

SHOULD STATES RATIFY? – PROCESS AND CONSEQUENCES OF THE OPTIONAL PROTOCOL TO THE ICESCR

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Abstract: *Proponents and opponents of ratification of the ICESCR's Optional Protocol have both exaggerated the consequences of giving individuals a "private right of standing" before the Committee on Economic Social and Cultural Rights. But this article argues that, on balance, ratification should be encouraged. Individuals will bring new and urgent issues to the international agenda, and the dialog will help to encourage a better sense of States' international legal obligations under the treaty. The consequences for ESC rights are likely to be modestly positive, if outcomes under the Optional Protocol of the ICCPR are any guide. Even States that already respect ESC rights in their domestic law should ratify, because there is a tendency, judging by the ratification behaviour relating to similar agreements, for States to emulate ratification practices of other States in their region. Ratification will neither end deprivation nor damage the credibility of the international legal system. It will be a modest step forward in consensus-formation of the meaning of ESC rights, which in turn is a positive step toward their ultimate provision.*

Keywords: *Human rights, economic social and cultural rights, ICESCR, justiciability, Human Rights Committee, impact.*

A. INTRODUCTION

Three billion people live on less than \$2.50 per day.¹ Another billion live in the "information age" unable to sign their name or read.² About half of humanity – some 2.6 billion people – does not have access to basic sanitation. From these facts, it is hard to tell that we live in a world in which economic rights have been defined as human rights and enshrined in international law for over 60 years. It is also hard to tell from these facts that 86 per cent of the States in the world have ratified one or more international covenant that recognizes each of their own

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¹ See World Development Indicators, 2008 located at <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:21725423~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (visited 5 March 2009).

² UNICEF's 1999 *State of the World's Children* Report located at <http://www.unicef.org/sowc99/> (visited 9 March 2009).

citizens is “entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”³ That there is a disconnect between the principle that human beings have a right to satisfy basic human needs and reality is a gross understatement.

The Optional Protocol to the International Covenant of Economic, Social and Cultural Rights purports to address these basic human rights. On the 60th anniversary of the Universal Declaration of Human Rights (and some 42 years after passage of a similar provision for civil and political rights), the United Nations General Assembly adopted language giving individuals the right to submit complaints of treaty violations by a State Party to the Committee on Economic, Social and Cultural Rights for their official view. The protocol gives individuals a “right of standing” before the Committee. Within some limits defined in the protocol, individuals would be able – if their State agrees – to ask the Committee for its view on whether their State has violated the ICESCR.

But *should States ratify?* Yes, on balance, they should. The agreement will not produce miracles for the world’s deprived, but it does give them a limited opportunity to hold their political leaders accountable for their actions (and inaction) relating to social, economic, and cultural rights. Proponents and opponents of ratification have both exaggerated the consequences of this treaty. It will neither make a serious dent in the statistics cited in the opening paragraph, nor will it constitute a “threat to the integrity of the treaty system”.⁴ It may encourage some governments to take economic, social and cultural rights into account in their developmental and social planning. Governments who have ratified the ICESCR presumptively should be willing to accept review of their policies if their own citizens complain they are not living up to their treaty obligations. Those governments who already take these rights seriously should ratify as a model to encourage others to follow suit. On balance, States should accept enhanced accountability by giving the Committee the authority to render views on individuals’ complaints.

This essay develops *consequentialist* arguments for ratifying the ICESCR. First, ratification may well help clarify an important obligation that States have under international law: what constitutes a violation of the ICESCR. Legal clarity arguably improves implementation and compliance. Second, the availability of an individual complaint mechanism may have positive consequences – at the margins – for rights realization. My argument here is not strictly legal; it is social and political. New evidence on human rights treaty effects suggests that ratification of agreements has consequences in domestic politics, mobilizing publics to view their rights and roles in new ways, focusing and legitimating demands, and creating new pos-

³ See especially Article 22 of the Universal Declaration on Human Rights, G.A. res. 217A(III), U.N. Doc. A/810AT 71(1948).

⁴ Michael Dennis and David P Stewart: “Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?” (2004) 98 *American Journal of International Law*, 462, quoting from Phillip Alston and Gerard Quinn: “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, (1987) 9(2) *Human Rights Quarterly*, 156.

sibilities for domestic coalitions.⁵ Furthermore, what little evidence we have on mechanisms for an individual right of complaint internationally does seem to suggest that these mechanisms are associated with rights improvements; at least, I will show, this has been the case with the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). While we need to be cautious in interpreting the evidence, and especially inferring an ironclad causal relationship, the possibility that an individual right of standing before a body of experts helps improve rights outcomes on average provides a strong rationale for ratification. Third and finally, States should ratify because it will encourage others to do so. Ratification of international legal agreements is, to some extent, “contagious”. I will demonstrate this effect with respect to the individual complaint mechanisms of three other human rights treaties. States tend to ratify optional protocols when their neighbouring peers do so. Modest peer pressure will in time encourage others to ratify and broaden the access of individuals to an authoritative interpretation of their economic, social and cultural rights. These are all good reasons, on balance, for States to ratify the Optional Protocol passed by consensus by the General Assembly in December 2008.

