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

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INTRODUCTORY NOTE TO THE OPTIONAL PROTOCOL TO
THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
BY TARA J. MELISH*
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On December 10, 2008, the United Nations General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), reproduced below, commemorating the 60th anniversary of the Universal Declaration of Human Rights (UDHR).¹ In so doing, it rectified a three-decades-old asymmetry in international human rights law: the lack of an individual communications procedure for alleged violations of the ICESCR.

This asymmetry, reflected in the establishment of an individual complaints procedure for the International Covenant on Civil and Political Rights (ICCPR) and virtually every other United Nations human rights treaty adopted in the interim,² traces back to an important U.N. General Assembly decision taken in 1952. Charged with drafting an International Bill of Rights, the U.N. Commission on Human Rights had by 1947 decided that the Bill would consist of a declaration, a convention, and measures of implementation.³ The first of those, the UDHR, was finalized and adopted on December 10, 1948. Predicated on an understanding that the ideal of human dignity could not be secured without equal attention to the full family of civil, cultural, economic, political and social rights, which could not be divided or considered in isolation from each other, it comprised in one consolidated text the full scope of human rights and fundamental freedoms.⁴

As the Commission turned its attention to making these rights legally binding in the form of an International Covenant on Human Rights, a split emerged among its Members. In 1950, a “policy decision” was requested from the General Assembly on whether the Covenant should be divided in two, with one Covenant focusing on civil and political rights and the other on economic, social and cultural rights.⁵ Such division was necessary, proponents argued, as the norms in question formed “two different kinds of rights and obligations” and hence required different enforcement mechanisms.⁶ Specifically, understood as negative restraints on State action, only civil and political rights were perceived as susceptible to immediate legislative application and legal enforcement. Economic, social and cultural rights, it was contended, were “equally important” but were “programme” rights rather than “legal” rights, and hence required distinct methods of both implementation and enforcement.⁷

Significantly, the General Assembly rejected this view, insisting that a single Covenant be drafted that included economic, social and cultural rights.⁸ Stipulating insertion “either in the draft Covenant or in separate protocols,”⁹ it expressly instructed the Commission to consider provisions “for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the Covenant.”¹⁰ In so doing, it reiterated that the enjoyment of all human rights “are interconnected and interdependent” and that “when deprived of economic, social and cultural rights man does not represent the human person whom the Universal Declaration regards as the ideal of the free man [sic].”¹¹

With increasingly sharp lines being drawn around the two “categories” of rights, and Western and Soviet-bloc States lining up on either side of the divide,¹² the issue became increasingly intertwined with Cold War politics. In late 1951, the General Assembly was requested to “reconsider” its previous decision.¹³ With a standoff looming, risking extended delay in the drafting process, the General Assembly reversed its 1950 decision in 1952, now requesting the Commission “to draft two Covenants on Human Rights . . . one to contain civil and political rights and the other to contain economic, social and cultural rights.”¹⁴ To emphasize their unity of purpose and “to ensure respect for and observance of human rights,” the two were nonetheless to contain as many similar provisions as possible and to be submitted simultaneously for adoption.¹⁵

Two separate covenants were thus drafted,¹⁶ each reflecting in key aspects of their construction a stylized view of the rights in question. The ICCPR’s rights were drafted with primary emphasis on their negative aspects, while those in the ICESCR emphasized their corresponding positive dimensions. Likewise, though parallel in each of their operative parts, the general obligations clauses of the two treaties were drafted to underscore, in the ICESCR’s case, the progressive nature of the “full realization” of rights and the real-world limits of available resources,

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while those of the ICCPR referenced neither, highlighting instead the need for legislative measures and effective remedies.¹⁷ By amplifying only certain aspects of the rights and duties in question—aspects today recognized as constitutive of all fundamental rights¹⁸—these constructions reinforced a conception that only the norms in the ICCPR were susceptible to independent oversight and judicial enforcement. Correspondingly, while the ICCPR created an international body of *independent experts* to receive interstate complaints and to monitor the progressive implementation of treaty norms through States' periodic reports (i.e., the Human Rights Committee), the ICESCR entrusted supervision to a *political body*, the Economic and Social Council (ECOSOC). Only the ICCPR was accompanied by an Optional Protocol contemplating an individual complaints mechanism.

