lowered in the practice by elaborating the standards of the fulfilment and avoiding the potential 'inconvenient' complaints against the State Party. The Maastricht Guidelines contain further promotional measures being significant at the national level, such as the i) necessary monitoring functions of the national ombudsman institutions and other human rights commissions, ii) the direct incorporation or application of international instruments recognizing economic, social and cultural rights as well as iii) the adoption of new standards in contribution with the state and relevant international bodies.[46] On the role of the national human rights institutions, the General Comment No. 10 had been adopted in 1998, setting out the general comment provides an indicative list on the types of activity on a national level.[47]

All the same, neither the non-binding guidelines, nor the non-binding (even not precedent-like) Committee recommendations will presumably mitigate the negative effects of this obstacle and abolish that fundamental inherent weakness.

Few African and Asian Countries Have Ratified the Optional Protocol

A great limitation and weakness of the Optional Protocol is that only a very small number of African countries (Cape Verde, Gabon and Niger) and Asian states (Mongolia alone) have ratified it.[48] Pro rata, only 20% of the ratifying states are African and Asian states (four of twenty states). While these countries currently boast strong economic (and so far,

44 Cf., Maastricht Guidelines, Para. 2.

45 See, Maastricht Guidelines, Para. 13.

46 See, ibid., Paras. 25-26. and 30.

47 Such as i) the promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights, ii) the scrutiny of existing laws and administrative acts to ensure the consistence with the Covenant, iii) providing technical advice, or undertaking surveys in relation to economic, social and cultural rights, iv) the identification of national level benchmarks, v) conducting research and inquiries, vi) monitoring compliance and vii) examining complaints alleging infringements of applicable economic, social and cultural rights standards within the state, as well. General Comment No. 10, Para. 3.

48 As of July 2015, no complaint against African and Asian states had been filed to the Committee.

social and cultural) development, the level of enforcement is low and detailed redress mechanisms are either absent or are barely implemented.[49]

Furthermore, regional protection for such rights on these continents is clearly missing: the African human rights system does not allow individual or group complaints addressed directly to Contracting Parties in judicial or quasi-judicial level; while pledging economic, social and cultural rights at a nominally advanced level;[50] while no Asian (pan-Asian) human rights system exists in the shape of treaties and a protection mechanism. This is the reason why such regions must be bound by the ratification of global and universal measures such as the Optional Protocol.[51] In summary, the non-attendance of African and Asian countries (except for the above-mentioned four State Parties) makes the Optional Protocol globally deficient.[52] In sum, approximately (as of July 2015) altogether 320 million individuals live on the territories of the State Parties from the estimated 7 billion world population (cca. 4.5% of the total population).

4.4 The Process Mechanism of the Optional Protocol

Originally, the 1966 Covenant on Economic, Social and Cultural Rights did not establish a treaty-based monitoring body (unlike the other 1966 Covenant that created the Human Rights Committee), instead the supervisory function from the outset has been assigned to one of the main political organs of the United Nations, namely the Economic and Social Council. However, a resolution of the Economic and Social Council set up the Committee on Economic, Social and Cultural Rights in 1985, introducing its first monitoring work in 1987.

Since 5 May 2013, under the new monitoring mechanism the Committee may consider individual complaints against contracting parties that allege the violation of human rights listed in the Covenant. The complaints shall meet the processual precondition laid down in Articles 1-4 of the Protocol.

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49 On the challenges relating to the Asian and African developing countries, see in general, W. van Ginneken & International Labour Organization (ILO), *Extending Social Security: Policies for Developing Countries. ESS Paper No. 13*, International Labour Office, Geneva, 2003. www.ilo.int/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/kd00061.pdf.

50 According to Art. 22(1) of the African Charter on Human and Peoples's Rights, 'all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'

51 It is worth noting that an increasing number of regional monitoring bodies, namely the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights as well as the European Committee of Social Rights have competence to examine cases related to the alleged violation of economic, social and cultural rights via individual or group complaint.