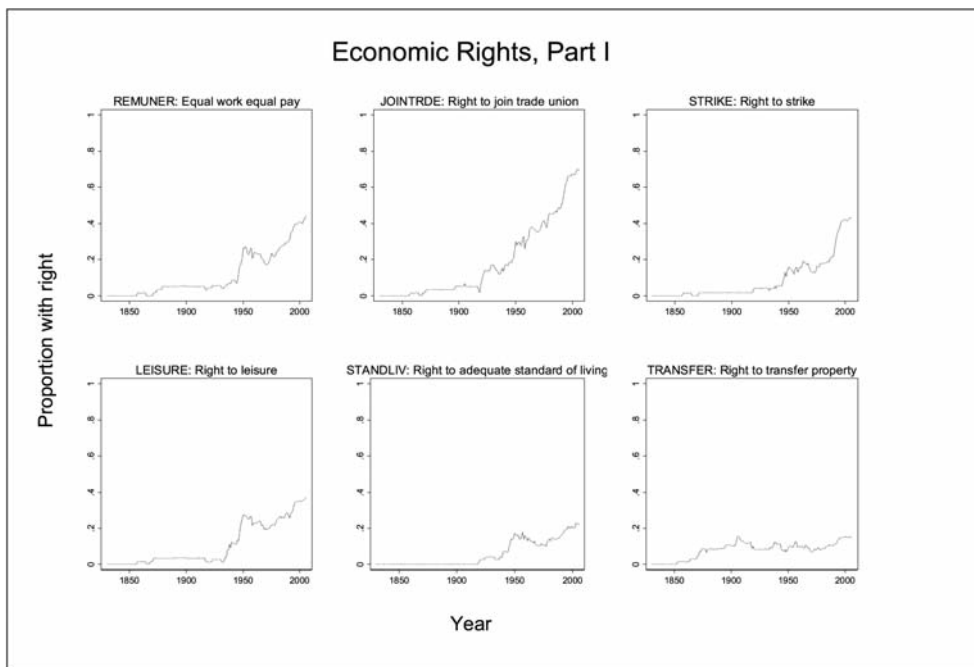
B. ENHANCING LEGAL CLARITY: FROM ABSTRACT PRINCIPLES TO CONCRETE CASES

Economic and social rights have been part of the legal landscape for quite some time, yet there is still a good deal of uncertainty about their boundaries and when and how they might be enforced. A small fraction of the existing constitutions prior to the 1950s had provisions for equal pay for equal work, a right to join a trade union and to strike, a right to rest and leisure, and a right to an adequate standard of living (see Figure 1). An even smaller proportion contained a right to shelter, and various provisions relating to a right to health care (see Figure 2). Moreover, thirty-three States’ constitutions directly and explicitly incorporate the UDHR into their basic law;⁶ while five countries’ constitutions explicitly incorporate the ICESCR.⁷ It is interesting to note that the proportion of national constitutions containing economic and social rights has increased shortly after the international adoption of a major convention. This

⁵ Beth Simmons: *Mobilizing for Human Rights: International Law in Domestic Politics*. (New York: Cambridge University Press, 2009).

⁶ Afghanistan, 1977, 2004; Andorra, 1993; Angola, 1975; Benin, 1979; Bosnia/Herzegovina, 1995; Burkina Faso (Upper Volta), 1960, 1991; Burundi, 1974, 1992, 2004; Cambodia (Kampuchea), 1972, 1993; Cape Verde, 1980; Central African Republic, 1981, 1994, 2004; Chad, 1962; Congo, 1992; Congo, Democratic Republic of (Zaire), 1964, 1978, 2003, 2005; Cote D’Ivoire, 2000; Djibouti, 1977; Equatorial Guinea, 1968, 1991; Gabon, 1991; Guinea, 1990; Madagascar (Malagasy), 1992, 1998; Mali, 1974, 1992; Mauritania, 1961, 1978; Moldova, 1994; Mozambique, 2004; Nicaragua, 1987; Niger, 1996, 1999; Peru, 1993; Romania, 1991; Rwanda, 1962, 2003; Senegal, 1963; Somalia, 1960; Togo, 1992; Yemen (Arab Republic of Yemen), 1991.

⁷ Nicaragua, 1987, Burundi, 1992; Central African Republic, 1994 and 2004; Bosnia Herzegovina, 1995; Rwanda, 2003.



is especially true in the late 1940s – as well as the mid-1960s – again, coinciding closely with the adoption and opening for signature of the ICESCR. The post-Cold War wave of constitution-drafting in Latin America and Eastern Europe also saw an increase in the adoption of domestic ESC rights. A few countries in Asia and Africa – notably, Indonesia and South Africa – adopted some similar constitutional provisions as well (Figure 2).

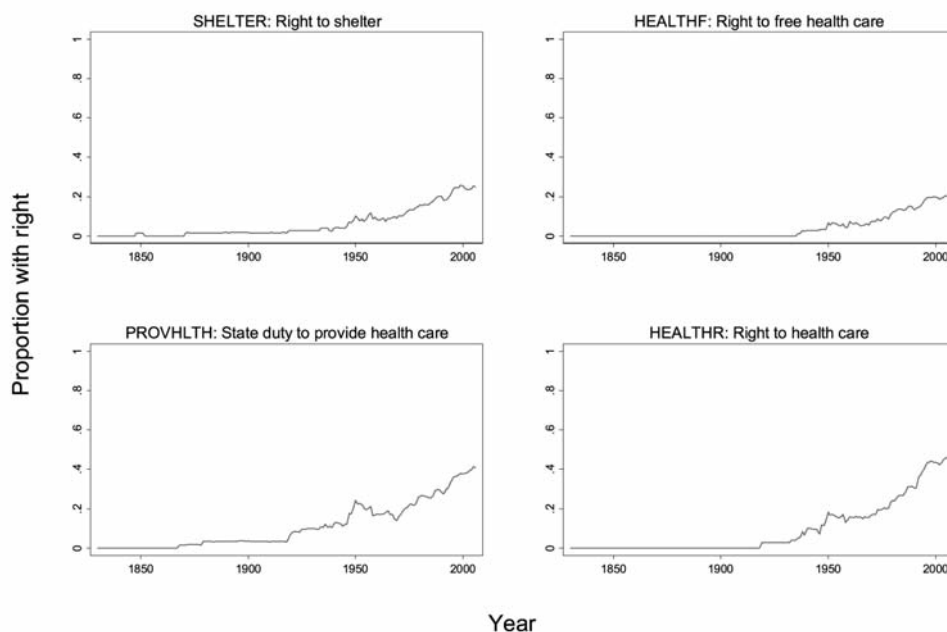
Many countries are starting to come to grips with the exact nature of the rights and obligations their international and domestic laws entail. In many developing countries, national human rights commissions have been quite active in interpreting the nature of economic and social rights. Katarina Tomasevski estimates that 44.5 per cent of the caseload of Indonesia’s Human Rights Commission in 2001 was classified as “violations of the right to welfare”.⁸ The inclusion of social rights – to housing and healthcare for example – in the South African constitution has led to litigation in that country that has been moderately successful and demonstrates the plausibility of enforcing these rights in a court of law.⁹

Governments and stakeholders alike have a strong interest in clear understandings about the nature of their obligations under the ICESCR. The reporting system has been helpful in

⁸ Katarina Tomasevski: “Strengthening Pro-Poor Law: Legal Enforcement of Economic and Social Rights.” Located at http://www.odi.org.uk/rights/Publications/Rights%20Meeting%20Series%20Publication%202006/chapter2_screen.pdf.

