

Evolutionary Interpretation and Subsequent Practice

Interpretive Communities and Processes in the Optional Protocol to the ICESCR

Diane A. Desierto^{*}/*Colin E. Gillespie*^{**}

Abstract	549
I. Introduction: From Authentic Elements of Interpretation to “Evolution”	551
II. The Covenant and Inherently Evolutionary Interpretation	561
III. Evolutionary Interpretation and Individual Complaints in the Optional Protocol of the Covenant on Economic, Social and Cultural Rights	570
IV. Evolutionary Interpretation and Inter-State Dispute Resolution in the Optional Protocol of the Covenant on Economic, Social and Cultural Rights	579
V. Conclusion	588

Abstract

The entry into force on 5.5.2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) augurs significant developments for the principle of “evolutionary interpretation” in relation to subsequent practice in the application of a treaty under Article 31(3)(b) of the Vienna Convention on the Law of Treaties. The ICESCR, by treaty design and expressed intent of the States Parties, is one such treaty that purposely embraces an evolving meaning and content (see fundamental obligations under Article 2(1) ICESCR) that treaty interpreters are tasked to continually and contemporaneously assess when determining State compliance with obligations to respect, fulfill, and protect economic, social, and cultural rights. The passage and entry into force of the Optional Protocol to the ICESCR establishes three key procedures – an individual/group communications procedure, an extensive and far-reaching inquiry procedure, and a unique inter-State communications procedure not found in the treaty

^{*} Assistant Professor University of Hawaii, William S. Richardson School of Law, Honolulu, United States of America. J.S.D., LL.M. (Yale Law School); J.D. (BSc Economic, University of the Philippines).

^{**} C.V. Starr Lecturer-in-Law, Peking University School of Transnational Law, China; incoming Law Clerk, U.S. Court of Appeals 2nd Cir. N.Y. ; J.D. (New York University School of Law); B.A. (Eng., Northwestern University).

procedures under the International Covenant on Civil and Political Rights (ICCPR).

We theorize that these new procedures in the Protocol meaningfully situate the principle of evolutionary interpretation in this treaty regime in three concrete ways. First, the Protocol purposely accepts the inherent dynamism of ICESCR norms in the process of determining State responsibility, and accordingly embraces States' "margin of discretion" over the "reasonableness" of means adopted to comply with the ICESCR obligations, similar to the interpretive positions already extant from regional and national jurisprudential practices. Second, the Protocol deliberately expands the epistemic, forensic, and law-applying communities that may bear upon the interpretive process for determining State responsibility over ICESCR violations. Finally, the Protocol's new inter-State procedure rejects the hard adversarial paradigm prevalent in inter-State dispute settlement processes, in favor of an inclusive and cooperative process focused on realigning or changing State policy to reach conformity with the ICESCR, rather than the standard forms of reparation under the general law of State responsibility. The horizontal design of the Protocol's inter-State procedure thus appears to incentivize, rather than coerce, compliance with the ICESCR.

I. Introduction: From Authentic Elements of Interpretation to “Evolution”

“Should the events of yesterday ever have the law of today applied to them? ... ‘generic clauses’ and human rights provisions are not really random exceptions to a general rule. They are an application of a wider principle – intention of the parties, reflected by reference to the objects and purpose – that guides the law of treaties.”

*Dame Rosalyn Higgins*¹

“The practice of evolutionary interpretation is another expression of the art of judging, which is constantly balanced between providing for stability based on respect for the principle of autonomy of the will of the parties, and a quest for the necessary flexibility to keep a treaty afloat by meeting the objectives it was designed to address.”

*Prof. Pierre-Marie Dupuy*²

“The importance of [...] subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes evidence of the understanding of the parties as to the meaning of the treaty.”

*International Law Commission*³

Interpretation inimitably involves a process of decoding the authoritative exegesis for any given text. Scholars of semiotics refer to the task of interpretation as an inevitable struggle for control over meaning, while avoiding the dangers of “overinterpretation” of texts.⁴ Similarly concerned about the

¹ R. Higgins, Time and the Law: International Perspectives on an Old Problem, ICLQ 46 (1997), 501 et seq., at 507 and 519.

² P.-M. Dupuy, Evolutionary Interpretation of Treaties: Between Memory and Prophecy, 124 et seq., at 137, in: E. Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention, 2011.

³ International Law Commission, Commentaries to the Draft Articles on the Law of Treaties (1966), Yearbook of the International Law Commission, 1966, Vol. II (hereafter, ILC Commentaries on the VCLT), 219, paras. 6, 15, 221.

⁴ See U. Eco, Interpretation and Overinterpretation, 1992, 40 [“... there are somewhere criteria for limiting interpretation. Otherwise we risk facing a merely linguistic paradox ...”];

hazards of limitless interpretation within the international legal canon, the International Law Commission (ILC) codified the integral rule of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties (VCLT) to set the boundaries of permissible interpretation of treaty texts.⁵ The customary nature of Article 31 VCLT has since become a well-established and generally accepted rule in international jurisprudence.⁶

However, the codification of Article 31 VCLT did not reduce treaty interpretation into a formulaic procedure. Even within the terms of Article 31 VCLT as a “single, closely integrated rule”,⁷ the ILC nevertheless created specific gateways for treaty interpreters to consider external rules and juridical phenomena arising subsequent to the conclusion of a treaty, deemed to be “authentic elements of interpretation”.⁸ Article 31(3) VCLT thus enumerates three such rules and phenomena that treaty interpreters may take into account together with context: 1) “any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions”;⁹ 2) “any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation”;¹⁰ and 3) “any *relevant rules of international law* applicable in the relations between the parties”.¹¹ By including these provisions in Article 31 VCLT, the ILC rejected any static or hermetic interpretation of treaties, but also omitted providing detail on the operational parameters governing such

52 [“...we can accept a sort of Popperian principle according to which if there are no rules to help to ascertain which interpretations are the ‘best’ ones, there is at least a rule for ascertaining which ones are ‘bad.’.”]; 63 et seq. [“The classical debate aimed at finding in a text either what its author intended to say, or what the text said independently of the intentions of its author. Only after accepting the second horn of the dilemma can one ask if what is found is what the text says *by virtue of its textual coherence* and of an original underlying signification system, or what the addressees found in it by virtue of their own systems of expectation.” (Italics added)].

⁵ For a succinct summary of the historical developments of the rule of interpretation under VCLT, Art. 31 and the supplementary rule of interpretation under VCLT, Art. 32, see *J. R. Weeramantry*, *Treaty Interpretation in Investment Arbitration*, 18 et seq.

⁶ *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991, 53, at 70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, I.C.J. Reports 1994, 6, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, 6, at 18, para. 33; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, 812, para. 23; *Kasikili v. Sedudu Island (Botswana v. Namibia)*, Judgment, I.C.J. Reports 1999, 1045, at 1059, para. 18.

⁷ ILC Commentaries on the VCLT, 220, para. 8.

⁸ ILC Commentaries on the VCLT, 221 et seq., paras. 14-16.

⁹ Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331 (hereafter, VCLT), Art. 31(3)(a).

¹⁰ VCLT, Art. 31(3)(b).

¹¹ VCLT, Art. 31(3)(c).

“authentic elements of interpretation” in Article 31(3) VCLT. Not unexpectedly, therefore, the main challenge for treaty interpreters and law-appliers applying Article 31(3) VCLT remains one of ascertaining *which* external rules and subsequent juridical phenomena could fall within the permissible outer limits of treaty interpretation. The cognitive complexity of this question strengthens the ILC’s view of treaty interpretation as, ultimately, a process involving “to some extent an art, not an exact science”.¹²

Beyond brief descriptions in its 1966 commentaries to the draft articles of the VCLT,¹³ the ILC has not yet elaborated criteria to aid treaty interpreters in determining an acceptably legitimate degree of “dynamic” or “evolutionary” interpretation arising from the “authentic elements of interpretation” enumerated in Article 31(3) VCLT. In 2006, the ILC Study Group on the Fragmentation of International Law issued several conclusions on Article 31(3)(c) VCLT (on “relevant rules of international law applicable in the relations between the parties”) as a principle of “systemic integration”,¹⁴ but the breadth of these conclusions has since been criticized and remains much-disputed within the international legal community.¹⁵ On the other hand, the ILC Working Group on “Treaties over Time/Subsequent Agreements and subsequent practice in relation to interpretation of treaties” has not yet issued any definitive report on Article 31(3)(a) VCLT and Article 31(3)(b) VCLT, although it has considered several oral reports of then “Treaties over

¹² ILC Commentaries to the VCLT, 218, para. 4.

¹³ ILC Commentaries to the VCLT, 221, paras. 14-16.

¹⁴ See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006), Yearbook of the International Law Commission, 2006, Vol. II, Part Two, paras. 17-42.

¹⁵ For the defence of the “principle”, see *C. McLachlan*, The Principle of Systemic Integration and 31(3)(c) of the Vienna Convention, ICLQ 54 (2005), 279 et seq. For critical views of the “principle”, see among others *R. Higgins*, A Babel of Judicial Voices? Ruminations from the Bench, 55 ICLQ 4 (2006), 791 et seq., at 796, 803 et seq.; *A. Orakhelashvili*, The Interpretation of Acts and Rules in Public International Law, 2008, 367 (“... ‘the principle of systemic integration goes further than merely restate the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely.’ But the use of this notion does not by itself clarify the essence of the process, in terms of what is integrated, how and on what conditions. More importantly, integration relates to a result, while interpretation methods definitionally relate to methods and means. From the perspective of the law of interpretation, reference to the relevant rules of international law will in some cases produce the result of integration while in other cases it will not. The positive or negative outcome in each case will in its turn be produced by circumstances more specific to the relevant interpretative method and context than is the general notion of ‘systemic integration’. All these factors require some degree of caution in advancing such a far-reaching notion. Although the integration of extraneous rules into a treaty can be an interpretative outcome in some cases, it is certainly not a principle, still less a principle that applies across the board.”)

Time” Working Group Chairman *Georg Nolte*¹⁶ and adopted several preliminary conclusions in 2011 and 2012.¹⁷ Following the reconstitution of the Treaties over Time Working Group into the “Subsequent Agreements and Subsequent Practice on the Interpretation of Treaties” Working Group, as of this writing the reconstituted ILC Working Group is considering the 19.3.2013 First Report by Special Rapporteur *Georg Nolte*.¹⁸

Based on his analytical survey of international jurisprudence in his First Report, the Special Rapporteur issued four draft conclusions on treaty interpretation and subsequent practice. These conclusions are significant, in that they are the first recent indications from the ILC on the contemporary functions of subsequent practice as an authentic element of treaty interpretation. First, the Rapporteur proposed that there could be a “different emphasis on the various means of interpretation contained in Articles 31 and 32 of the Vienna Convention”,¹⁹ such as a shift from a primarily textual to more purposive or teleological interpretation when the treaty authorizes it, a prominent example of which is the European Convention on Human Rights.²⁰ Second, he contended that authentic elements of interpretation

¹⁶ International Law Commission, Report of the Sixty-first session (2009), A/64/10, Chapter XII, (Treaties over Time), paras. 217-226; International Law Commission, Report of the Sixty-second session (2010), A/65/10, Chapter X, (Treaties over Time), paras. 344-354; International Law Commission, Report of the Sixty-third session (2011), A/66/10, Chapter XI, (Treaties over Time), paras. 333-344; International Law Commission, Report of the Sixty-fourth session (2012), A/67/10, Chapter X, (Treaties over Time), paras. 222-240.

