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Key Issues of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and its Role in Challenging Systematic Poverty

Mariagiulia Giuffré[*]

Abstract

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes the latest of the UN human rights complaints mechanisms. After an overview on the main key issues and functions of the Protocol, this paper examines the extent to which it may be deemed a meaningful tool for challenging systematic poverty.

This paper argues that interpreting development and poverty alleviation in terms of *shared responsibility* would reinvigorate the importance of the justiciable obligation of international assistance and cooperation in mitigating harmful practices of inequality and exclusion. It concludes that a potentially more effective complaints mechanism could have been created. Nevertheless, the adjudicatory role of the Committee would be crucial for highlighting violations of ESCR committed by both donor and recipient states, thus enhancing victims' participation, transparency, and accountability for any breach of the Covenant's territorial and extraterritorial obligations.

Keywords: Optional Protocol; Economic, Social and Cultural Rights; Poverty; International Cooperation

Introduction

Much is expected from the latest UN human rights complaints mechanism. The Optional Protocol (OP) to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted without a vote by the UN General Assembly on 10 December 2008 on the sixtieth anniversary of the Universal Declaration of Human Rights (UDHR) after a two-decade long campaign, was hailed by the High Commissioner of Human Rights, Navanethem Pillay, as "a veritable milestone in the international human rights system" at its signing ceremony on 24 September 2009.[1] Nevertheless, the slow process of ratification risks to downgrade the expectation put on the Protocol,[2] at its adoption called by a movement of human rights NGOs "an achievement […] of momentous importance" and a "great advancement […] in the pursuit of economic, social and cultural rights [ESCR]".

The cause for this initial overwhelming positive response is the fact that the OP provides the victims of violations of ESCR with a mechanism through which they can seek effective remedies at the international level. It does this by bestowing on the Committee on Economic, Social and Cultural Rights (Committee on ESCR) competence to receive and consider complaints or "communications" submitted by individuals or groups of individuals who are under the jurisdiction of a state party to the OP and claim to be victims of a violation of any of the rights set forth in the Covenant itself (Articles 1 and 2).[3] The OP thus places ESCR, as protected by the Covenant, on the same footing as civil and political rights (CPR) and, in doing so, reaffirms the indivisibility and interdependence of both sets of rights.

The commentaries of human rights advocates and scholars have tended to view the OP as a progressive step for the international human rights system.[4] Such commentaries have focussed largely on such issues as the emergence and drafting of the Protocol, the issue of the justiciability of ESCR at the international level, or the lessons that may be learnt from the experience of the complaints mechanism of the Human Rights Committee (HRC) associated with the International Covenant on Civil and Political Rights (ICCPR) since its inception.

After an overview on the main key issues of the OP and the supervision mechanisms it creates, the present paper seeks to preliminarily examine the various ways in which this international document may be considered a tool for challenging systematic or structural poverty the world over—the highest of expectations for an international mechanism of ESCR enforcement. Placing special attention on the identification of freedom from poverty as a legitimate human rights objective, the justiciable obligation of states to provide international assistance and cooperation for the realization of ESCR will be explored as an instrument to alleviate poverty and unequal access to wealth and world resources.

While there have been some notable developments in this regard—in particular the reports of the Special Rapporteur on the Right to Food and in recent academic approaches to global poverty (GHAI; COTTRELL, 2011; DE SCHUTTER, 2009; SALOMON, 2008)—these analyses have not been reflected by the international human rights system as a whole and do not form part of mainstream human rights thinking. Therefore, this paper asks how the OP may be used to address systematic poverty, whether or not that is an overt goal or not, in practice. Furthermore, the following analysis aims to investigate whether the OP in its final drafted form will have the potentiality for accomplishing the established objectives of the project as promoted during the long-running campaign for the international justiciability of ESCR, or whether, instead, it is not strong as it could have been, thus risking that the conjunction of standing provisions and admissibility criteria further hamper the process of access to justice for millions of victims and excluded worldwide.

The structure is the following. Section I, after a brief introduction on the opportunity to make ESCR justiciable, sets out the key issues to assess the future success or failure of the OP. In doing so, the paper looks at: first, the scope *ratione materiae* of the complaints mechanism in Article 2; second, admissibility and standing criteria; third, the establishment of an effective inquiry procedure; fourth, the role of international assistance and cooperation along with the setting up of a Trust Fund. Section II questions whether the ICESCR produces extraterritorial effects and whether the OP allows complaints for infringements of extraterritorial obligations. Finally, Section III starts with a description of Millennium Development Goals (MDGs) arguing how development and human rights practitioners have traditionally seemed to operate along "parallel lines". It then investigates, from a human rights perspective, the extent to which the OP to the ICESCR can be considered a meaningful tool for challenging structural poverty focussing, in particular, on the obligation of states to provide international assistance and cooperation, thereby contributing to realize ESCR to the maximum of their available resources.

1 Benefits, Challenges, and Critical Aspects of the OP

The issue of the justiciability of ESCR has gained currency in contemporary human rights discourses, especially in relation to the new international procedure of individual complaints adopted by the OP.[5] Today, indeed, one of the greatest challenges for both scholars and policy-makers is to identify effective approaches to implementation of ESCR, as well as mechanisms to make states accountable to fulfil their duties. The accountability of state actors through the adoption of new international adjudicative mechanisms appears to be an indispensable element of international human rights law.

The purpose of this paper is not to revisit the general arguments for and against the justiciability of ESCR, since studies of that particular nature have been extensively undertaken elsewhere (CHENWI, 2009; MASHAMBA, 2009). However, it is worth noting that the opponents of the proposal for an OP considered essentially flawed the assumption that ESCR must be treated the same as civil and political rights and must, therefore, be justiciable in the same sense (DENNIS; STEWART, 2004, p 462). By stigmatizing the international complaints procedure as a further mechanism to subordinate politics and legislative power to judicial or quasi-judicial processes, the most prominent opponents of the OP point out how it does not necessarily produce better results (NEIER, 2006; SANDLER; ROSS; SCHOEMBROD, 2003, pp 223-228; TUSHNET, 2004).[6] But also states such as Australia, Canada, Denmark, New Zealand, Poland, the United Kingdom, and the United States have severely obstructed progress toward the OP's adoption, arguing that they would have never ratified this instrument.[7]

In response to these critical arguments against the justiciability of ESCR, the idea of the crucial contribution of an international adjudicative mechanism to the global understanding and enforcement of ESCR has been widely supported (COOMANS, 2009, pp 315-316; ALSTON, 1995, p 107). Finding adequate legal remedies, and clearly defining broad open-ended rights, such as freedom of expression, the right to social security, or the right to work, are only some of the main difficulties of judges in addressing ESCR-related claims.

However, despite the challenges faced by those advocates seeking to litigate ESCR, the idea that the latter are incapable of being claimed through judicial means would be erroneous. Alston, for instance, argues that individual and group complaints would bring concrete and tangible issues into relief. Indeed, the focus on a particular case with the submission of precise information by the petitioner would provide a more detailed framework for inquiry which is otherwise absent in the traditional reporting procedure (ALSTON, 1995, p 107). Furthermore, making ESCR internationally justiciable, subject to formal third-party adjudication, both encourages governments to ensure more effective local remedies in respect of ESCR and provides an incentive to individuals and groups to formulate some of their economic and social claims in a more detailed way (*Ibid*).[8] Traditionally labelled as vaguely worded and resource- demanding, ESCR have been excluded from the perview of the judiciary, which does not have a democratic legitimacy. However, as Koch emphasizes, 'the issue is hardly whether a right has resource implications but whether there is a solid legal basis for claiming that a state is obliged to ensure that resources are allocated for a certain purpose.' (KOCH, 2006, p. 406)

The Committee on ESCR is the main UN body concerned with these rights. Its core tasks consist in supervising compliance by states parties with their obligations under the Covenant through the examination of regular reports submitted by member states at five-yearly intervals, which culminate in the

adoption of Concluding Observations. The Committee also produces General Comments (GC) with the scope of contributing to the development of the normative content of the rights recognized in the Covenant, and to urge states to develop national mechanisms for establishing accountability for violations of ESCR.[9] Generally speaking, human rights treaty bodies do not have judicial powers, and even the Committee on ESCR holds states accountable at an international level only through the examination of governments' reports.