⁹ Marius Pieterse: “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” (2004) 26 *Human Rights Quarterly* 882. See also chapter by Pius Langa in this Issue.

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this respect, but it has been driven primarily by the agenda of the Committee and the States Parties. As is well-known, States are sometimes late with their reports and often not sufficiently self-critical in their reporting.¹⁰ The submission of shadow reports is helpful, but there is still a risk that these periodic assessments become ritualized and formulaic. Allowing *individuals* to lodge complaints can be an important part of the process of gradually coming to a clearer understanding about what social and economic rights entail and what constitutes a good faith effort on the part of States Parties to comply with their international legal obligations. The individual complaints mechanism is an important complement to the dialogue between the oversight committee and each state party.

First, individual complaints require the discussion of rights to move from abstract principles to concrete cases. It is difficult to define in the abstract what constitutes steps taken “to the maximum of [each State party’s] available resources”¹¹ without a concrete instance of what is “available” and what a reasonable “maximum” might be. But in the limited set of cases in which concrete allegations have been litigated in national courts, some progress on these issues has been made. In South Africa, concrete cases have led to rulings that the constitutional right to housing does not mean housing on demand, but rather a reasonable program to ensure emergency housing relief. Decisions taken by the Constitutional Court have held that

¹⁰ See Anne F. Bayefsky: “The UN Human Rights Treaty System: Universality at the Crossroads” located at <http://www.yorku.ca/hrights>.

¹¹ Paragraph 4 of the Preamble to the Optional Protocol to the ICESCR, GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008) (Optional Protocol or OP)

reasonable programs must take into account specific resource limitations.¹² Discussion of cases brought by individuals has largely vindicated the position that social and economic rights are justiciable,¹³ though cases must be carefully crafted and expectations managed.

Second, the individual complaint mechanism is an important form of civil society empowerment. It is a way to help interpret the law through the lives and experiences of living individuals. As an *inductive means* to understand the concerns of human beings, this process brings their issues to the table. More than any other source of policy review, the individual complaint process empowers the individual to name the particular deficiency and thereby help to set the agenda for addressing it. As a complement to State reporting, individual complaints could well put issues on the table that the back-and-forth between States and experts has neglected.

Third, allowing individuals to register their complaints with the Committee could very well encourage the development and use of *domestic* mechanisms to deal with citizen complaints. Article 3 of the OP stipulates that “The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted.”¹⁴ In some cases, public officials may decide to improve access to domestic remedies – whether through the courts, ombudsmen procedures, or alternative forms of dispute resolution. In any case, the necessity to exhaust domestic remedies will require individuals and groups to become much more informed about their State, their rights, and the interaction between the two. In many cases, they will learn about the *limits as well as the possibilities* for demanding attention to economic and social rights in their domestic context.

As a consequence, the right of individuals to complain to the Committee is likely to contribute to a clearer consensus on the meaning of the obligations contained in the ICESCR. Dealing inductively with cases as they arise in concrete circumstances – after exhausting domestic remedies – will contribute to the clarity of the rules over time. The legitimacy of that consensus will be enhanced by the Committee’s willingness to adopt local perspectives, to understand local constraints, and to appreciate (as the Optional Protocol requires) that there are multiple paths to the fulfilment of the treaty’s obligations. Often, individuals will discover that they just do not have a case; their government is in fact fulfilling its obligations or at least making a good faith effort to do so. This is as it should be. Citizens will not only get a lesson on empowerment, they will also be educated in the limits of their claims as well. Ratification of the Optional Protocol could therefore contribute to what a growing literature terms “transnational legal processes” in which interactions at multiple levels lead to norm internalization that in turn facilitates international law compliance generally.¹⁵

¹² *Government of the Republic of South Africa v. Grootboom*, 11 BCLR 1169 (CC) (2000). See the discussion for example in Cass Sunstein: *Designing Democracy: What Constitutions Do* (Oxford: New York: Oxford University Press 2001).

¹³ See for example (note 9 above) and Kristine Yigen: “Enforcing Social Justice: Economic and Social Rights in South Africa” 2000 4(2) *International Journal of Human Rights* 13.

¹⁴ See Article 3(1) of the Optional Protocol.

¹⁵ See Hongju Harold Koh: “How Is International Human Rights Law Enforced?” (1999) 74 (4) *Indiana Law Journal* 1397; Anne-Marie Slaughter: *A New World Order* (Princeton, N.J.: Princeton University Press 2004).

A number of sceptics, of course, do not think the OP holds such promise.¹⁶ Some view the individual complaint mechanism as yet another example of the over-judicialization of human rights,¹⁷ which is especially inappropriate, they argue, for economic and social rights. They worry that litigation is not the answer to serious developmental issues, maintain that economic and social rights are not justiciable, and believe that the right of individuals to complain would divert attention and resources from the real problems governments face.