¹⁷ International Law Commission, Report of the Sixty-third session (2011), A/66/10, Chapter XI, (Treaties over Time), para. 344, (enumerating nine preliminary conclusions on: 1) the general rule on treaty interpretation; 2) approaches to interpretation; 3) interpretation of treaties on human rights and international criminal law; 4) recognition in principle of subsequent agreements and subsequent practice as means of interpretation; 5) concept of subsequent practice as a means of interpretation; 6) identification of the role of a subsequent agreement; 7) evolutionary interpretation and subsequent practice; 8) rare invocation of subsequent agreements; and 9) possible authors of relevant subsequent practice); International Law Commission, Report of the Sixty-fourth session (2012), A/67/10, Chapter X, (Treaties over Time), para. 240, (enumerating six additional preliminary conclusions on: 1) subsequent practice as reflecting a position regarding the interpretation of a treaty; 2) specificity of subsequent practice; 3) the degree of active participation in a practice and silence; 4) effects of contradictory subsequent practice; 5) subsequent agreement or practice and formal amendment or interpretation procedures; and 6) subsequent practice and possible modification of a treaty).

¹⁸ *G. Nolte*, Special Rapporteur, First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, A/CN.4/660, 19.3.2013, International Law Commission Sixty-fifth session (2013) (hereafter, *Nolte First Report 2013*).

¹⁹ *Nolte First Report 2013* (note 18), para. 28.

²⁰ See *J. Christoffersen*, Impact on General Principles of Treaty Interpretation, Chapter 3, 38 et seq., in: M. T. Kamminga/M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law*, 2009, (arguing that the method of interpretation of the European Court of Human Rights, in reality, is “firmly rooted within the traditional canons of interpretation of general international law”).

(such as subsequent practice) “may guide the evolutive interpretation of a treaty”,²¹ in light of the dispositive reasoning of the International Court of Justice in its 2009 Judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, which recognized evolutive interpretation as an acceptable method of treaty interpretation within Article 31 VCLT.²² With respect to the evidentiary threshold for subsequent practice, the Special Rapporteur’s third and fourth draft conclusions declared, respectively, that subsequent practice could be evidenced by “conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application”,²³ and such conduct could be located from “all State organs” as well as “non-State actors ... as far as it is reflected in or adopted by subsequent State practice”.²⁴

The ILC Special Rapporteur’s 2013 draft conclusions on subsequent practice suggest some watershed developments arising from modern treaty-making practices and current trends in the interpretive methods of modern international courts and specialized treaty-based tribunals. They affirm that States might “contract out” of applying the primarily text-based integral rule of interpretation under Article 31 VCLT,²⁵ through a treaty clause or provision reordering the relative weights of the elements of treaty interpretation in Article 31 VCLT. They also convey the ILC’s possible acceptance of conceptual linkages existing between subsequent practice and the method of evolutive interpretation, despite the key distinction that subsequent practice entails the interpretation of a treaty “on the basis of something about the later behavior of the parties”, while evolutive interpretation involves “developmental interpretation ... based on some evidence of the original

²¹ Nolte First Report 2013 (note 18), para. 64.

²² *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, 213, paras. 63-66, (declaring in particular in para. 66 that “where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning”).

²³ Nolte First Report 2013 (note 18), para. 118.

²⁴ Nolte First Report 2013 (note 18), para. 144.

²⁵ *J. Pawwelyn* maintains that, “by concluding a treaty, states can contract out of or deviate from general international law (other than *jus cogens*). States do so regularly, for example, in the final provisions of treaties on how to amend the treaty (thus contracting out of rules of general international law of treaties) ... The treaty must exclude the rules of general international law that the parties do not want to apply with respect to the treaty, not the reverse (i. e. the treaty does not have to list all such rules that are to apply to it) ... the text of the Vienna Convention does not have to be attached to the new treaty for general international law rules on the law of treaties to be applicable to it ...” *J. Pawwelyn*, *The Role of Public International Law in the WTO: How Far Can We Go?*, *AJIL* 95 (2001), 535, at 537.

intention of the parties that the treaty be capable of evolution”.²⁶ Finally, contrary to the traditional view that subsequent practice as an authentic element of treaty interpretation implies a high evidentiary threshold,²⁷ the 2013 draft conclusions suggest some loosening of this standard in order to enable law-apppliers to fully utilize subsequent practice within the interpretive process.²⁸

The International Court of Justice’s express acceptance of evolutive interpretation in its 2009 Judgment in *Costa Rica v. Nicaragua*, taken together with the abovementioned studies of the ILC Working Group, clearly presage the increasing normative importance of subsequent practice as an authentic element of treaty interpretation. This Article aims to contribute further analysis on evolutive interpretation and subsequent practice by situating both in a distinct treaty regime, namely the International Covenant on Economic, Social and Cultural Rights (hereafter, the Covenant),²⁹ and its singularly innovative Optional Protocol (hereafter OP-ICESCR) that entered into force on 5.5.2013.³⁰ In pursuing this project some conceptual clarity might be useful in order to distinguish between the emphasis which a treaty interpreter might give to subsequent practice or the technique of evolutive interpretation as compared to other sources of treaty interpretation laid out in Article 31 VCLT (or what might, given the recent interest in evolutive interpretation, be called “normal” operations of treaty interpretation),

²⁶ J. Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, *The Law and Practice of International Courts and Tribunals* 9 (2010), 443 et seq., at 445.

²⁷ A. Orakhelashvili (note 15), 362, (“... subsequent practice under the Vienna Convention has a similar nature and requirements to international law-making in general, whether through agreements, custom, acquiescence or unilateral acts: it has to involve concordance of actions and attitudes. Therefore, it is not surprising that the burden of proof in the case of establishing subsequent practice is as high as in the case of establishing other law-making processes. In the end, it is the treaty which is interpreted and in which the parties place confidence; the proof of any deviation therefrom must meet a high threshold of evidence.”); M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, 431 et seq. (“... The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties, and no other party will have raised an objection.”).

²⁸ See also 8.8.2011 Statement of the Study Group Chairman, Report of the International Law Commission, Sixty-fourth session, A/67/10, paras. 222-240.

²⁹ International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), 49, UN Doc. A/6316 (1966), (hereafter, ICESCR).

³⁰ See Statement by Mr. Ivan Simonovic, Assistant Secretary-General, Deposit of the 10th Instrument of Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (hereafter, OP-ICESCR), New York, 5.2.2013, available at <<http://www2.ohchr.org>>.

and the distinctions developing between an interpretive heuristic which takes for its starting point the evolutive nature of treaty norms as compared to the subsequent practice of states with respect to those norms.

With respect to the first distinction, between evolutive interpretation or subsequent practice and the other modes of interpretation laid out in the general rule of Article 31 VCLT, we would endorse the notion that the rule laid down in the VCLT “must not ‘be taken as laying down a hierarchical order’ of different means of interpretation contained therein, but that these are to be applied by way of a ‘single combined operation’”.³¹ This single combined operation, in addition, must include consideration of “the terms of the treaty in their *context*, and in light of its object and purpose”.³² The particular notion of context, as an element in the operation of treaty interpretation, has been analyzed in a number of different manners. In one sense it is a question of the place of a treaty term in relation to other terms in the treaty as a matter of textual interpretation, that is to say, a question of how different treaty terms combine to produce meaning. In another sense, in the case of contested meanings, the need to pay attention to context has been read as a requirement to look beyond the text to the “force that makes the treaty – the will behind the text”.³³ Accepting those definitions of context, we will advance the view that the importance of context in the instance of the ICESCR is its ability to harmonize particular treaty obligations with the dynamic obligation to “progressively ensure” Covenant rights.

The second distinction that needs to be elucidated in this case is that between techniques of interpretation in the manner of their operation, an interpreter might emphasize the question of the subsequent practice of the parties to a treaty, following Article 31(3)(b) VCLT, or evolutive interpretation, which derives its place in the operation of treaty interpretation from the necessity that treaties be interpreted in light of their “object and purpose”, and from a further supposition in a given case that parties to the treaty intended that a treaty term “be capable of evolution”.³⁴ The distinction between the two operations is illustrated by the differences between the majority opinion in *Costa Rica v. Nicaragua*, and the concurring opinion of Judge *Skotnikov*.

The dispute concerned the definition of the term “*comercio*”, which appeared in an 1858 treaty that delimited a maritime boundary between the

³¹ Nolte First Report 2013 (note 18), para. 9.

³² VCLT, Art. 31(1).

³³ *I. Venzke*, The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation, *Loy. L.A. Int'l & Comp. L. Rev.* 34 (2011), 99, 111 et seq.

³⁴ *J. Arato* (note 26), 445.

two states, and which granted Nicaragua sovereignty over the San Juan River, but allowed Costa Rica rights of navigation for commercial purposes.³⁵ The issue was whether the use of the river for purposes of tourism by Costa Rica fell under the definition of “*comercio*”. The majority concluded that it did, basing its decision on the fact that “*comercio*” was a generic term “incorporated into a treaty intended to remain in force in perpetuity”.³⁶ Judge *Skotnikov*, in contrast, concluded that the subsequent practice of Nicaragua, in particular not objecting to Costa Rica’s use of the river for purposes of tourism for ten years, indicated that the term had come to include Costa Rica’s right to use the river for the purposes of services as well.³⁷ These differing interpretive frames – evolutive interpretation in light of the object and purpose of parties at the time of drafting and interpretation of treaties in light of the subsequent practice of parties – yield different results in different cases.³⁸

The OP-ICESCR offers the opportunity to explore some of the nuances of the operations of treaty interpretation in one specific iteration. The new-found applicability of the individual communications, fact-finding inquiry, and inter-State procedures in the OP-ICESCR,³⁹ in our view, arguably *institutionalizes* subsequent practice for an inherently *evolutive* treaty such as the Covenant. Beyond the consequentialist arguments that have been articulated thus far in favour of ratifying the OP-ICESCR,⁴⁰ we submit that what is more revolutionary from the OP-ICESCR’s entry into force is how the new OP-ICESCR procedures before the Committee on Economic, Social, and Cultural Rights, coupled with the well-settled Articles 16 and 17 reportage State process to the Committee, establishes a more distinguishable, centralized, coherent, and publicly available index of relevant subsequent practice of States on the interpretation and application of the Covenant. It is

³⁵ J. Arato (note 26), 447. The debate is also summarized in the ILC report. See Nolte First Report 2013 (note 18), paras. 58-61.

³⁶ J. Arato (note 26), 447.

³⁷ J. Arato (note 26), 448.

³⁸ J. Arato (note 26), 448.

³⁹ OP-ICESCR, G.A. Res. A/RES63/117, 10.12.2008. Full text available at <<http://www2.ohchr.org>>.

⁴⁰ Beth Simmons observed in 2009 that OP-ICESCR ratification would provide legal clarity as to the nature of ICESCR obligations, improve treaty implementation and compliance, and open further opportunities for domestic mobilization vindicating economic, social, and cultural rights. See B. A. Simmons, Should States Ratify the Protocol? Process and Consequences of the Optional Protocol of the ICESCR, *Norwegian Journal of Human Rights* 27 (2009), 64 et seq. See also C. Mahon, Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *HRLR* 8 (2008), 617 et seq.

a distinctly novel situation where subsequent practice concretely features in the purposely-evolutionary interpretation of a treaty.⁴¹

These developments lead us to anticipate that law-appliers will be better equipped to manage and resolve the complex interpretive and evidentiary issues arising from normative uncertainties created by the dynamic nature of the Covenant, which have besieged this treaty regime particularly from the earliest drafting debates.⁴² We expect that by cyclically and publicly revealing the crystallizing subsequent practices of States in the implementation and application of the Covenant, the new procedures under the OP-ICESCR could also help defuse continuing criticisms on the supposed manipulability of Covenant obligations.⁴³ This would eventually lend a fairly more predictable and increasingly participatory dimension for States and non-State actors in the interpretation and application of the Covenant through better-centralized Committee procedures.⁴⁴ Finally, we contend that subsequent practice gleaned from the fact-finding and softly adjudicative Committee procedures institutionalized under the OP-ICESCR will

⁴¹ See Nolte First Report 2013 (note 18), para. 54, (“The possible legal significance of subsequent agreements and subsequent practice as means of interpretation also depends on the so-called intertemporal law. This concerns the question whether a treaty must be interpreted in the light of the circumstances at the time of its conclusion [‘contemporaneous interpretation’], or rather in the light of the circumstances at the time of its application [‘evolutionary interpretation’] ...”).

