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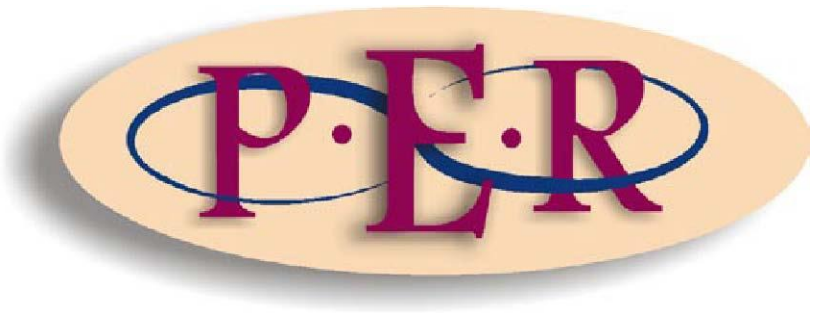
ISSN 1727-3781



2014 VOLUME 17 No 6

http://dx.doi.org/10.4314/pelj.v17i6.09

AN ARGUMENT FOR SOUTH AFRICA'S ACCESSION TO THE *OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* IN THE LIGHT OF ITS IMPORTANCE AND IMPLICATIONS

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1 Introduction

The universality, indivisibility, interdependence and interrelatedness of human rights have been affirmed internationally, for example, in the 1968 *Declaration of Tehran*[1] and in the 1993 *Vienna Declaration and Programme of Action*.[2] However, despite rhetorical affirmations, there has been a continued prioritisation of the protection of civil and political rights at the expense of socio-economic rights,[3] with international monitoring bodies dealing with civil and political rights adopting Optional Protocols mandating them to receive and consider individual communications for their violation, while such a mechanism has for a long time been lacking for the vindication of violations of socio-economic rights.[4] Even in instances where some

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1 *Final Act of the International Conference on Human Rights* (1968) para 13, which states that "[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible".

2 *Vienna Declaration and Programme of Action* (1993) para 5, which further states that "[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".

3 The term "socio-economic rights" is used here to denote those rights encompassing the basic necessities of life. These rights have traditionally been distinguished from "civil and political" rights because they are viewed as imposing particular fulfilment obligations on states, an issue which often gives rise to arguments about resource constraints and progressive realisation. Cultural rights are in our view quite discreet from "socio-economic rights" and we therefore avoid bundling them all together as "economic, social and cultural rights".

4 The international legal instruments providing for individual communication mechanisms for CPRs include the following: *First Optional Protocol to the International Covenant on Civil and Political Rights* (1966) aa 1-6; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* (1999) a 1; *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (2006) a 1; *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) a 14; *Convention Against Torture and Other Cruel, Inhuman or*

available international mechanisms have a corollary possibility of adjudicating socio-economic rights on the basis that the relevant substantive international legal instruments contain both civil and political and socio-economic rights - such as those created under the *Convention on the Rights of the Child* (CRC) and the *Convention on the Rights of Persons with Disabilities* (CRPD) - communications alleging the violation of socio-economic rights have seldom been adjudicated by these mechanisms. Due to the disparities in the international enforcement of socio-economic rights compared to that of civil and political rights;[5] the continued adjudication of socio-economic rights at the domestic and regional levels leading to the elaboration of clearer content and obligations emanating from socio-economic rights;[6] and the recommendations emanating from the 1993 World Conference on Human Rights for the continued examination of an *Optional Protocol to the ICESCR*,[7] concerted steps were undertaken to adopt an individual communications mechanism under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[8] These efforts culminated in the drafting and adoption of an *Optional Protocol to the ICESCR* on 5 March 2009.[9] It subsequently entered into force on 5 May 2013, three months after the tenth ratification had been deposited by Uruguay.[10] By 31 May 2014, 45 states had signed the OP-ICESCR, but only 14 have become State Parties.[11]

Degrading Treatment or Punishment (1984) a 21; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) a 77.

5 IAIHR and ICJ 2010 http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf 21.

6 For a comprehensive analysis evidencing the adjudication of socio-economic rights at the domestic and regional levels, see generally Langford *Social Rights Jurisprudence*.

7 *Vienna Declaration and Programme of Action* (1993) para 75.

8 See generally, Arambulo 1996 *UC Davis J Int'l L & Pol'y* 111-136; Chenwi 2009 *AHRLJ* 23-51; De Albuquerque 2010 *Hum Rts Q* 144-178; Langford 2009 *NJHR Special Issue* 1-129; Mahon 2008 *HRL Rev* 621-628; Vandenbogaerde and Vandenhole 2010 *HRL Rev* 207-237.

9 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2009) (hereafter OP-ICESCR).

10 See OP-ICESCR, a 18, which provides that the Protocol is to enter into force three months after the deposit of the 10th instrument of ratification or accession. Uruguay was the tenth state to ratify, which it did on 5 February 2013. Apart from Uruguay, the countries that have also ratified the Optional Protocol include: Argentina, Belgium, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Finland, Gabon, Mongolia, Montenegro, Portugal, Slovakia and Spain. See UN Treaty Collection 2014 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

11 See the list of ratifying States in the footnote above.

The process of drafting an *Optional Protocol for the ICESCR* was not easy, however, with its opponents contending that it had not been demonstrated that an individual complaints mechanism for socio-economic rights would be practical, effective and worthwhile.[12] In the context of this debate, Dennis and Stewart[13] raised the following concerns in relation to the drafting of the Optional Protocol:

> - Can the treaty obligations assumed by States Parties under the ICESCR be measured, quantified, and applied in a meaningful way?
> - Can the review standards be the same for all countries (regardless of their levels of development) and, if not, how will such distinctions be made?
> - How would States Parties be able to demonstrate their levels of achievement in response to individual complaints?
> - How would a legally binding adjudicative regime improve States Parties' implementation of socio-economic rights?
> - Would a complaints mechanism under the ICESCR add meaningfully to the mechanisms and procedures already available in other international complaints regimes?

They further argued that an international adjudicatory mechanism would limit the necessary discretion of States in dealing with disparate domestic situations, with the resultant effect that States would de-emphasise the importance of socio-economic rights, thus undermining their stature and acceptability.[14]

Despite these challenges, the notion of an *Optional Protocol to the ICESCR* garnered sufficient support to allow for its adoption and entry into force. In relation to the individual communications mechanism, it states as follows:[15]

> A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.

This article seeks to explore the importance of the individual communications mechanism under the Optional Protocol; it interrogates whether the ratification of the Optional Protocol has practical benefits for a State party and its citizens; and it considers the implications for States of its ratification. It is divided into six interrelated sections. After this brief introduction the paper undertakes an analysis of the provisions of the Optional Protocol in section 2. It then delves into a discussion

12 Dennis and Stewart 2004 *AJIL* 464.
13 Dennis and Stewart 2004 *AJIL* 464-465.
14 Dennis and Stewart 2004 *AJIL* 467.
15 OP-ICESCR a 1.

of the importance of the individual communications mechanism under the Optional Protocol as well as some of the possible challenges to the effectiveness of the individual communications mechanism under the Option Protocol in sections 3 and 4 respectively. It advances some arguments why South Africa should accede to the Optional Protocol in section 5, and ends with some brief concluding remarks in section 6.

2 Understanding the individual communications mechanism under the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*

The Optional Protocol is based on certain fundamental principles that have been the mainstay of the human rights and fundamental freedoms regime since the adoption of the *Universal Declaration of Human Rights*. These principles include: inherent dignity as well as the equal and inalienable rights of all human beings;[16] freedom from fear and want;[17] the universality, indivisibility, interrelatedness and interdependence of rights;[18] and the standard of progressive realisation to the maximum of available resources through national efforts and through international cooperation and assistance.[19] The Optional Protocol mandates the CESCR to receive and consider communications from individuals or groups of individuals who are victims of the violations of any of the socio-economic rights contained in the ICESCR from State Parties to the ICESCR who have similarly ratified or acceded to the Protocol.[20] This comprehensive approach, taken together with the full inclusion of article 2(1) of the ICESCR in the preamble of the Optional Protocol,[21] entrenches the requirement that the examination of individual communications under the Protocol must be consonant with the normative legal standards established by the ICESCR.[22]

16 OP-ICESCR preambular paras 1-2.
17 OP-ICESCR preambular para 3.
18 OP-ICESCR preambular para 4.
19 OP-ICESCR preambular para 5.
20 OP-ICESCR preambular para 6 and aa 1-2. Where communications are submitted on behalf of victims of ESCR violations, this must be done with their consent unless other justifications exist. Also see *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2012) Rule 4 (hereafter the *Provisional Rules*).
21 OP-ICESCR preambular para 5.
22 Griffey 2011 *HRL Rev* 279.