It is patently obvious that no mechanism for complaining can compensate for severe resource constraints, corrupt and inefficient governments, or ill-conceived developmental plans. No one – not even the Optional Protocol’s most ardent supporters – would suggest otherwise. But crucially, the OP is a policy *complement*, not a *substitute*, for programmes that address dire economic needs and social inequality. Furthermore, the idea that this agreement constitutes an example of over-legalization is mistaken. The characterization of some commentators to the contrary notwithstanding,¹⁸ the OP is not a judicial or a litigatory mechanism in a strict sense.¹⁹ The Committee is not a “court”, and the procedures described in the OP are not designed to take a “strict violationist”²⁰ approach to the ICESCR. The Committee is empowered to receive and consider “communications”,²¹ not charges. If the Committee considers under exceptional circumstances that victims may suffer irreparable damage before it can consider the situation, it “requests”²² the State to take interim measures; it does not issue injunctions. Communications are to be transmitted “confidentially”²³ to the State Party and discussed in “closed meetings”,²⁴ in contrast to public accusations and proceedings in a trial setting. The State Party responds to the communication with “clarifying” statements, not a defence brief. Most importantly, the idea is to settle the complaint amicably, “with a view to reaching a friendly settlement”²⁵ – not explicitly to find guilt or to punish an offender. The Committee follows up its discussions by transmitting its “views” and “recommendations”, if any, to the parties concerned.²⁶ It does not render a verdict. At the end of the day, the State Par-

¹⁶ For a good summary of these and related concerns, see Dennis and Stewart, (note 4 above).

¹⁷ See Laurence R Helfer: “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes” (2002) 102 *Columbia Law Review* 1832.

¹⁸ See in particular Dennis and Stewart (note 4 above).

¹⁹ Some legal scholars have identified an individual right of complaint as a key ingredient in rendering any quasi-adjudicative institution more “court like”. See Laurence R. Helfer and Anne-Marie Slaughter: “Toward a Theory of Effective Supranational Adjudication”, (1997) 107(2) *Yale Law Journal* 107 273. This certainly need not be the case, however, and the OP to the ICESCR is designed to avoid the trappings of judicialization.

²⁰ This term is used by Dennis and Stewart (note 4 above).

²¹ See note 11 above, Article 1(1).

²² *Ibid.*, Article 5(1).

²³ *Ibid.*, Article 6(1).

²⁴ *Ibid.*, Article 8(1).

²⁵ *Ibid.*, Article 7.

²⁶ *Ibid.*, Article 9(1).

ty concerned is not fined or imprisoned. The extent of its obligation is to “give due consideration to the views of the Committee” and provide a written response within six months.²⁷ That’s all. And yet, opponents of the OP worry about “overreaching legal positivism”²⁸ and frame the entire project as one of ambitious judicialization. Perhaps to the chagrin of some NGOs, States Parties were quite careful *not* to create a court on “violationist” premises to render verdicts on the violation of economic, social and cultural rights.

With this in mind, we should clear away some misunderstandings. The protocol does not substitute the decision of an international court for local legislative decision making. External enforcement (since there is none) will not undermine these rights’ stature and acceptability. “Litigation” will not crowd out other approaches, since the process of communication outlined in the protocol is not designed to supplant local approaches to local economic and social issues, but rather to complement them. The idea that the optional protocol represents over-legalization run amok is a contorted caricature of the protocol.

Once we correctly understand that we are not in the world of litigation, but instead in the world of communication and persuasion, many of the arguments against ratification of the Optional Protocol lose their bite. The whole debate over the justiciability of the progressive realization of rights is far less ominous when the purpose is dialogue and persuasion rather than “strict violationism”. The concerns that standards for compliance with the ICESCR are not currently very precise²⁹ miss the point that improving shared understandings of these standards is what the individual complaints process is designed to do, in a non-litigious mode. Nor is the debate over the justiciability of economic/social rights versus civil/political rights – urgent, perhaps, in the domestic context – of central importance in the decision to ratify the OP.³⁰ Hundreds of pages have been written about whether the ICESCR will now be expected to be implemented immediately and in toto, on pain of the Committee’s “view” that a State Party has failed to do so. Instead, the individual complaint process can and ought to focus on what constitutes *reasonable progress* in implementing these rights.³¹

²⁷ Ibid., Article 9(2).

²⁸ See Dennis and Stewart 2004 (note 4 above).

²⁹ Ibid.

³⁰ The debate is well encapsulated in a recent pair of articles. See James L. Cavallaro and Emily J. Schaffer: “Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas” (2004-2005) 56 *Hastings Law Journal*, who argue that there are fundamental differences between these clusters of rights that should inform the framing of litigation, and Tara J. Melish: “Rethinking The ‘Less as More’ Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas” (2006) 39 *New York University Journal of International Law & Politics* 171, who argues that such distinctions can actually be counterproductive to the advancement of human rights.

³¹ This seems to be the approach of the Constitutional Court in South Africa, for example, in the Grootboom case, where the court required reasonable programs with careful attention to limited budgets. *Government of the Republic of South Africa v. Grootboom*, 11 BCLR 1169 (CC) (2000).

The focus on litigiousness has obscured an important aspect of individual complaints to the international community: these complaints can complement and support broader domestic social movements to prod governments to change public policies and priorities. The most important consequences of significant cases will not so much be the formal findings, but the inspiration the case provides to groups, coalitions, and social movements to press an issue forward on multiple fronts. Indeed, far from being an alternative to “legitimate political processes”,³² the publicity surrounding individual complaints can be used to bolster them. A finding that the government has not lived up to its obligations would add at least a bit of weight to people’s demands that their government take economic and social deprivation and discrimination seriously. It could certainly be useful for framing demands to governments and legislatures. These cases should provide inputs into domestic political processes, not replace those processes.

C. WILL RATIFICATION MATTER? EVIDENCE FROM THE ICCPR

“We see no convincing evidence that a legally binding adjudicative mechanism would lead to greater compliance by states with the ICESCR obligations.”³³ This section will provide such evidence. With the caveat that it is impossible to prove an institution’s empirical consequences before it has been established, and with the further caveat, as I have argued above, that the protocol is not strictly speaking an *adjudicative* mechanism, this section argues that such evidence is not only available, it is suggestive of salutary consequences for the individual right to complain. This section shows that ratification of the Optional Protocol to the ICCPR is in fact associated with improvements in civil rights practices in the countries that have ratified. There are good reasons to think that a similar process stands a chance of improving rights outcomes in the area of social, economic, and cultural rights as well.