⁴² On the drafting history and conceptual debates surrounding the meaning, content, and implementation of ICESCR obligations, see *M. A. Baderin/R. McCorquodale*, The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development, in: *M. A. Baderin/R. McCorquodale*, Economic, Social, and Cultural Rights in Action, 2007, 3 et seq. On the evolving conceptual content of the famous triage of State obligations under the ICESCR (the “obligation to respect, to protect, and to fulfill”), see *A. Eide*, Economic, Social and Cultural Rights as Human Rights, Chapter 2, in: *A. Eide/C. Krause/A. Rosas* (eds.), Economic, Social and Cultural Rights, 2001, 9 et seq., at 30. For observations on the difficulties behind empirical measurement of ICESCR compliance, see *R. E. Robertson*, Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights, HRQ 16 (1994), 693.

⁴³ *K. G. Young*, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, *Yale J. Int’l L.* 33 (2008), 113, at 116, (arguing that absent clear interpretation, the concept of minimum core obligations under the ICESCR “cannot supply a predetermined content to economic and social rights, rank the value of particular claims, or offset the level and criteria of state justification required for a permissible infringement ... it is unlikely that the concept will ever offer the relative determinacy required for these three states”). For similar criticisms in constitutional discourses on the interpretation and application of socio-economic rights, see *E. Rosevear/R. Hirschl*, Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities, in: *T. Campbell/K. D. Ewing/A. Tomkins* (eds.), The Legal Protection of Human Rights: Sceptical Essays, 2011.

⁴⁴ See *P. Alston*, Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights, HRQ 9 (1987), 332, (on the early structural challenges identified at the inception of the Committee).

not just “guide”, but ultimately, shape the evolutive interpretation of the Covenant and control against its unjustified and limitless “overinterpretation”.

We show in Part II (The Covenant and Inherently Evolutive Interpretation) that the Covenant, by treaty design and expressed intent of the States Parties, is one such treaty that purposely embraces an evolving meaning and content (see fundamental obligations under Article 2 [1] ICESCR) that treaty interpreters are tasked to continually and contemporaneously assess when determining State compliance with obligations to respect, fulfil, and protect economic, social, and cultural rights. The passage and entry into force of the OP-ICESCR establishes three key procedures – an individual/group communications procedure, an extensive and far-reaching inquiry procedure, and a unique inter-State communications procedure not found in the treaty procedures under the ICCPR – which, we theorize, concretely situates the principle of evolutionary interpretation in this treaty regime. The OP-ICESCR purposely accepts the inherent dynamism of Covenant norms in the process of determining State responsibility, and accordingly embraces States’ “margin of discretion” over the “reasonableness” of means adopted to comply with Covenant obligations, similar to the interpretive position articulated in the Limburg Principles, and subsequently adopted in the jurisprudence of the European Court of Human Rights and the African Commission on Human and Peoples’ Rights “Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights”.

In Part III (Evolutive Interpretation and Individual Complaints in the Optional Protocol of the Covenant on Economic, Social and Cultural Rights), we further illustrate how the OP-ICESCR deliberately expands the epistemic, forensic, and law-applying communities that may bear upon the interpretive process for determining State responsibility over Covenant violations. To this end, the Committee on Economic, Social and Cultural Rights is authorized to designate and outsource part of its fact-finding and interpretive functions to Working Groups and Rapporteurs, as well as to accept information and reports from a vast range of governmental and intergovernmental sources (e. g. UN specialized agencies, non-governmental organizations, national governments, among others).⁴⁵ The Committee is

⁴⁵ On recent developments in the UN High Commissioner’s endorsement of indicators to empirically monitor ICESCR compliance, see Article on Indicators for Monitoring Compliance with International Human Rights Instruments, HRI/MC/2006/7, 11.5.2006, available at <<http://hrbportal.org>>; United Nations Office of the High Commissioner for Human Rights, Human Rights Indicators: A Guide to Measurement and Implementation, United Nations 2012, available at <<http://www.ohchr.org>>. See also *B. Simma/D. A. Desierto*, Bridg-

also vested with significant *proprio motu* evidence-gathering and fact-finding powers well outside the traditional model of the State reportage process in Articles 16 and 17 of the Covenant. The plural sources of information and empirical data now open through the Committee procedures both under the Covenant as well as the OP-ICESCR, in our view, respond well to democratic deficit and legitimacy issues currently afflicting the international human rights fact-finding process.⁴⁶

We conclude in Part IV (Evolutionary Interpretation and Inter-State Dispute Resolution in the Optional Protocol of the Covenant on Economic, Social and Cultural Rights), that the OP-ICESCR's new inter-State procedure rejects the hard adversarial paradigm prevalent in inter-State dispute settlement processes, in favour of an inclusive and cooperative process focused on realigning or changing State policy to reach conformity with the Covenant. Rather than adjudicating individual claims for reparations under the general law of State responsibility, this new inter-State procedure seeks to incentivize, rather than coerce, treaty compliance. While the findings elicited from these procedures will certainly not preclude future or parallel resort to individual reparations claims in national courts or other international tribunals, we are also of the view that the reasoned elaboration of decisions involving State responsibility for Covenant violations⁴⁷ would henceforth require some recalibration. The interpretive results available in the future from OP-ICESCR procedures would fulfil a gap-filling function for law-apppliers, most crucially in regard to the process for determining *legitimate* changes in regard to "evolving" terms within the Covenant.

II. The Covenant and Inherently Evolutionary Interpretation

From the earliest treaty drafting debates up to its present implementation,⁴⁸ the Covenant has not lacked in perennial challenges against, and

ing the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR, in: Essays in Honour of Eibe Riedel, 2012, 1 et seq. reprinted in: *Transnational Dispute Management* 1 (2013); J. V. Welling, International Indicators and Economic, Social, and Cultural Rights, HRQ 30 (2008), 933 et seq.

⁴⁶ On these issues, see P. Alston/C. Gillespie, *Global Human Rights Monitoring, New Technologies, and the Politics of Information*, EJIL 23 (2012), 1089.

⁴⁷ We observe that the International Court of Justice was quite laconic in its analysis of state responsibility for ICESCR violations, as seen in the *Advisory Wall* opinion. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at paras. 133-134.

⁴⁸ See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, 1995; P. Alston/G. Quinn, *The Nature and Scope of States*

scrutiny of, its legal enforceability.⁴⁹ While the International Court of Justice has recognized the Covenant as a binding source of international legal obligation in its *Wall* advisory opinion,⁵⁰ and States Parties have regularly participated for around four decades in the Committee reportage process required by the Covenant,⁵¹ the programmatic nature of this treaty nevertheless continues to invite some scepticism of the precise determinability of obligations contained therein.⁵² For a multilateral treaty almost five decades into existence and global implementation, however, Covenant obligations have, at the very least, arguably gained their place within the *opinio juris* lexicon of its States Parties.⁵³

Among the major international human rights treaties, the normative design of Covenant obligations stands out for being purposely evolutive and dynamic. Article 2(1) best capsulizes the evolutive nature of the Covenant, through its cornerstone obligation requiring States Parties to “take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.⁵⁴ As the Committee on Economic, Social and Cultural Rights (hereafter, Committee) emphasized, “while the Covenant provides for pro-

Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights, HRQ 9 (1987), 156 et seq.

⁴⁹ See among others *M. J. Dennis/D. P. Stewart*, Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, *AJIL* 98 (2004), 462 et seq.; *A. Ely Yamin*, The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda, HRQ 27 (2005), 1200 et seq.; *P. O’Connell*, The Death of Socio-Economic Rights, *The Modern Law Review* 74 (2011), 532 et seq.

⁵⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136, at paras. 133-134.

⁵¹ See *C. Puta-Chekwe/N. Flood*, From Division to Integration: Economic, Social, and Cultural Rights as Human Rights, in: I. Merali/V. Oosterveld (eds.), *Giving Meaning to Economic, Social and Cultural Rights*, 2001, 39 et seq.

⁵² *M. Dowell-Jones*, Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit, 2004, 23.

⁵³ See *M. A. Baderin/R. McCorquodale* (note 42), 14, (“... there have been considerable debates about the nature and scope of the obligations of ESC rights, both during the forty years of the existence of the ICESCR and beforehand. The essence of the arguments that doubted the nature, the justiciability, and the scope of obligations of ESC rights have, in our view, now all been comprehensively rebutted in the literature and jurisprudence, both through strong conceptual analysis and clear applications of ESC rights.”). On recent issues in the implementation of the ICESCR, see Committee on Economic, Social and Cultural Rights, Report on the forty-sixth and forty-seventh sessions, E/2012/22, E/C.12/2011/3, Supplement No. 2 (2012), 439 et seq.

⁵⁴ ICESCR, Art. 2(1).

ZaöRV 73 (2013)

gressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect”.⁵⁵ The principle of non-discrimination in Article 2(2) and the right to equal pay for equal work in Article 7 are examples of Covenant obligations deemed immediately effective upon State Parties from the time of accession to the Covenant.⁵⁶

A State Party’s obligation “to take steps” is one that should be “deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant,”⁵⁷ with the means to be used to fulfil the obligation to take steps being “all appropriate means, including particularly the adoption of legislative measures”,⁵⁸ which may also include, and are not limited to, “administrative, financial, educational and social measures”.⁵⁹ This obligation of “result” through progressive realization⁶⁰ concedes programmatic flexibility in the State’s implementation of Covenant obligations, but does not eliminate the State’s duty to “move as expeditiously and effectively as possible” towards realizing Covenant rights, with a further duty to justify any measures that appear “deliberately retrogressive” as compared with the State’s previous modes of implementation of, and compliance with, its Covenant commitments.⁶¹ The United Nations High Commissioner for Human Rights operationally regards the principle of non-retrogression to mean that “no right can be permitted deliberately to suffer an absolute decline in its level of realization, unless the relevant duty-bearer(s) can justify this by referring to the totality of the rights in force in the given situation and fully uses the maximum available resources. So when allocating more resources to the rights that have been accorded priority at any given time, the other rights must be maintained at least at their initial level of realization.”⁶²

⁵⁵ Committee on Economic, Social and Cultural Rights, General Comment 3 (The nature of States parties obligations [Art. 2, para. 1]), 14.12.1990, para. 1, available at <<http://www.unhchr.ch>>.

⁵⁶ See *U. Khaliq/R. Churchill*, The Protection of Economic and Social Rights: A Particular Challenge?, in: H. Keller/G. Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, 199 et seq., at 210.

⁵⁷ CESCR General Comment 3 (note 55), para. 2.

⁵⁸ CESCR General Comment 3 (note 55), para. 3.

⁵⁹ CESCR General Comment 3 (note 55), at para. 7.

⁶⁰ CESCR General Comment 3 (note 55), at para. 9.