For the past decade, the matter of the foundation of an individual complaints procedure for adjudicating breaches of ESCR has been under consideration. However, it was only in 2003 that the UN Commission on Human Rights appointed the "Open-ended Working Group on an Optional Protocol to the ICESCR (OEWG)", which was granted a mandate in 2006 to prepare a first draft OP to be used as a basis for interstate negotiations. Yet, from the outset, some commentators and governments opposed the adoption of such a document, and considered as a priority only the development of the normative content of the Covenant, rather than the adoption of an individual complaints procedure. In particular, there has been considerable resistance from countries, such as Australia, Canada, the United Kingdom, and the United States.

For this reason, the participation of national-level NGOs and the enthusiasm of the civil society have been absolutely essential to carry out this process. Governments were, indeed, in sharp disagreement over the viability of the proposal for an OP by questioning whether and how a legally binding adjudicative regime would improve states parties' implementation of ESCR (First OEWG, 2004). Finally, in early April 2008, the OEWG approved by consensus the draft OP and decided to transmit it for consideration to the Human Rights Council.[10] The text of the OP, conclusively approved by the UN General Assembly on December 2008, was open for signature by states on 24 September 2009 and will enter into force once ratified by ten states (Article 18).

The elaboration of instruments that enable victims of human rights violations to bring complaints at the international level is not a new issue. Individual recourse to international institutions constitutes an essential remedy for victims of human rights infringements since they are allowed to vindicate their rights without any authorization by state agencies. In addition, as the state against which the legal action is brought is placed at the same level of the complainant, it cannot avail itself of sovereign rights to escape from its legal responsibility with respect to the claimant.

The majority of UN human rights treaties already have optional protocols establishing individual complaints and inquiry procedures.[11] Although the opinions expressed by the HRC after reviewing individual complaints on violations of CPR are not legally enforceable as a domestic court opinion traditionally is, states parties have agreed to be legally bound by these pronouncements. Indeed, the "views" of the HRC, even being devoid of legal force, bear, however, high moral authority. Likewise, the Committee on ESCR is empowered, pursuant to the new OP, to consider inter-state, individual, or group communications (Articles 10 and 2) issuing authoritative "views" with the purpose of recommending states to provide adequate remedies against violations of relevant rights.

On a general note, the decisions of the UN human rights treaty monitoring bodies do not specify the content of these remedies, thus leaving states a wide degree of discretion in determining how to comply with their international obligations. At the same time, in some cases, these "recommendations" could

expressly indicate how governments should rectify a situation of abuse and whether restitution or compensation are required. The Committee on ESCR can also both initiate inquiries once received reliable information indicating grave and systematic violations of the Covenant (Article 11) and request states parties to endorse interim measures in case of risk of irreparable damage to the victims of the alleged violations. These safeguards should ensure, in particular, that applicants are not subject to any form of intimidation as a consequence of communicating with the Committee (Article 5).

In concert, Langford and Scheinin suggest that a way to strengthen the quality of the decision-making of the Committee consists in giving it authority through, for instance, an internal "code of conduct". In this sense, the HRC could serve as an instructive example given that it has adopted a self-imposed rule that only professors and judges are appointed to its ranks and that they abstain from engaging in any external activities or functions which could affect their impartiality and independence (2009, p 102).

In Cahn's words, "the OP seems to bring the possibility of international justice one step closer for millions of excluded persons, groups, and communities worldwide" (2008, p 6). Besides, this process might give impetus to the struggle against extreme poverty, which, as Mary Robinson suggests, probably represents the most serious form of human rights violation today. While in 1992, the UN General Assembly recognized for the first time "extreme poverty" as a violation of human dignity, in 2004 the Office of the High Commissioner of Human Rights adopted "Draft Guidelines on a Human Rights Approach to Poverty Reduction" (HUNT; OSMANI; NOWAK, 2004). Unequal opportunities in terms of resources and access to services are basically unjust and deny poor people a political voice. As economic disparity is rooted in power structures, when a national government is unable or unwilling to remedy extreme poverty, a human rights-based responsibility should fall upon the international community and its international accountability mechanisms such as those procedures of control and supervision established by human rights treaties (*Ibid*).

In addition, as stressed by the UN High Commissioner for Human Rights Louise Arbour, an international adjudicative mechanism "will provide a way for individuals, who may otherwise be isolated and powerless, to make the international community aware of their situation" (2008). While only time will tell what the potential future impact of this new OP will be, next sections offer a depiction of the key issues of the OP, with the purpose of endowing the reader with the elements for an early evaluation of the potential impact of universal quasi-judicial remedies in securing ESCR in practice and in challenging systematic poverty.

1.1 Scope Ratione Materiae

The draft OP adopted in June 2008[12] by the Human Rights Council allowed states, individuals, and groups to bring communications in relation to a large but still limited portion of ESCR, namely those set forth in Part II and III of the Covenant (Article 2 draft OP). The exclusion of Part I (the right to self-determination) from the ambit of the complaints mechanism was among the concerns some states expressed in the last sessions of the Working Group. In particular, the delegations of Algeria, Egypt, Palestine, Pakistan, and Syria clearly manifested their unwillingness to accept the explicit exclusion of the right to self-

determination as a consequence of pressure exercised by governments such as China, India, and Russia. Finally, incessant formal and informal discussions at the Human Rights Council led to the renegotiation of a new arrangement including the right to self-determination.[13]

While the final text is the result of a compromise between different state interests, it has nevertheless embraced a comprehensive approach, which allows communications for violations of any of the rights set forth in the Covenant. Indeed, pursuant to Article 2, "[c]ommunications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of *any* of the economic, social, and cultural rights set forth in the Covenant by that state party" (emphasis added). On 10 December 2008, since no state broke the consensus on the compromise text, the General Assembly unanimously adopted the last draft of the OP holding a comprehensive approach toward the protection of ESCR.

Generally speaking, a limited approach concerning the selection of rights to be covered by the Protocol would set a retrogressive precedent on the right to a remedy for ESCR violations as opposed to other universal human rights mechanisms. A hierarchy of rights, indeed, would inevitably weaken the principle of their interdependence and indivisibility indicating that, while the protection of CPR benefits from a comprehensive approach, the safeguard of ESCR can be subjected to a number of exceptions on the basis of state party's discretion and convenience.

The complaints mechanisms established by some international treaties also adjudicate a number of rights enshrined in the ICESCR.[14] It thus follows that the adoption in the new OP of an *à la carte* approach would have raised normative inconsistencies and legal uncertainty (NGO Coalition, 2007, § 7). A valuable role has been played, throughout, by the Coalition for the OP to the ICESCR that supported a comprehensive approach and stimulated the inclusion of Part I of the Covenant from the outset (*Ibid,* § 9). Similarly, also the African Group and the Group of Latin America and Caribbean states endorsed the proposal for a wide-ranging approach. Since Part I of the ICCPR is identical to that of the ICESCR and it is not omitted from the relevant Optional Protocol, the NGO Coalition accounted as inappropriate its exclusion from the OP to the ICESCR. Additionally, given the identity of Part I in both Covenants, the jurisprudence of the HRC could be an important precedent for the Committee on ESCR (*Ibid*).

