
Realizing a Promise: A Case for Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights

by Jan Kratochvíl*

I. INTRODUCTION

THE SIXTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) WILL BE REMEMBERED AS AN INTERNATIONAL BREAKTHROUGH FOR THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (social rights). This category of rights has been given second-class status and treated with mistrust and caution. Their adjudication was considered impossible and undesirable. Yet on December 10, 2008, the UN General Assembly unanimously adopted an Optional Protocol (Protocol) to the International Covenant on Economic, Social and Cultural Rights (Covenant) that enables victims of violations of rights covered by the Covenant to file individual complaints to the Committee on Economic, Social and Cultural Rights (Committee). Its adoption marks a watershed in the quest for realizing the UDHR's promise expressed by the UN motto, "All human rights for all."

Adoption of the Protocol resonated positively within the global human rights community. Thirty-six UN human rights Special Rapporteurs welcomed the Protocol's adoption as "an essential step" in reinforcing "the universality, indivisibility, interdependence and interrelatedness of all human rights, and the guarantee of dignity and justice for all."¹ Similarly, the International NGO Coalition for an Optional Protocol to the International Covenant on Economic Social and Cultural Rights described it as "an historic advance for human rights."² The UN High Commissioner for Human Rights, Navanethem Pillay, described the adoption as having "singular importance by closing a historic gap."³

Not all, however, are excited about the Protocol. Most notably and importantly, the reaction of states was mixed. Although some states expressed their intention to become parties to the Protocol, others voiced serious skepticism regarding the rationale of adjudicating social rights and therefore the existence of the Protocol itself. This essay briefly describes the main features of the Protocol before specifying the concerns held by some states regarding the Protocol. Finally, the essay attempts to dispel the concerns and present arguments for why states should ratify the Protocol.

II. THE CONTENT OF THE PROTOCOL

Even though a new treaty, others have already analyzed the Protocol elsewhere.⁴ An overview of its main features, however, is appropriate. The Protocol is in many ways a standard instrument establishing the right of individuals claiming to have suf-



Courtesy of David Marques.

Residents from Chicago's Southside speak out to save their homes from foreclosure.

ferred violations of their rights to file a complaint before an international body. Its main features are similar to the corresponding mechanisms under other UN human rights treaties. The Protocol spells out admissibility criteria for accepting communications and contains procedural rules for the Committee to deal with them. Similar to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture, the Protocol creates an optional inquiry procedure if 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." As in the newer mechanisms (i.e. optional protocols to CEDAW and the Convention on the Rights of Persons with Disabilities) the Protocol contains an explicit acknowledgement of the power of the Committee to issue interim measures. An innovative feature of this Protocol, however, is the express inclusion of a follow-up procedure under which states are obliged to respond within six months to the recommendations of the Committee.

ADMISSIBILITY CRITERIA

The inclusion of particular admissibility criteria was among the more contentious issues during the negotiations and an area where some compromises had to be made. Besides the standard admissibility criteria like exhaustion of domestic remedies, compatibility *ratione materiae* and *temporis, etc.*, there are two new criteria. First, a communication must not be "exclusively based on reports disseminated by mass media."⁵ This provision was included in order to exclude communications dependent only on second-hand information and thus only indirectly related to the alleged victim or petitioner. Crucial, however, is the addition of a new criterion in international law. Under Article 4 of the

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Protocol, the Committee can declare a communication inadmissible if it “does not reveal that the author has suffered a clear disadvantage.” This provision mirrors a similar condition included in Protocol 14 to the European Convention on Human Rights which is not yet in force, by which European countries have tried to address the vast volume of complaints in Strasbourg. A similar rationale was behind the addition of the criterion here. It is meant to give a tool to the Committee with which it can protect itself from being flooded by communications.