⁶¹ CESCR General Comment 3 (note 55). Underscoring in the original.

⁶² United Nations, Office of the High Commissioner for Human Rights, Frequently Asked Questions on a Human Rights Based Approach to Development Cooperation, 2006, 12.

The classic tripartite typology of State duties to “respect”, “protect”, and “fulfil” Covenant rights⁶³ encapsulates both the principles of progressive realization with non-retrogression.⁶⁴ The obligation to respect the Covenant “requires States to abstain from performing, sponsoring or tolerating any practice, policy, or legal measure violating the integrity of individuals or infringing upon their freedom to use those material or other resources available to them in ways they find most appropriate to satisfy economic, social and cultural rights”.⁶⁵ The obligation to protect Covenant rights “requires the State and its agents to prevent the violation of any individual’s rights by any other individual or non-State actor”,⁶⁶ while the obligation to fulfil Covenant rights “requires positive measures by the State when other measures have not succeeded in ensuring the full realization of these rights, [such as] public expenditure, governmental regulation of the economy, the provision of basic public services and infrastructure, taxation and other redistributive economic measures”.⁶⁷ These three obligations capture the broad spectrum of State Party actions and measures necessary to comply with the Covenant.⁶⁸

Apart from the tripartite typology and the principles of progressive realization and non-retrogression under Article 2(1), a further crucial aspect of the Covenant is its mandatory minimum social protection baseline. As explained by the Committee, States must observe, regardless of resource or material constraints, a “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.⁶⁹ A State Party can only justify its failure to meet this minimum core content

⁶³ See “The Right to Adequate Food as a Human Right”, Final Report prepared by Special Rapporteur A. Eide, E/CN.4/Sub.2/1987/23 (where the tripartite typology was first proposed in the context of the Covenant).

⁶⁴ For other key studies that apply the principles of non-retrogression and progressive realization under Art. 2(1) of the Covenant to specific rights, see among others “Realization of Economic, Social and Cultural Rights”, Preliminary Report by Special Rapporteur D. Turk, E/CN.4/Sub.2/1989/19; Progress Report by Special Rapporteur D. Turk, E/CN.4/Sub.2/1990/19; Second Report by Special Rapporteur D. Turk, E/CN.4/Sub.2/1991/17; Third Report by Special Rapporteur D. Turk, E/CN.4/Sub.2/1992/16; “The Human Right to Adequate Housing”, Final Report by Special Rapporteur R. Sachar, E/CN.4/Sub.2/1995/12.

⁶⁵ See United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, 2005, 15.

⁶⁶ United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, 2005, 17.

⁶⁷ United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, 2005, 18.

⁶⁸ See A. Eide *Economic, Social and Cultural Rights as Human Rights*, in: A. Eide/C. Krause/A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2001, 9 et seq., at 30 et seq.

⁶⁹ CESCR General Comment 3 (note 55), para. 10.

due to a lack of available resources if it shows that “every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”.⁷⁰ The Committee was explicit in requiring continued observance of Covenant’s minimum core obligations even in times of “economic recession”, where “the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes”.⁷¹

The “minimum core” content of Covenant obligations for each State Party is determined contextually by the State Party with the Committee, from the time of the State Party’s accession to the Covenant and the submission of the initial report required under Articles 16 and 17 of the Covenant. The Committee’s initial assessment of the particular “minimum core” content or baseline applicable to a given State Party takes into consideration the State’s resource capacities, population needs, scientific and technological advancement, among others.⁷² The assessment is a broad-based information-gathering process, one that is intended to elicit the essential levels of a Covenant right, “without which a right loses its substantive significance as a human right”.⁷³ *Manisuli Ssenyonjo* describes the minimum core obligation as an “absolute international minimum”, applicable “whatever the State’s level of development and resources” since the minimum core obligation entails “the basic level of sustenance necessary to live in dignity ... the baseline below which all States must not fall, and should endeavor to rise above”.⁷⁴

The process of identifying a State Party’s minimum core obligations under the Covenant is quite similar to proportionality analysis common in judicial reasoning.⁷⁵ To this end, the Committee has defined criteria for de-

⁷⁰ CESCR General Comment 3 (note 55), para. 10.

⁷¹ CESCR General Comment 3 (note 55), para. 12.

⁷² See *P. Alston* (note 44), 332 et seq., (discussing at 351-353 how the Committee’s mandate includes identification of the minimum core content of Covenant obligations). This process of identification, as evidenced by the Committee’s varying practices across State reporting processes, has not been immune from criticism. See *M. Langford/J. A. King*, Committee on Economic, Social and Cultural Rights, in: *M. Langford* (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 2008, 477 et seq., at 492 et seq.

⁷³ *F. Coomans*, Identifying the Key Elements of the Right to Education: A Focus on its Core Content, 2, unpublished paper available at <<http://www.crin.org>>.

⁷⁴ *M. Ssenyonjo*, *Economic, Social and Cultural Rights in International Law*, 2009, 66 et seq.

⁷⁵ See *A. Barak*, *Proportionality: Constitutional Rights and Their Limitations*, 2012, 202 et seq., (on proportionality and international and national human rights law); 422 et seq., (on proportionality and positive constitutional rights).

termining the minimum core content of the right to food,⁷⁶ the right to health,⁷⁷ the right to social security,⁷⁸ the right to water,⁷⁹ among others. The minimum core content of Covenant rights is meant to “establish [...] a minimum quantitative and qualitative threshold enjoyment of each [ESC] right that should be guaranteed to everyone in all circumstance as a matter of top priority ... [it] is linked to vital interests of individuals that are often connected to their survival”.⁸⁰ Additionally, academic literature is replete with quantitative and empirical proposals to measure this minimum core content of Covenant rights for particular States, factoring in resource constraints, governmental capabilities, and population needs of each State on a case-by-case basis.⁸¹

The Committee’s methodology of setting “minimum core obligations” (and from which progressive realization of Covenant rights would then be ascertained) also finds support in parallel or subsequent national and international practices demonstrating the acceptance of some notion of a binding

⁷⁶ CESCR General Comment 12, (The right to adequate food [Art. 11]), 1999, para. 17. See also *R. Künemmann*, *The Right to Adequate Food: Violations Related to Its Minimum Core Content*, in: A. Chapman/S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, 2002, 161 et seq.

⁷⁷ CESCR General Comment 14, (The right to the highest attainable standard of health [Art. 12 of the International Covenant on Economic, Social and Cultural Rights]), para. 43. See also *A. R. Chapman*, *Core Obligations Related to the Right to Health*, in: A. Chapman/S. Russell (note 76), 185 et seq.

⁷⁸ CESCR General Comment 19, (The right to social security [Art. 9]), 2007, para. 59. See also *L. Lamarche*, *The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights*, in: A. Chapman/S. Russell (note 76), 87 et seq.

⁷⁹ CESCR General Comment No. 15, (The right to water [Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights]), 2002, para. 37.

⁸⁰ *A. Müller*, *The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts*, 2013, 75.

⁸¹ See *G. S. McGraw*, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, *Loyola University Chicago International Law Review* 8 (2011), 127; *S. Kalantry/J. E. Getgen/S. Arrigg Koh*, *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, *Cornell Law Faculty Working Papers* 63, available at <<http://scholarship.law.cornell.edu>>; *E. Anderson*, *Using Quantitative Methods to Monitor Government Obligations in Terms of the Rights to Health and Education*, *Center for Economic and Social Rights Working Paper*, November 2008, available at <<http://www.cesr.org>>; *E. Felner*, *A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability*, *Sur International Journal on Human Rights* 9 (2008), 109 et seq., available at <<http://www.surjournal.org>>. On auditing national government policies in light of the ICESCR, see methodology developed in *R. Balakrishnan/D. Elson*, *Auditing Economic Policy in the Light of Obligations on Economic and Social Rights*, *Essex Human Rights Review* 5 (2008), 1 et seq., available at <<http://www.cwgl.rutgers.edu>>.

essential minimum of economic, social, and cultural rights. Albeit with some variances between them, constitutional courts of Colombia, India, and South Africa have also referred to “minimum” requirements or minimum essential levels of compliance with economic, social and cultural rights.⁸² The same concept of a minimum core has also been argued to be well within the penumbra of fundamental obligations of the American Convention on Human Rights⁸³ and the European Social Charter.⁸⁴ Notably, the African Commission on Human and People’s Rights made the most explicit incorporation of the “minimum core” methodology in 2010, specifying a minimum in regard to substantive rights enumerated in the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter of Human and People’s Rights.⁸⁵

After the Committee and the State Party jointly determine the applicable minimum baseline, the State Party is then obligated to move progressively towards the full realization of Covenant rights. For obligations to take action, this would mean that the Committee’s periodic review would examine whether a State Party’s claimed implementation of the Covenant through certain measures “is reasonable or proportionate with respect to the attainment of the relevant rights”, “complies with human rights and democratic

⁸² J. Chowdhury, *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective*, Cornell Law School Graduate Paper 27 (2009), citing CC decision, C-251, 1997; CC decision, SU-225, 1998; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) AIR SC 2426; *Government of Republic of South Africa v. Irene Grootboom and Petitioners*, 2001 (1) SA 46 (CC) (S. Afr.); *Minister of Health v. Treatment Action Campaign (No. 2)*, 2002(5) SA 721 (CC) (S. Afr.). On the reasonableness review and minimum core approach of the South African Constitutional Court, see S. Liebenberg, *Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate*, available at <<http://justiciabilityconference.wikispaces.com>>.

⁸³ T. Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, (Orville H. Schell Jr. Center for International Human Rights, Yale Law School), 170 et seq.

⁸⁴ See F. Coomans, *Economic, Social and Cultural Rights*, 26 et seq., paper available at <<http://www.uu.nl>>; O. de Schutter, *The Protection of Social Rights by the European Court of Human Rights*, in: P. van der Auweraert/T. de Pelsmaecker/J. Sarkin/J. Vande Lanotte (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments*, 2002, 207 et seq. See also R. R. Churchill/U. Khabiq, *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, EJIL 15 (2004), 417 et seq., (acknowledging determinability problems with the substantive obligations in the Charter in the process of adjudicating collective complaints).

⁸⁵ *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People’s Rights*, Nairobi, Kenya, 2010, full text available at <<http://www.escr-net.org>>. See also A. Chidi Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights*, HRQ 23 (2001), 327 et seq.

principles”, and “is subject to an adequate framework of monitoring and accountability”.⁸⁶ The review process entails considerable detailed factual data, where the Committee can, at any point, amplify its requests for information from a State Party on its domestic implementation of Covenant obligations.⁸⁷ While the Committee’s processes are structurally designed to be cooperative, dialogic, and solution-oriented, the Committee is not at all precluded from publicly declaring, at any relevant or appropriate juncture, that a State Party has failed to comply with Covenant obligations.⁸⁸ In practice, however, the Committee has done this quite sparingly, declaring, for example, that certain mass expulsion policies of the Dominican Republic in 1990 had violated the right to housing, and likewise with regard to Panama’s implementation of forcible evictions and demolitions of certain community areas in early 1990.⁸⁹ Rather, the Committee has tended to function instead in a broad-based consultative manner with States Parties, non-governmental organizations, and related international organizations and specialized agencies of the United Nations to urge States Parties to adopt new legislation to implement the Covenant, urge the repeal of non-conforming domestic legislation, appeal to the implementation of pre-existing legislation, and recommend preventive action to avoid or forestall Covenant violations.⁹⁰ Lacking procedural standardization, the Committee has drawn criticism of its ability to effectively discharge the mandate delegated to it by the United Nations Economic and Social Council (ECOSOC).⁹¹

In performing those core functions that have been delegated to it in response to the needs of an intrinsically evolutive set of Covenant obligations, the question arises as to the extent to which the Committee might be said to be exercising international public authority. The concept of international public authority has been developed “in order to better identify those international activities that determine other legal subjects, curtail their freedom in a way that requires legitimacy and therefore a public law framework”,

⁸⁶ J. M. Diller, *Securing Dignity and Freedom Through Human Rights: Article 22 of the Universal Declaration of Human Rights*, 2011, 138.