52 On the judicial enforcement of socio-economic rights in the – mostly African and Asian – developing world, see, V. Gauri & D. Brinks (Eds.), *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, Cambridge, 2008, p. 363.

The treaty-based bodies recognize – beyond the less efficient reporting system – three complaint mechanisms, namely individual communications, state-to-state complaints and the inquiry procedure. During the ratification process, a State Party must indicate which of the above-mentioned procedure(s) of the Protocol the state is going to adhere to.

Pursuant to Article 2 of the Optional Protocol, the individual complaint may be submitted by and on behalf of the individual or group whose right(s) or the group members' right(s) set forth in the Covenant have allegedly been violated in a grave and systematic manner by the State Party to the Covenant and the Optional Protocol.[53] Furthermore, inter-State communications can be submitted to the Committee, when a State Party claims that another State Party is not fulfilling its obligations under the Covenant. It is worth mentioning, that the exhaustion of effective domestic remedies is imperative for admitting claims upon the Optional Protocol, similarly to the general practices of human rights monitoring bodies within the international sphere (Art. 3, Para. 1).

Firstly, the Committee shall make available its good offices to the individual/group and the State concerned for the sake of settling the matter in a friendly way (Art. 7). Secondly, during a detailed examination period performed by the Committee itself on the basis of the claims presented by or on behalf of individuals or groups of individuals, the Committee shall hold closed meetings and may consult appropriate bodies. The Committee shall consider the reasonableness[54] of the necessary steps taken by the State in accordance with Articles 2-5 of the Covenant; and even more, shall bear in mind that the State may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant (Art. 8, Paras. 2-4). Thirdly, after an in-depth examination period, the follow-up phase focuses on the merit and non-binding settlement recommendations, and the Committee shall transmit its (also non-binding) views and advices towards the parties concerned. It must be noted that this phase requires an active states-based contribution, namely delivering written responses on the actions taken in accordance with the written recommendations of the Committee.[55]

The most novel phase of the Optional Protocol is the inquiry procedure, upon which in the case of alleged violation of the Covenant rights, 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.'[56] An inquiry may be conducted by one or more designated Committee members, whose task is to take into account the relevant observations and reliable information presented by the state on the given case.

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53 The requirement of admissibility are set forth in Art. 3 and 4.

54 Cf., B. Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol. 11, No. 2, 2011, pp. 275-327.

55 See, Art. 9, Paras. 2-3.

56 See, Art. 11, Para. 2.

The outcome of this inquiry includes the transmission of the Committee containing non-binding comments and recommendations, whereupon the state shall submit its own observations, followed by a potential summary delivered and published by the Committee.[57] Additionally, the Committee may conduct a follow-up period (Art. 12) by means of inviting and challenging the state on the application and implementation of the remedies based upon the recommendation of the Committee. Meanwhile, the states are obliged to take all appropriate measures to ensure that claimants are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the complaint mechanism (Art. 13). Besides, the Optional Protocol set forth the requirement of international assistance and cooperation (including the setting up of a financial trust for the sake of promoting human rights and fostering the inquiry procedure); the summary of inquiries in the annual report of the Committee, as well as the dissemination and information regarding their matters, views and recommendations, hereby encouraging states how to avoid the non-desired negative precedent status via UN-level (Arts. 14-16).