The rationale behind the initial omission of Article 1 from the list of justiciable claims is probably that the right to self-determination is not an individual one, but rather a right of peoples that cannot be individually enforced under a completely comprehensive model (TOMUSCHAT, 2008, p 208). This position was supported, for instance, by the delegations of Australia, Greece, India, Morocco, Russia, the United Kingdom, and the United States (OEWG, 2007, § 158). Nonetheless, a number of countries immediately started to voice concerns regarding the "limited comprehensive" scope of the OP, which risked undermining the interrelatedness and indivisibility of Covenant rights. As a result, the text was amended by the General Assembly on 10 December 2008 as to allow complaints regarding violations of *any* of the ESCR set forth in the Covenant.[15]

Some states, however, continued to be convinced that the "right to self-determination cannot be invoked to trigger a complaint"[16] and that the vague nature of this new wording would leave room to serious problems of interpretation of the OP. As Mahon observes, the OEWG in opting for the initial exclusion of Part I, tried to adopt an approach consistent with the HRC (2008, p 633). The

latter, although maintaining that it has no competence in adjudicating stand-alone violations of the right to self-determination, *de facto* has always considered claims concerning breaches of this right, but only in relation to violations of other rights.[17]

The fact that the draft OP, adopted in June 2008, had excluded the justiciability of the right to self-determination could have led to courts determining that this right could be adjudicated neither internationally nor domestically, thus further contributing to its detriment. Such a distinction within the same category of rights does not only undermine the holistic nature of ESCR, which depend on each other, but it would also amount to a failure to recognize and address the realities faced by victims of ESCR abuses, preventing them from receiving adequate remedy, reparation, and guarantees of non-repetition (MIVELAZ, 2006, p 6). Eventually, this inconsistency was solved in the final text by entitling even victims of violations of the right to self-determination to access justice and seek redress (Article 2 OP).

A further critical issue related to the competence *ratione materiae* of the OP was whether an Article, which allowed for reservations to the OP would have introduced an *à la carte* approach through the backdoor. Building on the principle of *pacta sunt servanda*—according to which states parties to a treaty are bound to respect it—and on the practice of the HRC, which considers reservations contrary to the object and purpose of the treaty, some international human rights documents have included provisions which expressly prohibit reservations.[18] In the light of UN human rights bodies' practice, also the OP to the ICESCR has deleted the article on reservations,[19] thus preventing states from choosing which rights to recognize.

1.2 Admissibility and Standing

Under Article 2 of the OP, communications may be submitted by or on behalf of individuals or groups of individuals, who are under the jurisdiction of a state party, only with their consent. While a single person has to show that he/she was personally affected by a human rights violation, in the case of groups it would be sufficient to demonstrate that, by virtue of an official act, that group was subject to a condition of general discrimination (Fourth OEWG, 2007, § 51).[20] The Committee can decline to consider a complaint if *prima facie* the author seems not to have suffered a "clear disadvantage", unless the Committee deems that the communication raises a host of serious issues of general importance requiring a deeper analysis (Article 4 OP). It has also been argued that "declaring such cases inadmissible is optional and not obligatory" (IAIHR; ICJ, 2010, p 66).

The original proposal to insert a provision on the need to prove that the victim is likely to suffer a "significant disadvantage" raised notable concerns.[21] Since it seemed to introduce the unacceptable assumption that some violations could be considered insignificant, in the last draft of the OP states decided to turn to a safer and sounder "clear disadvantage". Needless to say, this formulation—encompassed with the aim of thwarting unworthy cases and avoiding to overburden the Committee as a result of a flood of complaints—is devoid of a distinct legal content and could lead to the dismissal of deserving cases. It will be, hence, interesting to see how it will be interpreted by the Committee in its future activity as a quasi-judicial body (MAHON, 2008, p 636).

Beside the requirement of "clear disadvantage", Article 3 enlists all the criteria

for determining the inadmissibility of a communication:

> 1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged.
> 2. The Committee shall declare a communication inadmissible when: (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date; (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; (d) It is incompatible with the provisions of the Covenant; (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; (f) It is an abuse of the right to submit a communication; or when (g) It is anonymous or not in writing.

An issue that has traditionally engendered debate concerns how to precisely interpret and spell out the rule requiring the exhaustion of domestic remedies as a *conditio sine qua non* of the Committee's intervention. Indeed, under Article 3 of the OP, the Committee shall consider a communication only when all domestic remedies have been exhausted. In this regard, Argentina, Azerbaijan, Finland, Mexico, and Portugal proposed to introduce an exception to this criterion where the application of the remedies was "unreasonably prolonged or useless […], or where the domestic legislation did not afford due process of law, or access to remedies had been denied or unreasonably delayed" (Third OEWG, 2006, § 49). Notwithstanding, in Article 3 of the final text only the reference to "unreasonably prolonged remedies" was retained.

The requirement of exhaustion of "all available" domestic remedies has also roused ample discussion on the opportunity to include "judicial, administrative, and other remedies" as national tools for enforcing and adjudicating ESCR. It should be observed, however, that the Committee on ESCR in its GC 9 has stressed the importance of judicial remedies "to ensure that the State's conduct is consistent with its obligations under the Covenant" (GC 9, 1998, § 14). Moreover, the requirement to submit a communication within one year after the exhaustion of domestic remedies, except in cases where the applicant can demonstrate that it had not been possible to submit the communication within that time limit, has been opposed by several delegations at the fourth session of the OEWG as an "unnecessary barrier to access to the procedure" (2007, § 61).

With regard to inter-state communications, the delegations of China, Ecuador, Ethiopia, Japan, Norway, and the United Kingdom pointed out that no country would have lodged a complaint against another government for violations of ESCR against its citizens. In other words, political and diplomatic state interests would have compromised the redress of individual victims. Nonetheless, this proviso was retained thanks to the support of the NGOs Coalition and states such as Egypt, France, Mexico, the Netherlands, Portugal, South Africa, and Spain. As an opt-in procedure, it is not mandatory but applies only if both the complaining and the defending states have made a declaration recognizing the competence of the Committee. Indeed, under Article 10,

> [a] state party to the present Protocol may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the Covenant. Communications under this article may be received and considered only if submitted by a state party that has made a declaration recognizing in regard to itself the competence of the Committee.

No communication shall be received by the Committee if it concerns a state party which has not made such a declaration.

According to Mahon, this provision can also be read as a further tool of international diplomacy which states rely upon to solve their disputes (2008, p 642). In this view,

> an inter-state procedure might be a means by which a treaty body could provide its good offices in order to seek a friendly solution between states having made an appropriate declaration to accept such an instrument, in relation to concerns [for instance] over international cooperation and assistance (DE ALBUQUERQUE, 2005, § 34).

As a general assessment on the issue of the *locus standi* to submit communications, the OP should have given more importance to the role of national and international NGOs in lodging recourses on behalf of victims, including systemic violations of the rights of groups of individuals or whole communities (VANDENBOGAERDE; VANDENHOLE, 2010, p 234). Because of the deletion of a proviso on "collective complaints", NGOs and other institutions can lodge a petition only with the consent of the victims or if they can justify acting on behalf of the victims without such consent. Although an individual complaints mechanism is in line with other communication schemes in the universal human rights system, communications before the Committee on ESCR may be lodged by an organization only on behalf of individuals and groups who claim to be victims (MAHON, 2008, p 634). Therefore, the effectiveness of the complaints mechanism of the Protocol could be undermined by the fact that NGOs do not have standing to submit claims in their own right every time there is an allegation of an unsatisfactory application of the Covenant.