The inclusion of Article 4 was far from uncontroversial. Some viewed it as limiting the access of victims of violations to the procedure and signaling that some violations of the Covenant do not matter. One must keep in mind, however, that it is only a procedural criterion. It does not follow that states do not need to remedy “minor” violations of the Covenant. It is only a way for the Committee to manage its workload and concentrate on the most important cases should the need arise. In that sense, given that the Committee “may” apply this admissibility criterion “if necessary,”⁶ it should not be used unless the Committee is overwhelmed with cases to the point that it makes both effective examination of communications and its other work impossible.

THE ISSUE OF COLLECTIVE RIGHTS

A last minute compromise was achieved at the Human Rights Council regarding the subject matter jurisdiction of the Committee, an issue that threatened the whole Protocol. The controversy was and still is whether the Committee should be able to review communications alleging violations of the right to self-determination. Ultimately the issue was not resolved and was left for the Committee to decide. During the adoption in the General Assembly, many states cautioned against such an approach, opining that the Committee should adopt the same interpretation as the Human Rights Committee, which maintains that individuals do not have standing to claim that a state has violated the right to self-determination because it is a collective right.⁷ As the Human Rights Committee can receive only individual communications, it effectively cannot consider alleged violations of the right to self-determination. A similar interpretation may be warranted here as the Protocol also does not allow collective complaints.

Yet, interpreting the Protocol in such a way that would limit standing to individuals and groups of individuals may pose a problem *vis-à-vis* other collective rights in the Covenant, namely the rights of trade unions under Article 8. Some suggest that the Committee may consider trade unions a group of individuals.⁸ If that is accepted by the Committee then it can be argued analogically that “people” enjoying the right to self-determination are nothing more than a group of individuals. From this perspective the questions whether the Committee can consider communications alleging violation of trade unions rights and the right to self-determination are closely connected.

Another thorny issue in the negotiations was how the Protocol would deal with the obligation of international cooperation towards realizing the rights in the Covenant. Ultimately, the Committee will be only allowed to send recommendations regarding need for technical assistance to specialized UN agencies, funds and programs and other competent bodies. A novel provision, however, envisions creation of a voluntary trust fund, which would finance programs of building national capacities regarding technical expertise relevant for social rights.

Overall, it is fair to say that the Protocol is a major success in terms of its coherence and integrity. It does not compromise or undermine any of the rights in the Covenant or any aspects of the rights. On the contrary, it establishes the first comprehensive and universal procedure for individual complaints regarding violations of all aspects of social rights. Yet adoption of the instrument by the General Assembly is only a preliminary step. Its acceptance and ratification by as many states as possible is equally if not more important. The article next identifies and responds to some concerns states had with the Protocol and subsequently presents arguments for its ratification.

III. OBJECTIONS TO THE PROTOCOL

While many governments welcomed the adoption of the Protocol, several countries expressed skepticism about the individual adjudication of social rights. Their comments centered on the alleged difficulty in adjudicating these complaints. Specifically, governments who spoke against the Protocol were concerned with the vagueness of the Covenant, the progressive nature of the obligations and the illegitimate transgression into states’ (mainly budgetary) policies.

It is telling, though, that in the public record no delegation defended an absolutist view that social rights are not justiciable. Rather, they put forward specific arguments concerning why the Covenant is not easily subject to adjudication. Hopefully, this signals that the debate on justiciability has become largely obsolete. The shift is understandable given mounting evidence and examples of cases and decisions on social rights. Commenting on a recent publication that compiled social rights cases from various jurisdictions, Philip Alston, one of the early proponents of the Protocol in the beginning of 1990s, said, “This book provides eloquent testimony to the fact that the debate about the justiciability of social rights has come of age.”⁹

The point that social rights are not conceptually different from civil and political rights and therefore susceptible to adjudication in the same way has been argued extensively and persuasively elsewhere.¹⁰ Consequently, this essay focuses only on specific arguments governments raised.