The impact of these decisions was significant. The Human Rights Committee, beginning its work in 1978, promptly began developing a comprehensive jurisprudence on the rights under the ICCPR, drawing from the concrete, contextualized situations of individualized abuse it considered under the communications procedure.¹⁹ By contrast, ECOSOC effectively neglected its supervisory mandate during the ICESCR's first decade in force. It was not until 1985 that ECOSOC, in recognition of its supervisory inattentiveness, authorized the creation of an independent body of experts, the Committee on Economic, Social and Cultural Rights (CESCR), to take over its supervisory tasks.²⁰ Even then, the CESCR could not address the individual dimensions of the rights it supervised, being limited to the consideration of general situations as reported in States' periodic reports.²¹

Consequently, as early as 1990, the CESCR began to call formally for an Optional Protocol, with a view to establishing an individual complaint mechanism. According to the CESCR, this was necessary not only to increase the stature and seriousness accorded to the ICESCR, but, by allowing the Committee to speak directly to concrete instances of abusive conduct, to provide more effective protection to individual victims and clearer normative guidance on the nature of rights and the scope of legitimate restrictions on them in distinct contexts. By engaging States in discussions of appropriate responsive measures to particularized abuses, it could, moreover, better encourage the development of effective domestic remedies and increase public attention to economic, social and cultural rights.²²

In 1992, the CESCR prepared a draft proposal on an optional protocol, submitting a statement and analytical paper on the issue to the 1993 Vienna World Conference on Human Rights.²³ The Conference responded by declaring that “[a]ll human rights are universal, indivisible and interdependent and interrelated . . . [and are to be treated] on the same footing, and with the same emphasis,” and by calling upon the U.N. Human Rights Commission “to continue examination of optional protocols” to the ICESCR in cooperation with the CESCR.²⁴

In December 1994, the Committee submitted to the Commission on Human Rights a report entitled “Draft optional protocol providing for the consideration of communications,”²⁵ and in 1996, following consultations,²⁶ a revised draft. In 2001, having sent the revised draft to Governments, intergovernmental organizations, and NGOs for comments in 1997,²⁷ the Commission appointed an Independent Expert, Mr. Hatem Kotrane, to examine the question of a draft Optional Protocol to the ICESCR.²⁸ Following two reports from the Independent Expert submitted in 2002 and 2003,²⁹ the Commission decided to establish an Open-ended Working Group (OWG) “with a view to considering options regarding the elaboration of an optional protocol to the ICESCR.”³⁰ Chaired by Ms. Catarina de Albuquerque of Portugal, the Working Group held five ten-day sessions from 2004 to 2008.³¹

Although the Working Group's first session in 2004 ended without any decision, the Chairperson was given a mandate at the second session to prepare a report containing elements of an OP with a view to facilitating discussions at the third session in 2006.³² The “elements paper”³³ lay out alternatives for each of the major issues in debate. Four merit highlighting. The first addressed broad disagreement within the OWG over whether the OP should adopt a “comprehensive approach” to subject matter jurisdiction, like all other U.N. treaties, or an “à-la-carte approach,” as is done under the European Social Charter, in which States pick and choose among norms they recognize as subject to the communications procedure.³⁴ A second disagreement, also related to *ratione materiae* jurisdiction, addressed the scope of the Committee's competence to find violations of norms in Parts I, II, and/or only III of the Covenant.³⁵ A third contested issue addressed the Committee's *ratione personae* jurisdiction and legal standing: whether the complaint mechanism should be limited to “individuals or groups of individuals” (like most U.N. treaties), collective complaints (like the Revised European Social Charter and ILO complaint procedure), or allow for both types of communications. And, fourth, disagreement persisted over the precise definition of State obligations under article 2 of the Covenant, and specifically how the concept of “progressive realization” and “available resources” would be interpreted in an individual complaints procedure.³⁶ Although

these issues remained heavily contested until the final session in 2008, each was ultimately resolved in favor of the approach adopted in other U.N. treaties, rather than as adopted in regional or specialized systems.