An express inclusion of *amicus* standing for NGOs and national and international human rights institutions was evaluated during negotiations,[22] but the major part of states objected this proposal on the ground that third party participation rights were already provided for and they might give rise to an unprecedented number of communications (Fourth OEWG, 2007, § 51, 53). Nonetheless, in accordance with Article 8(3), the Committee, in deciding on the merits of a communication, could rely upon documentation provided by NGOs and human rights organizations.[23] It may be observed how there is no direct mention of *amicus* standing in Article 2 of the OP or in any other part of the document, although this possibility is not explicitly excluded. Those *amici curiae* submitted by NGOs under the finalized OP would significantly contribute to consideration of complaints by the Committee because of the long-standing experience of NGOs in the preparation of reports, including data-collection and legal analysis, as well as in dispute settlement concerning human rights. Additionally, their general ability to undertake autonomous fact-finding investigations and their independence of states and governments (RUBAGOTTI, 2005, pp 85-86) could have been well-grounded reasons to extend the right to petition also to NGOs.

1.3 Inquiry Procedure

The inquiry procedure, established under Article 11(2) of the OP empowers the Committee on ESCR to initiate an investigation if it receives "reliable information indicating grave or systematic ESCR abuses." While this provision was openly supported by the NGOs Coalition and by several states such as Azerbaijan,

Finland, Mexico, and Portugal, a number of more sceptical countries, including Argentina, Belgium, Brazil, Chile, France, Italy, Spain, and the United Kingdom, raised a host of doubts (Third OEWG, 2006, § 70-72). In particular, Angola, Egypt, and Nigeria objected a potential overlap with the work of both other human rights mechanisms and Special Rapporteurs, the criteria which would be employed to qualify gross and systematic violations, and the fact that—in the absence of an identified victim—information could be collected anonymously (*Ibid,* § 73).

Furthermore, the possibility for states to be subjected to an inquiry procedure is made more complicated in two respects: first, the threshold is very high, and second, the defending state must have accepted the competence of the Committee by a specific declaration, which could be withdrawn at any time by notification to the Secretary-General (Article 11(8) OP). It should also be considered that the views of the Committee are deemed as authoritative statements but are unlikely to be immediately considered as legally binding.

The inquiry mechanism is applicable on an "opt in" basis since a state has to timely and expressly declare that it recognizes the competence of the Committee before the latter initiates to conduct investigations. A positive aspect is, however, that such a procedure would allow the Committee to issue more detailed recommendations to the state party concerned which is entitled to submit its observations to the Committee within six months of receiving the findings. Article 12 provides a follow up mechanism whereby the Committee invites the state to transmit information concerning the measures employed in response to its investigation.

The inquiry procedure would complement the OP petitions' mechanism for various reasons. Firstly, the Committee will have the possibility to inspect—through a visit to the interested state with its consent—situations which are not adequately addressed by individual and group communications (Article 11(3) OP). Secondly, it can perform a more accurate inquiry, in particular when individuals or groups are unable to make recourse to an international complaint mechanism for reasons including fear of intimidation and reprisals. Thirdly, it establishes a more-timely response to grave or systematic violations of the provisions of the ICESCR,[24] designating one or more of its members to report urgently on the findings of such an investigation (Article 11(3) OP). Fourthly, as Courtis and Sepulveda posit,

> it is not necessary to count on a state to bring information to the Committee, meaning that victims, groups of victims, non-governmental organizations, and other stakeholders can do so, and even if the information comes from a state, it does not need to be a state party to the ICESCR or to the Optional Protocol; nor must it make any declaration about the inquiry procedure" (COURTIS; SEPULVEDA, 2009, p 61).

Article 5 of the Protocol consecrates interim measures to avoid irreparable damages to the victims of the alleged violations for the fact of communicating with the Committee. However, the exceptional nature of these procedures, to be invoked only in "exceptional circumstances", can discourage the intervention of the Committee that should exhaustively justify any request for interim measures.

Moreover, the Committee, when examining the merits of the case, will hold closed meetings and will rely on all the "relevant documentation emanated from other United Nations bodies, specialized agencies, funds, programmes and other international organizations, as well as from any observations or comments by the state party concerned" (Article 8(3)). Thus, in accordance with Article 9, after

examining the communication, the Committee will transmit its views and recommendations to the state itself. The state is, then, invited to submit further information detailing the internal measures taken to comply with the Committee's views and recommendations. One of the missing points of the OP is, again, the lack of a well-defined role of NGOs in the inquiry procedure as providers of credible information and data, particularly in complex cases such as those involving violations of ESCR.

1.4 Article 14: The Establishment of a Trust Fund as a Means to Provide International Assistance and Cooperation

A) The Trust Fund

As far as international cooperation is concerned, the Committee on ESCR shall bring to the attention of United Nations specialized agencies, funds, programmes, and other competent bodies, its views and recommendations to encourage the promotion of ESCR within the framework of international development cooperation activities (GC 2, 1990, Article 22 § 3), and to indicate a need for technical advice or assistance (Article 14(1) OP).[25] The realization of ESCR is an obligation of all states, and it is particularly incumbent upon those governments which are in a position to assist others in this regard. The Committee has also indicated that a state's "available resources" means both the resources existing within a country and those obtainable from the international community through international cooperation and assistance (GC 3, 1991, Article 2, § 1).

Several delegations, including Canada, Denmark, and the United States opposed the establishment of a Trust Fund noting "the danger of linking violations to funding, the risks of duplicating existing United Nations funds, and the practical difficulties in managing such a fund" (Fifth OEWG, 2008, § 114). Since some of these states expressed concerns on the basis that the Fund would "send a wrong signal that non-compliance with the Covenant rights could be justified by a lack of international assistance" (Fourth OEWG, 2008, § 129), Article 14(4) prescribes that its provisions are "without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant."

After tortuous negotiations, the Chairperson of the Working Group decided to incorporate a provision on the establishment of a Trust Fund to assist states in the implementation of the rights enshrined in the Covenant. The specific purposes of this new arrangement may only be understood through a closer reading of Article 14 of the OP, which includes both provisions on "international assistance and cooperation" and on the "Trust Fund" itself. Its establishment might potentially contribute to the fulfilment of states' duty to provide international assistance and cooperation on ESCR.

What are, therefore, the main aspects of the Trust Fund? Firstly, it will not assist states to provide remedies for violations of ESCR. This is a point on which this instrument contrasts, for example, with the Trust Fund for Victims of the International Criminal Court. Secondly, it does not envisage a system of legal assistance or legal aid for individuals or groups who wish to submit communications to the Committee but are unable to do so because of the lack of expertise and adequate resources. Thirdly, there is no mention of the nature of state obligations with respect to the Fund: while Egypt (on behalf of the African Group) and Nigeria reverberated that the word "voluntary" in Article 14 should be

deleted, no express reference is made to the duty to make obligatory contributions because of the concerns raised by states such as Guatemala and the United Kingdom that a completely obligatory Fund would be both unacceptable and difficult to manage (Fourth OEWG, § 165). As a result, it ends up being indirectly voluntary in nature.

A further limit of the Trust Fund is the fact that it is not designed to the implementation of the views of the Committee in case of violations, but it is established to provide expert and technical assistance to states parties and to enhance—with the *consent* of the government concerned—the national implementation of the rights enshrined in the Covenant (Article 14(3) OP). A "facilitative" function of the Fund would have provided the resources to promote the timely taking of actions to implement the decisions of the Committee under the OP, as well as to improve both the quality and the approach to the follow-up processes for the implementation of the rights contained in the ICESCR

The term "expert and technical assistance" might be conceived of as to encompass the provision of professional advice, training, and also the undertaking of missions to the state concerned. There is no reason why the forum for such expert or technical assistance should be restricted to Geneva, or even the capitals of states concerned. The assistance should come, for instance, also from well-established and recognized practitioners in the relevant field of expertise, and it might be directed at all levels of government officials and NGOs. Finally, if the Fund may be used to assist governments in implementing ESCR through the provision of resources and assistance, the role of NGOs in this process has received, again, scant and inadequate attention.