First, the premise that civil rights, compared with social rights, are defined precisely is indefensible. For example by reading the succinctly written Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”) it is not immediately obvious that a violation will occur when states do not effectively investigate alleged acts of torture. Moreover, it is not obvious that states must provide necessary medical treatment to detainees; nor is it clear from the language of Article 7 which acts constitute torture. Yet, the Human Rights Committee found in its case-law all these obligations to arise from Article 7. To find all obligations generated by a right and to clarify any ambiguities, practitioners must look to the case law and not simply the text of an article. Even if the rights in the Covenant look imprecise, it does not hinder their adjudication any more than civil rights. After all, interpreting and making obligations concrete by relating them to real life situations and questions is the essence of judicial work.¹¹

Second, social rights in the Covenant are defined as “progressive.” Under the Covenant, a state party “undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recog-

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nized in the present Covenant.”¹² In contrast, under the ICCPR, states simply undertake to “respect and to ensure” the rights.¹³ But even that does not make them conceptually different to the extent that they would be unjusticiable. First, not all obligations from the Covenant are progressive in nature. An example is the prohibition of discrimination.¹⁴ But that is arguably not important, given that the Protocol envisions adjudication of all obligations under the Covenant. Yet progressive obligations do not mean that they should be fulfilled sometime in the future. It is an immediate obligation to take “deliberate, concrete and targeted” steps towards achieving full realization of the rights in the Covenant.¹⁵ As such, it becomes a matter of evaluating the steps taken by the government.

Human rights obligations can be divided into two categories: obligations of result and obligations of due diligence. The former requires reaching concrete results; for example, the absence of acts of torture. If the result is not achieved, a violation occurs. The latter concentrates not on results, but on the process or procedure. For example, states must effectively investigate all alleged acts of torture. Such investigations must fulfill certain criteria, but a violation does not always occur when a perpetrator is not found or punished. These latter obligations might be seen as more vague; but they are only more complex. There is no single fact which, if proved, results in a violation. Deliberation of the adjudicator involves testing the conduct against multiple criteria. This kind of deliberation is far from impossible; human rights bodies have engaged in these tests for years while adjudicating civil and political rights. It is therefore not the case that adjudicating progressive obligations, which are obligations of due diligence, is impossible, or *per se* illegitimately transgresses state policies.

Similarly, civil rights also have extensive budgetary implications. Therefore, it is simply not possible to say that decisions with budgetary implications are illegitimate as a matter of course. The underlying concern is a fear that an overzealous Committee will dictate state policies. Critics say that the Committee should not tell states how much to spend on healthcare, housing, nor education, etc. The crux of the dispute, therefore, is not justiciability of social rights itself but the methods of (quasi-)judicial review. The Protocol accommodates these concerns well.

One of the crucial issues in the negotiation of the Protocol was to agree on a test the Committee should adopt in reviewing

the positive obligation of states. This is indeed the current topical issue in the justiciability debate. Article 8(4) of the Protocol stipulates that “the Committee shall consider the reasonableness of the steps taken . . . In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.” This language ensures that the Committee does not illegitimately transgress into the field of policy decisions.

In fact, the current practice of the Committee shows that it is working exactly along these lines. It has made clear that states exercise a margin of discretion in devising their policies implementing the Covenant.¹⁶ The need for such discretion is acknowledged in the expert opinions¹⁷ and literature advocating social rights protection.¹⁸ Consequently, there is no basis to fear that the Committee will engage in overzealous and illegitimate review practices. Providing states with considerable discretion implies that even if the Committee might think that there are better ways to secure social rights, it does not follow that there is a violation of the Covenant. A violation will happen only if the measures taken by the state fail the test of reasonableness.