⁸⁷ D. P. Forsythe (ed.), *Encyclopedia of Human Rights*, 2009, 93.

⁸⁸ See “The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights”, Note verbale dated 5.12.1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights, E/CN.4/1987/17, 8.1.1987 (hereafter, *Limburg Principles*), para. 12.

⁸⁹ S. Leckie, *The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform*, in: P. Alston/J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, 2000, 129.

⁹⁰ S. Leckie (note 89), 129 et seq.

⁹¹ See B. Lyon, *Discourse in Development: A Postcolonial Agenda for the United Nations Committee on Economic, Social, and Cultural Rights through the Postcolonial Lens*, *American University Journal on Gender Society Policy and Law* 10 (2002), 535.

with the public law framework in turn defined as a framework in which authoritative actions must be “based on public law (constitutive function)”, that authority is also controlled and limited by the substantive and procedural standards provided by public law (limiting function).⁹² To round out this conceptual framework, authority is defined as “the legal capacity to determine others and reduce their freedom”, a conceptual innovation which includes not only the ability to modify a legal situation but also to condition it.⁹³

The institution of the Committee, as an evolutive interpreter of Covenant obligations, is bound in the exercise of the international public authority by the remaining constituent elements of this definition which identifies those institutions exercising “international” and “public” authority as institutions which exercise authority to further a goal defined to be “in the public interest” on the basis of “authority attributed to them by political collectives on the basis of binding or non-binding international acts”.⁹⁴ Given this definition of international public authority, we would be likely to accept the observation that the function of the Committee with respect to evolving norms under the Covenant is an instance of the exercise of international public authority. At the level of two constituent elements necessary to classify an act as an exercise in international public authority, the Committee, as an international body, is constituted as by law by States Parties to the Covenant. In a more sophisticated manner, the interpretations of the Covenant promulgated by the Committee, either in the context of general comments or in the individual state reporting process are designed to condition, in certain respects, the Parties to the Covenant, either as a matter of individual State evaluation, or as an interpretation of treaty norms which might influence or bind all States Parties to the Covenant.⁹⁵

While the nature of Covenant obligations necessitates their continuous evolutive interpretation,⁹⁶ such repeated interpretation has been narrowly

⁹² A. von Bogandy/P. Dann/M. Goldman, *Developing the Publicness of Public Law: Towards a Legal Framework for Global Governance Activities*, GLJ 9 (2010), 1375, 1380.

⁹³ A. von Bogandy/P. Dann/M. Goldman (note 92), 1381 et seq.

⁹⁴ A. von Bogandy/P. Dann/M. Goldman (note 92), 1383.

⁹⁵ We have focused, in this intervention, on the institutional and conditioning aspects of the exercise of international public authority, which seem to interface most directly with the work of evolutive interpretation with respect to the Committee’s work on the Covenant. We would wish to reserve judgment, however, on the question of whether each act of interpretation which has a manner of operation that emphasizes the intention of the parties that a treaty term evolve over time might also be an instance of the exercise of public authority, as opposed to an act of interpretation. Such a question would require a different, and more substantive, line of inquiry than that pursued here.

⁹⁶ J. M. Diller (note 86), 141, (“The changing scope and substance of the entitlement and the corresponding core obligations reflect the principle of evolving interpretation of rights

facilitated in the regular State reportage process originally built into the Committee's treaty monitoring mandate. As we show in the following Part III, however, the recent entry into force of the OP-ICESCR effectively entrenched the Committee's competence to determine and verify a State Party's compliance or lack of compliance with the Covenant in specific fact-situations. Determining a Covenant violation may not necessarily be just a matter of selective discretion and prudence for the Committee, as it has hitherto shown throughout its thin practice in publicizing findings of State violations of the Covenant.⁹⁷ Following the entry into force of the OP-ICESCR, however, we expect that future Committee determinations of state responsibility for Covenant violations could conceivably be more a matter of institutionalized practice and legal obligation arising from its new mandate. In addition, because the acts of the Committee may be said to condition State behaviour in the matter described, we discuss in detail the procedures which are laid out in the Optional Protocol which we believe address legitimacy concerns stemming from exercises of public authority vested in the Committee by States Parties to the Protocol.

III. Evolutive Interpretation and Individual Complaints in the Optional Protocol of the Covenant on Economic, Social and Cultural Rights

Having established the inherently evolutive nature of Covenant obligations, and the degree to which State Parties have expressly consented to this normative evolution, we now turn to the OP-ICESCR to examine in detail how a robust individual complaints mechanism would enrich the interpretive landscape for economic, social, and cultural rights. Our thesis in the section that follows is that the individual complaints mechanism provides a forum for the articulation of inherently evolving treaty norms in a manner that crystallizes the interpretive inquiry for finding state consent to evolving treaty norms. We further theorize that, given the inherently evolutive nature

and are a natural outgrowth of the change over time in the notion and context for realization of the rights. Exactly what constitutes the minimum essential level of each right which States parties must meet as their minimum core obligation is subject of evolving international interpretation.”).

⁹⁷ We note the concerns expressed nearly two decades ago that effective monitoring of the Covenant could not be genuinely conducted unless the Committee was willing to publicly and regularly articulate its analysis of State Party violations of the Covenant. See *A. R. Chapman*, A “Violations” Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights, HRQ 18 (1996), 23 et seq., at 29 et seq.

of Covenant norms, if the Committee is interpreted as exercising international public authority in the assessment of individual complaints the various procedural mechanisms in these procedures adequately address risks that Committee findings might be accused of illegitimacy.

To make such a point we first explore the current state of the reporting process under the Covenant, and second, explain the two ways in which the OP-ICESCR builds on this reporting process (both by the incorporation of an individual complaints mechanism, as well as by granting certain powers of investigation to the Committee which it may exercise independent of an individual complaint). We conclude that the OP-ICESCR provides a model of institutionalized continuing practices on evolutive interpretation, by authorizing the Committee to draw on the work of a wide range of actors when it first evaluates the individual complaints. Additionally, the Committee is now well-positioned to establish a State Party's fulfilment of its obligations to avoid taking deliberately retrogressive measures with respect to core Covenant rights. Finally, in its role as an evaluator of the "reasonableness",⁹⁸ of the steps taken by a State Party with respect to particular Covenant rights, the Committee is in a position to do powerful work that could serve to rebut the proposition that economic, social, and cultural rights are non-justiciable.

Before the entry into force of the OP-ICESCR, the Committee's work of evaluating compliance with state obligations under the Covenant was primarily governed by the periodic state reporting process laid out in Articles 16 and 17 of the Covenant. Article 16 obligates States to "submit ... reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein".⁹⁹ Article 17 mandates that these reports be submitted "in accordance with a program" established by the Committee,¹⁰⁰ and that such reports "may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant".¹⁰¹ The current model for this schedule of reporting allows the Committee to consider, on average, between ten to fifteen state reports yearly, spread over two sessions. In addition to information from states, the

⁹⁸ OP-ICESCR, Art. 8(4).

⁹⁹ CESCR, Art. 16(1).

¹⁰⁰ CESCR, Art. 17(1). In point of fact the original obligation for monitoring State compliance with the Covenant fell on the Economic and Social Council, whose functions have since been transferred to the Committee. See *P. Alston* (note 44).

¹⁰¹ CESCR, Art. 17(2).

Committee will entertain reports submitted by Non-Governmental Organizations bearing on state behaviour as well.¹⁰²

Two aspects of this model are important to tease out. First, given the number of State Parties to the Covenant, and the limited amount of time given the Committee in the course of its working sessions, there will be often many years between executing obligations and the submission of an assessment of compliance with the Covenant. Second, and more importantly, the Committee's concluding obligations, in addition to focusing on substantive compliance with the Covenant, often include either calls for additional information, or request that states monitor the fulfilment of economic, social, and cultural rights in the case of ongoing social welfare projects. The Committee's concluding remarks in its periodic evaluation of Azerbaijan, completed in May 2013, are not atypical:

“The Committee recommends that the State party ensures that the State Program on Development of Official Statistics in 2013-2017 includes all the data necessary to monitor the enjoyment of economic, social and cultural rights under the Covenant disaggregated by sex, disability, ethnicity, urban and rural area and other relevant criteria.”¹⁰³

The significance of this data monitoring, and the disaggregation of this data, to state responsibility under the Covenant is a subject to which we will soon return.

In keeping with the work of the Committee with respect to periodic reporting, the OP-ICESCR envisions a number of sorts of engagement in the case of a fact-finding procedure prompted by communications from within a State Party to the Covenant. The modalities of this engagement are laid out primarily in two sets of articles under the OP-ICESCR. After clarifying the rules regarding the competence of the Committee to receive individual communications from those “under the jurisdiction of a State Party” to the OP-ICESCR,¹⁰⁴ as well as the rules regarding admissibility (which mainly speak to the necessity of the exhaustion of local remedies),¹⁰⁵ and finally various other sets of procedural rules,¹⁰⁶ the OP-ICESCR lays out the modalities the Committee may make use of in examining communications that it receives. These passages deserve quoting at length.

¹⁰² On recent developments regarding the Committee's use of indicators to monitor State Party compliance with the Covenant, see *O. de Schutter*, *International Human Rights Law*, 2010, 492 et seq.

¹⁰³ Committee on Economic, Social, and Cultural Rights, Concluding Observations on the Third Periodic Report of Azerbaijan, UN Doc. E/C.12/AZE/CO/3 (19.5.2013).

¹⁰⁴ OP-ICESCR, Art. 1.

¹⁰⁵ OP-ICESCR, Art. 2.

¹⁰⁶ OP-ICESCR, Arts. 3-7.

“3. 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, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.

4. When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party ... In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures ...”¹⁰⁷

As a descriptive matter, one can say that one paradigmatic conceptual principle governing modalities of information-gathering available to the Committee in considering individual complaints is that of integration. This integration operates both at the institutional level of the United Nations human rights architecture, that is, vertically, and within the institution, and explicitly across the multiplicity of what the Protocol calls “human rights systems”,¹⁰⁸ that is, horizontally, across various potential treaty regimes. Both have a bearing on the strength of the Committee, exercising its powers under the OP-ICESCR, and might play as a crystallization of an evolutive approach to treaty interpretation.

In the first place, as a matter of vertical integration, the range of information available to the Committee from relevant UN bodies is expansive. The Committee, as well, is on the plain language of the Article given the leeway to establish its own interpretation of relevance. This range of information at the very least draws on the work of the numerous Special Rapporteurs working in thematic areas directly related to those rights protected under the ICESCR, which might include for example housing,¹⁰⁹ water,¹¹⁰

¹⁰⁷ OP-ICESCR, Art. 8(2)-(3). A fruitful comparison might be drawn with the analogous provisions of the First Optional Protocol to the International Covenant on Civil and Political Rights at this point, see Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. A/6316, 23.3.1976 (hereafter OP-ICCPR). Those articles entitle the corresponding Human Rights Committee to consider communications “in light of all written information made available to it by the individual and the State Party.” (OP-ICESCR, Art. 5[1]). The “evolution” in the scope of the reach of these paradigmatic treaty bodies is one sort of evolution that, we would submit, has a bearing on, and also reflects, developments in treaty interpretation theory of the sort that are discussed here. For present purposes however, the focus is on the OP-ICESCR.

