THE REASONABLENESS OF ARTICLE 8(4) – ADJUDICATING CLAIMS FROM THE MARGINS

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Abstract: *Reviewing the background debates and the drafting process behind the inclusion of a reasonableness standard in the Optional Protocol, this article argues that the reasonableness review that is contemplated in Article 8(4) must be guided by the right to effective adjudication and remedies for all ESC rights claimants. The drafting history shows that proposals for providing for an automatic "broad margin of discretion" in these cases or requiring a finding of "unreasonableness" were rejected in order to hold fast to the principle of adjudication that is inclusive of the claims of the most disadvantaged individuals and groups. The Article does recognize, however, that effective adjudication presupposes a recognition of institutional limits and appropriate roles. Ensuring access to effective remedies for claimants challenging the "entitlement system failures" leading to poverty and homelessness will require innovative approaches and remedial options that draw on and enhance the capacities of various actors, including adjudicative bodies, governments, claimant groups and human rights institutions.*

Keywords: *Effective remedies, reasonableness, margin of discretion, poverty, justiciability of ESC rights.*

A. INTRODUCTION

> 8(4). When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

In an aptly titled article "Human Rights Made Whole",[1] Louise Arbour, as the High Commissioner for Human Rights at the time, celebrated the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol)[2] at the

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[1] Louise Arbour, "Human Rights Made Whole" in Policy Innovations, (Carnegie Council, July 8, 2008) online at http://www.policyinnovations.org/ideas/commentary/data/000068 (visited 6 March 2009).

[2] GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008).

UN Human Rights Council. She described it as a retrieval and renewal of the unified vision of the Universal Declaration of Human Rights. The protocol, in her view, redresses the unequal status that has been accorded the adjudication and remedy of human rights claims to "freedom from want".[3] By institutionalising an equal right to adjudication and remedy to violations of the right to adequate food, housing, healthcare or education, the Optional Protocol "can make a real difference to those who are often left to languish at the margins of society, and are denied their economic, social, and cultural rights, such as access to adequate nutrition, health services, housing, and education."[4]

Whether the vision of a truly unified approach to human rights that is fully inclusive of claimants affirming the right to freedom from want, is actually realised through the Optional Protocol will largely depend on how its Article 8(4) is interpreted and applied. This will, in turn, inform and be informed by the way in which the principle of reasonableness review of substantive social rights claims evolves at other treaty monitoring bodies, in regional systems and in domestic law. The concept of reasonableness is a double edged sword. It can be used by adjudicative bodies and courts to justify a virtually unlimited "margin of discretion" to states' socio-economic policies and hence to deny adequate adjudication of or effective remedies for substantive social rights claims. Alternatively, it can be used to rise to the challenge presented by genuine rights claims that go to the systemic causes of poverty and exclusion. The adoption of the Optional Protocol is the first step in the project of making human rights whole. The interpretation and application of the reasonableness standard in Article 8(4) in light of the overall principle of inclusive and effective adjudication will constitute the ongoing work.

In this article I suggest that when interpreted in light of its drafting history and situated in the context of the problem that the Optional Protocol was intended to address, Article 8(4) offers a solid foundation for the unified vision of human rights that Justice Arbour describes. Those who advance rights claims related to dignity, security and freedom from poverty, claiming access to adequate housing, healthcare or education are no longer to be denied access to adjudication or remedies. The fact that there may be multiple causes of poverty and a broad range of remedial options can no longer justify adjudicative acquiescence to serious and widespread violations of fundamental human rights. The focus of the reasonableness review mandated in Article 8(4) is to ensure compliance with the Covenant and the protection of human rights values.

The reasonableness review contemplated by 8(4) does acknowledge, however, that the kinds of substantive social rights claims that address systemic inequality, poverty and destitution present different types of challenges to adjudicative bodies. While the Committee on Economic, Social and Cultural Rights (CESCR) is directed by Article 8(4) not to shy away from adjudicating these critical claims, it is at the same time directed not to lose sight of the fact that its role is to focus on compliance with the ICESCR and on the fundamental values it protects. The CESCR will not, under the reasonableness review that is endorsed in Article

[3] Louise Arbour, "Freedom from Want – From Charity to Entitlement," LaFontaine-Baldwin Lecture 2005, available at http://www.lafontaine-baldwin.com/speeches/2005/. (visited 2 april 2009).

[4] Ibid.