The standard of reasonableness is famously used in adjudicating progressive obligations under the Constitution of the Republic of South Africa.¹⁹ The test is also well known in adjudicating civil and political rights. The European Court of Human Rights uses reasonableness in deciding if the measure a state adopted in fulfilling its obligation to protect is satisfactory.²⁰ More generally, the concept of reasonableness is widely used in common-law systems. The test captures the idea that most rights, including all social rights, are not absolute. For example, not everyone has a right to be provided with a house. Rather states must take reasonable steps to ensure that everyone has access to adequate housing. If somebody does not have access, a violation is still not inevitable because the steps taken might still be reasonable. Applying the test to particular cases, the Committee can be further guided by the abundant experience of other bodies in other contexts.

The Committee has already articulated its preliminary thoughts on how it would determine whether adopted measures are reasonable. It emphasizes the procedural criterion of “transparent and participative decision-making processes.”²¹ Substantively, it pointed, *inter alia*, to requirements that the

exercise of discretion is non-discriminatory, that the measures are deliberate, concrete and targeted, and take into account “disadvantaged and marginalized individuals or groups.”²² These criteria hardly evoke an overzealous second-judgment of government policies.

Moreover, the fears of illegitimate transgression into states’ policies are considerably lowered by nature of the Committee’s mandate. All the Committee can issue are recommendations. So there is no well-founded fear that the Committee would substitute state’s decisions by its own judgments. The State party would still have the option of adopting its own alternative measures, as the Committee itself acknowledges.²³ Consequently, the fear that the Committee will dictate states’ budgets and the general issue of appropriate remedies for violations of social rights is moot.

Even though the concerns of states *vis-à-vis* the Protocol are unfounded, a question still remains why states should ratify the Protocol. The next and last section will present several arguments for ratification.

IV. REASONS TO RATIFY

There are myriad reasons why individuals should have access to international remedies when alleging human rights violations. The main reason is that there should be independent oversight of states’ human rights obligations. With the wide range of international mechanisms allowing individuals to petition civil rights violations, the principle is hardly disputed. Bearing in mind that all arguments for individual access apply in the same way to social rights, the question is whether there are particular reasons for establishing individual petitions for victims of social rights violations.

MOVING SOCIAL RIGHTS INTO THE SPOTLIGHT

The Protocol is the first universal mechanism for adjudicating social rights. Several reasons why states should ratify the Protocol arise from that fact alone. As mentioned, the Protocol brings an end to sixty years of neglect of social rights exemplified also by a lack of effective overview mechanisms. Social rights have been marginalized in the discourse both at an international level and in the vast majority of states. The Protocol transforms the theory that the protection of all human rights requires the same emphasis²⁴ into practice. It highlights social rights, which is a necessary precondition for improving their overall enjoyment. There are two principal ways the Protocol can achieve this objective.

First, individual applications telling individual stories will make social rights more attractive for a public audience. Social rights will acquire a human face. Such stories are able to gain public awareness in a way that concluding recommendations on periodic reports can never do. The media is more likely to report the story of a person living in slums than to report that a committee “is concerned about the lack of a national housing policy which . . . addresses the needs of . . . those living in slums.”²⁵ This will generate higher awareness of social rights among a larger population and foster local movements for protection of social rights. The media and the general public’s focus on these rights is likely to generate greater government interest and consequently better protection of these rights.

Second, a possibility of an international quasi-judicial review provides governments with high incentives to resolve problems

at home, rather than facing the prospect of a negative outcome of an international procedure. Governments generally try to avoid condemnations at the international level.²⁶ This will inevitably encourage states to pay greater attention to social rights and provide effective remedies at home. Consequently, victims’ right to an effective remedy will be strengthened.

Current neglect of social rights at the international level results in many governments logically paying more attention and devoting more resources to protecting civil rights than social rights. This is an arbitrary distinction between civil and social rights that hurts those suffering from or susceptible to social destitution. Similarly, even though protection of all human rights is important, when states allow individual petitions for civil rights violations and not social rights violations, they implicitly privilege one group (victims of civil rights violations) against others (victims of social rights violations). The Protocol ends this schism and presents an opportunity to intensify social rights protection domestically.