The closest we can come to understanding the effect of the ICESCR’s Optional Protocol is to look at an analogous commitment: the ICCPR’s first optional protocol. How “successful” has that provision been? While there has been much speculation, and a few spectacular cases in which the abuse of the ICCPR’s individual complaint process has backfired,³⁴ prac-

³² The Committee’s General Comments acknowledge that the realization of economic social and cultural rights require domestic implementation through legislation, administrative decision and reform, and budgetary measures, and other measures; not a fiat from a committee of external experts. See the discussion in Dennis and Stewart (note 4 above).

³³ Dennis and Stewart, note 4 above. This and similar statements elsewhere in the literature on the effects of international human rights agreements cites research by Oona Hathaway: “Do Human Rights Treaties Make a Difference?” (2002) 111 *Yale Law Journal* 1935-2042. New research suggests there are likely to be much more positive consequences to international human rights treaties. See for example Mark M. Gray, Miki Caul Kittilson and Wayne Sandholtz: “Women and Globalization: A Study of 180 Countries, 1975–2000” (2006) 60(2) *International Organization* 293-333; and Simmons (note 5 above).

³⁴ Helfer (note 17 above).

tically no systematic evidence has been brought to bear on this question. To what extent has an OP commitment to the ICCPR influenced the quality of civil rights among its signatories? Certainly we can think of theoretical reasons that the OP might have positive effects on civil rights: States may try to improve their practices pre-emptively, anticipating the possibility of closer scrutiny touched off by the complaints of an individual;³⁵ State officials might improve their practices in direct response to discussions with and/or views of the HRC; or, State policy changes might be a much more complex response to the increased salience of a broader social movement that may have inspired the case in the first place. In short, there are a number of ways individual complaints might have effects that do not require the fist of centralized enforcement from the international community.

To proceed, we need a measure of civil liberties. Freedom House, a non-profit and non-governmental organization, has compiled civil liberties scores ranging from 1 to 7 based on a broad range of subcomponents,³⁶ and which parallels many of the basic requirements of the ICCPR. I develop a model that is extraordinarily stringent. Ordinary least squares are used,³⁷ pooling observations both across cases and over time, with the “county-year” as the unit of analysis. In every case, the dependent variable is *change* in actual civil liberties since the previous year. Positive coefficients therefore indicate *improvements* in civil liberties from year to year. In order to control for the baseline from which change is measured, I include a lagged measure of the level of civil liberties in the previous period. Because there is a range of possible explanations for civil liberties that vary by country or region, but not across time, country

³⁵ Malcolm Langford and Jeff King cite the example of the ICCPR’s Optional Protocol as encouraging the Australian High Court to anticipate and incorporate international law in interpreting common law. See Malcolm Langford and Jeff A. King: “Committee on Economic, Social and Cultural Rights: Past, Present and Future” in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 477, 514.

³⁶ The complete checklist can be accessed at <http://www.freedomhouse.org/research/freeworld/2000/methodology3.htm> (accessed 15 July 2003). The measure considers freedom of the media to express ideas (ICCPR, Article 19(2)), free religious expression (ICCPR, Article 18(1), Article 27), freedom of assembly (ICCPR Article 21), independent judiciary (ICCPR, Article 14(1)), equal protection of the laws (ICCPR, Articles 14(3), 26), protection from unjustified imprisonment and torture (ICCPR Article 7, 9(1)), freedom of movement (ICCPR Article 12), equal rights in marriage (ICCPR Article 23). Freedom House does use a broader set of considerations in addition to those with specific parallels in the treaty. For example, they consider trade unions and collective bargaining, freedom from war and insurgencies, freedom from extreme government indifference and corruption, and freedom from indoctrination by the state, none of which are explicitly addressed in the ICCPR. Nonetheless, there is a high degree of overlap. The civil liberties indicator parallels reasonably closely the spirit of the civil protections enumerated in the ICCPR.

³⁷ An instrumental variable ordered probit model would have been preferable given the categorical nature of the data (changes in the civil liberties index are typically though not exclusively 0s and 1s) but a two-stage ordered probit model would not converge when including country fixed effects. I made the decision to retain the fixed effects and use ordinary least squares regression.

fixed effects³⁸ are included in every specification. Thus, any differences reported in civil liberties correspond to changes within countries over time, and not to differences among countries themselves.

But how can we distinguish the effects of ratifying the Optional Protocol on actual human rights, when the root cause might be some factor that explains both ratification and civil liberties improvements? Governments might have improved their practices, whether or not they have ratified a treaty obligating them to do so. I account for this possibility by using instrumental variables³⁹ to model the decision to ratify the Optional Protocol in the first place. I use a two-stage approach, in which all of the variables that explain the behavioural outcome are used to estimate the first-stage ratification decision. This approach helps us to estimate the effects of ratification, once we have accounted for all of those factors which explain ratification in the first place.

Of course, many factors can make it more or less likely that a government will expand or contract the civil liberties offered to its citizens. Many of these are reflected in the control variables. (Note that all variables are defined in the Data Appendix.) One of the most important controls is the level of civil liberties in the previous period. Extremely liberal governments naturally have less room to improve than more restrictive ones. The better the existing practices, the less likely we are to see improvements. Another control is change in the quality of democracy itself. Controlling for the level of democracy makes for a very conservative test of our primary hypothesis about the role of the ICCPR's OP. This specification refuses to credit treaty ratification with improved civil liberties protection when that credit should go to the broader processes of democratization that we have witnessed over the course of the past two decades. Similarly, I control for domestic efforts to bring governmental abuses out into the open and under control by including each country's experience with domestic truth commissions and the use of criminal human rights trials. It is very likely that a government willing to prosecute or to expose abuses of the past is itself more likely to respect its citizens' civil rights.

Two other variables also capture the broad processes of transition and democratization and their possibly contagious nature. I include the level of civil liberties in a country's region in the previous period as a potential influence. It is very plausible that liberties diffuse from country to country directly as citizens observe the practices of their near neighbours and come to expect similar freedoms from their own governments. I also include year dummies for the transition years from the Cold War to the post-Cold War periods (1990 and 1991). These were certainly years of commonly experienced shocks associated with civil rights liberalization. While the ideals of the ICCPR may have in fact inspired some of the changes of this period, the specifications below control for the widespread liberalizations associated with the end of

³⁸ These are columns of dummy variables (1 or 0) that distinguish one country from another over time.