This, of course, makes the jurisprudence emanating from the work of the CESCR in the use of its reporting mandate, especially the General Comments interpreting the rights entrenched in the ICESCR, important resources in the determination of communications under the Optional Protocol.[23]

For a communication to be admissible under the Optional Protocol, it must meet the following requirements:[24]

- Local remedies, which are not unduly prolonged, must have been exhausted.[25]
- The communication must be submitted within one year after exhaustion of local remedies, unless it is demonstrated that this was reasonably impractical.[26]
- It must deal with events occurring after the entry into force of the Protocol for a specific State Party, unless the violation is of a continuing nature.
- The same facts must not have been considered or be under consideration in another international procedure of investigation and settlement.[27]
- It must be compatible with the ICESCR.
- It must be substantively and sufficiently founded, and not based exclusively on media reports.
- It must be in writing and must indicate the author.[28]
- It should not be an abuse of the communication process.
- Communications not revealing that an author has suffered a clear disadvantage may be declined unless the author demonstrates that it raises serious issues of general importance.[29] This provision was influenced by Protocol 14 of the European Convention of Human Rights.[30]

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23 Griffey 2011 *HRL Rev* 280-290.

24 OP-ICESCR, a 3.

25 The use of this provision must of necessity take into account the development of international law in the area of exhaustion of domestic remedies, which requires that only effective remedies be exhausted.

26 See Langford 2009 *NJHR* 23, who suggests that this may be a retrogressive provision which is most likely to adversely affect claimants from States without domestic remedies for the violation of socio-economic rights, as they are less likely to be aware of the existence of the available international options. He thus recommends that, for the communications procedure to overcome this challenge, awareness-raising concerning the Optional Protocol is critical.

27 Some of the relevant regional mechanisms in Africa that have ESCR's mandate and that must be considered in this instance include the African Commission of Human and Peoples' Rights and the African Court on Human and Peoples' Rights. See the *African Charter on Human and Peoples' Rights* (1981) aa 55-56, and the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998) a 3.

28 Also see the *Provisional Rules* Rule 1(3).

29 OP-ICESCR a 4. This was a mechanism inserted to enable the CESCR to distinguish between cases and to enable it to concentrate only on cases demonstrating serious and widespread violation of socio-economic rights, should there be an overload of communications. See Kratochvil 2009 *Hum Rts Br* 30-31, who contends that being only a procedural criterion, it should not be used unless the CESCR is overwhelmed with cases to the point that it makes the individual communications and treaty monitoring work of the CESCR impossible.

30 See *Protocol No 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* (2004) a 12, which amends a 35(3) of the Convention as follows: "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that : b) the applicant has not

A decision on the admissibility of a communication is to be made by a simple majority of the members of the CESCR or by a unanimous decision of a working group established by the CESCR under the Rules of Procedure.[31]

Like the communication procedures under other treaty monitoring mechanisms, the Optional Protocol empowers the CESCR to issue interim measures to avoid possible irreparable damage to victims of socio-economic rights violations,[32] to offer its good offices for the friendly settlement of disputes submitted to it,[33] to consider inter-state communications through an opt-in clause,[34] and to conduct an inquiry for grave or systematic violations of socio-economic rights by a State Party through an opt-in inquiry procedure.[35] Further, in noting the importance of resources in the realisation of socio-economic rights, the Optional Protocol affirms the importance of international assistance and cooperation, giving the CESCR the mandate to request, with the consent of the specific State Party, technical assistance from relevant UN specialised agencies to the State Party.[36] It also envisages the creation of a trust fund to enhance the realisation of socio-economic rights through the building of national capacities.[37]

After receiving a communication, the CESCR is required to submit it to the relevant State Party, which is then expected to submit to the Committee within six months a

suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

31 *Provisional Rules* Rule 8.

32 OP-ICESCR a 5; *Provisional Rules* Rule 7. Also see Langford 2009a *NJHR* 24, who notes the importance of the interim measures in the protection of socio-economic rights from violations such as the "destruction of livelihoods, forced evictions, sudden retrogressive measures or lack of immediate reasonable action that could expose complaints to serious denial of their rights such as homelessness, destitution and exposure to disease".

33 OP-ICESCR a 7; *Provisional Rules* Rule 15.

34 OP-ICESCR a 10; *Provisional Rules* Rules 36-46. A State Party has to expressly declare that it recognises the competence of the CESCR to consider inter-state communications against it. It may choose to opt-out at any time, but this would not interfere with a communication already submitted.

35 OP-ICESCR aa 11-12; *Provisional Rules* Rules 21-35. A State Party similarly has to expressly acknowledge the competence of the CESCR to conduct inquiries in its territory under the Optional Protocol. The inquiry procedure was deemed important as it would enable individuals and groups having difficulty in accessing the individual communications procedure or facing the danger of reprisals to have an alternative avenue for accessing a remedy for the violation of socio-economic rights. See Mahon 2008 *HRL Rev* 641.

36 OP-ICESCR a 14.

37 OP-ICESCR a 14(3).

response clarifying the complaint and indicating if any remedial action has been undertaken.[38] When considering communications on their merits, which is to be done in closed meetings, the CESCR is required to examine in totality the submitted documentation as well as relevant documentation from UN bodies, specialised agencies and other international and regional organisations.[39] After the consideration, the CESCR transmits its non-binding views and recommendations to the relevant State Party, which is required to respond to the Committee within six months, indicating the actions taken by the State in the light of the views and recommendations of the CESCR.[40] The Committee is empowered by its Rules of Procedure to appoint a Special Rapporteur or establish a Working Group to conduct follow-up on the implementation of final recommendations of the Committee by the State Party.[41] In undertaking the follow-up role, the Rapporteur or the Working Group is empowered to take all appropriate action to ensure that the views and recommendations of the CESCR are duly complied with.[42]

One of the difficulties in enhancing the justiciability of socio-economic rights at the international level has been the challenge of designing workable criteria and standards of measurement for the judicial or quasi-judicial enforcement of these rights.[43] In their argument opposing the adoption of the Optional Protocol, Dennis and Stewart[44] contended that States would be reluctant to ratify an Optional

38 OP-ICESCR a 6; *Provisional Rules* Rule 10.

39 OP-ICESCR a 8; *Provisional Rules* Rules 14, 19. See Chenwi 2009 *AHRLJ* 42, who argues that this provision permits the CESCR to consult international NGOs with expertise in the area of socio-economic rights when determining an individual communication under the Optional Protocol.

40 OP-ICESCR a 9. See Chenwi 2009 *AHRLJ* 46-47 for a discussion of the follow-up mechanism under the Optional Protocol.

41 *Provisional Rules* Rule 18(5).

42 *Provisional Rules* Rule 18(6)-(9).

43 Dennis and Stewart 2004 *AJIL* 489-490. They argue at 496 that the task of assessing the violations of socio-economic rights is far more intricate than the task of assessing the violations of CPRs due to their interdependent and contextual nature and the fact that these rights present issues of considerably greater scope and complexity requiring more information as well as greater expertise to resolve. For an elaboration of the arguments for the insertion of assessment criteria into the text of the Optional Protocol to the ICESCR during debates in the Working Group, see Porter 2009 *NJHR* 43-50.

44 Dennis and Stewart 2004 *AJIL* 489. They further argue that even ratifying States may refuse to comply with decisions from a socio-economic rights adjudicatory body unless their decisions are based upon universally accepted principles. In this context, they contend as follows: "In order to be credible and have tangible impact, any criteria must be carefully tailored to set realistic and achievable goals. Such criteria cannot simply be decreed unilaterally by the adjudicators, but must be derived from a participatory process with input from the affected states."

Protocol for the international adjudication of socio-economic rights unless a clear standard was developed beforehand which indicated the criteria that will be used to determine whether and to what extent they have violated the provisions of the ICESCR. These concerns were noted by the CESCR in its statement on the OP-ICESCR:[45]

> The Committee is aware of States parties' interest in obtaining further clarification as to how it would apply the obligation under article 2, paragraph 1, "to take steps … to the maximum of its available resources" to achieve progressively the full realization of the rights recognized in the Covenant. Of particular relevance is how the Committee would examine communications concerning this obligation, while fully respecting the authority vested in relevant State organs to adopt what it considers to be its most appropriate policies and to allocate resources accordingly.