It will be wise for governments to internalize social rights into policy and decision-making processes. Government must consider consequences for social rights of all their actions and devise concrete plans for furthering the realization of social rights. This will be the best for ensuring that they comply with obligations under the Covenant. In this way, the Protocol may lead governments to mainstream social rights into all their activities. Mainstreaming social rights is needed to prevent violations in the first place. Thus, the Protocol will strengthen domestic implementation of the Covenant.

This also implies that allowing individual adjudication of social rights is not an expensive way to achieve justice for individuals. On the contrary, at most times the decision will have a systemic effect. Besides providing a possible remedy for the actual petitioner, states will have a chance to adjust their practices which will often positively affect a much wider population. Examples of this systemic effect from national jurisdictions are distribution of food to all those suffering from hunger,²⁷ nationwide distribution of AIDS treatment drugs,²⁸ or extending the right to social security to all non-nationals with permanent residence.²⁹

ADJUDICATION AS A BENEFIT FOR GOOD FAITH STATES

The procedure established by the Protocol cannot, however, be seen as a whip under which states will labor to improve social rights. On the contrary, the rationale of the procedure is to help states fulfill their obligations under the Covenant by considering individual cases and decisions based on real-life situations. The decisions will provide guidance in situations that states face in practice. The views of the Committee will highlight issues that the state possibly overlooked or misinterpreted. Any state that is serious about good faith fulfillment of international obligations will welcome the mechanism as a source of insight into its duties. By ratification, a state will take the moral high ground and be seen as treating its international obligations under the Covenant seriously.

Moreover, individual adjudication of social rights will help identify and suggest solutions for actual problems on the ground. Individuals themselves know best what troubles them. Petitions brought by individuals will thus be a valuable source of information where problems are perceived.³⁰ This will be an

indication both for the governments and international community of what kind of issues to address.

SOLVING THE ALLEGED VAGUENESS OF SOCIAL RIGHTS AND CULTIVATING COMPLIANCE

The Protocol will address the issue that some states have against the adjudication of social rights, namely their vagueness. This argument for perceived unjusticiability of social rights can be actually reversed. Perhaps social rights are vague because they are not adjudicated. The Protocol will break this vicious circle and contribute to better understanding social rights' content and the obligations arising from them. Even though the Committee has done a considerable amount of work to this end, especially in its general comments, there is only so much that it can achieve. As Craig Scott and Patrick Macklem state, "there are limits to how well any supervisory body, no matter how democratic, diligent, or expert, can determine whether policies and laws respect human rights without having the benefit of real-life detail that individual petitions provide."³¹

At the same time, states do not need to fear that any binding decisions will be imposed on them. The Committee has the power to issue only non-binding recommendations. The rationale of the Protocol is not enforcement, but rather more subtle kinds of implementation like highlighting, mainstreaming and assisting the governments to identify with more precision their obligations under the Covenant. Contrary to what Michael Dennis and David Stewart in their article claim, the Protocol is exactly that kind of soft enforcement of international law via "norm-internalization," and cultivation of "voluntary obedience" that they favor as opposed to compelling compliance.³² Furthermore, as Thomas Franck argued, the indeterminacy of norms is a cause for lower levels of compliance.³³ Thus the concretizations of the obligations will further induce better levels of voluntary state compliance with obligations under the Covenant.

ENDING THE MARGINALIZATION OF VICTIMS

States should ratify the Protocol because it will allow individuals to publicly tell their stories at an international level. The benefits human rights victims derive when judicial bodies listen to their stories are studied within the context of international criminal justice. The benefits include relieving victims' sense of societal abandonment, the psychological benefits of testifying or publicly telling their story and victims' sense of empowerment.³⁴ There is no reason to believe that these positive effects will not apply in cases of social rights violations. Adjudication transforms experienced neglect into a situation where problems matter and brings the individuals hope. In many cases, it might well be a false hope when no improvement materializes, or at least not in the short-term. But it is submitted that when an independent expert body reviews the case, a different level of respecting the inherent dignity of every individual is achieved.