B) International Assistance and Cooperation

In keeping with Article 14 of the OP,

> 1. The Committee shall transmit, as it may consider appropriate, and with the consent of the state party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, along with the state party's observations and suggestions, if any, on these views or recommendations.
>
> 2. The Committee may also bring to the attention of such bodies, with the consent of the state party concerned, any matter arising out of communications considered under the present Protocol which may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting states parties in achieving progress in implementation of the rights recognized in the Covenant.

Reflecting the content of Article 22 of the Covenant, the OP provides that the Committee may convey to United Nations specialized agencies and other competent bodies any matter which could be useful to assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the implementation of the Covenant. Transmission of views and recommendations to UN specialized bodies represents a good compromise between the entitlement of individuals to claim violations of ESCR and "the need to alert the international community to cases in which the state's ability to gradually roll out these rights is limited because of a lack of resources" (IAIHR; ICJ, 2010, p 105). Since, pursuant to paragraph 2 of Article 14, the Committee may also bring to the attention of such bodies any communications that it considers to be related to their respective fields of competence, these specialized

entities may increase their knowledge of situations requiring international assistance and cooperation (*Ibid,* p 106).

Although UN agencies and financial institutions will not be respondents in the complaints procedures lodged before the Committee, the role of the Committee may be instructive in shedding light on the participation of these non-state actors in a contextual situation of human rights violation (COURTIS; SEPULVEDA, 2009, p 63). Of relevance is the question of how states can fulfil their extraterritorial obligations under the ICESCR while are contemporarily leading governments of such international authorities. In this respect, it is to be hoped that the new complaints procedure will create case law to elucidate the issue of the extraterritorial reach of the Covenant and the scope of state obligations in relation to international cooperation and assistance.

Implementation of ESCR is primarily related to the responsibility of governments to their own citizens. However, as members of the international community, states need to cooperate in dealing with issues that have an international dimension and go beyond national borders. As Vandenbogaerde and Vandenhole point out,

> during the negotiations on the Optional Protocol, the issue of international assistance and cooperation, which could have led to an interesting discussion on shared responsibility for ESC rights in a globalized world, was narrowed down to development aid and technical advice and assistance (2010, p 209).

In this respect, it would be interesting to question whether the ICESCR gives rise to extraterritorial obligations of a state party towards individuals and groups outside its territory, and, if so, scrutinize what the nature of such obligations is.

2 Does the Optional Protocol Allow Complaints for Breaches of Extraterritorial Obligations?

The economic power imbalance between North and South has rendered the role of international assistance and cooperation essential in protecting human rights for all people.[26] Indeed, policies and practices of each state extend beyond its borders and can often result in human rights abuses abroad or in the failure to protect the human rights of citizens of another state (COOMANS, 2004). At times different judicial bodies provide ambiguous and inconsistent interpretations of their jurisdictions over actions committed beyond the territory of a contracting party.[27] Going beyond reciprocity of rights and the traditional concept of territorial jurisdiction,

> the important point becomes to see jurisdiction in human rights terms as a tightly knit web of protection from violations, where one's state protection ends where another state's begins. This reflects the particular nature of human rights in international law—and in particular the universality principle (SKOGLY, 2006, p 45).

In this vein, although the extraterritorial application of the ICESCR could also be established within the framework of universality of such a treaty, which in the Preamble urges states parties to promote "universal respect for, and observance of, human rights and freedoms", the following analysis will look at some Articles of both the Covenant and the OP as well as at the relevant GCs to explore the content of extraterritorial obligations. A number of scholars concur that states have often ignored any extraterritorial obligation in relation to ESCR, while the

exhortation to cooperate does not appear to go very far beyond a commitment to participate in international humanitarian activities (CRAVEN, 2007, p 77).

Despite this premise, at least as far as the ICESCR is concerned, the drafters' extraterritorial intent appears clear. For example, not only does Article 2(1) of the ICESCR requires that states parties take steps "individually and through international assistance and co-operation" for the fulfilment of the rights enshrined in the Covenant, but it also avoids any reference to "jurisdiction" or "territory" as delimiting criteria for the scope and application of the treaty. Article 11(1) of the Covenant also recognizes the essential role of international co-operation based on free consent while states take measures to ensure the realization of the right to an adequate standard of living. Pursuant to the 1991 "Revised General Guidelines" drafted by the Committee, states should report on the activities undertaken to comply with their duty to provide international assistance and cooperation for the protection of all the rights encompassed in the Covenant.[28]

Since Article 1(2) of the ICESCR asserts that a people may never be deprived of its own means of subsistence, a foreign authority causing such a deprivation would breach an extraterritorial obligation under the Covenant.[29] Despite the lack of international case law, the practice of the Committee on ESCR seems to confirm that states' obligations are not restricted only to persons within their territory or jurisdiction but are directed also to individuals of third states. For instance, in various circumstances, the Committee has stressed how the concept of jurisdiction is meant as to encompass all areas where a state maintains geographical, functional, or personal jurisdiction (Concluding Observations on the Netherlands, 1999, § 194; Concluding Observations on Israel, 1999, § 232).

Beside, GCs 2 and 8 exclusively deal with issues having extraterritorial application. In GC 2, the Committee recommends UN agencies to give careful consideration to the whole range of protections and safeguards formulated in the ICESCR while undertaking development cooperation activities (1990, § 7). Furthermore, "international measures to deal with the debt crisis should take full account of the need to protect ESCR through, *inter alia,* international cooperation" (*Ibid,* § 9). In its GC 8 on Sanctions, the Committee affirms that contracting parties should assume some obligations of extraterritorial nature when designing sanctions against other states. Firstly, ESCR should be fully taken into account and monitored throughout the period of sanction in order to guarantee a minimum standard of protection (1997, § 7, 11). Secondly, the external entity responsible for the imposition or implementation of the sanction has the duty to take steps, individually or through international assistance and cooperation, in order to avoid "any disproportionate suffering experienced by vulnerable groups within the targeted country" (GC 8, 1997, § 14). Accordingly, GC 1 requires a state party to monitor to what extent the rights consecrated in the Covenant are, or are not, enjoyed by "all individuals within *its territory* or under *its jurisdiction*" (1989, § 3).

In its GC on the Right to Food, the Committee recognizes the overwhelming role of international cooperation through joint and separate actions in achieving the full realization of the right to adequate food (GC 12, 1995, § 36). It also holds that states parties should take steps to guarantee the protection and enjoyment of this right in other countries, providing the necessary aid when required. Finally, states should refrain at all times from food embargoes or similar measures which endanger conditions for access to basic alimentation in other countries (*Ibid,* § 37).[30] Likewise, in GC 15 on the Right to Water, the Committee maintained that

states can never use water as an instrument of political and economic pressure (2002, § 32). They also must prevent their own citizens and companies from infringing the enjoyment of such a right by individuals and communities in other countries (*Ibid,* § 33). This GC also emphasizes that water should be accessible to everyone "without discrimination, *within the jurisdiction* of the state party" (*Ibid,* § 12(c)).

To address the issue of whether the OP allows complaints for breaches of extraterritorial obligations, it is necessary to put into relation the obligations embodied in the Covenant with the system of protection established by the Protocol. Article 2 of the OP provides that

> communications may be submitted by or on behalf of individuals or groups of individuals *under the jurisdiction* of a State Party, claiming to be victims of a violation of *any* of the economic, social, and cultural rights set forth in the Covenant by that State Party.