In responding to the concerns, the CESCR reiterated its elaboration of the nature of the obligations arising from the ICESCR in its General Comment Number 3, emphasising the need for State Parties to take concrete, deliberate and targeted steps through all appropriate means, including the enactment of legislation as well as the provision of judicial and other remedies, in order to achieve the progressive realisation of the Covenant rights.[46] It further reiterated the immediate nature of the obligation to take steps, emphasising that the unavailability of resources on its own is an insufficient defence to the total failure to take steps aimed at the realisation of the Covenant rights, and that low-cost measures must be put in place to protect the most marginalised and vulnerable groups where resources are demonstrably inadequate.[47]

In the exercise of its individual communications mandate under the Optional Protocol, the CESCR acknowledges that it is the responsibility of national State organs to formulate, adopt, fund and implement measures aimed at the realisation of socio-economic rights, and it has undertaken to give States the requisite margin of appreciation in their choice of measures aimed at the realisation of socio-economic rights.[48] It has, however, clarified that the extent of the margin of appreciation will depend a great deal on the transparency and the participative

45 CESCR 2007 http://www2.ohchr.org/english/bodies/cescr/docs/e_c_12_2007_1.pdf (hereafter CESCR Statement) para 2.
46 CESCR Statement para 3.
47 CESCR Statement para 4.
48 CESCR Statement para 11.

nature of the decision-making process in which the national measures are adopted and are being implemented.[49] In determining if a State Party has failed to take steps to the maximum of its available resources to realise socio-economic rights, the CESCR will assess the adequacy or reasonableness of measures adopted by any particular State using the following criteria:[50]

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

The CESCR further contended that should a State Party fail to take any measures or adopt retrogressive steps, the onus would be on the State to justify its action, taking into account the totality of the Covenant rights and the full use of its resources.[51] The CESCR acknowledges the disparities in resource availability in different contexts and between countries, and contends that in the event that a State uses "resource constraint" as a justification for the adoption of a retrogressive measure, it will assess such a claim using the following considerations:[52]

> (a) the country's level of development;
> (b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
> (c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession;
> (d) the existence of other serious claims on the State Party's limited resources, for example, resulting from a recent natural disaster or from recent internal or international armed conflict;
> (e) the extent to which the State Party had sought to identify low-cost options; and
> (f) the extent to which the State Party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reasons.

49 CESCR Statement para 11.
50 CESCR Statement para 8.
51 CESCR Statement para 9.
52 CESCR Statement para 10.

The efforts to develop universal criteria for the assessment of individual communications is an indication that the CESCR is determined to be as objective as possible while taking into account the resource differentiations between States in the fulfilment of its mandate under the Optional Protocol.

The elaboration of the above criteria was taken into account in the drafting of the Optional Protocol, leading to the insertion of article 8(4), which provides as follows:[53]

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

In their analysis of this provision of the Optional Protocol, Vandenbogaerde and Vandenhole[54] have argued that this assessment criterion is unprecedented and is unique to the Optional Protocol. They contend that it was inserted by States due to a fundamental mistrust of some States in the judgment of the CESCR as well as the ideological concerns of these States as to the justiciability of socio-economic rights.[55] Griffey[56] has added to these reasons for the elaboration of article 8(4) by contending that the need for its inclusion arose from State concerns over the extent to which their policymaking and budgetary choices would come under the Committee's magnifying glass, and whether the Committee would recommend costly measures to remedy the harm caused to claimants by breaches of the Covenant. Acknowledging the importance of article 8(4) to the overall effectiveness of the individual communications regime under the Optional Protocol, Porter[57] has argued as follows:

> Whether the vision of a truly unified approach to human rights that is fully inclusive of claimants affirming the right to freedom from want, is actually realised through the Optional Protocol will largely depend on how its Article 8(4) is interpreted and applied. This will, in turn, inform and be informed by the way in which the principle of reasonableness review of substantive social rights claims evolves at other treaty monitoring bodies, in regional systems and in domestic law.

53 For an analysis of the drafting history of a 8(4), see Griffey 2011 *HRL Rev* 291-304.
54 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 223-226.
55 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 223-226. Also see Griffey 2011 *HRL Rev* 277.
56 Griffey 2011 *HRL Rev* 279, 292-294.
57 Porter 2009 *NJHR* 40.

Porter[58] calls article 8(4) "a double-edged sword", which can either be used restrictively to accord unlimited margin of appreciation to States' socio-economic policies to the detriment of adequate adjudication and the provision of effective remedies for substantive socio-economic rights claims, or progressively, as a mechanism aimed at responding effectively to the challenges of genuine socio-economic rights claims that go to the root of the systemic causes of poverty and exclusion. Porter[59] concludes that if the article is interpreted in the light of its drafting history and the challenges the Optional Protocol was intended to respond to, it is capable of facilitating the achievement of the adequate adjudication and effective remedies for violations of the Covenant. Despite the obvious importance of article 8(4) in individual communications under the Optional Protocol, Griffey[60] reminds us that it does not change the substantive normative socio-economic rights obligations in the ICESCR, and must be interpreted and applied consistently and in conformity with the Covenant.

3 Importance of the individual communications mechanism under the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*

The realisation of socio-economic rights has always been subject to the standard of "progressive realisation" as entrenched in article 2(1) of the ICESCR. This necessarily meant that the enactment of legislative, policy and programmatic frameworks was an important component of their fulfilment. Due to the prominent role national institutions play in elaborating and enacting these frameworks, many States contended that the elaboration of an Optional Protocol envisaging an international complaint mechanism would dictate to States the kind of policies to adopt, or even the type of macro-economic system to adopt.[61]

The drafters of the Optional Protocol responded to these concerns by adopting the reasonableness approach as the standard of assessment of the States' socio-economic rights implementation framework in article 8(4) of the Protocol, as well as

58 Porter 2009 *NJHR* 40.
59 Porter 2009 *NJHR* 40.
60 Griffey 2011 *HRL Rev* 322.
61 Langford 2009 *NJHR* 25-26.

acknowledging the wide range of options available to States in their realisation of these rights.[62] This provision is in line with the purpose of the Optional Protocol, not as a forward-looking mechanism to act as a catalyst for social change by determining the policies to be put in place by States for the realisation of socio-economic rights, but as a backward-gazing (*ex post*) monitoring mechanism which "focuses on providing accountability and remedies in those cases of alleged violations that are submitted to the Committee".[63] The Optional Protocol thus envisages States having the requisite discretion to choose the policies for the realisation of socio-economic rights that are best suited to their situation, with the CESCR assessing only the adequacy and reasonableness of the measures adopted by a State when a complaint for the violation of a particular right is brought against the specific State. This thus ensures that States retain their sovereignty as to the choice of legislative, policy and programmatic frameworks for the realisation of socio-economic rights, as well as other national macro-economic policies.

One of the most enduring challenges to the judicial enforcement of socio-economic rights is their lack of precise, clear and enforceable content.[64] This challenge has been emphasised in comparison to civil and political rights, which are said to have a clear and judicially enforceable content.[65] However, it is not always acknowledged that the extensive jurisprudence of the Human Rights Committee in relation to its individual communications mandate under the *Optional Protocol to the ICCPR* has had a lot to do with the clarity and stable content of these rights.[66] That a similar mechanism has been lacking at the international level in relation to socio-economic rights has had much to do with the nebulous content of these rights.[67] It is anticipated that this will change as a result of the adoption of the *Optional Protocol*

62 Langford 2009 *NJHR* 25-26.

63 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 231-232.

64 This was one of the grounds under which Sweden expressed its doubts with regard to the elaboration of an Optional Protocol to the ICESCR, which it expressed as follows/; "... for an individual complaints procedure to function in a credible and efficient way, the State obligations to which such a procedure would refer would have to be precise". See De Albuquerque 2010 *Hum Rts Q* 152, note 37.

65 See Arambulo 1996 *UC Davis J Int'l L & Pol'y* 114-120.

66 De Albuquerque 2010 *Hum Rts Q* 148-149.

67 De Albuquerque 2010 *Hum Rts Q* 148-149. Also see Langa 2009 *NJHR* 33-34, who remarks as follows: "I agree with the view that the content of these rights is less clearly defined more because of their exclusion from the realm of adjudication, than due to an inherent vagueness."

to the ICESCR.[68] This latitude is acknowledged by Kratochvil,[69] who argues as follows:

> To find all obligations generated by a right and to clarify any ambiguities, practitioners must look to the case law and not simply the text of an article. Even if the rights in the Covenant look imprecise, it does not hinder their adjudication any more than civil rights. After all, interpreting and making obligations concrete by relating them to real life situations and questions is the essence of judicial work.