Another important reason states should ratify the Protocol lies in the nature of rights as tools of empowerment. The poor protection of social rights most seriously affects people living on the margins of society. These people are often disadvantaged in many ways and effectively unable to claim their rights through usual democratic processes. Their political power is insignificant. If anything, their unpopularity among majority populations

invites politicians, who are trying to win minds of the majority, to further socially exclude them. A classic example is the treatment of the Roma minority in many European countries. Social rights and their judicial protection provide important empowerment and voice to legitimate claims. As the Committee put it, the non-justiciability of social rights "would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."³⁵

Sandra Fredman elaborated this point, arguing that judicial protection of social rights strengthens democracy. The courts can hold those in power accountable and they can assure that a decision by an executive was done in a deliberative fashion with proper reasons.³⁶ By giving voice to minorities, adjudication remedies the majoritarian bias of democracy.

The arguments presented above are valid reasons why states should ratify the Protocol. Some states, however, may be concerned for some reasons with social rights protection in other states. For example, some might be concerned about the plight of humans anywhere on the planet but others might be concerned with social rights abroad because they do not want people migrating to their country to enjoy greater social rights protection. Whatever reason a state has in supporting social rights abroad, it is hardly possible for it to propose that other states ratify the Protocol without itself first being a party. Therefore, this serves as another reason for a state to become a party to the Protocol.

Finally, some governments, including Japan, are not categorically against ratifying the Protocol. Instead, they want to see how the mechanism will work before committing to it. Yet if every state waited for others to make the first move, no state would ratify the Protocol. More importantly, there are additional advantages to becoming a party soon. Ratification will present the state as sympathetic to social rights and as wishing to live up to the standards set sixty years ago by the UDHR. The first ratifying states will also have the biggest influence on how the procedure will develop in practice. They will be able to frame the procedures and standards of review for all the subsequently ratifying states. Finally, states retain the authority to denounce the Protocol if they are unhappy with the Committee's interpretations of its powers or of the Covenant's provisions.

CONCLUSION

This short essay has argued that states have nothing to fear from ratifying the Optional Protocol to the International Covenant on Social, Economic and Cultural Rights. It is a great opportunity for states to focus on complying with their obligations under the Covenant and to seriously address the social rights of their population. The Protocol has the potential to improve social rights protection. Of course, this is not to suggest that social rights adjudication is a panacea that will solve all problems in the world. It is only one part, though very important, of a broader mosaic of effective human rights protection. Overall, the Protocol can help to realize the promise of the UDHR of an "advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want."³⁷ It is now up to the states whether they will live up to the promise and ratify the Protocol or let it slowly decay into disuse and thus neglect the fundamental needs of millions of people.