¹⁰⁸ OP-ICESCR, Art. 8(2).

¹⁰⁹ Commission on Human Rights, Resolution 2000/9, 17.4.2000, (establishing for an office of Special Rapporteur in this area).

¹¹⁰ Human Rights Council, Resolution 7/22, 28.3.2008, (establishing for an office of a Special Rapporteur on the right to water).

and health.¹¹¹ These mandates themselves work to increase the range of authoritative sources identified as relevant in the context of making determinations on subsequent practice under evolutive interpretation of international legal obligations, as the work of the Special Rapporteurs, often also synthesize state practices as regards treaty obligations.¹¹²

The horizontal work of integration envisioned in this model of resolving individual complaints also has various implications for crystallizing some aspects of the evolutive approach to treaty interpretation. In particular, the explicit reference to regional human rights systems augurs an opening for documentation collected in conjunction with regional human rights treaties, that is, in the terminology of Article 31(3)(c) VCLT, “relevant rules of international law”.¹¹³ In his first report, *Nolte* noted in particular that the European Court of Human Rights has seen fit, for various reasons, to embrace the model of interpretation laid out in the VCLT.¹¹⁴ The directions of influence, in the fact-finding model of the Committee provided for, run in two ways. They flow both from the global to the regional (via the use of the VCLT in interpreting regional human rights instruments) and from the regional to the global (via the adjudication of individual complaints by the Committee in the context of documentation by regional human rights institutions).

In addition to the model of fact-finding envisioned by Article 8 of the OP-ICESCR, Article 11 also provides for additional evaluation of the compliance of a State Party with its obligations under the Covenant. It is not sufficient to call the procedure in Article 11 an individual complaint mechanism. Rather, it is an evaluative procedure that states may recognize after ratifying the Protocol that serves at least as an early warning system in the case of serious deprivations of rights. It provides as follows.

“2. 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, 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.

3. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and

¹¹¹ Human Rights Council, Resolution 15/22, 30.9.2010, (establishing the Special Rapporteur on the right to the highest attainable standard of health).

¹¹² See, e. g., Report of the Special Rapporteur on the Right to Food *O. de Schutter*, *Agriculture and the Right to Food*, U.N. Doc. A/HRC/13/33 (22.12.2009).

¹¹³ VCLT, Art. 31(3)(c).

¹¹⁴ *Nolte* First Report 2013 (note 18), paras. 15-21.

to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.”¹¹⁵

We do not wish to place an undue emphasis on this provision of the OP-ICESCR, which has the ability to serve as independent adjudicatory mechanism within the Committee. It is, first of all, a mechanism that parties must opt-in to in order for the Committee to exercise its authority.¹¹⁶ In the second place, it is a procedure that is limited only to those violations of Covenant rights that are either “grave or systematic”.¹¹⁷

Nevertheless, the evidence-gathering functions attributed to the Committee by the Article are quite powerful. The Committee itself, as with questions regarding what might constitute “relevant” information, is likewise under its Article 11 powers within its competence to evaluate the meaning of “grave or systematic” violations of rights protected under the Covenant. Coming to an independent evaluation of the quality of the information available to it in order to prompt further evaluation of State behaviour in keeping with its powers under the Article is also within the discretion of the Committee. In particular Article 11 burdens the Committee with the task of evaluating, in the first instance, the “reliability” of the information submitted, without reference to a source for that information which is, as in Article 8, “under the jurisdiction” of the State Party to the Protocol.¹¹⁸ After satisfying itself as to reliability, and to the standard of “grave or systematic” abuses, the Committee may, then, *proprio motu*, both conduct internal investigations on the territory of a State Party, with the consent of the respective State Party to take other investigatory measures.

We will draw three conclusions from this expansion of the interpretive communities now involved in the evaluation of complaints under the OP-ICESCR. The first conclusion is that these communities have expanded beyond merely those individuals “under the jurisdiction” of a State Party to the OP-ICESCR engaged in the complaint making process. At least under Article 8, at the forensic level, they involve a wide swath of the United Nations architecture engaged in the protection of economic, social, and cultur-

¹¹⁵ OP-ICESCR, Art. 11(2)-(3).

¹¹⁶ OP-ICESCR, Art. 11(1), (“A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article.”); see also OP-ICESCR, Art. 11(8), (“A State Party ... may, at any time, withdraw this declaration by notification ...”). Two ratifying states have thus far deposited instruments that recognize the power of the Committee under this article – El Salvador and Portugal.

¹¹⁷ OP-ICESCR, Art. 11(2).

¹¹⁸ OP-ICESCR, Art. 1.

al rights.¹¹⁹ In conjunction with Article 11, the forensic community involved in the evaluation of State performance of obligations under the ICESCR includes two sets of parties that previously would not have had access to reporting procedures. Those communities are, in the first instance, human rights actors that are in a position to bring “reliable information” to the attention of the Committee. In the second instance, the forensic community has been expanded to include Committee members themselves. As a matter of expanding the legal community tasked with articulating the meaning of a given economic, social, and cultural right, the individual complaints mechanism of Article 8, standing alone, invites the Committee to actively give content to these rights by relying on the expertise of regional human rights systems, as well as by relying on the expertise of individual U.N. mandate holders that have developed right-specific expertise in these areas.¹²⁰

Second, this process of fact-finding and complaint evaluation has a direct bearing on the ongoing interpretation of the nature of State obligations under the Covenant. Setting aside the frequent critique of imprecision concerning the “minimum core” of State compliance with Covenant obligations,¹²¹ it is axiomatic that the core obligation under the Covenant is to “progressively ensure” the enjoyment of basic economic, social, and cultural rights. What this has meant, for the last twenty-five years, is that at the very least, States have an obligation not to take “deliberately retrogressive” measures with respect to these rights.¹²² The difficulty in this sort of evaluation, if there has been one, has been in establishing the baseline against which deliberately retrogressive measures might be evaluated. The OP-ICESCR, by expanding the range of sources against which state performance might be measured, resolves the difficulties in this baseline. At this point, states have to a large extent been subject to an evaluation of their performance of treaty obligations under the mandatory reporting procedures discussed above.¹²³ And it is clearly within the prerogative of the Commit-

¹¹⁹ We note that the Committee has long followed this practice of institutional cooperation and fact-finding with other specialized agencies of the United Nations. See for example Concluding Observations adopted in 1996 by the Committee on Economic, Social, and Cultural Rights, 415 et seq., at 448, in: A. von Bogdandy/R. Wolfrum (eds.), *Max Planck UNYB*, Vol. 1 (1997).

¹²⁰ See *M. Langford/J. A. King*, Committee on Economic, Social and Cultural Rights, in: *M. Langford* (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 2008, 477 et seq., at 504 et seq., (illustrating this practice in regard to the right to social security and the role of the International Labour Organization/ILO in the assessment of compliance with this right).

¹²¹ *K. G. Young* (note 43).

¹²² CESCR General Comment 3 (note 55), para. 9.

¹²³ See text accompanying notes 99-104. Similar observations on the wealth of information already institutionally available to the Committee has been previously made and dis-

tee, in evaluating complaints, to rely on previous reports submitted to it in conjunction with these mandatory reports.¹²⁴ As a matter of evolutionary interpretation of treaty norms, any perceived difficulty with establishing prior state practice, or the clear and convincing evidence of state understanding of a norm, would asymptotically diminish. State reports, if they are anything after all, are definitive statements of the State's own interpretation of the meaning of its obligation under the treaty, and provide one concrete starting point against which later state performance can be judged.¹²⁵

Finally, and as a matter intrinsic to elaboration of Covenant norms, the requirement that the Committee undertake its evaluation with a view towards the "reasonableness" of the steps taken by the State offers an opportunity to rebut the notion that economic, social, and cultural rights are non-justiciable.¹²⁶ The reasonability heuristic can be grounded both in traditional models, on the one hand of proportionality analysis, and on the other of the behaviour of a common law model of a reasonable actor. In either event, it offers the opportunity for the Committee to expand on its original articulation of "deliberately retrogressive measures", which the Committee has reasoned, are measures that would "need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".¹²⁷ Reasonableness performs this analytical work by providing an offensive frame in which to evaluate state behaviour, as opposed to the merely defensive posture at stake when a state is obligated to justify retrogressive measures. It thus offers a rich ground to observe the development of evolving interpretations of an international norm.

The question remains, however, as to the extent to which such interpretive acts, in conjunction with individual complaints and Committee actions, suffer from allegations of illegitimacy, that is, whether such evaluations are capable of addressing criticisms of democratic deficits in acts of international legal interpretation taken as a whole. The argument has been formulated in conjunction with respect to international courts and tribunals,¹²⁸ and thus

cussed in *B. Simma/D. Desierto* (note 45), special issue on Aligning Investment Protection and Human Rights.

¹²⁴ OP-ICESCR, Art. 8(2).

¹²⁵ See *M. Kjerum*, State Reports, in: G. Alfredsson/J. Grimheden/B. G. Ramcharan/A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, 2nd revised ed. 2009, 17 et seq.

¹²⁶ *H. J. Steiner/P. Alston/R. Goodman*, *International Human Rights in Context: Law, Politics, Morals*, 2007, 312 et seq., (laying out the debates).

¹²⁷ CESCR General Comment 3 (note 55), para. 9.

¹²⁸ *A. von Bogandy/I. Venzke*, In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification, *EJIL* 23 (2012), 7.

might justifiably be directed at the work of the Committee in the context of individual complaints. We consider the most important aspects of this question to have two aspects. The first might perhaps be said to exist at the macro-level, and pertains to the notion that legitimacy is strained in the context of international legal disputes because international treaty obligations, among others, are products bound in time, and that “[o]nce an international agreement is in place, it is largely withdrawn from the grasp of its individual makers”.¹²⁹ A second set of particularized objections to the work of the Committee with respect to individual complaints would focus on the procedures in place in these mechanisms, and attempt to determine what safeguards remain in place to ensure that state consent remains the basis of the work of the Committee.

With respect to the first objection, we would again refer to the inherently progressive nature of state obligations in the Covenant. If the objections to legitimacy are based on the notion that there is no responsive mechanism in place to address treaty obligations, the response is that the ICESCR has been uniquely calibrated to accommodate individual state policy-makers on contested questions.¹³⁰ Progressive realization is best conceived of as the responsibility of the state not to retreat from its commitments absent compelling circumstances.¹³¹ Policymakers in States Parties are, in a sense, the “responsive”¹³² community here, taking steps with respect to the rights enshrined by the Covenant, and constantly evaluating those steps both as a matter of state policy and, if they are acting in conformity with international obligations, in keeping with the protection of rights enumerated under the Covenant. The design of the Covenant pre-commits states to fulfil Covenant obligations but provides flexibility for them to do so.

With respect to the second set of objections, specific to the assessment of individual complaints, it is our view that the expansion of interpretive communities enhances the legitimacy of Committee determinations that have the weight of interpretation. The procedures governing Committee determination of complaints are structured in such a way as to decrease the risks of illegitimacy. First, as *von Bogandy* and *Venzke* have argued, processes of politicization in international bodies might reduce the risks of illegitimacy. One way in which they assert this is done is by international bodies “refraining adding to the substance of disputed norm” but rather including procedural rights of participation by affected actors in certain decisions,

¹²⁹ *A. von Bogandy/I. Venzke* (note 128), 21.

¹³⁰ See text and footnotes in Part II of this Article.

¹³¹ See text and footnotes in Part II of this Article.