In dealing with individual communications for the violation of socio-economic rights, the CESCR will enhance the practical elaboration of the content of the rights entrenched in the Covenant in specific contextual situations. It will also enhance the clarification and elucidation of the specific obligations arising from Covenant rights, with the result that these rights are better protected, promoted, implemented and fulfilled.[70]

Under its State reporting function, the CESCR had adopted an expansive and broad elaboration of the rights in the ICESCR through its Concluding Observations. It has similarly taken a broad approach in the elaboration of its numerous General Comments, based on its experience of considering State reports.[71] This broad elaboration had been due to the fact that State reporting is a dialogical exercise which does not generally entail the finding of violation of rights by State Parties. This broad elaboration of socio-economic rights by the CESCR has been one of the criticisms against the adoption of the OP-ICESCR, in general, and the mandating of the CESCR to determine individual communications via the Optional Protocol, in

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68 For an extensive discussion of this contention, see Scheinin and Langford 2009 *NJHR* 99ff, where they argue that the previous situation of a lack of an international institutional mechanism for the adjudication of socio-economic rights had starved the rights of the requisite oxygen for their development, stating that justiciability does not depend on the nature of the norm concerned, but rather on the authority of the body making the decision.

69 Kratochvil 2009 *Hum Rts Br* 31, 33.

70 See International NGO Coalition for OP-ICESCR 2013 http://www.escr-net.org/docs/i/1475393 2. See also Arambulo 1996 *UC Davis J Int'l L & Pol'y* 116, who argues that the clear nature of civil and political rights is because they were based on existing national jurisprudence, a fact not true for socio-economic rights, and also that even after their elaboration in the ICCPR, the civil and political rights have been subjected to more judicial interpretation, with the result that their norms are clearer, more precise and better understood. Juridical elaboration of the content of socio-economic rights will thus similarly enhance the clarity and precision of the content of their norms.

71 See Scheinin and Langford 2009 *NJHR* 100, where they note the concern of opponents of an Optional Protocol that the CESCR has either been too far-reaching in some of its General Comments or has been insufficiently precise in some of its Concluding Observations.

particular.[72] However, with the adoption of the Optional Protocol giving it the ensuing mandate to consider individual communications, the CESCR will have to adjust this expansive approach and adopt a more juridical approach to treaty interpretation so as to strengthen the foreseeability and consistency of its jurisprudence.[73] The CESCR will thus, more likely, be relatively conservative in its consideration of individual communications under the Optional Protocol than it was in its interpretation of rights under the more dialogic State reporting mandate.

States are differently situated in terms of their prevailing social conditions as well as the availability of structural, human and financial resources for the realisation of socio-economic rights. This was the reason why the "progressive realisation" standard was adopted in the ICESCR and why there was opposition to the adoption of the OP-ICESCR. In assigning both the mandate to consider State reports under the Covenant and the individual communications procedure under the OP-ICESCR to the CESCR, the expertise as well as the ability of the CESCR to acknowledge and take into account the contextual situation of each State in the exercise of its communications mandate is enhanced by its holistic delving into a State's situation in the exercise of its treaty-reporting mandate.[74] In this way, a holistic and interdependent interpretation of the provisions of the ICESCR, taking into account the distinctive contextual situations of State Parties, is ensured.[75] The importance of context-sensitive adjudication is acknowledged by the former Chief Justice of South Africa, the late Justice Langa,[76] in the following words:

> Through this mechanism, the Committee receiving the complaints will receive information on the nature of the complaint and ultimately gain insight into the challenges faced by the complainant and the extent of the limitations or perpetrations committed by the Member State. This would enable the Committee to develop a jurisprudence that is sensitive to the global realities, which could provide

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72 See Dennis and Stewart 2004 *AJIL* 490-498. They contend that the CESCR's broad maximalist approach has the potential to extend the international liability of State Parties beyond the Covenant provisions, at 493.

73 Scheinin 2006 *HRL Rev* 133.

74 Scheinin 2006 *HRL Rev* 133. This aspect is especially augmented by the practice of the CESCR to receive additional information on a State's situation through alternative reports by NGOs in the exercise of its treaty reporting mandate, a practice that enables the CESCR to have a more complete and accurate picture of any given State's contextual human rights situation. See Arambulo 1996 *UC Davis J Int'l L & Pol'y* 126-127.

75 Scheinin 2006 *HRL Rev* 133.

76 Langa 2009 *NJHR* 31.

> a useful framework through which further complaints, concerning other member States, may be analysed and understood.

Respect for context and the mandate of national political institutions to choose, adopt, develop, implement and enforce measures for the realisation of socio-economic rights is further entrenched in the Optional Protocol itself in article 8(4), which encompasses the reasonableness standard.[77]

4 The possible challenges to the effectiveness of the individual communications mechanism under the Optional Protocol

As a mechanism for human rights enforcement under the UN system, the Optional Protocol similarly suffers from challenges affecting most such mechanisms. Some of these challenges result from political and ideological compromises made during drafting; some arise from the composition and role of the CESCR; and others from limited capacity and resources. These challenges are discussed below.

4.1 Challenges due to political and ideological compromises

One of the major challenges to the effectiveness of the individual communications mechanism under the Optional Protocol results from the fact that it is the outcome of a compromise fraught with political and ideological struggles, leading to the adoption of an instrument with weaker wording and weaker procedural protection.[78] The challenges resulting from compromise in the international elaboration of legal instruments with a global reach are described by Antonio Cassese[79] as follows:

> [UN complaint mechanisms] tend to be so conditioned, in their unfolding, by political and diplomatic considerations, that often their final result is rather weak, being couched in terms that are too general or too diplomatic.

This was the situation with the Optional Protocol, leading to the watering down of certain provisions such as the failure to include a provision for collective complaints; the deletion of the requirement that local remedies must be effective if they are to be considered as remedies worthy of exhaustion; the requirement that communications be submitted within a year after the exhaustion of local remedies;

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77 For an elaboration of the reasonableness approach adopted under a 8(4), see s 2 above.
78 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 231.
79 Cassese *International Criminal Law* 389.

the inclusion of the inter-state and the inquiry procedures as opt-in provisions; as well as the unprecedented inclusion of "assessment criteria" under article 8(4).[80] With a relatively weak procedure, the concerns are that the complaint mechanism will not be able to meaningfully consider violations of socio-economic rights and enhance their overall protection, which was the very reason for the elaboration of the Optional Protocol.[81]

In their critique of the OP-ICESCR, Vandenbogaerde and Vandenhole[82] flag some of the issues that were either provided for inadequately in the Protocol or were left out entirely, and which would have made the individual complaints mechanism more effective in the protection of socio-economic rights. The first issue they raise is the failure to clarify the legal nature of the obligation of international cooperation and assistance in the realisation of these rights. In this context, they argue that this lack of clarity led to the subsequent failure to provide effectively for the shared responsibility and solidarity of States for the realisation of socio-economic rights and the concomitant extraterritorial obligations of States, an important tool in addressing socio-economic rights violations in a globalising world.[83] The second issue that is likely to detract from the effectiveness of the Optional Protocol is the entrenchment of the enquiry procedure and the inter-state complaint procedures only as opt-in procedures, curtailing the full potential of these two procedures as avenues for the protection of Covenant rights.[84] The third issue likely to detract from the effectiveness of the Optional Protocol is the failure to include a collective complaint procedure without a victim requirement, a challenge that is likely to curtail the important role that NGOs and other such institutions can play in filing communications entailing a more general or systematic violation of socio-economic rights affecting a large group of people or entire communities.[85] The fourth issue

80 For an elaboration of the reasonableness approach adopted under a 8(4), see s 2 above.
81 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 231.
82 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 232.
83 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 232.
84 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 233-236.
85 Despite the importance of the collective complaint procedure, it is important to note that the Elements Paper by the Chairperson of the Working Group drafting the OP-ICESCR indicated that none of the UN human rights mechanisms foresees a collective communications procedure. See De Albuquerque 2006 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/164/64/PDF/G0516464.pdf para 10(c).