8(4), impose its own policy choices when other choices may be available and preferred as a means to ensure compliance with the ICESCR. It will not confuse its role with that of the respondent government or other institutions better placed to design and craft appropriate policies and programs. The envisioned review will encourage an openness to a wide array of remedial options and engagement with relevant actors in the implementation of Covenant rights. New forms of institutional relationships among adjudicative bodies, governments, rights claimants and human rights institutions will respect institutional limits at the same time as implementing and affirming the right to effective remedies.

The reasonableness review contemplated by Article 8(4) recognises that the right to effective remedies relies on, rather than undermines, the recognition of appropriate institutional roles and limitations. Its success will hinge on developing new approaches to adjudication and remedy to overcome the challenges of increasing poverty and destitution in rich and poor countries alike, and the widespread violations of economic, social and cultural (ESC) rights that have resulted, drawing on and enhancing the capacities of the various actors, rather than overstepping them, or confusing roles.

B. Affirming the Principle of Substantive Equality of Access to Adjudication and Remedy for ESC Rights Claimants

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[5] now has an optional complaints procedure that is at least the equivalent to the procedure that has been in place under the International Covenant on Civil and Political Rights (ICCPR) for forty years.[6] This formal equality does not in itself, however, remedy the historic substantive inequality that has denied hearings or remedies to those who would claim the right to freedom from want. Substantive equality requires a recognition that to realise an equal right to effective remedies for all ESC rights, adjudication may have to meet different needs and develop new approaches. The critical question is thus not simply whether there is a parallel complaints procedure under the ICESCR, but whether ESC rights claims will be effectively and fairly adjudicated under the new Optional Protocol. The question is particularly compelling for those who have historically been denied access to adjudication to challenge poverty, homelessness, hunger, or freedom from want.

Rights claims that require resource allocation, positive legislative measures, or time within which the State may implement the legislation, and programs or policies necessary to remedy the violation are not, of course, new. There is no clear dividing line between ESC rights and civil and political rights and there is no distinct category of rights that will be adjudicated[7] under the Optional Protocol which was previously entirely excluded from adjudication. In

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[5] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

[6] 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* Mar. 23, 1976.

[7] Craig Scott: "Reaching Beyond (Without Abandoning) the Category of Economic, Social and Cultural Rights", (1999) 21(3) *Human Rights Quarterly*, 633.

the Elements Paper prepared by the Chairperson of the Open Ended Working Group on an Optional Protocol to the ICESCR (Working Group) in November, 2005, a number of examples of cases were provided to show that resource allocation issues have often been dealt with in the context of civil and political rights claims, including communications under the Optional Protocol to the ICCPR.[8]

The recognition of the right to adjudication and remedy for ESC rights claims and the "unified vision" referred to by Justice Arbour is intricately linked to a deeper understanding of the concept of substantive equality of disadvantaged groups and of the interdependence and indivisibility of civil and political and ESC rights. As will be discussed below, the convergence of the right to equality and non-discrimination with the economic, social and cultural rights of persons with disabilities in the new International Convention on the Rights of Persons with Disabilities (ICRPD)[9] exemplifies the new reality of convergent paradigms of rights and remedies and the importance of the standard of reasonableness in reviewing the right to positive measures in light of available resources in the context of both equality rights and ESC rights.

Some claims under the Optional Protocol will be framed as rights claims which could equally have been framed as alleged violations of the right to non-discrimination or the right to life under the ICCPR, as violations of rights under the Convention on the Elimination of All Forms of Discrimination Against Women,[10] or under the ICRPD. It will be difficult to identify any claims from vulnerable groups suffering violations of ESC rights that could not also be framed as non-discrimination claims under another human rights treaty. The Committee on Economic, Social and Cultural Rights (CESCR) thus will not be sailing in entirely uncharted waters in adjudicating claims to positive measures or in the consideration of reasonable limitations related to available resources. It is not a brand new standard of review for a new category of rights claims: the reasonableness standard that is alluded to in 8(4) is one which emerges from a convergence of civil and political rights with ESC rights jurisprudence.

Nevertheless, in assessing the import of the Optional Protocol in general, and of Article 8(4) in particular, it is appropriate to acknowledge that what is most significant and potentially transformative about the Optional Protocol is that it affirms in no uncertain terms that rights claims related to positive measures described in Article 2(1) of the Covenant are to be adjudicated rather than being dismissed as being beyond the proper scope of adjudication. Rights claims alleging failures to take positive measures, "to the maximum of available resources" and "by all appropriate means including particularly the adoption of legislative measures", as required under Article 2(1), may be similar in form to claims to positive meas-

[8] U.N. E/CN.4/2006/WG.23/2 30 November 2005 Section IV A. "An optional protocol and domestic decisions on resource allocation." See in particular the discussion of the case of *Mukong v. Cameroon* Communication No. 458/1991, decision adopted on 21 July 1994 (CCPR/C/51/D/458/1991.