¹³² *A. von Bogandy/I. Venzke* (note 128), 19.

a practice that they recognize occurring in WTO decisions as well as in determinations of rights under the United Nations Convention on the Law of the Sea.¹³³ Such participatory process-based rights form an important element of the meaning of rights under the Covenant as well.¹³⁴ Second, the expanded forensic community involved in the determination of an individual complaint does not include any group whose competence to participate in such a proceeding is not based on prior state consent. To the extent that this forensic community includes prior reporting to the Committee in the state reportage process of periodic reporting by national stakeholders, such participation is an established matter of practice. With respect to reporting across U.N. bodies, such information must be public.¹³⁵ It is regrettable that such determinations, perhaps, will not be openly contested,¹³⁶ but the bases on which decisions of the committee are made are public.

IV. Evolutionary Interpretation and Inter-State Dispute Resolution in the Optional Protocol of the Covenant on Economic, Social and Cultural Rights

The final manner in which we anticipate the OP-ICESCR would enrich the jurisprudence on evolutionary interpretation of international legal treaty obligations arises from the establishment of an inter-State communication procedure and dispute resolution procedure in Article 10 of the Protocol. We fully acknowledge that similar inter-State procedures already exist with respect to the Convention against Torture, the Convention on the Rights of the Child, the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on Enforced Disappearances, and the Convention on the Protection of the Rights of All Migrant Workers and

¹³³ *A. von Bogandy/I. Venzke* (note 128), 31.

¹³⁴ See, e. g., Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water, para. 37 (f), E/C.12/2002/11, (“The state must immediately take steps [t]o adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.”) The procedural right involved exists at a different level of participation, but the principle is intact.

¹³⁵ *A. von Bogandy/I. Venzke* (note 128), 27 et seq., (setting out various procedural rules that might enhance openness in international adjudication).

¹³⁶ OP-ICESCR, Art. 8(2).

Members of their Families, and that these procedures remain, as yet, dormant and unutilized.¹³⁷ While several explanations have been made for States' reluctance to use any of these inter-State procedures to date (such as States' preferences for less adversarial enforcement, avoidance of litigation costs, prevention of retaliatory counter-complaints, or the fact that a State may simply not regard itself as having a sufficient interest in another State's implementation of human rights obligations when the latter does not have transboundary effects reaching into its territory),¹³⁸ we believe, however, that there may be two particular incentives specific to the Covenant as a treaty regime which could encourage States to opt in and use the Article 10 OP-ICESCR inter-State procedure in the future.

First, unlike the other aforementioned human rights treaties whose inter-State complaints procedures have either not yet entered into force (as with the Migrant Workers' Convention or the Optional Protocol to the Convention on the Rights of the Child) or which contemplate readily identifiable or discrete State conduct amounting to treaty violations at a static point in time (such as under the Convention against Torture or the Convention on the Elimination of Racial Discrimination),¹³⁹ States could well anticipate that the programmatic and inherently evolutive nature of Covenant obligations makes it more advantageous for them to undertake regular clarification with the Committee in regard to specific programs, governmental policies or measures that could bear upon the fulfilment of economic, social, and cultural rights. The inter-State procedure in Article 10 OP-ICESCR provides a nonpartisan venue to clarify and test Covenant obligations as they apply to concrete State policy situations or governmental measures, without incurring punitive consequences or damaging inter-State political sensitivities as is the case with a hard adversarial paradigm typical to international adjudi-

¹³⁷ See Art. 21 of the Convention Against Torture; Art. 74 of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Art. 32 of the International Convention on Enforced Disappearances; Art. 12 of the Optional Protocol to the Convention on the Rights of the Child; Arts. 11-13 of the Convention on the Elimination of Racial Discrimination; Arts. 41-43 of the International Covenant on Civil and Political Rights.

¹³⁸ S. Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, HRQ 10 (1988), 249 et seq.; A. L. Paulus, *Dispute Resolution*, in: G. Ulfstein/T. Maruhn/A. Zimmermann (eds.), *Making Treaties Work: Human Rights, Environment, and Arms Control*, 2007, 351 et seq., at 356.

¹³⁹ Certainly, none of the other fundamental human rights treaties carry a comparable or identical "progressive realization" obligation in Art. 2(1) of the Covenant. Unlike, say, the specific obligations of States to prevent and punish torture under the Convention Against Torture, verifying State compliance with the Covenant first requires the State to accept that the normative obligations contained therein are ultimately "moving targets" throughout the life of this particular treaty regime.

cation.¹⁴⁰ As we show in this Part IV, the Article 10 OP-ICESCR procedure mainly seeks to cooperatively encourage non-conforming States to design policy realignments or adjustments towards Covenant compliance. States Parties to the Covenant thus have a pragmatic, as well as principled, stake in actively shaping its evolutive interpretation.

Second, increasing concerns about the potential extraterritorial application of the Covenant¹⁴¹ particularly in regard to how a State is bound by the tripartite typology of the duties to “respect”, “protect”, and “fulfil” obligations under the Covenant for “territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction”¹⁴² could also make Article 10 of the OP-ICESCR attractive to States as a less confrontational and more expeditious inter-State dispute resolution option. On the one hand, States could resort to this inter-State procedure where particular consequences are felt within their respective territories resulting from another State Party’s actions or omissions in regard to the Covenant. The affected State could thus invite the non-complying State

¹⁴⁰ See C. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, *William and Mary Law Review* 38 (1996), (on the general polarizing consequences of the adversarial system in law); G. A. Raymond, *International Adjudication and Conflict Management*, in: H. M. Hensel (ed.), *Sovereignty and the Global Community: The Quest for Order in the International System*, 2004, 221 et seq., at 221, (“To be sure, there are drawbacks to [international] adjudication. Because the process is adversarial, relations between the litigants may deteriorate during the course of the proceedings. Plaintiffs may feel constrained by rules of procedure that limit what can be introduced as evidence of wrongdoing, and defendants may believe these same rules circumscribe their ability to mount a stout defense. Even after a verdict is reached, resentment may continue as the losing side harbors grievances over remedies imposed by the court.”).

¹⁴¹ See M. Langford/F. Coomans/F. Gomez Isa, *Extraterritorial Duties in International Law*, in: M. Langford/W. Vandenhole/M. Scheinin/W. van Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, 2013, 51 et seq., at 61, (citing the Maastricht Guidelines’ perspective on State jurisdiction to respect, protect, and fulfil Covenant obligations in “situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law”).

¹⁴² *Wall Advisory Opinion*, para. 112, at 180, (“The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction ...”).

Party to recalibrate its measures first through this mostly confidential¹⁴³ procedure before the Committee, rather than immediately moving towards initiating a contentious case where a full-blown decision would yield a finding of international responsibility, such as those found in decisions issued by the International Court of Justice. On the other hand, bringing an inter-State communication on the issue of the Covenant's extraterritoriality also affords the Committee the distinct opportunity to fully clarify and explicate the operational parameters of what it holds to be the actual extraterritorial scope of States Parties' Covenant obligations.¹⁴⁴ A case of first impression, such as the complex question of whether a State Party has the duty to control the conduct of transnational corporations and ensure that the latter does not cause that State Party to breach its Covenant obligations,¹⁴⁵ could be one example of an interpretive issue that could be cautiously brought for Committee clarification and early dialogue between States Parties under the OP-ICESCR inter-State procedure, without ripening into a contentious case leading to a finding of international responsibility (and the corollary reparations consequences), to which States might be more loathe to give consent.

With the foregoing incentive considerations in mind, and anticipating that the inter-State complaints mechanism in Article 10 of the OP-ICESCR would likely be more strategically used in the future by States Parties to the Covenant opting in to this mechanism, we then turn to discuss the procedures therein, their unique place in the Covenant given its inclusion of important obligations with respect to international cooperation, and the gap-filling role that state-state resolution of complaints under the mechanism

¹⁴³ OP-ICESCR, Art. 10(1)(e), ("The Committee shall hold closed meetings when examining communications under the present article.").

¹⁴⁴ See *F. Coomans*, *The Extraterritorial Scope of the International Covenant on Economic, Social, and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, HRLR 11(2011), 1 et seq.

¹⁴⁵ Academic literature on the Covenant remains tentative and undertheorized on the subject of State Parties' duties as members of international financial institutions that issue decisions with development consequences for other states, as well as for State Parties' duties as "home States" of transnational corporations whose conduct may injure economic, social, or cultural rights in other jurisdictions. For an interesting set of recent proposals, however, see *S. Narula*, *International Financial Institutions, Transnational Corporations and Duties of States*, in: *M. Langford/W. Vandenhole/M. Scheinin/W. van Genugten* (note 141), 114 et seq., (arguing that IFIs and TNCs can be held indirectly accountable for Covenant violations in three ways – by requiring Member States in IFIs to take the Covenant into account when participating in IFI decision-making processes; applying a "decisive influence" and "due diligence" standard to the relationship between the home State and the TNC as would make the home State accountable for TNC violations of the Covenant; and by requiring the home States of TNCs to enact domestic legislation applying the Covenant with extraterritorial reach).

will have on the articulation of norms under the CESCSC with respect to reasoned elaborations of State Responsibility under the Covenant.

The inter-State communication mechanism provided for in Article 10 codifies, as a procedural matter, the ways in which a State might lodge a complaint both with another State, as well as with the Committee, alleging non-compliance with obligations provided for in the Covenant. Like Article 11, the inquiry procedure is an opt-in provision – States may declare that they recognize the competence of the Committee to entertain such communications.¹⁴⁶ Three crucial procedural steps of this inter-State dispute mechanism provide stages at which the various actors involved in the procedure – the transmitting State, the receiving State, and the Committee – are required to establish the steps taken (or allegedly not taken) with respect to the particular norm at issue, and in so doing, to elaborate the content of a norm that must be progressively achieved. In the first instance, this burden of norm-elaboration falls on the complaining state. “If a State Party to the present Protocol considers that another State Party is not fulfilling its obligations under the Covenant it may, by written communication, bring the matter to the attention of that State Party.”¹⁴⁷ In the second instance, the burden of norm elaboration falls on the receiving State, which is obligated to “afford the State that sent the communication an explanation ... clarifying the matter” within three months of receiving the communication.¹⁴⁸

At the final stage of the norm elaboration process, the Committee is involved in the process if, within six months of the communication, “the matter is not settled to the satisfaction of both State Parties concerned”.¹⁴⁹ Either the transmitting state or the receiving State has the right to refer the matter to the Committee. At this stage, a quasi-judicial proceeding is envisioned, at which the Committee, in closed meetings, will consider “relevant information” pertaining to the communications,¹⁵⁰ and at which the States Parties “shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing”.¹⁵¹ The Committee’s own responsibilities with respect to norm elaboration take the form of its ultimate evaluation of the communications, as it is obligated to report, in the event that a settlement is not reached between the parties, on the nature and factual issues involved in the dispute.¹⁵² In the

¹⁴⁶ OP-ICESCR, Art. 10(1).

¹⁴⁷ OP-ICESCR, Art. 10(1)(a).

¹⁴⁸ OP-ICESCR, Art. 10(1)(a).

¹⁴⁹ OP-ICESCR, Art. 10(1)(b).

¹⁵⁰ OP-ICESCR, Art. 10(1)(f).

¹⁵¹ OP-ICESCR, Art. 10(1)(g).