On Friday April 4, 2008, on the last day of its fifth session, the Working Group adopted its report *ad referendum*, agreeing to transmit the draft OP-ICESCR to the Human Rights Council for its consideration.³⁷ In June 2008, the Council approved the draft text by consensus,³⁸ and it was adopted and opened for signature by the U.N. General Assembly on December 10, 2008. The optional protocol will come into force three months after deposit of the tenth instrument of ratification or accession.³⁹

The resulting text is similar to the optional protocol to the ICCPR in most respects, but adds several important features, many drawn from the optional protocols to the Convention on the Elimination of Discrimination Against Women (OP-CEDAW) and the Convention on the Rights of Persons with Disabilities (OP-CRPD). For example, like OP-CEDAW and OP-CRPD, the OP-ICESCR expressly empowers the Committee to issue interim measures to protect individuals from irreparable harm and obligates States parties to take all appropriate measures to ensure that individuals under their jurisdiction are not subject to any form of ill-treatment or intimidation as a consequence of communicating with the Committee.⁴⁰ Likewise, the optional protocol borrows innovative language from the OP-CRPD in which it obligates States parties to ensure wide public access to, and knowledge of the ICESCR, its optional protocol, and the CESCR's views and recommendations, including through their dissemination "in accessible formats for persons with disabilities."⁴¹ It also requires that the Committee open its good offices to pursuit of friendly settlements.⁴²

The optional protocol includes two additional features not included in the OP-ICCPR. First, following OP-CEDAW and OP-CRPD—and drawing upon the old 1503 procedure of the U.N. Commission on Human Rights—it creates an inquiry procedure in which the Committee is empowered to conduct a confidential inquiry, including potential onsite visits, where it receives reliable information indicating "grave or systematic violations" of the ICESCR's rights by a State party.⁴³ Unlike the CEDAW and CRPD optional protocols, however, the OP-ICESCR procedure is an *opt-in* mechanism, rather than an *opt-out* one. Second, not only is the Committee empowered to send requests for technical assistance to the specialized U.N. agencies, funds, and programs, but the optional protocol mandates the establishment of a trust fund to provide expert and technical assistance to States Parties for the "enhanced implementation" of the rights contained in the Covenant.⁴⁴ Such assistance is "without prejudice" to the obligations States undertake by ratifying the Covenant.⁴⁵ As clarified by the CESCR, the "'availability of resources,' although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints justify inaction."⁴⁶

Two features nonetheless differentiate the OP-ICESCR from all other U.N. treaties. The first is a jurisdictional provision permitting the CESCR to discretionarily decline to consider a communication where it "does not reveal that the author [sic⁴⁷] has suffered a clear disadvantage."⁴⁸ This provision, recalling Protocol No. 14 to the European Convention on Human Rights, responds to a concern that large numbers of "trivial petitions" would be lodged with the Committee, thereby distracting it from other essential functions, such as its periodic reporting competence.⁴⁹ It prevailed in negotiations notwithstanding frequent reminders that no other U.N. treaty body has experienced this phenomenon, given the strictness of their respective admissibility rules, rules the CESCR shares under the OP. While the Human Rights Committee, like most other human rights bodies, has recognized the degree of impact on an individual's enjoyment of protected rights as a relevant factor in determining state responsibility for an alleged violation, it has done so at the merits stage only (in the exercise of proportionality review), not as a matter of admissibility.⁵⁰

Another significant difference with other U.N. treaties is that, in light of continuing misconceptions about the nature of State duties correlative to social rights, the OP-ICESCR provides directive guidance to the Committee as to how the conduct-based duty to "take steps" is to be interpreted under the individual complaints procedure. It stipulates that the Committee "shall consider the *reasonableness* of the steps taken by the State Party," bearing 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."⁵¹ This construction was included as a compromise between persistent proposals to include a direct reference to States' "broad margin of appreciation" and those insisting that such a margin is not always "broad" and must be determined on a case-by-case basis.⁵²