[9] G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008.

[10] G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

ures under other treaties or within civil and political rights frameworks.[11] But the language of Article 2(1) is unique in its acknowledgement of the temporal dimension of fulfilment, the relation to available resources and the necessity of the adoption of legislative measures to fulfil Covenant rights. All of these aspects of substantive ESC rights claims must now be dealt with in an appropriate adjudicative context, assigning remedial roles beyond the competence of an adjudicative body to appropriate actors without compromising the principle of the right to adjudication and remedy of violations of human rights.

Article 8(4) makes it clear that the unique wording of Article 2(1) of the ICESCR and the different types of challenges associated with substantive, positive rights claims under the ICESCR are not to be used as a basis for denying effective adjudication and remedy. States' obligations are subject to the limitations of available resources and progressive fulfilment over time. The solution to a violation may not be a singular remedy, but may entail a range of possible options. These challenges may be more characteristic of a range of ESC rights claims than of more traditional civil and political rights claims, but they are not to be invoked as a basis for denying effective adjudication and remedy.

In other words, the import of the Optional Protocol and of Article 8(4) is precisely as Justice Arbour describes it. It is not an expansion of adjudication to new categories of rights but rather the affirmation of a principle of substantive equality for those whose rights were previously denied fair hearings and effective remedies by inappropriate and discriminatory limits imposed on the adjudicative function. It aspires to correct a systemic exclusion or under-representation of rights claims from the margins, from those suffering from poverty or destitution. It is an affirmation of a principle of equal right to adjudication and remedy, and a rejection of a restrictive paradigm of rights adjudication that fails to adequately hear or address substantive ESC rights claims.

C. The Drafting History of 8(4): The Rejection of Margin of Discretion in Favour of Substantive Compliance within a Range of Policy Choices

The decision to include Article 8(4) in the Optional Protocol, and the crafting of its particular wording, needs to be understood as a response to the broader debate about the justiciability of ESC rights and the scope of the Optional Protocol. At the first meeting of the Working Group, it became clear that a complaints procedure for the ICESCR could become the opposite of what proponents of this mechanism were hoping for. Rather than affirming the right to effective remedies for all victims of violations of ESC rights, a significant number of the participating States seemed to view the adoption of an Optional Protocol as an opportunity to do the

[11] Article 2(1) of the ICESCR states that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, 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."

opposite – to affirm that certain categories or components of ESC rights ought to be exempt from adjudication or remedy. The discussion of the issue of justiciability at the first meeting in 2004 provided clear evidence of the risks ahead:

> In the exchange of views on the question of justiciability, different views were expressed on whether the proposed optional protocol should cover all substantive articles of the Covenant or only a selection of these. Some delegations expressed doubts as to whether all economic, social and cultural rights were equally justiciable. ... Several delegations referred to the tripartite typology of obligations, according to which States parties have an obligation to respect, protect and fulfil economic, social and cultural rights. Some delegations expressed doubts as to whether a failure to "fulfil" and "take steps to the maximum of available resources" could reasonably constitute a violation. A number of delegations suggested that an "à la carte" approach might be appropriate as it would allow each State to select only those rights that are already justiciable under domestic legislation. Other delegations favoured a limited approach whereby only a selected number of provisions of ICESCR would be covered by an optional protocol.
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> 66. Other delegations favoured a comprehensive approach arguing that an optional protocol should cover all substantive rights contained in the Covenant. [12]

It was often asserted during the debates that the Optional Protocol is a procedural instrument and should not alter the substance of the protections afforded by the ICESCR. Yet the intricate relationship between the right to a remedy and the substance of a right itself made it difficult to separate these two issues. Attempts by some States to distinguish between justiciable and non-justiciable components of the Covenant were often, in fact, disguised attempts to import into the Optional Protocol the very inequalities between civil and political and ESC rights which this mechanism had the potential to remedy. Proposals for "a la carte" options, through which States could pick those rights or components of the Covenant that they agreed to be justiciable, proposals to limit complaints to allegations of discrimination in relation to the enjoyment of Covenant rights, or to particularly egregious violations of minimum core obligations, akin to right to life violations under the ICCPR, were examples of the kinds of selective approaches that, if accepted, would have dismembered the unified vision of human rights and actually served to deny claimants of substantive ESC rights access to effective remedies.