At the same time, Article 13 imposes on states to take "all appropriate measures to ensure that individuals *under [their] jurisdiction* are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee." It seems that the decision to choose a rather weak wording and to narrow down the issue of both shared responsibility for ESCR and of extraterritorial obligations to one of technical advice and financial assistance by UN competent bodies has jeopardized the potential effectiveness of the complaints mechanism (VANDENBOGAERDE; VANDENHOLE, 2010, p 232).

However, as Courtis and Sepulveda observe, "in the absence of a specific act by a state to recognize jurisdiction on subjects operating or deeds occurring beyond its borders […] there is no generally accepted presumption in favour of state jurisdiction beyond its own territory" (COURTIS; SEPULVEDA, 2009, p 58). Hence, the burden of proof in establishing whether a violation occurred *de jure* under the jurisdiction of a state party, though outside its territory, will exclusively weigh on the applicants lodging a complaint before the Committee. As a consequence, breaches of extraterritorial obligations cannot be successfully claimed through the communication procedure proscribed by Article 2, but they could be reasonably addressed under the inter-state and the inquiry mechanisms (*Ibid*). Under Article 10(1),

> A state party to the present Protocol may at any time declare […] that it recognizes the competence of the Committee to receive and consider communications to the effect that a state party claims that another state party *is not fulfilling its obligations under the Covenant*.

This proviso does not make any reference to either jurisdiction or territory and the only required criterion for a state party to lodge a complaint against another state party is that the latter has allegedly violated any of the obligations enshrined in the Covenant—which, *inter alia,* embodies extraterritorial obligations (*Ibid,* p 59). Likewise, the text of Article 11(2) of the OP implicitly suggests that the inquiry procedure can be employed in those cases involving human rights violations that have an extraterritorial effect. Indeed,

> [i]f the Committee receives reliable information indicating *grave or systematic violations by a state party of any of the economic, social and cultural rights set forth in the Covenant*, the Committee shall invite that state party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

It should be noted that the above remedies available under the OP are not particularly helpful in facilitating petitions for breaches of extraterritorial obligations. While the inquiry procedure requires a rather high threshold of grave and systematic violations, the inter-state complaint mechanism can be used only by states—but it hardly ever occurs (VANDENBOGAERDE; VANDENHOLE, 2010, p 232). Indeed, as the practice of other UN human rights treaty bodies amply demonstrates, states are generally very reluctant to rely on this politically sensitive instrument to lodge a complaint against another state

3 The Relationship between the OP and Poverty Alleviation Strategies

3.1 Millennium Development Goals in Context

The exploration of the significance of the notions of extraterritoriality and international cooperation sheds light on the concept of territoriality. Locating poverty and dispossession within an exclusively territorial framework encourages the stigmatization of these problems as mere local problems associated with resource scarcity, corruption, or lack of knowledge and expertise. Instead, poverty and related diseases, unemployment, and social insecurity are consequences of investments, debt, resource exploitation, or unfair conditions of trade, which are not inherently local, but may be framed within an international context. In other words, poverty becomes more a question of universal resource distribution, and less a question of national scarcity (CRAVEN, 2007, pp 85-86).

While the presentation of these issues as local phenomena, on the one hand, depicts international assistance and intervention as necessary palliatives, on the other hand, it fails to configure poverty and dispossession within that broader international context in which such problems are socially produced. The importance of the global context for an understanding of ESCR helps highlight the responsibility of international actors for the impoverishment of millions around the globe. But it also makes ultimately possible the idea that the latter are legitimate claimants who have been literally *dis-possesed* of their right to enjoy all those resources available on a global scale, but unequally distributed (*Ibid*).

As Salil Shetty posits, "[t]he MDGs are about realizing the Right to Development within a broader human rights framework" (2005, p 10). In this vein, scholars of different disciplines have highlighted the complementarity of development and human rights (GAHI; COTTRELL, 2011, pp 55-56), but *de facto* these two discourses have not been addressed, so far, in a concerted and practical manner (DOMINIGUEZ REDONDO, 2009, p 29). Whereas systematic poverty has been an issue for development practitioners, it has seldom been one for human rights practitioners, including those working on ESCR who have focussed on individual violations. Therefore, before addressing later in this paper the need for development and human rights types to talk to one another, the substantial issues underlying the MDGs should be outlined.[31]

The MDGs, grown out of the 2000 UN Millennium Declaration and put at the heart of the global development agenda, articulate eight time-bound commitments of states to poverty reduction by 2015. These Goals representing human needs and basic rights for every individual around the world are the following: freedom from extreme poverty and hunger; achievement of universal primary education,

promotion of gender equality and empowerment of women, reduction of child mortality, improvement of maternal health, struggle against HIV/ADS, malaria, and other diseases, protection of environmental sustainability, and creation of a global partnership for development. The outcome document for the MDG Summit, held from 20 to 22 September 2010 and adopted by the General Assembly by consensus, reiterates an action agenda for achieving the Goals by 2015. Moreover, not only it recognizes that development, peace and security, and human rights are interlinked and mutually reinforcing, but it also reverberates their importance for achieving the MDGs (GA Resolution, 2010, § 13).

It is worth adding that the UN General Assembly, on 28 July 2010, adopted a Resolution declaring that safe, clean, accessible, and affordable drinking water and sanitation is a human right essential to the full enjoyment of life.[32] Although water is recognized as the fundamental source of life and "a prerequisite for the realization of other human rights" (GC 15, 2002, § 1), the UN General Assembly did not explicitly specify that this fundamental right entailed legally binding obligations. Therefore, the UN Human Rights Council Resolution in September 2010 is a landmark decision since for the first time it affirms that the right to water and sanitation is derived from the right to an adequate standard of living (§ 3).

These MDGs, formulated in very general terms, are non-enforceable targets and do not provide a normative framework of accountability and responsibility where specific duty bearers and rights holders are clearly identified (DE KADT, 165). Part of the doctrine also highlights how the MDGs could result in ideological cover for neoliberal initiatives. Indeed, the South has not incisively contributed to their formulation and they have been mainly prompted by the triad (the United States, Europe, and Japan) with the co-sponsorship of the World Bank, the International Monetary Fund, and the Organization for Economic Cooperation and Development. Accordingly, the rhetorical commitment to poverty in the MDGs fails to address the structural causes of this phenomenon and does not affect the privileges of richer countries in fields such as trade, investments as well as economic and financial power (SALOMON, 2008, p 47; AMIN, 2006).[33] Therefore, argues Salomon,

> [f]or there to be any success in the human rights undertaking of attending meaningfully to poverty globally there will need to be a shift in focus from the poor to the rich, from the powerless to the powerful and to the rules and policies that govern this interchange" (*Ibid,* p 48).

This articulation *a contrario* of the legal framework to combat poverty is crucial to grasp both the responsibilities of wealthy states and their obligations under human rights law to take measures to mitigate harmful practices of inequality and exclusion even outside their own territory.

3.2 Role of the OP in Challenging Structural Poverty Through International Assistance and Cooperation

This section preliminarily investigates, through the lens of human rights law, the extent to which the OP to the ICESCR can be considered a meaningful tool for challenging structural poverty broadly meant as the deprivation of all those capabilities and freedoms that permit a dignified human existence.[34] According to Article 2(1) of the ICESCR,

> [e]ach state party to the present Covenant undertakes to take steps, individually and through *international assistance and cooperation*, especially economic and technical, *to the maximum of its available resources*, with the view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means (emphasis added).

The obligation of states to take steps to the maximum of their available resources does not only encompass domestic resources, but also those deriving from the international community through international assistance and cooperation (Limburg Principles Nos. 29–34). Such a legally binding obligation, if correctly implemented could be a concrete device to contribute to the achievement of the MDGs, in particular MDG 8, which calls for "the creation of a global partnership for development" through international assistance and cooperation. However, it is of pivotal importance to highlight how aid alone will not solve the problems of the world's poorest citizens, and responsibility should always lie on both donor nations and their partners in the developing world.