Taken as a whole, the adoption of the OP-ICESCR is highly significant. It promises to put to rest some of the most persistent criticisms regarding the adjudication of claims based on economic, social and cultural rights, criticisms that generally prevail only at the level of the abstract.⁵³ As the Committee engages with new sets of claims centered not on abstract violations and diffuse population-wide setbacks in rights enjoyment, but rather on concrete harms to individuals caused by identifiable state conduct, a more refined and grounded jurisprudence will appear. That jurisprudence is one delimited both by the Committee's case-based justiciability requirements, shared with the Human Rights Committee, such as individualized harm and causal imputation to State conduct,⁵⁴ and by the necessary balancing required by proportionality analysis and other forms of merits-based "reasonableness review."⁵⁵ In this respect, the jurisprudence of the CESCR under the OP-ICESCR is not likely to look significantly different from that currently being established in the areas of the rights to health, education, culture, housing, social security and work by the Human Rights, CERD, and CEDAW Committees, particularly in their emphasis on preventative safeguards, transparent and participative decisionmaking processes, and the institution of effective local remedies for specific abusive conduct.⁵⁶ Neither is it likely to look significantly different from the rapidly expanding jurisprudence of either the regional human rights systems or many national-level constitutional courts adjudicating in the area—either in the standards of substantive review the Committee employs or in the substantial discretion reserved for local political authorities in the crafting of appropriate remedial responses.⁵⁷

The obvious consequence will be a clearer appreciation that the adjudication of claims based on economic, social and cultural rights does not entail different legal standards than those applied to claims based on civil and political norms, either at admissibility, merits or remedial stages.⁵⁸ The legal principles and standards of international human rights law apply equally to both. It is not, then, a pronounced increase in either the quantity or quality of international litigation that should be expected of the OP-ICESCR's adoption. Rather, its contribution will be both more subtle and more important: to better focus the attention of public opinion on economic, social and cultural rights, on the legal principles and safeguards that must be respected in the drafting, implementation and monitoring of public policies and programs that affect them, and on nationally appropriate ways to provide effective remedies for concrete violations where arbitrary or otherwise unjustified interferences are found.

As the High Commissioner on Human Rights stressed in her report to the Working Group in 2008, the establishment of a communications procedure under the ICESCR "will send a strong and unequivocal message about the equal value and importance of *all* human rights . . . help[ing to] put to rest the notion that legal and quasi-judicial remedies are not relevant for the protection of economic, social and cultural rights."⁵⁹ Overcoming this long-standing misconception, and hence opening the door to more concerted public attention to economic, social and cultural rights and to the shape of public policies that affect them, is, in the final analysis, likely to be the OP-ICESCR's most significant contribution.

ENDNOTES

1 U.N. Doc. A/RES/63/117 (Dec. 10, 2008) [hereinafter OP-ICESCR]

2 An individual communications procedure had been established with respect to the rights in six of the other seven core U.N. human rights treaties, most of which contain economic, social and cultural rights norms. These include: the ICCPR, the Convention on the Elimination of Racial Discrimination, the Convention Against Torture, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of Migrant Workers. Only the Convention on the Rights of the Child lacks an individual complaints procedure.

3 See Commission on Human Rights, Report 6, 6 U.N. ESCROR, Supp. 1, at 4-5, U.N. Doc. E/600 (1947) (making decision and setting up three working groups to deal respectively with each issue).

4 For an excellent discussion of the UDHR drafting negotiations,

see MARY ANN GLENDON, *THE WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

5 ECOSOC Resolution 303 I(XI) (requesting General Assembly to make policy decision regarding "[t]he desirability of including articles on economic, social and cultural rights" in the International Covenant on Human Rights).

6 See 13 U.N. ESCOR, Plenary Meetings, Supp. 1, at 36, U.N. Doc. E/2125 (1951).

7 See *Annotations on the text of the draft International Covenants on Human Rights*, 10 GAOR, Annexes, Agenda, Item 28 (Part II), at 4, ¶ 29, U.N. Doc. A/2929 (1955); *id.* at 7-8, ¶¶ 7-11 (noting view of certain U.N. Member States that "legal" rights could best be implemented by the creation of a good offices committee, while "programme" rights could best be implemented by the establishment of a system of periodic reports). It is to be noted that a system of periodic reports was established under both the ICCPR and ICESCR.