flagged by the authors is the deletion of an exception to the rule regarding the exhaustion of local remedies which required only effective national remedies to be exhausted, an exception that is contained in other UN legal instruments.[86] The retention of the exception would have compelled States to provide effective domestic remedies for the violation of SERs in their domestic jurisdictions, with failure on the part of the State to provide such remedies leading to the direct filing of individual complaints to the CESCR against it under the Optional Protocol.[87] The fifth challenge to the effectiveness of the Optional Protocol is the inclusion of the provision allowing the CESCR to decline a communication that does not demonstrate that a clear disadvantage was suffered, a provision which was aimed at curtailing a floodgate of communications to the CESCR, and which might limit, at the admissibility stage, cases worthy of consideration on their merits.[88] The last challenge is the deletion of the provision prohibiting reservations, which technically allows States to opt out of some provisions of the Protocol, to the detriment of its overall effectiveness.[89]

Despite the above challenge, the effectiveness of the individual communication mechanism will depend on the tenacity of the CESCR in breathing life into the provisions of the Optional Protocol through pragmatic yet progressive interpretation, with the aim of enhancing the elaboration and protection of socio-economic rights. For example, in relation to the deletion of the provision requiring domestic remedies to be effective, it has been suggested that these concern can be addressed by the CESCR adopting the jurisprudence of the Human Rights Committee, which has affirmed, in the case of *Patino v Panama*,[90] that only remedies that are reasonably effective and which offer a claimant reasonable prospects of redress need to be exhausted.[91]

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86 These include: the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990); the *Optional Protocol to the Convention on the Elimination of Discrimination against Women* (1999) (OP-CEDAW); and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (2006) (OP-CRPD).

87 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 234.

88 Langford 2009 *NJHR* 23-24; Scheinin and Langford 2009 *NJHR* 110-111.

89 Vandenbogaerde and Vandenhole 2010 *HRL Rev* 235-236.

90 *Patino v Panama* Communication No 437/1990, UN Doc CCPR/C/52/D/437/1990 (1994).

91 Langford 2009 *NJHR* 22-23.

4.2 Legitimacy and the capacity of the CESCR to consider individual communications

Concerns have been raised about the legitimacy of the CESCR, a creation of the UN Economic and Social Council (ECOSOC), a body with a limited membership if compared to the General Assembly of the UN, to consider individual communications on the violations of socio-economic rights.[92] Similarly, it has been argued that the CESCR, as presently constituted, will be unable to handle the high number of individual communications expected to be filed when the Optional Protocol comes into force and still fulfil its monitoring obligations of State reporting under the ICESCR.[93] In this context, Dennis and Stewart[94] argue as follows:

> It is simply unrealistic to expect that any single body of experts could, in a timely manner, handle a flood of individual cases from a broad range of states across the globe, covering the full panoply of Covenant rights.

They further contend:[95]

> Extrapolating from the available information, what could one anticipate if the [CESCR] were charged with resolving complaints about violations under the Covenant? By its own calculations the Committee is now able to review implementation reports from only some 10 states per year. With 149 states parties, that means a review cycle of roughly fifteen years. Adding even a relatively light caseload to this burden could more than double that period and possibly also degrade the Committee's work in other respects.

Concerns about the legitimacy of the CESCR considering individual communications under the Optional Protocol simply because it was created by ECOSOC and not directly under the ICESCR are overstated. Despite being created by ECOSOC, the CESCR has been largely successful in monitoring compliance with the ICESCR through State reporting and has gained the respect of States. A significant number of State parties have complied with its Concluding Observations and taken into account its interpretation of Covenant rights through its General Comments.[96] It is difficult to see this respect and compliance changing just because the CESCR's new

92 Dennis and Stewart 2004 *AJIL* 506-507.
93 Dennis and Stewart 2004 *AJIL* 507-509.
94 Dennis and Stewart 2004 *AJIL* 507.
95 Dennis and Stewart 2004 *AJIL* 509.
96 For a comprehensive analysis of the work of the CESCR and the influence it has had in the realisation of socio-economic rights at the national and international level, see generally Sepulveda *Nature of Obligations*; Craven *ICESCR*.

mandate under the Optional Protocol envisages the Committee making non-binding recommendations on State Parties' violations of socio-economic rights.[97]

The challenge as to capacity, in terms of the time available for the CESCR to undertake its duties, as well as its professional capacity to undertake its diverse duties, is genuine and needs to be looked into more carefully. Justice Langa[98] acknowledged the need for adequate capacity to handle all the challenges that the adjudication of socio-economic rights entails, and advised that for the CESCR to be able to undertake its role effectively, it would be crucial to have members with the requisite skills, qualifications and capacity to employ creative solutions to ensure compliance with the Committee's findings. These concerns were also acknowledged during the drafting process of the Optional Protocol, and the Chairperson in her elements paper considered the need to enhance the capacity of the CESCR through the hiring of professional staff to assist the Committee in its individual communications mandate.[99] The CESCR also acknowledged these challenges with regard to its capacity to handle the complexity of ESCR adjudication at the international level, and it responded to these challenges by detailing in its provisional rules of procedure the possibility of establishing Working Groups or designating Rapporteurs to make recommendations to the Committee or to assist the Committee in a specified way in its individual communications mandate.[100] Though a genuine challenge, the issue of capacity can be effectively bridged through the hiring of professional staff to assist the CESCR with its work, as well as by the CESCR engaging professional bodies in its individual complaints mandate.

97 See Human Rights Law Resource Centre 2009 http://www.hrlrc.org.au/files/op-icescr-hrlrc-submission-to-government.pdf para 31-34, where they affirm that even though views and recommendations from the CESCR will be non-binding legally, States have a duty to take steps to implement them in good faith in cooperation with the CESCR and treat the views as "authoritative determination by the organ established under the Covenant itself" (footnote omitted).

98 Langa 2009 *NJHR* 36.

99 De Albuquerque 2006 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/164/64/PDF/G0516464.pdf paras 57-59.

100 *Provisional Rules* Rule 6.

4.3 Resource constraints

Concerns about the availability of resources within the UN are closely linked to the capacity concerns raised above.[101] During the negotiations and the drafting process in the Working Group, concerns were raised as to the viability of the creation of a new complaints mechanism within the UN system, taking into account the reality of the dwindling resources available to the UN treaty monitoring mechanisms.[102] It was observed that due to these constraints, the creation of the complaints mechanism would severely eat into the resources of the CESCR, with the result that the quality of its work on treaty monitoring and the consideration of State reports would decline.[103] These are genuine concerns, but the dire situation being faced by people whose socio-economic rights are violated extensively all over the world with adverse consequences cannot be overlooked simply due to disquiets about costs. To respond to these capacity and resource constraint challenges, the Office of the High Commissioner for Human Rights (OHCHR) has undertaken a process of harmonisation of the work of the different UN treaty body mechanisms to enhance the efficient use of resources and to increase the support of the Secretariat to the different mechanisms.[104] The streamlining of administrative and support services being offered to the different international complaint mechanisms by the OHCHR will ensure that the available resources are used effectively to improve the operations of the complaint mechanisms for the benefit of victims of socio-economic rights violations.

5 Argument for Accession to the Optional Protocol by South Africa

The argument for accession by South Africa to the OP-ICESCR departs from the premise that South Africa has become (or at least will very soon be) a State Party to the ICESCR.[105] Having signed the ICESCR on 3 October 1994, South Africa has taken

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101 For a comprehensive elaboration of the resource constraints facing the UN Human Rights Treaty bodies, see Pillay 2012 http://www2.ohchr.org/english/bodies/HRTD/docs/HCReport TBStrengthening.pdf 25-28.

102 Langford 2009 *NJHR* 17.

103 Langford 2009 *NJHR* 17. Also see Dennis and Stewart 2004 *AJIL* 510-511.

104 Pillay 2012 http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf 32ff.

105 As South Africa has already signed the ICESCR, the term "ratification" is used to denote the formal acceptance of the treaty as binding on the country; and given that South Africa - as a

some significant steps towards its ratification. In particular, on 10 October 2012 Cabinet approved ratification of the Covenant.[106] The process has subsequently moved to Parliament in accordance with section 231(2) of the South African *Constitution*, which provides that an international agreement must be approved by both Houses of Parliament, namely the National Assembly and the National Council of Provinces, by way of a resolution of ratification, before approval becomes legally binding upon the Republic. Although this process has been stalled significantly, it is still on-going and it is hoped that South Africa will soon ratify the ICESCR.[107]

Having enacted a *Constitution* which entrenches a very extensive corpus of human rights, including justiciable socio-economic rights, and having made progressive steps towards ratifying the ICESCR, the substantive international human rights instrument providing for these rights, the question for South Africa in relation to the accession of the OP-ICESCR is not so much one of enlarging the scope of human rights standards, but one of adding to the enforcement of the already accepted standards.[108] Ratification of the ICESCR is important as it will ensure substantive uniformity in the normative standards for the realisation of socio-economic rights at the national and international level and cure the supposed difference in the structure of socio-economic rights as provided in the 1996 *Constitution* and the ICESCR.[109] Further, as the ratification process should in principle be preceded by a renewed

non-state party to the Covenant - has not been in a position to sign the OP-ICESCR, the argument is that South Africa should accede to the Optional Protocol either simultaneously with ratifying the Covenant, or as soon as is feasible thereafter. Initial signature, followed by ratification of the OP-ICESCR will in our view be an unnecessary waste of time.