¹⁵² OP-ICESCR, Art. 10(1)(h)(ii).

event that a settlement is reached, this report will not necessarily include the communications that gave rise to the dispute.¹⁵³

This inter-State communications procedure is, in our view, calibrated to the particular needs of the economic, social, and cultural law-making communities, and also appears as a method of dispute resolution in the context of human rights regimes. The Optional Protocol to the ICCPR, by contrast, has no comparable mechanism, and limits its procedures to individual communications from those subject to the jurisdiction of a State Party.¹⁵⁴ Similar regional bodies are likewise limited in the scope of applications that they might be able to consider.¹⁵⁵

However, the unique nature of State obligations with respect to cooperation in achieving the enjoyment of rights in the CESCR arguably requires this sort of inter-State procedure. The operative obligation in the Covenant, Article 2, invokes not only the obligation to “progressively ensure” rights, but does not do so without first requiring that States take these steps “individually and through international assistance and co-operation, especially economic and technical”.¹⁵⁶ No comparable reference to international engagement exists, for example, in the ICCPR, which restricts obligations by focusing in great detail on the rights of individuals in the jurisdiction of a State Party.¹⁵⁷ This vision of international cooperation under the Covenant, at the very least, belies a strictly territorial conception of this particular human rights treaty, as would seek to restrict its scope merely to the relationship between the State and those individuals in its jurisdiction. Rather, the Covenant is explicit. It envisages a cooperative and engaged State, an actor both domestically and in the international community.¹⁵⁸ For those States pursuing technical or economic assistance in conjunction with another State Party to the Covenant there is also a question, to our knowledge under-theorized at this point,¹⁵⁹ as to the nature of the obligation of a State in a

¹⁵³ OP-ICESCR, Art. 10(1)(h)(i).

¹⁵⁴ OP-ICCPR, Art. 1.

¹⁵⁵ See, e. g., European Convention on Human Rights, Art. 34, (limiting the adjudicative mechanism to persons, non-governmental organizations, or groups).

¹⁵⁶ ICESCR, Art. 2(1).

¹⁵⁷ ICCPR, Art. 2(1).

¹⁵⁸ On States Parties’ control of extraterritorial conduct by private actors in relation to the States’ duties to provide access or not to impede access or not to tolerate private actors’ conduct that impedes access, see General Comment No. 15, (on the right to water), paras. 23-24; General Comment No. 18, (on the right to work), para. 25; General Comment No. 19, (on the right to social security), paras. 45 and 54.

¹⁵⁹ We note that General Comment No. 2, (on international technical assistance matters) bypasses this question altogether.

position to provide this assistance.¹⁶⁰ In a progressive reading of its mandate under the OP-ICESCR, we would at the very least expect that the Committee, entitled as it is to request “relevant information” from parties involved in the procedure, to deem that relevant information should include steps taken by a complaining party with respect to actions it has taken to fulfil its obligations of cooperation.¹⁶¹

State-state resolution of disputes under this procedure has the potential not simply to build out this cooperative aspect of the Covenant, but to elaborate the meaning of the Covenant’s substantive norms as well. The starting point for this contention is the discussion of state responsibility for violations of economic, social, and cultural rights found in the ICJ’s *Wall Advisory Opinion*.¹⁶² Ultimately, the Court reached the conclusion that the construction of the wall “impeded the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights ...”.¹⁶³ In reaching this conclusion the Court relied on region-specific United Nations Rapporteurs, as well as the Rapporteur on the Right to Food, who had both reported that the proposed construction of the wall would cut off Palestinians from educational institutions, for example, as well as from agricultural land and other means of transport, thus im-

¹⁶⁰ Although we note the Committee’s recently increasing practice of issuing statements on topical applications of the Covenant in States’ economic policy-making. See Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, 20.5.2011, holding, among others, that “Respecting rights requires States Parties to guarantee conformity of their laws and policies regarding corporate activities with economic, social and cultural rights set forth in the Covenant ... States Parties shall ensure that companies demonstrate due diligence to make certain they do not impede the enjoyment of Covenant rights by those who depend on or are negatively affected by their activities” (para. 4); “Protecting rights means that States Parties effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation, and accountability procedures to set and enforce standards for the performance of corporations” (para. 5); “Fulfilling rights entails that States Parties undertake to obtain the corporate sector’s support to the realization of economic, social and cultural rights” (para. 6); 16.5.2012, Letter of the Chairperson of the Committee on Economic, Social and Cultural Rights in relation to the protection of Covenant rights in the context of economic and financial crisis.

¹⁶¹ CESCR General Comment 3 (note 55), para. 9 (where a similar point has been argued in regard to the meta-obligation of international cooperation built into the Covenant).

¹⁶² See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at paras. 133-134.

¹⁶³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 162), at para. 134.

plicating the rights which the Court discussed.¹⁶⁴ This brief discussion, while useful in its insistence that rights protected under the Covenant are obligatory, rather than hortatory, as a matter of international law, arguably left open the discussion of how one can attribute wrongfulness to a state which is failing in its obligation to progressively ensure these rights, rather than an attribution of wrongfulness to a state engaged in a program with retrogressive effects, such as the construction of the wall.

It is our view that the OP-ICESCR inter-State procedure could help towards framing a coherent, consistent, and authoritative response in the future to the issues of causation and attribution peculiar to the Covenant and its inherently evolutive interpretation. The Court's silence on these issues in the *Wall Advisory Opinion* could certainly be read as a policy favouring judicial parsimony, where the Court instead chose to refrain from further explication since it was unnecessary to the assessment of the international legal consequences of the construction of the wall.¹⁶⁵ But it may not be as easy for the Court to remain silent on these questions in the future, should an actual contentious case be brought requiring it to assess international legal responsibility for Covenant violations. This is where we particularly find the OP-ICESCR inter-State procedure to be relevant to filling these gaps in the assessment of international responsibility for Covenant violations. At each level of the interstate procedure, the burden is placed on the State Party to articulate the legal content that it ascribes to a Covenant norm. This process of norm-elaboration establishes evidence of state practice with respect to these norms. If the procedures laid out in Article 8 and 11, and discussed in Part III, operate against a backdrop of extensive technical data supplied in the context of State reporting procedures, and investigations into individual complaints or systemic abuses, in order to adjudicate a particular complaint, the procedure laid out in Article 10 helps to establish a legal baseline against which state behaviour will both be judged in the course of the dispute, and which can serve as a benchmark for later attributions of state responsibility. The twin sets of procedures – one dependent on a rich factual matrix, one on a rich legal matrix – are not, of course, invitations to law-making, but rather to clarification, and will give predictability

¹⁶⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (note 162), at para. 133.

¹⁶⁵ On the Court's sometimes-restrictive posture in regard to its law-making function as part of its judicial function, see S. Wittich, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, 2008, 981 et seq., at 994, ("... the International Court has always taken a restrictive approach towards the idea of expressly contributing to the development of international law [let alone international law-making] ...").

and guidance to states in how they must fulfil their obligations under the Covenant.

While we agree that the entry into force of the OP-ICESCR would indeed give rise to “individual entitlements at the level of public international law, [where] the individual himself or herself would be in a position to claim respect for his or her rights within an international procedural arrangement”,¹⁶⁶ in our view, what has been rather more striking from the new procedures established under the OP-ICESCR are their long-term impacts on the democratic (and ultimately more legitimate) assessment of international responsibility for Covenant violations. On one end, the Committee’s expanded mandate under the OP-ICESCR to interpret and normatively evolve the content of Covenant obligations in the discrete cases or situations giving rise to the individual or inter-State communications procedures, in our view, ultimately strengthens the evidentiary weight of the Committee’s future factual findings and interpretive pronouncements upon other international courts, regional tribunals, or local courts adjudicating claims of a State’s alleged violation of the Covenant.¹⁶⁷ This is the case, we would assert, because such assessments will be based on an index of state practices generated by states themselves. This index, moreover, is generated in light of state consent to committee authority to pronounce on determinations of state action under the Covenant.

On the other hand, the coordinated and participatory role for States Parties in the new procedures of the OP-ICESCR also provides both the necessary interpretive controls and index of authoritative subsequent State practice. The full involvement of all States Parties, the Committee, and other sources of information (whether from international organizations, private entities, individuals or other non-state actors) now welcomed within the new framework of procedures in the OP-ICESCR, creates enduring interpretive communities that will crystallize subsequent practices relevant to the present and future evolutionary interpretation of the Covenant.

¹⁶⁶ T. Marauhn, Social Rights Beyond the Traditional Welfare State: International Instruments and the Concept of Individual Entitlements, in: E. Benvenisti/G. Nolte/D. Baraq-Erez (eds.), *The Welfare State, Globalization, and International Law*, 2004, 275 et seq., at 288.

¹⁶⁷ On the complexity and lack of standardization of fact-finding and evidentiary treatment in the International Court of Justice, see S. Rosenne, *Essays on International Law and Practice*, 2007, Ch. 14, (“Fact-finding before the International Court of Justice”), 235 et seq. While the Court may request information from international organizations (including specialized agencies within the United Nations), it is not clear what probative weight is assigned to information submitted by such organizations, if at all. See Art. 34(2) Statute of the International Court of Justice; Art. 69(1), Rules of Court of the International Court of Justice.

V. Conclusion

“Protean” international law is a paradox for one’s conception of the rule of law,¹⁶⁸ but in the case of the Covenant, States Parties have uniquely pre-committed themselves to adaptation and change in the performance of obligations to respect, protect, and fulfil economic, social, and cultural rights. Perhaps more than any other treaty regime, the Covenant is unquestionably of an evolutive character. How does one then determine the path of its normative and interpretive evolution, and yet assure both individual and State stakeholders in economic, social, and cultural rights, that international legality and decision-making legitimacy will be attained in the process of implementing the Covenant?

We conclude that the entry into force of the OP-ICESCR completes the system of broad-based monitoring and contextual assessment that was uniquely established in the Covenant. The expansion of the Committee’s mandate to include institutional oversight and soft quasi-adjudicative interpretation within the OP-ICESCR’s cooperative framework of inter-State and individual communications procedures, administratively complements the reportage and information-gathering functions earlier established in the Covenant’s periodic reporting system. Nearly five decades into the binding effect of the Covenant, one could readily expect a vast repository of documented information on State practice towards progressive realization of Covenant obligations. The establishment of the individual and inter-State communications procedures and the fact-finding inquiry procedure of the Committee stands to further amplify such information, but also to streamline and systematize its use in the assessment of international responsibility for Covenant violations.

Most importantly, institutionally intertwining and entrenching subsequent practice (combining the information sources, legal and factual output from both the OP-ICESCR’s new procedures with the Covenant’s reportage procedures) with the continuing evolutive interpretation of the Covenant, is a remarkable decision that seeks to avoid the classic problems of lacunae in international law. A State’s economic planning and decision-making, by nature, depends crucially on designing public programs, measures, and policies far into the future to achieve desired social welfare outcomes. The adaptation and adjustment of State fiscal and public programs, measures, and policies to ensure consistency with State duties to re-

¹⁶⁸ The pejorative metaphor is more closely associated with *jus ad bellum* interpretive debates. See S. D. Murphy, Protean Jus Ad Bellum, Berkeley J. of Int’l L. 27 (2009), 22.

spect, protect, and fulfil economic, social, and cultural rights is the critical normative challenge for all States Parties to the Covenant. The quiet revolution behind the entry into force of the OP-ICESCR lies with how it could institutionalize and integrate discourses within and across the constituencies that comprise the interpretive communities driving economic, social and cultural rights today – from States Parties, the Committee, individuals and groups enjoying their new entitlements to remedies, and all other non-State actors. When the subsequent practices of these communities collectively inform and guide the evolutionary interpretation of the Covenant, our global project of building a postmodern culture of compliance with economic, social, and cultural rights would appear less of a Manichean exercise.