- 8 G.A. Resolution 421 (V) (Dec. 4, 1950), ¶ 8 (deciding “to include in the covenant on human rights economic, social and cultural rights”).
- 9 *Id.* The option of including an individual petitions mechanism “in separate protocols” appeared to provide for the possibility that States Parties to the covenant might opt-in to the mechanism with respect to distinct sets of rights as they were ready.
- 10 *Id.*
- 11 *Id.* ¶ 7(a), (b).
- 12 Non-aligned States split fairly evenly between the two.
- 13 Commission on Human Rights, Report of the Seventh Session, 13 U.N. ESCOR, Supp. 9, at 6, ¶ 22, U.N. Doc. E/1922 (1951). Formally, this was justified on the ground that the Commission, in complying with the Assembly’s 1950 decision, had nonetheless left open the issue of whether the implementation measures, now laid out in Parts IV and V of the draft, applied to the whole Covenant or only to certain parts. *Id.*
- 14 G.A. Resolution 543 (VI) (Feb. 5, 1952).
- 15 *Id.* Both Covenants were adopted simultaneously on December 16, 1966 and both entered into force in 1976, although the ICESCR did so several months earlier than the ICCPR.
- 16 The drafting of both Covenants was completed in 1954. See ECOSOC Resolution 545 B (XVIII) (transmitting draft covenants to General Assembly). Another twelve years nonetheless passed before they were adopted by the General Assembly in 1966.
- 17 See ICESCR, art. 2; ICCPR, art. 2.
- 18 See, e.g., CESCR, General Comment No. 9, *The Domestic Application of the Covenant*, U.N. Doc. E/C.12/1998/24 (1998) (stating that the “central obligation” of the ICESCR is to “give effect” to rights, through “all appropriate means,” which include legislative measures and the provision of effective legal remedies).
- 19 For the leading commentary on the ICESCR, see MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 43-44 (2d rev. ed. 2005).
- 20 ECOSOC Resolution 1985/17 (May 28, 1985) (authorizing replacement of sessional working group with committee of 18 independent experts).
- 21 A general periodic reporting system was the only implementation mechanism created under the ICESCR. See ICESCR, Part IV.
- 22 See, e.g., CESCR (6th session, 1991), E/1992/23, ¶ 362 (discussing reasons why Optional Protocol is necessary for its work); CESCR, Fact Sheet No. 16 (rev. 1) (1991), Part 8 (same).
- 23 U.N. Doc. A/CONF.157/PC/62/Add.5, Annex II.
- 24 1993 Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, ¶¶ 5, 75.
- 25 U.N. Doc. E/C.12/1994/12 (1994).
- 26 See, e.g., F. COOMANS AND G.J.H. VAN HOOFF (ED.), *THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROCEEDINGS (OF THE EXPERT MEETING ON THE ADOPTION OF AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Utrecht, 25-28 January 1995))* (1995).
- 27 The text of the draft is appended to E/CN.4/1997/105 (Dec. 18, 1996).
- 28 Commission on Human Rights Resolution 2001/30.
- 29 The independent expert’s two reports can be found at E/CN.4/2002/57 and E/CN.4/2003/53.
- 30 Commission on Human Rights Resolution 2002/24, U.N. Doc. E/CN.4/RES/2002/24 (2002).
- 31 These included: first session (Feb 23-Mar. 5, 2004), second session (Jan. 10-20, 2005), third session (Feb. 6-16, 2006), fourth session (July 16-27, 2007), fifth session (Feb. 4-8, 2008 and Mar. 31 – Apr. 4, 2008). It was not, however, until 2006, following the OEWG’s third session, that the Working Group was given a mandate by the newly-constituted Human Rights Council to begin drafting the optional protocol. See Human Rights Council Resolution 1/3 (June 29, 2006) (deciding to extend the mandate of the Working Group for two years in order to elaborate an optional protocol and requesting the Chairperson to prepare a first draft optional protocol as the basis for further negotiations, including draft provisions corresponding to main approaches outlined in her analytical paper).
- 32 See Report of second session, E/CN.4/2005/52. The report of the third session is available at E/CN.4/2006/47 (Mar. 14, 2006).
- 33 Elements for an optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, E/CN.4/2006/WG.23/2 (Nov. 30, 2005).
- 34 The “à la carte” approach” was sub-divided into three alternatives: “opt-in à la carte,” “out-out à la carte,” and “time limited” approaches. See *id.* at ¶ 5.
- 35 While some Working Group members advocated extension to all three Parts, others preferred exclusion of Part I only, while still others pressed for limitation to Part III.
- 36 In 2007, the CESCR issued a very useful report to assist Member States in understanding the duties undertaken in article 2 of the ICESCR. See CESCR, *An evaluation of the obligation to take steps to the “maximum of available resources” under an Optional Protocol to the Covenant*, E/C.12/2007/1 (Sept. 21, 2007).
- 37 A/HRC/8/7 (2008), ¶ 255.
- 38 Human Rights Council Resolution A/HRC/8/2 (June 18, 2008).
- 39 OP-ICESCR, *supra* note 1, art. 18.
- 40 *Id.* arts. 5, 13.
- 41 *Id.* art. 16.
- 42 *Id.* art. 7.
- 43 *Id.* art. 11.
- 44 *Id.* art. 14.3.
- 45 *Id.* art. 14.4.
- 46 See U.N. Doc. E/C.12/2007/1, *supra* note 36, ¶ 4.
- 47 The use of the term “author” appears to be a drafting error. Article 2 of the Optional Protocol carefully distinguishes the legal identities of the “author” of a communication and those “claiming to be a victim,” which need not be identical. The OP-ICESCR *travaux préparatoires* on draft article 4 correspondingly indicate the drafters’ intent that the “alleged victim” have suffered “a clear disadvantage,” not the author.