HRB

ENDNOTES: Realizing a Promise

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- ² Press Release, OP-ICESCR Coalition, NGO Celebrates Historic Adoption of Optional Protocol for Economic, Social and Cultural Rights at UN, (Dec. 10, 2008) (<http://www.opicescr-coalition.org/PressReleaseDecember10.pdf>).
- ³ Press Release, UN High Comm’ner for Human Rights, Closing a historic gap in human rights, (Dec. 10, 2008) (<http://www.unhchr.ch/hurricane/hurricane.nsf/0/D39BD9ED5406650FC125751C0039FE08?opendocument>).
- ⁴ See Claire Mahone, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUM. RTS. L. REV. 617 (2008); Christophe Golay, CTR. EUROPE TIERS MONDE (CETIM), OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2008).
- ⁵ Optional Protocol to the International Covenant on Economic Social and Cultural Rights, G.A. Res. 63/117 art. 3(e), U.N. Doc. A/Res/63/117 (Dec. 10, 2008).
- ⁶ *Id.* at art 4.
- ⁷ *Lubicon Lake Band v. Canada*, Decision on Admissibility, Human Rights Committee, Comm. No. 167/1984 § 13.3, U.N. Doc. Supp. A/45/40 (1987).
- ⁸ Mahone, *supra* note 4, at 634 (2008).
- ⁹ Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* ix (Cambridge Univ. Press 2008).
- ¹⁰ See e.g. KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS (Intersentia 1999); Navish Jheelan, *The Enforceability of Socio-Economic Rights*, EUR. HUM. RTS. L. REV. 146 (2007); MALCOLM LANGFORD, “The Justiciability of Social Rights: From Practice to Theory, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Cambridge Univ. Press 2008); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992); G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views*, in THE RIGHT TO FOOD, (Philip Alston and Katarina Tomaševski, eds., Nijhoff 1997).
- ¹¹ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) (“It is rare, however, that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft”).
- ¹² International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.
- ¹³ International Covenant of Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171.
- ¹⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 16*, ¶ 16, U.N. Doc. E/C. 12/2005/4 (Aug. 11, 2005).
- ¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, ¶ 2 U.N. Doc. E/1991/23 (Dec. 14, 1990).
- ¹⁶ Committee on Economic, Social and Cultural Rights, *Statement by the Committee: An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant*, ¶¶ 11, 12, U.N. Doc. E/C.12/2007/1 (Sept. 21, 2007).
- ¹⁷ See The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 71, U.N. Doc. E/CN.4/1987/17 (June 6, 1986); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 8, (Jan. 22–26, 1997).
- ¹⁸ E.g. Victor Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 SUR INT’L J. HUM. RTS. 181, 197 (2005).
- ¹⁹ S. AFR. CONST. 1996., §§ 26(2), 27(2), 29(1b); see also, Sandra Liebenberg, *Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review*, in THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (John Squires, Malcolm Langford, & Bret Thiele, eds., UNSW Press 2005); Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT’L. L. REV. 673 (2007).
- ²⁰ E.g. *Osman v. the United Kingdom*, 29 Eur. Ct. H.R. 245, 302 (1998).
- ²¹ Committee on Economic, Social and Cultural Rights, *Statement by the Committee: An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant*, ¶ 11 U.N. Doc. E/C.12/2007/1 (Sept. 21, 2007).
- ²² *Id.* at ¶ 8.
- ²³ *Id.* at ¶ 13.
- ²⁴ Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/23, (Jul. 12 1993).
- ²⁵ Committee on Economic, Social and Cultural Rights, *Concluding Observations India*, ¶ 30, (May 16, 2008) [Jan: I can’t find this document. Can you send it to me electronically so that we can arrange the citation]
- ²⁶ 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, and Health?* 98 AM. J. INT’L. L. 462, 511 (2004).
- ²⁷ *People’s Union for Civil Liberties v Union of India*, (2001) 1 S.C.C. 301; see www.righttofoodindia.org.
- ²⁸ *Minister of Health v Treatment Action Campaign 2002* (5) SA 703 (CC) (S. Afr.).
- ²⁹ *Khosa & Others v Minister of Social Development & Others 2004* (6) BCLR (569) (CC) (S. Afr.).
- ³⁰ See also, Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 37 (1992).
- ³¹ *Id.* at 37.
- ³² 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, and Health?* 98 AM. J. INT’L. L. 462, 467 (2004).
- ³³ Thomas Franck, *The Power of Legitimacy Among Nations*, chapter 4 (Oxford Univ. Press 1990).
- ³⁴ Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?* 46 HARV. INT’L L. J. 295 (2005).
- ³⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 9*, ¶ 10, U.N. Doc. E/C. 12/1998/24 (Dec. 3, 1998).
- ³⁶ SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 100–23 (Oxford Univ. Press 2008).
- ³⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), Preamble, U.N. Doc A/810 at 71 (Dec. 10, 1948).