106 See Government Communications 2012 http://www.gcis.gov.za/content/newsroom/media-releases/cabstatements/11Ict2012 where it was decided as follows: "Cabinet approved that South Africa accede to the United Nations International Covenant on Economic and Cultural Rights. The recommendation will be tabled in Parliament for ratification in line with Section 231(2) of the South African Constitution. The Covenant is a key international treaty which seeks to encourage State Parties to address challenges of inequality, unemployment and poverty, which are critical to the strategic goals of governments."

107 International organisations and civil society groups have decried the slow process of accession to the ICESCR by South Africa. For an analysis of these concerns, see ICESCR Ratification Campaign date unknown http://www.peopletoparliament.org.za/focus-areas/socio-economic-rights/
campaigns/Statements-20on-20ratification-20of-20ICESCR-20by-20SA-20-2031.08.2010-1.PDF.

108 See Evju 2009 *NJHR* 85, making a similar point in relation to Norway.

109 For a comparative analysis of the provisions of the 1996 Constitution vis-à-vis the provisions of the ICESCR, see ICESCR Ratification Campaign date unknown http://www.peopleto parliament.org.za/focus-areas/socio-economic-rights/campaigns/Comparison-20Chart-20-20the-20ICESCR.the-20Constitution.and-20the-20African-20Charter-1.PDF.

compatibility study, which would ensure that not only the *Constitution* but all other domestic laws and policies correspond to the international obligations entrenched in the ICESCR, South Africa's ratification of the Covenant is thus likely to ensure constitutional, legislative and policy conformity with South Africa's international socio-economic rights obligations. The result of the acceptance of both the Covenant and its Optional Protocol would be that socio-economic rights would be better observed, respected, protected, promoted and fulfilled by all levels and organs of the State.[110] Therefore, once South Africa's ratification of the ICESCR has been formalised, the added accession of the Optional Protocol would only be a complementary procedural tool for the enforcement of ICESCR rights.[111]

Given that South Africa already has in place a comprehensive constitutional framework and institutional mechanisms for the vindication of socio-economic rights, what is the added value for South Africa in acceding to the OP-ICESCR? In the view of the authors, accession would be of benefit to South Africa as a State, to South Africans in general, and to the international community at large. These beneficial interests largely dovetail with the major reason for the elaboration of an OP-ICESCR, which is to enhance the realisation of socio-economic rights at the national and international level. During the debates in the Working Group sessions, the following potential benefits of the Optional Protocol to future state parties, in general, were noted:[112]

> A complaints mechanism would: encourage States parties to ensure more effective local remedies; promote the development of international jurisprudence, which would in turn promote the development of domestic jurisprudence on economic, social and cultural rights; strengthen international accountability; enable the adjudicating body to study concrete cases and thus enable it to create a more concise jurisprudence.

Below, these benefits are elaborated on and placed in a specifically South African context.

110 CHR and SAIFAC "Memorandum to the Department of Justice" paras 3, 5.
111 Griffey 2011 *HRL Rev* 318.
112 OHCHR 2004 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/120/29/PDF/G0412029.pdf?OpenElement para 23.

5.1 Acceding to the OP-ICESCR will provide an additional safety net in instances of failure of recourse at the domestic level

By giving concrete form to the principle of the indivisibility of rights in its Bill of Rights, and by providing examples of the viability of the judicial adjudication of socio-economic rights, South Africa's 1996 *Constitution* has become a beacon to other states across the globe. The entrenchment of socio-economic rights in the 1996 South African *Constitution* has been held out as one of the most transformative aspects of the *Constitution*, and these rights have been hailed as instruments to build a caring society based on human dignity and equality. The transformative potential of justiciable socio-economic rights was affirmed in the *Grootboom* judgment, where the Constitutional Court held as follows:[113]

> All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The jurisprudence of the South African courts indicates that the constitutionally entrenched justiciable socio-economic rights are important for the eradication of poverty, inequality and marginalisation, as well as for the overall constitutional project of enhancing substantive equality, human dignity, social justice and the holistic transformation of the South African society into a more egalitarian and caring society. With the aim of achieving this constitutional project, South Africa has put in place an extensive range of mechanisms for the protection and promotion of socio-economic rights at the national level, including the judiciary, the South African Human Rights Commission, and the Commission on Gender Equality.

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113 See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23. The Court further noted in para 44 as follows: "A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those, whose needs are the most urgent, and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."

Despite this wide array of protection mechanisms, there may be instances where these mechanisms fail to adequately or effectively protect the socio-economic rights of South Africans, with severe implications for equality, human dignity and freedom, values that underpin the national constitutional project. If this occurs, access to an international mechanism provides an essential procedure by which individuals can access a remedy to repair a contravention. Such a mechanism at the international level is provided for by both the individual communication mechanism established under the OP-ICESCR and the opt-in inquiry procedure under the Protocol.

Mazibuko v City of Johannesburg provides an example of a case where the individual complaint mechanism may have been relevant. In this case, the Constitutional Court overruled both the High Court and the Supreme Court of Appeal with regard to the content of the right to adequate water (the sufficiency of the free basic water that was being provided by the City) and the legality of pre-paid water metres in the poorer parts of the City of Johannesburg.[114] The availability of the international mechanism would have enabled the litigants to access an alternative forum for the amelioration of their dire health and sanitary situation, taking into account the normative purposes and values underpinning socio-economic rights as contained in the ICESCR and the jurisprudence of the CESCR in relation to the right to water as contained in General Comment Number 15.[115]

It is crucial that international complaints mechanisms, as provided for under the OP-ICESCR, are available to right-holders as they provide a complementary avenue for rights claimants to access justice, thereby enhancing the overall realisation of socio-economic rights.[116] This is acknowledged by Simmons,[117] who argues that "these complaints can complement and support broader domestic social movements to prod governments to change public policies and priorities". The availability of this complementary international mechanism, even if it results in findings that are not formally binding, enhances the weight of advocacy in the domestic political processes, with the result that the needs of the vulnerable and marginalised groups

114 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).
115 *CESCR General Comment No 15: The Right to Water* (2003).
116 Simmons 2009 *NJHR* 65-66.
117 Simmons 2009 *NJHR* 72.

are brought to bear in national policy decision-making for the realisation of socio-economic rights. The importance of these international quasi-judicial mechanisms in the domestic protection of rights is further affirmed by Roach[118] who, in discussing the importance of the *First Optional Protocol to the International Covenant on Civil and Political Rights*, states as follows:

> Complaints under the Optional Protocol operate in an asymmetrical fashion; they guard against under-enforcement as opposed to over-enforcement of rights at the domestic level and thus serve as a potential buffer against the sense of complacency that can occur when domestic courts find that no rights have been violated.

Therefore, by acceding to the OP-ICESCR, South Africa will enhance the protection of these rights through the provision of further complementary safeguards against their violation, thus enhancing the potential that the social transformation envisaged by the 1996 *Constitution* is actually achieved for the majority of South Africans.[119] Accession will signal South Africa's humility in accepting that that there may be cracks, however small, in its protective framework. By proclaiming its commitment to the justiciability of these rights as an international commitment it further solidifies this position and makes its future reversal all the more improbable. Accession will also signal its continued commitment to the eradication of poverty, inequality and marginalisation through all the available legal means, domestically and internationally.[120]

5.2 Acceding to the OP-ICESCR will affirm South Africa's place as an international leader in the protection of justiciable socio-economic rights

Having entrenched and adjudicated on a wide range of socio-economic rights at the national level, South Africa continues to be a trend-setter for the judicial enforcement of socio-economic rights internationally. The national jurisprudence emanating from the South African Courts, especially the South African Constitutional

118 Roach 2004-2005 *Tex Int'l LJ* 540. Roach argues further at 354-355 that international quasi-judicial mechanisms serve as an antidote to a danger observed by James Bradley Thayer that democracies which rely on the judicial enforcement of bills of rights may become complacent about rights.