According to the Committee on ESCR, the obligation to provide assistance, especially economic and technical, is particularly incumbent upon those states which are in a position to assist developing countries in securing their minimum essential level of rights necessary for a person to live a life of dignity (Statement of the Committee on ESCR, 2001). Yet, a key problem consists in the narrow interpretation of the duty to provide international assistance and cooperation as the Covenant only imposes on states to take steps *to the maximum of their available resources*. Additionally, the pursuit of a "minimum" degree of rights deriving from the duty of richer states to comply with their core obligations[35] contrasts with a more inclusive interpretation of the Covenant calling states to guarantee a "maximum" degree of rights (SALOMON, 2008, p 48).

Without engaging in a sophisticated examination of the content of the provisions requiring international assistance and cooperation, it may be observed how the duty of developed states to respect, protect, and fulfil human rights both at the national and international level generally entails a cluster of obligations: a duty to abstain from activities that could adversely impact upon the enjoyment of ESCR abroad; an obligation to take measures to prevent non-state actors—which are operating extraterritorially—from interfering in the enjoyment of ESCR outside their own borders; an obligation to create an institutional framework for facilitating the enjoyment of economic and social rights in the recipient state; and a duty to guarantee that international programmes of cooperation and assistance are accompanied by an increased awareness of both the Covenant rights and its remedies on the part of the nationals of the recipient countries (SEPULVEDA, 2009, pp 89-94). At the same time, also developing states, by virtue of the principle of mutual responsibility have the duty to seek international assistance, implement required domestic policy reforms, involve poor people in decision-making, and spell out their needs while drafting reports to submit to the Committee (*Ibid*, pp 94-95; DE KADT, p 177).

The supervisory reporting mechanism, set up by the Covenant, is a weak instrument to monitor states' compliance with ESCR obligations and to assess the extent to which wealthier countries ensure international assistance and cooperation. The new OP, with its mechanism of individual complaints will enable the Committee on ESCR to address situations of infringement of the rights recognized in the Covenant, including international assistance and cooperation. Furthermore, it would contribute to make states aware that their obligations in the area of economic and social rights are not primarily domestic, but rather

international and transnational. Non-compliance with the extraterritorial obligations stemming from Article 2(1) of the Covenant could fall under the purview of the system of supervision established by the Protocol (interstate complaints and inquiry procedures), thereby strengthening the opportunity for the Committee to both assess any shortcomings in international cooperation programmes and gauge their human rights impact.

Several activities conducted by wealthy states in developing countries with the aim of addressing poverty and boosting economic growth have produced either intentional or unintentional harmful effects on local populations and have been counter-productive in terms of their human rights impact. The adjudicatory role of the Committee would be crucial for bringing into relief violations of ESCR committed by both donor and recipient states dealing with international assistance issues, thus enhancing victims' participation (and eventually compensation), transparency, and accountability for any breach of the Covenant's obligations having either a territorial or extraterritorial connotation.

Since, then, realistically and pragmatically, local remedies must first be available and exhausted for international remedies to practically work, it follows that both universal and domestic adjudicative mechanisms, with their ability to provide redress for individuals claiming a violation of socio-economic rights, are potentially appropriate avenues to contribute to the recognition of these neglected rights as justiciable claims. As Van Bueren sharply put it, "no law alone can make poverty disappear but this does not mean that the constituent elements of poverty are not justiciable and incapable of being adjudicated by the courts" (VAN BUEREN, 2002, p 459).

The Committee could be called on to adjudicate upon the compliance with the rights of the Covenant, such as the right to work or the prohibition of discrimination and social exclusion every time a developing state implements an international cooperation programme. Breaches of the duty to seek international assistance and cooperation can be found even if the state does not allow all stakeholders to participate and to be informed of the international programme. Furthermore, victims could also petition the Committee to find a remedy against situations of corruption in the implementation of a project by fraudulent governments and authorities, which divert to other purposes the money received by international donors (*Ibid,* p 98).

More complicated would be the situation in which communications are lodged against a developed state for alleged infringements of the duty to grant international assistance. A fallacious assumption exists, indeed, that wealthy states are not under an obligation to provide specific international aids under Article 2(1) of the Covenant. Problems may arise also when a state does not take measures to avoid the activities of a transnational corporation interfere with the enjoyment of ESCR in another country. In this context, although victims are entitled to petition the Committee against the responsible state, a high standard of proof would be required (*Ibid,* p 99). For this reason, the individual complaints machinery is probably not the most suitable mechanism to monitor compliance with the human rights standards of Article 2(1) of the Covenant and this role could be better played by the inquiry procedure set out in Article 11 of the OP.

Through both investigations in developed countries to supervise the effective functioning of an international assistance programme, and the issuance of comments and recommendations, the inquiry mechanism also consents states to modify and improve—on the basis of human rights-based considerations—the implementation of current and future cooperation programmes. Furthermore, the

possibility to subject a government to international formal third-party adjudication for the examination of specific assistance and cooperation projects would also encourage involved governments both to ensure more effective domestic remedies in respect of ESCR abuses and to guarantee a broader participation of stakeholders and local communities in the decision-making and in the implementation of the project. The supervision and adjudication of an international quasi-judicial body would also contribute to the creation of a human-centred framework of analysis whereby victims and perpetrators are identified through open investigations, debates, and recommendations, which also offer different approaches and solutions to improve state practices and address world poverty.

The obligations of international assistance and cooperation, consecrated in Article 2(1) of the ICESCR and assumed by 160 States, possess an underlying relevance for the accomplishment of MDG8. Indeed, both the MDGs and implicitly Article 2 of the Covenant share the same objective of promoting well-being and improvement of life conditions for all individuals around the world by guaranteeing access to food, work, education, enjoyment of the highest attainable standard of physical and mental health, protection of mothers and children, and in general a life of dignity. Some successful examples of the utilization of legal tools to achieve development-related goals come from countries such as India, Colombia, and South Africa where rights directly related to poverty have been adjudicated by domestic courts.[36]

Albeit MDGs "reflect only a partial human rights agenda" (ALSTON, 2005, p 760) and are deemed a feeble instrument in the hands of states to address poverty at a global level, it is also true that these goals have been set up in a more technical, quantified, and pragmatic fashion than in Article 2 of the ICESCR: as a consequence, not only can MDGs and human rights be complementary and mutually reinforcing but "it might be beneficial for the [Committee on ESCR] to rely on the targets, benchmarks, and priorities of the MDG8" (*Ibid,* p 102). In turn, although containing measurable time-bound global commitments, the MDGs do not possess legally binding duties as well as enforcement and monitoring mechanisms.

Therefore, the human rights machinery within the UN could partly cover the lack of specific monitoring mechanisms of the MDGs (DOMINGUEZ REDONDO, 2009, p 38). Moreover, by securing state accountability for any violation of ESCR as well as victims' participation, transparency, non-discrimination, and international supervision, the OP could be a valuable tool for forcing richer governments to comply with both the MDGs and ESCR obligations with the aim of eradicating extreme poverty, exclusion, and unequal access to wealth and global resources.

Concluding Observations

Expressing economic and social requirements in the language of legal human rights is essential to provide them with that legitimacy and credibility necessary to stand as human rights in the long term. Since socio-economic rights are often formulated in open-ended terms, which hamper the capacity of judges to clearly define their substance, bringing them within the realm of adjudication would both increase legal certainty and give content to their "vagueness" (LANGA, 2009, pp 19-20). An international system of protection of human rights becomes effective

when it provides individuals with a remedy that is not only political, but either judicial or quasi-judicial, consisting in the possibility to bring a case to court, to receive a verdict, to obtain compensation for the damage suffered as well as guarantees of non-repetition (ROEPSTORFF, 2009, p 320).