³⁹ The instruments I use are: regional OP ratification density, domestic ratification processes (the constitutional ratification hurdle), and the country's legal heritage (whether it is a common or civil law system). These variables influence ratification, but they bear no significant relationship with the rights outcomes of interest here. See the more elaborate justification provided in Simmons (note 5 above).

the Cold War. In short, if there are any positive effects associated with ratification of the ICCPR, they are not being driven by these transition years alone.

I also control for civil wars, which are notoriously associated with the degeneration in civil liberties when governments perceive their nation's security to be at stake. This is a simple dichotomous measure of whether a country was embroiled in a civil war or not during the year in question. I also control for a country's degree of social heterogeneity, since it is not unlikely that governments in more heterogeneous social settings use their power to favour some groups and to repress others. This is the log of the combined measure of religious, linguistic, and ethnic "fractionalization".⁴⁰ This variable does not vary over time. The greater the total fractionalization in a given society, the more repressive we might expect the government to be. And finally, I consider the influence of external providers of development assistance. Because most of this aid comes from the more liberal democracies, there is a possibility that aid dependence is associated with improved civil liberties over time. Whether this might be due to conditional aid or subtler processes of socialization and learning, aid dependence is expected to be positively associated with improvements in civil liberties.

The results of these tests are reported in Table 1. Ratification of the ICCPR's Optional Protocol may have some effect on civil liberties, but as we might expect, it is hardly the only or even the strongest effect among the factors considered here. These results suggest that the right of an individual to complain to the HRC about an ICCPR violation is associated with a .09 increase in the 7-point civil rights scale. Certainly this is not a huge effect, but it is detectably better than no effect at all. The scale of the effect can be compared to the effect of criminal prosecutions for human rights abuses (which are estimated to be associated with an improvement of .12 on the scale) and a domestic truth commission, which delivers (with somewhat high confidence) an improvement in civil liberties about three times higher.⁴¹

All of the control variables behaved as expected, and most were highly statistically significant. Certainly, the previous *level* of civil rights strongly predicts *changes* in the opposite direction. The better the practices in a country's region on average, the more likely a government itself is to improve its own civil liberties. A change in a country's level of democracy in the previous period is almost certainly likely to result in improved civil liberties in the next, as is overseas development assistance as a proportion of GDP. The transition years marking the end of the Cold War (1990-91) were clearly associated with civil liberties improvements compared to all other years.

We can conclude that there is *some* evidence that ratification of the ICCPR's Optional Protocol has made some difference in the likelihood that civil liberties will improve in the ratifying country, subject to some caveats. Despite the inclusion of many variables that represent processes that unfold over time, it is hard to tell whether there still may be some time-depend-

⁴⁰ Each component of this measure captures the likelihood that any two individuals drawn randomly from the population will be from the same religious, linguistic, or ethnic group. They are totalled, and the log of the sum (plus one) is taken to reduce the influence of extreme outliers.

⁴¹ Note however, that while treaty ratification is endogenous in this model, truth commissions are not. So it is not clear what advantage truth commissions would deliver above and beyond the conditions which were associated with setting them up in the first place.

TABLE 1: EFFECT OF ICCPR OPTIONAL PROTOCOL RATIFICATION ON CIVIL LIBERTIES IMPROVEMENTS (POSITIVE CHANGE)

*Instrumental Variable Regression
Regression coefficients (p-values)*

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 7
Optional protocol obligation (t-1)	.099* (p=.067)	.092* (p=.074)	.093* (p=.068)	.090* (p=.097)	.083 (p=.127)	.087 (p=.119)
Civil liberties level (t-1)	-.214*** (p=.000)	-.217*** (p=.000)	-.217*** (p=.000)	-.233*** (p=.000)	-.236*** (p=.000)	-.241*** (p=.000)
Civil liberties in region (t-1)	.117** (p=.018)	.188*** (p=.001)	.114** (p=.023)	.113*** (p=.008)	.059 (p=.268)	.116** (p=.034)
Democratic improvement (t-1)	.021*** (p=.001)	.020*** (p=.002)	.020*** (p=.002)	.019*** (p=.003)	.018*** (p=.005)	.019*** (p=.004)
Civil war	-.190*** (p=.001)	-.188*** (p=.001)	-.192*** (p=.000)	-.222*** (p=.000)	-.231*** (p=.001)	-.241*** (p=.000)
Fractionalization	-.521** (p=.031)	-.562** (p=.021)	-.559** (p=.021)	.288*** (p=.004)	.571*** (p=.001)	.324*** (p=.002)
Criminal trials	--	.130* (p=.053)	.129* (p=.052)	.127* (p=.074)	.134* (p=.070)	.130* (p=.080)
Domestic truth commission	.282*** (p=.007)	.266** (p=.012)	.268** (p=.012)	.271** (p=.012)	.267** (p=.011)	.265** (p=.015)
1990	.245*** (p=.009)	.244*** (p=.087)	.245*** (p=.009)	.256*** (p=.009)	.252*** (p=.007)	.247*** (p=.010)
1991	.110* (p=.094)	.113* (p=.083)	.114* (p=.081)	.131* (p=.053)	.136** (p=.043)	.119* (p=.085)
Human Rights Commission member	--	--	.021 (p=.506)	--	--	--
Economic growth rate	--	--	--	.001 (p=.659)	--	--
Trade share in GDP	--	--	--	--	.002** (p=.042)	--
Overseas Development Aid/ GDP (logged), t-1	--	--	--	--	--	.591 (p=.191)
Number of countries	128	128	128	127	127	127
Number of observations	2308	2308	2308	2135	2094	2111
R-squared	.143	.145	.146	.162	.175	.169

*=significant at .10 level **=significant at .05 level ***=significant at .01 level

Note: country fixed effects included but not reported here.