119 Chenwi and Hardowar 2010 *ESR Review* 5.

120 CHR and SAIFAC "Memorandum to the Department of Justice" para 2.

Court's decisions in the cases of *Grootboom*, *Treatment Action Campaign*[121] and *Soobramoney*,[122] have been the guiding lights in the debate on and the drafting of the OP-ICESCR.[123] This was reflected in the specific adoption in the OP-ICESCR of the reasonableness approach - as developed in the *Grootboom* judgment - as a prominent component of the assessment criteria in the adjudication of cases under the Optional Protocol.[124] This is affirmed by Porter who contends as follows:[125]

> The incorporation of wording from the *Grootboom* judgment suggests, as does the drafting history, that just as the South African Constitutional Court has incorporated jurisprudence from the CESCR into its own domestic jurisprudence, so has South African jurisprudence now informed the text of an international human rights instrument. There are a number of aspects of the reasonableness standard affirmed in the *Grootboom* decision which should, in turn, inform the interpretation and application of Article 8(4) of the Optional Protocol.

By acceding to the Optional Protocol, South Africa will continue being the beacon for other States in emphasising the justiciability of socio-economic rights both at the national and international level, with the result that these rights are better protected in domestic jurisdictions around the world and in the international sphere.[126] Together with the requirement of international solidarity in the realisation of socio-economic rights in all parts of the world, these should encourage South Africa to accede to the Optional Protocol. This is especially so in the light of South Africa's effort to maintain a high profile internationally as a State which is human rights compliant and which has taken serious strides to enhance domestic adjudication of socio-economic rights.[127] Failure to become a party to the Optional Protocol would contradict this key aspect of South Africa's foreign and international development

121 *Minister of Health v Treatment Action Campaign (No 1)* 2002 5 SA 703 (CC).

122 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC).

123 De Albuquerque 2006 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/164/64/PDF/G0516464.pdf paras 38-41, 62; Chenwi and Hardowar 2010 *ESR Review* 5.

124 Langa 2009 *NJHR* 32-33; Porter 2009 *NJHR* 46, 49-51.

125 Porter 2009 *NJHR* 50-51.

126 See for example Human Rights Law Resource Centre 2009 http://www.hrlrc.org.au/files/op-icescr-hrlrc-submission-to-government.pdf para 69, who, in arguing for the ratification of the Optional Protocol to the ICESCR by Australia, points to the jurisprudence of the South African Constitutional Court to indicate that socio-economic rights are sufficiently precise and capable of interpretation by the CESCR in the application of its individual communications mandate.

127 See SPII 2013 http://www.spii.org.za/agentfiles/434/file/ICESCR%20Booklet%20%28Jan2013%29.pdf 3, where they quote the founding President of the Post-Apartheid South Africa, Nelson Mandela, who pledged that "human rights will be the light that guides our foreign affairs".

policies, and might be used as a precedent to undermine efforts to promote and protect socio-economic rights elsewhere.

Further, accession by South Africa, a country with evident experience in the domestic protection of socio-economic rights, would also encourage the ratification and accession of the Optional Protocol by other African States, as the history of ratification of similar treaties indicates that States have a tendency to emulate the ratification practices of other States in their regions, especially regional hegemons, due to either moral or political pressure.[128] By mid-2014 only one African State, Gabon, had ratified the OP-ICESCR.[129] Should South Africa accede to the OP-ICESCR more African States might be encouraged to ratify or accede to it, resulting in the realisation of the dream of the drafters of the *African Charter on Human and Peoples' Rights* as contained in the preamble paragraph 8 of the Charter, which provides as follows:

> [It is] essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Widespread ratification of the Optional Protocol in Africa would enhance the respect, protection, promotion and enforcement of socio-economic rights in Africa, and thus improve the dire human development situation evidenced by the pervasive poverty and the lack of access to basic goods and services.

5.3 Acceding to the OP-ICESCR will encourage the development of uniform assessment standards internationally for the realisation of socio-economic rights and thus ensure greater consistency

Different national and regional courts have adopted different approaches and strategies in the judicial adjudication of socio-economic rights. An international

128 Simmons 2009 *NJHR* 64, 77-80. She contends at 65 that "[t]hose governments who already take these rights seriously should ratify as a model to encourage others to follow suit".

129 So far only 14 countries have ratified the OP-ICESCR and they are Argentina, Belgium, Bolivia, Bosnia and Herzegovina, Ecuador, El-Salvador, Finland, Gabon, Mongolia, Montenegro, Portugal, Slovakia, Spain and Uruguay - see UN Treaty Collection 2014 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

mechanism for the adjudication of socio-economic rights has the potential to comprehensively combine these different approaches to build a progressive international jurisprudence aimed at enhancing the full realisation of these rights globally.[130] This international jurisprudence will not only enhance the development of the content of socio-economic rights, but will also help ascertain the specific contours of States' international socio-economic rights obligations, leading to legal certainty and its attendant improvement in the implementation of and compliance with these rights.[131] Simmons[132] emphasises this by stating as follows:

> Allowing individuals to lodge complaints can be an important part of the process of gradually coming to a clearer understanding about what social and economic rights entail and what constitutes a good faith effort on the part of States Parties to comply with their international legal obligations.

In the application of this international jurisprudence on socio-economic rights at the national level, it is also important to note that the views resulting from the individual communications mandate of CESCR under the Optional Protocol are non-binding, which means that the domestic courts will still retain the power to scrutinise and censure the jurisprudence from the CESCR when considering its potential influence on domestic democratic decision-making, with the result that judicial power is not irrevocably transferred to the international level.[133] As the leader in domestic socio-economic rights adjudication, South Africa could thus benefit greatly from this international comparative jurisprudence in its own national adjudication of socio-economic rights, with the result that these rights would be better protected nationally and victims of their violation would be afforded adequate and effective remedies.[134] This is acknowledged by Langa,[135] who argued as follows:

> It is therefore useful to have progressive international instruments leading the development towards an increased protection of fundamental human rights.

130 Langa 2009 *NJHR* 31.

131 Simmons 2009 *NJHR* 65, 66-72; International NGO Coalition for OP-ICESCR 2013 http://www.escr-net.org/docs/i/1475393 3.

132 Simmons 2009 *NJHR* 68.

133 Evju 2009 *NJHR* 89.

134 See ss 39(1), 233 of the *Constitution of the Republic of South Africa*, 1996, which require South African courts to take international law into account when interpreting the rights entrenched in the *Constitution*. For a further discussion in this regard, see Chenwi and Hardowar 2010 *ESR Review* 4.

135 Langa 2009 *NJHR* 31.

> International instruments can assist the courts in understanding human rights and influence governments to legislate effectively to protect human rights.

So far South African courts have only sparingly utilised the jurisprudence emanating from the CESCR in the development of domestic socio-economic rights jurisprudence, with the courts emphasising that they do not have to follow the interpretive guidance of the CESCR.[136] This is likely to change with the ratification of the ICESCR, the possible accession to the OP-ICESCR and the development of comparative international jurisprudence, with the effect that the courts will not only be inward-looking but will also look outwards to the more protective comparative jurisprudence emanating from the international level.[137] This will ensure that socio-economic rights are better protected at the national and international level.

5.4 Acceding to the OP-ICESCR will not unduly encroach on South Africa's sovereignty and institutional integrity

Sovereignty concerns, informed by unease about the integrity of national processes of adjudicating socio-economic rights, may be allayed by referring to the requirement that domestic remedies need to be exhausted before a communication will reach the CESCR, and, in particular, as article 4 stipulates, that the applicants have to show that they suffered a "clear disadvantage"; by the possibility, allowed for under article 7, of friendly settlement before the Committee; and by the complementary role of the CESCR in its individual communications mandate. The competence of the Committee is contoured by the restrictions of article 8(4) of the Optional Protocol, which enshrines the reasonableness approach in the adjudication of socio-economic rights at the international level. In this constrained role, the CESCR is, like any other judicial or quasi-judicial body, mandated to review only the reasonableness of the measures that have been put in place to enhance the realisation of socio-economic rights, respecting the State's margin of appreciation due to the plurality of the choices of measures that can be put in place to realise these rights. The CESCR is thus not mandated to dictate to States which measures to adopt or which macro-economic policies to adopt in order to enhance the

136 CHR and SAIFAC "Memorandum to the Department of Justice" para 6.
137 See Van der Burg 2012 *ESR Review* 7.

realisation of socio-economic rights. This is acknowledged by Porter[138] in his assessment of article 8(4), where he contends as follows:

> While the CESCR is directed by Article 8(4) not to shy away from adjudicating these critical claims, it is at the same time directed not to lose sight of the fact that its role is to focus on compliance with the ICESCR and on the fundamental values it protects. The CESCR will not, under the reasonableness review that is endorsed in Article 8(4), impose its own policy choices when other choices may be available and preferred as a means to ensure compliance with the ICESCR. It will not confuse its role with that of the respondent government or other institutions better placed to design and craft appropriate policies and programs.