- The error appears attributable to a direct translation of the term “applicant” from Protocol No. 14 to the European Convention on Human Rights. *See infra* note 49.
- 48 OP-ICESCR, *supra* note 1, art. 4.
- 49 *See* Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, C.E.T.S. 194 (permitting European Court of Human Rights to decline to admit a case if the “applicant has not suffered a significant disadvantage, unless respect for human rights . . . 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”). Protocol No. 14, which, has yet to come into force pending ratification by Russia, was adopted by the Council of Europe in 2004 in an attempt to deal with the tremendous backlog of cases faced by the European Court of Human Rights, which now receives over 40,000 cases per year.
- 50 *See, e.g.*, *Länsman et al. v. New Zealand*, U.N. Hum. Rts. Comm., Comm. No. 511/1992, ¶ 9.5.
- 51 OP-ICESCR, *supra* note 1, art. 8(4) (emphasis added).
- 52 The European Court of Human Rights follows a case-by-case approach to margin of appreciation analysis. *See generally* HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996). Although most other supranational human rights bodies decline to apply the appreciation doctrine as a direct basis of review, *see, e.g.*, *Länsman*, *supra* note 50, ¶ 9.4, all recognize through case-by-case proportionality analysis that States have varying levels of discretion in choosing appropriate means to implement rights. The operative question is whether the means chosen are proportional to the legitimate and pressing ends sought to be achieved.
- 53 *See generally* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?*, 98 AM. J. INT’L L. 462 (2004) (making claims from abstract). For a detailed discussion of comparative approaches to the concrete adjudication of economic, social and cultural rights claims by national and supranational tribunals, *see* M. LANGFORD, ED., *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (2008).
- 54 OP-ICESCR, *supra* note 1, art. 2 (communications may be submitted “by or on behalf of individuals or groups of individuals claiming to be *victims* of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State party”) (emphasis added).
- 55 *See* ICESCR, arts. 4-5. The Committee has interpreted ICESCR articles 4 and 5 as requiring proportionality review. *See, e.g.*, CESCR, General Comment No. 14, *The right to the highest attainable standard of health*, U.N. Doc. E/C.12/2000/4 (2000), ¶¶ 28-29.
- 56 *See, e.g.*, *SOCIAL RIGHTS JURISPRUDENCE*, *supra* note 53, chs. 24-26 (examining comparative treaty body approaches to social rights).
- 57 *See, e.g., id.* chs. 4-22 (examining comparative approaches to social rights adjudication in national and regional jurisdictions).
- 58 Like human rights bodies with primary jurisdiction over civil and political rights norms, the merits-based focus of the CESCR under the OP-ICESCR is highly likely to center on three sets of legal review standards, each designed to determine whether discrete interferences with or limitations on protected rights are justified in the circumstances: (1) classic means-ends proportionality analysis, (2) recognition of the procedural dimensions of rights, including safeguard policies around the core human rights principles of non-discrimination, participation, and accountability; and (3) the development of substantive equality standards requiring special attention to the most vulnerable. The CESCR has repeatedly referred to these safeguards in its General Comments, *see, e.g.*, General Comment No. 14, *supra* note 55, and they closely track the standards already applied extensively by human rights tribunals around the world as they deal with claims affecting the full family of human rights.
- 59 Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Fifth session, Salle XII, Palais de Nations, Mar. 31, 2008.