The development of procedures to make governments accountable before the community of states offers an international authorized framework to the deprived to legitimate their own struggles for the realization of ESCR. Indeed, one of the limitations of the reporting procedure set in the ICESCR is that it does not enable the Committee to focus on individual victims or to make recommendations on their behalf. On the contrary, a universal standard of review might serve as a model for the implementation of ESCR at the national level and would also allow those individuals and groups who are denied domestic remedies to benefit of a comprehensive international recourse.

A human rights-based approach with its mechanisms of international state accountability undertakes, therefore, an essential role insofar as it both promotes human-centred development and empowers poor people into believing they are active citizens with rightful claims and responsibilities. Triggering legal redress against the deprivation of food, shelter, work, water, or health care would also provide an incentive to improve state transparency in the process of policy development. At the same time, the evident difficulties that governments have experienced in arriving at a final, durable compromise text of the OP indicates the persistent disagreement of states on the nature of ESCR at inter-governmental level (CAHN, 2008, p 6).

Notwithstanding, the overall success (or failure) of a complaints procedure set by the OP will be assessed upon whether it contributes to enhance the practical relevance of the ICESCR. One of the challenges ahead, indeed, is to ensure that this new mechanism can compel states to provide an effective venue for victims of ESCR violations to find ultimately justice within the UN system. This process will take time and it still remains to be seen how widespread and representative the participation in the Protocol will be, if it ever enters into force.

However, such procedures permitting individuals to bring allegations of violations of rights to the international attention of the Committee are not sufficient to make human rights truly effective. It is also essential that human rights lawyers and traditional development actors bring forth more concrete actions against poverty, which still continues to affect the lives and dignity of millions of people around the world. In this regard, for instance, the exclusion of NGOs from the list of entities able to bring complaints to the Committee represents a grave *vulnus* for the regime of protection of ESCR. It also undermines the possibility for those victims that do not have adequate resources and awareness to file a complaint, to have access to justice.

An *ex ante* general assessment of the OP cannot neglect that—as some commentators argue—ideological prejudices and the priority to adopt the protocol by consensus have inexorably defeated attempts to create a potentially more effective mechanism (VANDENBOGAERDE; VANDENHOLE, 2010, p 209). At the same time, interpreting development and poverty alleviation in terms of *shared responsibility* would reinvigorate the justiciable obligation of international assistance and cooperation as a tool for promoting an improvement of life conditions for all individuals around the world. By highlighting poverty as more than material need but as powerlessness and social exclusion, it is to be hoped that the legal enforceability of ESCR can help equalize the distribution and exercise of power within and between societies. Therefore, the final challenge remains, as

stated in 2001 by the Committee on ESCR, "to connect the powerless with the empowering potential of human rights".

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[1] Statement by Navanethem Pillay, UN High Commissioner for Human Rights at the Signing Ceremony for the OP to the ICESCR, 24 September 2009.

[2] The paper is updated to 26 June 2011. A late note of the author underlines that as of 14 February 2012, 39 states have signed the OP and only Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, and Spain, have ratified it.

[3] Other UN treaty bodies have the competence to consider individual communications concerning ESCR issues insofar as they fall within the scope of the relevant treaty. See, e.g., the Optional Protocol to the Convention on the Elimination of Discrimination Against Women and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

[4] For a sample of the burgeoning literature, see, MAHON (2008, p 617) and the articles contained in the Special Issue of Nordic Journal of Human Rights, v. 27, n. 1, 2009, pp 1-129.

[5] The concept of "justiciability" is understood as the possibility to demand before a judge or a tribunal of justice the adequate redress to which victims of ESCR violations are entitled.

[6]A quasi-judicial process occurs when action is taken and discretion exercised by public administrative agencies or bodies, and not by courts of law.
[7] For an overview on the arguments advanced by the different delegations during the negotiations of the OEWG, hereinafter, see, http://www2.ohchr.org/english/issues/escr/intro.htm
[8] For a thorough analysis of emerging domestic jurisprudence on ESCR, see, (LANGFORD, 2010).
[9] For a detailed account on the functioning of the Committee, see, (ODELLO, SEATZU, 2010, forthcoming).
[10] Human Rights Council, 2008. See also (DE ALBUQUERQUE, 2008)
[11] See e.g., the ICCPR, the Convention against Torture (CAT) and the Convention on the Elimination of Racial Discrimination (CERD). In recent years, also the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) came into force.
[12] Resolution 8/2 of 18 June 2008.
[13] For a comprehensive analysis on the way in which the debate on the OP has evolved up, in particular during the discussions within the OEWG, see, (DE ALBUQUERQUE, 2010).
[14] See e.g., the following conventions: ICCPR, CERD, CEDAW, the Convention on the Protection of Migrant Workers, and the Convention on the Rights of People with Disabilities.
[15] Article 2 as amended by GA Resolution A/RES/63/117 on 10 December 2008.
[16] These states are: Australia, Canada, Switzerland, Turkey, and the United Kingdom.
[17] See eg., *Diergaardt et al. v. Namibia,* 1998, § 10.3.
[18] See eg., Article 17 of the Optional Protocol to the CEDAW.
[19] Article 21 of the Revised Draft to the OP to the ICESCR, A/HRC/8/WG.4/2, 24 December 2007.
[20] It was in particular, Austria, Egypt (on behalf of the African Group) and Ethiopia that stressed the importance for groups of individuals to be able to submit communications.
[21] This proposal was endorsed by Canada, New Zealand, and the United Kingdom. See (ESCR-Net, Section 9: OEWG).
[22] More specifically, *amicus curiae* is a brief submitted by an individual or group, who has no direct interest in the litigation, to a court upon the granting of permission in order to propose a decision consistent with its own views.
[23] Pursuant to Article 8(3) of the OP, "when examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programs and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned".
[24] Both Article 20 of the CAT and Article 8 of the Optional Protocol to the CEDAW authorize, for example, inquiry procedures in prescribed situations.
[25] See also, Articles 2(1), 11(1) and (2), 15(4), and 23 of the ICESCR.
[26] International cooperation is here intended in its original meaning of "working together" to realize human rights for each person.
[27] See generally, (SKOGLY, 2010).
[28] The Committee does not require states to indicate the role of international assistance with regard to the right to join and form trade unions and the right to strike (Article 8 of the ICESCR).
[29] Today the destruction of local agriculture or the exploitation of natural resources of a country are carried out mainly by international corporations which indiscriminately deprive millions of people of their means of subsistence and their biological and cultural diversity. Since this issue would be beyond the frontiers of this paper, see generally, SHIVA, 2006; McCORQUODALE; SIMONS, 2007, pp 598-625; KUNNEMANN, 2004, pp 219-220).
[30] It is noteworthy that a number of Western European and Northern States joined the US, which during the 2004 session of the UN Commission on Human Rights firmly denied the principle whereby the right to food gave rise to international obligations. See, WILLIAMSON, 2004, p 16, § 84.
[31] Details on the MDGs are available at http:// www.un.org/millenniumgoals/
[32] GA Resolution, 2010, adopted with a vote of 122 in favour to none against, with 41 abstentions.
[33] For a punctual review of the main critiques of the MDGs, see, (ALSTON, 2005, 762-766).
[34] Although no agreement on the definition of poverty can be found, the World Bank considers a person poor if his/her level of consumption or income is below the so-called "poverty line". On the current value of the "poverty line", see, (RAVALLION; CHEN, 2008, pp 4-5).
[35] See, e.g., GC 14, § 45; GC 15, § 38.

[36] For a selection of relevant case law in these countries, see, ESCR-Net.