Accession to the Optional Protocol by South Africa will thus not detract from the sovereign mandate and responsibility of the relevant national government institutions to put in place specific measures aimed at the realisation of socio-economic rights. On the contrary, all that a review under the Optional Protocol will do is to enhance State accountability for the realisation of the Covenant rights at the international level;[139] encourage openness to a wide array of remedial options and engagement with relevant actors in the implementation of Covenant rights; and create new forms of institutional relationship between the government, international institutions and claimants of human rights in the realisation of socio-economic rights.[140]

5.5 Acceding to the OP-ICESCR will not create extra onerous international human rights obligations for South Africa

South Africa has ratified United Nations legal instruments creating individual complaint mechanisms, some of which already provide for at least some socio-economic rights and allow for their adjudication by bodies with a status similar to that of the CESCR.[141] South Africa's acceptance of these complaint mechanisms can

138 Porter 2009 *NJHR* 40-41.

139 Simmons 2009 *NJHR* 65.

140 Simmons 2009 *NJHR* 65.

141 At the international level, international legal instruments with complaint mechanisms that South Africa has ratified or acceded to include: the *First Optional Protocol to the International Covenant on Civil and Political Rights* (1966); a declaration under a 14 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) (CERD); a 22 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) (CAT), and a 1 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (2006) (OP-CRPD). It has so far not acceded to two instruments with individual complaints mechanisms, being the *Optional Protocol to the Convention on the Elimination of All Forms of*

hardly be said to have detracted from South Africa's sovereignty or its policy-making mandate in relation to the adoption of socio-economic policies for the realisation of human rights and fundamental freedoms at the national level.

At the regional level South Africa has already accepted international complaints mechanisms adjudicating socio-economic rights.[142] In fact, by accepting the jurisdiction of the African Court on Human and Peoples' Rights, the country has already accepted *judicial* adjudication of socio-economic rights. This is so because the *African Charter on Human and Peoples' Rights* incorporates the entire corpus of human rights, including socio-economic rights.[143] While the *African Charter* creates a quasi-judicial mandate for the African Commission on Human and Peoples' Rights to consider individual communications on claims for the violation of these rights,[144] the Court provides for binding adjudication of these rights.[145] In addition, South Africa is a state party to the Protocol to the *African Charter on the Rights of Women in Africa* (the *Women's Rights Protocol*), which not only guarantees an even more extensive array of socio-economic rights,[146] but also places the obligation on state parties to allocate spending on social welfare rather than on their military.[147]

Although South Africa has ratified the *African Charter*, the *Women's Rights Protocol* and the *Court Protocol*, so far no socio-economic rights communications or cases

Discrimination against Women (1999) (OP-CEDAW) and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) (MWC).

142 At the regional level South Africa has ratified the following legal instruments providing for an individual communications mechanism: the *African Charter on Human and Peoples' Rights* (1981); the *African Charter on the Rights and Welfare of the Child* (1990); the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003); and the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998).

143 *African Charter on Human and Peoples' Rights* (1981) aa 15 (right to work), 16 (right to health), 17 (right to education and cultural life), 18 (right to protection of the family) and 22 (right to economic, social and cultural development).

144 *African Charter on Human and Peoples' Rights* (1981) a 30 as read with aa 45-46.

145 *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998) a 1 as read with aa 2-3.

146 Some of the socio-economic rights entrenched in the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003) aa 12-24, include: education and training; equal opportunities in work and career advancement; health, including sexual and reproductive health; food security; adequate housing; and sustainable development. The *African Charter on the Rights and Welfare of the Child* (1990) similarly contains a myriad of socio-economic rights in aa 11-20, such as education, health, protection from child labour and exploitation, and the right to parental care.

147 Article 10(3) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

have been filed against it either at the African Commission or the African Court. The lack of socio-economic rights communications against South Africa in these complaint mechanisms is unlikely to be due to a lack of knowledge of the existence of these mechanisms, but is more likely to be due to the fact that potential claimants see little added value in having recourse to these complaint procedures due to the adequacy of the available domestic remedies. This is likely to be unchanged even if South Africa accedes to the OP-ICESCR.

Acceding to the Optional Protocol will thus not create more onerous obligations for South Africa above and above similar - and even more onerous - obligations it has already undertaken under these other legal instruments. It thus makes sense for South Africa to accede to the Optional Protocol, as ratification will re-affirm South Africa's commitment to a continued constructive engagement with treaty monitoring bodies at the regional and international level.

5.6 Acceding to the OP-ICESCR will enhance national awareness and appreciation of socio-economic rights and the international mechanisms available for their enforcement

Accession to the Optional Protocol is likely to enhance the overall understanding of socio-economic rights among South Africans, as the Optional Protocol obliges States to widely distribute and disseminate the ICESCR and the Optional Protocol itself, as well as the views and recommendations emanating from the CESCR under its individual communications procedure.[148] Widespread knowledge of the Covenant, the Optional Protocol and other materials emanating from the CESCR at the national level would enhance domestic advocacy for the improved realisation of socio-economic rights by individuals, groups as well as civil society organisations, with the effect that the national dialogue would be more inclusive and comprehensive. It would also improve the national civic monitoring and evaluation of the government's legislative, policy and programmatic framework for the realisation of socio-economic rights using international standards, with the result that the government's

148 OP-ICESCR a 16.

accountability for the domestic implementation of socio-economic rights in South Africa would be enhanced.[149]

6 Conclusion

The adoption and the coming into force of the OP-ICESCR provides an important opportunity for the enhanced protection, promotion and full realisation of socio-economic rights in line with the international law principle of the indivisibility, interrelatedness and interdependence of rights. In empowering the CESCR to consider individual communications and through its inquiry procedure, it provides an important avenue for the continued effort at the reduction of poverty by providing an opportunity for individuals and communities at the margins of society to attack poverty-enhancing violations of socio-economic rights at the international level. This was aptly captured by the former High Commissioner for Human Rights, Louise Arbour,[150] who stated that the Optional Protocol:

> [w]ill provide an important platform to expose abuses that are often linked to poverty, discrimination and neglect, and that victims frequently endure in silence and helplessness. It will provide a way for individuals, who may otherwise be isolated and powerless, to make the international community aware of their situation.

Accession to the Optional Protocol by South Africa may thus go a long way towards enhancing the protection of socio-economic rights at the national level, may improve the efforts to enhance substantive equality, to reduce poverty and improve standards of living, as well as to enhance the achievement of the transformative goal of the 1996 South African *Constitution* of transforming South Africa into an egalitarian and caring society.

We believe that a strong case exists for South Africa's accession to the OP-ICESCR. In fact, it is difficult to conjure up credible or convincing counter-arguments. Logic impels too strongly that South Africa should confirm at the international level its

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149 See Chenwi and Hardowar 2010 *ESR Review* 5, where they contend that "the OP-ICESCR promotes the culture of accountability and helps empower poor, vulnerable and marginal groups, and both of these objectives are encouraged by the South African Constitution". Also see Petherbridge 2012 http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf.

150 Arbour date unknown http://www.un.org/apps/news/story.asp?NewsID=27069&Cr=arbour.

position as a world leader on the national justiciability and legal enforcement of socio-economic rights, as, indeed, it has done during the drafting process of the Optional Protocol.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
AJIL	American Journal of International Law
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CHR	Centre for Human Rights, University of Pretoria
CPRs	Civil and political rights
CRC	Convention on the Rights of the Child
ECOSOC	Economic and Social Council of the United Nations
ESCR	Economic, social and cultural rights
HRC	United Nations Human Rights Committee

HRL Rev	Human Rights Law Review
Hum Rts Br	Human Rights Brief
Hum Rts Q	Human Rights Quarterly
IAIHR	Inter-American Institute on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NGOs	Non-governmental organisations
NJHR	Nordic Journal on Human Rights
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
SERs	Socio-economic rights
SPII	Studies in Poverty and Inequality Institute
Tex Int'l LJ	Texas International Law Journal
UC Davis J Int'l L & Pol'y	niversity of California Davis Journal of International

	aw and Policy
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disability