Based on robust standard errors, clustering on country.

Note: includes only states that have ratified the ICCPR.

ent process that is associated with both ICCPR ratification and civil liberties improvements.⁴² While these results are suggestive of a positive relationship between ratification and improvements in a broad measure of civil liberties, they should be interpreted cautiously. Of course, different variables in addition to ratification of the OP are likely to explain economic, social and cultural rights, including various measures of development and economic and bureaucratic capacity. Still, there is some evidence to suggest that the individual complaints mechanism of the ICCPR is associated with modest improvements in civil liberties, controlling for many other possible explanations.

D. RATIFICATION AND EMULATION: WHY EVEN COUNTRIES WITH DOMESTIC ESC RIGHTS GUARANTEES SHOULD RATIFY THE PROTOCOL

I have argued above that ratification of the ICESCR's OP will put new issues important to individuals on the table for discussion and that this process could very well have salutary effects in those countries. But why should a country that has already made ample provisions in its own law for economic, social and cultural rights ratify? Surely in countries already in substantive compliance with the treaty, ratification will make little difference to the quality of life and the security of rights for individuals within those countries. There are still good reasons, however, for States in compliance to ratify the OP: *it will encourage other States to do so*. Emulation effects could very well contribute to a virtuous spiral in which rights leaders ratify, others follow their example, the dialogue over individuals' complaints begins, expectations converge, local political pressure for compliance increases, and responsible government agencies and legislatures consider their policy alternatives in the light of new interpretive information about the legitimate range of ways a state may fulfil its international legal obligations.

But do States really emulate the ratification decisions of others?⁴³ Once again, we can turn to analogous treaty provisions for evidence. Four important human rights conventions – the ICCPR, the CERD, the CEDAW, and the CAT – have optional protocols or complaint procedures analogous to that of the ICESCR.⁴⁴ Only the ICCPR contains the further option of

⁴² For example, when a time trend is included, it disturbs these results by increasing greatly the ICCPR standard errors (making it harder than ever to tell whether there is a relationship). Furthermore, the results are also weakened significantly when year fixed effects are included.

⁴³ There is a burgeoning literature on policy diffusion that explores – quantitatively and qualitatively – the various mechanisms that explain this observed tendency for States to adopt policies that have been adopted by others. For a recent review of the literature and some empirical tests, see Simmons et al.: *The Global Diffusion of Markets and Democracy* (Cambridge: Cambridge University Press 2008).

⁴⁴ Optional Protocol I of the ICCPR, for example, specifies that “A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.” Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI),

committing to allow other *States* to lodge violation complaints with the Human Rights Committee (though it has never been exercised).⁴⁵ By examining governments' willingness to take on commitments that progressively expose them to greater authoritative external scrutiny, we can test the proposition that States tend to emulate one another's ratification decisions.

I use what is called a hazard model to test for the factors that significantly raise the probability that a State will ratify one of these optional obligations in any given year, given that it has not yet done so. The explanatory variables raise (or lower) the proportionate "risk" or "hazard" that a State will ratify. Strictly speaking, this hazard model analyzes *time to ratification*, taking into account that some States will never ratify. The effects I report are called "hazard ratios." Factors that raise the relative likelihood of ratification take on hazard ratios-greater than one; those that reduce the likelihood, less than one. We are interested in the hypothesis that the more States within a country's region ratify one of these Optional Proto-

21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976. For a discussion of how this mechanism works see De Zayas et al.: "Application of the ICCPR under the Optional Protocol by the Human Rights Committee" (1985) 28 *German Yearbook of International Law* pp 9-64. The Optional Protocol of the Convention on the Elimination of all forms of Discrimination Against Women provides that "A State Party to the present Protocol ... recognizes the competence of the Committee on the Elimination of Discrimination against Women ... to receive and consider communications ... submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party." Articles 1 and 2, Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* December 22, 2000. In the case of the CERD, a similar option is spelled out in Article 14, which reads: "A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention." Article 14, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* January 4, 1969. Similarly, the CAT contains a provision for optionally establishing such an obligation. According to Article 22, "A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention." G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

⁴⁵ This option is contained in Article 41: "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration." G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976.

TABLE 2: RECOGNITION OF INTERNATIONAL AUTHORITY TO RULE ON COMPLAINTS
Cox proportionate hazard model
Hazard ratios (p-values)

<i>Explanatory Variables:</i>	<i>State-to-state right of complaint:</i>	<i>Individual Right of Complaint...</i>			
	ICCPR Art 41	ICCPR OPI	CERD Art. 14	CAT Art. 22	CEDAW OP
Regional Ratifications	1.02* (p=.095)	1.018*** (p=.002)	1.34** (p=.016)	1.04* (p=.09)	.995 (p=.777)
Democratic since WW1	2.55 (p=.11)	3.58*** (p=.026)	6.34** (p=.032)	2.95 (p=.17)	5.81** (p=.011)
Democratic Since WW2	.976 (p=.973)	2.45* (p=.089)	4.45** (p=.04)	1.51 (p=.55)	6.99** (p=.012)
Newly Transitioned Democracy	1.58 (p=.482)	3.28*** (p=.000)	1.90 (p=.353)	4.88*** (p=.005)	4.64*** (p=.040)
British Legal Heritage	.529 (p=.181)	.509* (p=.065)	.119*** (p=.001)	.458* (p=.081)	.538 (p=.332)
Left Government	--	2.03*** (p=.007)	--	1.72 (p=.17)	--
Log GDP	1.16 (p=.147)	.806*** (p=.004)	1.07 (p=.613)	1.21* (p=.062)	.938 (p=.457)
GDP/capita	1.00 (p=.92)	1.00 (p=.26)	.999 (p=.168)	1.0001* (p=.056)	1.00 (p=.983)
#of countries	149	134	144	149	148
#of ratifications	37	70	29	35	27
#of observations	3677	2097	3465	1854	423
Prob >chi2	0.000	0.000	0.000	0.000	0.000

* significant at the .10 level ** significant at the .05 level ***significant at the .01 level

cols (that is, the greater the density of ratification within a State's region), the more likely a State itself is to do so. In other words, the hypothesis is that the more States within the region ratify, the more a country feels pressure – whether moral or political – to do so as well (controlling for other obvious influences).