The most novel achievements of the Optional Protocol are on the one hand, i) the possibility for individuals to submit a claim against a contracting party on the basis of the Covenant; on the other hand, ii) the undertaken inquiry procedure may support the understanding of the inherent content of such rights and, particularly, state obligations. Furthermore, the Committee's non-binding views and recommendations (and the responsive state observations, as well) may promote and enhance the long-term development and improvement of socio-economic rights and their enforcement via state level. Arambulo published the expressive statement on this issue, which reads as follows: 'influencing national legislation and policy positively is the function most effectively served by an individual complaint procedure.'[58]

As of July 2015, three pending cases can be found in the docket of the Commission.[59] One of them has already been admitted, and the other two complaints are currently in the admission phase. The Commission admitted the individual complaint No. 1/2013 against Spain in the subject of discrimination in access to non-contributory pension while in prison (in accordance with the Arts. 2 and 9 of the Covenant). In addition, the individual complaint No. 2/2014 against Spain on the denial of access to court to protect the author's right to housing (invoking Art. 2(1) and 11(1) of the Covenant) and the individual complaint No. 3/2014 against Ecuador under Articles 2, 4, 10(3), 13 and 15 of the Covenant with regard to the discrimination of a minor foreigner in participating in football tournaments are still pending before the official admission. Nevertheless, the Commission has not published further information and details about the merits of the complaints. Thus,

57 Cf., Art. 11, Paras. 3-8.
58 See, Arambulo, ibid., p. 179.
59 www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx.

the Commission has to deal with the invoked rights on such various issues as the access to pension in prison, the denial of access to court concerning right to housing and the discrimination as a labour restriction in sport, therefore the interpretation of the Covenant in individual complaints procedure requires deep analysis and 'courageous' (expectedly complainant-friendly) stance conducted by the Commission on the financial contributions allocated by the State Party.

4.5 Conclusion and Perspectives

In order to achieve the desired outcome of i) strengthened legal protection for economic, social and cultural rights, which will move the international community closer to the unified vision of human rights of the Universal Declaration on Human Rights (declared by Navi Pillay) as well as ii) the reaffirmation of universality, indivisibility, interdependency and interrelatedness of civil, political, economic, social and cultural rights launched at the 1993 Vienna World Conference on Human Rights, the remarkably short time since 5 May 2013 and limited experience (actually missing as of the fall of 2014) requires caution in predicting the future and potential results of the functioning of the mechanism under analysis.

It should be noted that its evolution, originating from the reporting system of the Economic and Social Council (the original 1966 monitoring system) to the individual complaint mechanism of the Committee (the 2008 monitoring system of the Optional Protocol) is also a positive and promising trend favouring the rights of the individual.

The strengthening and weakening elements of justiciability are separately significant and demonstrative; however the comparison of the two pools of human rights (civil-political and economic-social-cultural) clarifies their common nature indivisibility. Since the entry into force of the Optional Protocol, the question whether the socio-economic rights are enforceable or not had been replaced by various further questions on the method of justiciability; however their legal basis is obvious at present. The paper hereby occupied the stance of comprehensive assessment on the pro and contra arguments on the justiciability of economic, social and cultural rights, proving that the present lack of practice of the Commission gives floor to review all these arguments.

The main observations and conclusions are multiple, such as i) the entry into force of the Protocol firstly gives the chance to enforce such rights and fill them with substantial normative content within the form of interpretation by the Commission; ii) it could encourage the whole human rights structure to use this method and to compile the relevant background materials (such as complaint aid and follow-up measures by NGOs, etc.); iii) the acceptance of guides for states and individuals to access to the complaint procedure seems to be unavoidable in cooperation with the competent bodies (e.g. the Commission); iv) without a doubt, the practice of the Commission will predict the chance to narrow the

differences between the developed and developing states on implementing these rights; v) in sum, the above-mentioned prospects could lead the economic, social and cultural rights closer to the idea of indivisibility with the civil and political rights in the post-(financial)crisis period. However, the development of such field cannot be envisaged without the increase of number of participating states of the Optional Protocol and number of complaints before the Commission.

Time must pass in order to sum up the practice and (still missing) 'case law' of the Committee and state practices (if any) of progressive implementation of such rights under the aegis of the Covenant and the Optional Protocol. For a final and optimistic sentence, let us quote Navi Pillay again, who stated that thanks to this new procedure, 'a jurisprudence will now be developed that will help define the scope of application of economic, social and cultural rights and outline adequate remedies for victims.'