Table 2 shows that emulation of neighbouring States' ratification behaviour is strong. Breaking up the world into nine regions (defined by the World Bank), the densities of ratification within those regions is a fairly reliable predictor of a given country's ratification. The hazard ratios are all positive and statistically significant (except for the case of the Convention on the Elimination of Discrimination Against Women). Every percentage point increase in the proportion of States within one's own region increases the likelihood that others will also ratify – for the ICCPR, by 1.8 per cent, for the CERD by 34 per cent, and for the CAT by about 4 per cent. We can be between 91 per cent certain (for the CAT) and 99.8 per cent certain

(for the ICCPR) that these relationships are not likely to have been generated by chance alone. Strong regional effects for ratification of individual complaint mechanisms obtain even we control for the influence of the quality and stability of democracy, the tradition of the local legal system, whether the government in power can be considered “left leaning”, and controlling for size and wealth of the country. Governments look to others in their region for signs of what is appropriate and expected. They often know their reputations will be judged in comparison to others in their region. This “demonstration effect” can be encouraged if some States take a leadership position and ratify the Optional Protocol. As I have argued in the section above, there is a good chance the added scrutiny and the enhanced dialogue about rights themselves will nudge policies in a positive direction.

E. CONCLUSIONS

This essay, rather than concentrating on a legal analysis of the ICESCR and the Optional Protocol, has argued in a consequentialist vein that ratification of the Optional Protocol *might help*. No one can say for sure, but the Optional Protocol invites new issues – important to actual human beings who live daily with their perceived injustices and deprivations – to be put on the table for discussion. As many have done, I have taken the position that such discussions have the potential to encourage better understandings of what the ICESCR requires. Unlike many, however, I do not see this as an example of the “judicialization” of human rights. Indeed, there is some prospect that the Committee will learn of some of the limits and frustrations of States in their attempts to comply with their obligations as much as they promulgate their own “views”. These cases could help shape expectations about the meaning of the treaty. This is especially important where there is a lingering perception that economic, social and cultural rights are not justiciable.⁴⁶

Alarmists worry that the Committee will engage in over-reach; others may be concerned that activists will abuse the complaint process to force governments’ hands in an unproductive way that does nothing but produce backlash. Some reflection should suffice to conclude that these concerns are probably overdrawn. Human rights advocates want rights to improve. Many have come to realize that “litigation strategies that are not linked to other forms of pressure rarely achieve major impact and often are irrelevant in a way that undermines the strength of supranational judicial bodies.”⁴⁷ Governments also have incentives to support improvements; empirical work has shown that higher productivity levels are associated with the better provision of certain economic and social rights.⁴⁸ Moreover, the Committee has no incen-

⁴⁶ Research in specific country contexts suggests the assumption that social, economic and cultural rights are non-justiciable is not very well founded. See Pieterse (note 9 above) with respect to South Africa and Melish (note 30 above) with respect to Latin America.

⁴⁷ Cavallaro and Schaffer, note 30 above.

⁴⁸ See Lorenz Blume and Stefan Voigt: *The Economic Effects of Human Rights*, Discussion Papers in Economics No. 66/04, 2004, Institute of Economics, University of Kassel.

tive to make ridiculous demands that States Parties are in no position to implement.⁴⁹ Their influence depends on maintaining the respect of governments.⁵⁰ Without that respect, their own legitimacy – their sole source of power - will be undermined. The ICESCR itself and the history of its drafting clearly acknowledge that compliance with the treaty is consistent with a broad range of developmental philosophies, strategies, and social/political systems.⁵¹

There is some reason to believe that empowering individuals to complain might nudge governments to take economic, social and cultural rights more seriously. Evidence from the ICCPR suggests that ratification of that treaty's analogous OP is associated with improvements across a broad measure of civil rights.⁵² We should have no illusions, however, that such results will be easy or automatic. In particular, no one should expect ratification of the Optional Protocol to make a big dent in the kinds of indicators cited at the beginning of this essay. As put by Mark Malloch Brown, “you cannot legislate good health and jobs. You need an economy strong enough to provide them” (UNDP, 2000: iii). Neither the Optional Protocol, nor the ICESCR for that matter, is a substitute for a reasonable development policy. But development also requires a government accountable for the distributional decisions it makes with a society's resources. Ratification of the Optional Protocol is a modest step in that direction, and governments should be encouraged to ratify.

DATA APPENDIX

Description of the data used for the quantitative analysis in this article can be found at <http://www.humanrights.uio.no/forskning/publikasjoner/ntmr/2009/1/innhold.html> or <http://scholar.iq.harvard.edu/bsimmons/should-states-ratify-protocol>

⁴⁹ Nor do they have the authority, as it is broadly understood that the ICESCR requires progressive implementation. Article 2(1).

⁵⁰ This is a point made by many analysts, see for example Cavallaro and Schaffer, (note 10 above), at 220. More broadly there is a significant literature on strategic judges which suggests that they are motivated to render decisions that have some probability of being complied with, not over-ruled, and not frustrated by other governmental bodies. See, for example, Geoffrey Garrett et al.: “The European Court of Justice, National Governments, and Legal Integration in the European Union” (1998) 52 *International Organization* 149-76. 1998; Pablo T. Spiller and Raphael Gely: “Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labour-Relations Decisions, 1949-1988” (1992) 23 *Rand Journal of Economics* 463. While I have argued the OP is not a judicial process, the general findings of this literature should assuage to some extent concerns that the Committee will ask States to do the impossible.

⁵¹ Alston and Quinn (note 4 above).

⁵² Others have made the argument that coherence requires a holistic approach to the entire panoply of human rights. See, for example, Rolf Künneemann: “A Coherent Approach to Human Rights” (1995) 17 *Human Rights Quarterly*, 323-42.