As the deliberations of the Working Group continued into the second and third years, the unprecedented nature and serious implications of any attempt to distinguish between justiciable and non-justiciable components of the Covenant became clearer. A majority of states began to express support for the comprehensive approach to the scope of the Optional Protocol to cover all rights and components of rights. It was at this stage of the process that the focus of debates shifted to the standard of review to be applied to communications relating to positive measures and resource allocation under Article 2(1). States such as Canada, the U.K.

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[12] *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session* U.N. Doc E/CN.4/2004/44 (2004), 23 February – 5 March 2004, paras 65-66.

Australia, Poland, China and the United States that had previously sought to exclude substantive rights claims related to article 2(1) obligations from the scope of the Optional Protocol began instead to advocate for a clarification of the standard of review for the adjudication of such claims. In particular, they advocated for the inclusion of a reference to "a broad margin of appreciation" to be accorded to states in assessing whether obligations under article 2(1) had been met and for a further reduction in the standard of review through a substitution of a standard of "unreasonableness" for a standard of "reasonableness".[13] The effect of these proposals would have been to incorporate into the text of the Optional Protocol the kind of excessive acquiescence to socio-economic decision-making that had denied adjudication to many ESC rights claims in domestic jurisdictions, and to transfer the onus onto claimants to establish that decisions or policies were unreasonable in their formulation or design. The vision of adjudication focused on compliance and fulfilment of rights would be lost.

While the intentions of these States may have been somewhat suspect, they argued with some persuasiveness that it was appropriate to provide, within the text of the Optional Protocol, some guidance as to the standard of review that ought to be applied in cases relating to resource allocation and broad socio-economic policy design. They noted that the Optional Protocol would institute a new adjudicative relationship between the CESCR and State parties, with a new "third party" added to the mix – a rights claimant. Because of the newness of this relationship, particularly as it would apply to the unique provisions of Article 2(1) of the ICESCR, it was argued that it would benefit from some clarification, at least about the standard of review that would be applied in the adjudication of communications alleging failure to comply with positive obligations under Article 2(1).

A number of questions regarding the standard of review were put to the representative of the CESCR attending the Working Group Sessions. In response to these queries, and once the Human Rights Council had mandated the Working Group to negotiate a text of the Optional Protocol, the CESCR adopted a statement "to clarify how it might consider States Parties' obligations under article 2(1) in the context of an individual communications procedure."[14] With respect to the reference to the maximum of available resources, the CESCR described in its statement a relatively rigorous standard of review:

> The "availability of resources", although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect

[13] Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session U.N. Doc, Geneva, U.N. Doc E/CN.4/2006/47 para. 92.

[14] *Statement by the Committee: An evaluation of the obligation to take steps to the "Maximum of available resources" under an optional protocol to the Covenant* U.N. Doc. E/C.12/2007/1 (2007) 10 May 2007, para. 3

the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.[15]

The CESCR then suggested that the standard of review it would adopt would assess the reasonableness of steps taken. The CESCR proceeded to list a number of possible factors it would consider in assessing whether steps taken had been reasonable, including:

(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
(b) whether the State party exercised its discretion in a non-discriminatory and non arbitrary manner;
(c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;
(d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;
(e) the time frame in which the steps were taken;
(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[16]

The CESCR also stated that it would place a high priority on "transparent and participatory decision-making at the national level"[17] and, "To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances."[18]

The criteria outlined by the CESCR with respect to the standard of reasonableness suggested a strong commitment to the principle of effective remedies. The considerations listed were compatible with similar standards that had emerged in domestic jurisprudence. A reasonableness standard had been the basis on which the South African Constitutional Court had affirmed the justiciability of the duty to progressively realise ESC rights in the *Grootboom* case[19] and in subsequent jurisprudence, with a similar emphasis on the protection of vulnerable groups and compatibility of decision-making with broader human rights values. Similar standards of reasonableness are being applied to positive equality rights claims, such as claims to reasonable accommodation of disabilities, in both domestic and international law. In fact, at a similar time, the language of reasonableness was adopted within the text of the

[15] Ibid., para. 4.

[16] Ibid., para. 8.

[17] Ibid., para. 11.

[18] Ibid., para. 11.

[19] *Government of the Republic of South Africa and* Others *v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) at para 44.

ICRPD, where, for the first time in an international treaty, it had been clearly stated that a failure to adopt reasonable measures of accommodation itself constitutes discrimination.[20]

While the reasonableness standard had considerably less resonance for States from the Group of Latin American and Caribbean Countries and other civil law jurisdictions, the value of adopting a principle which increased comfort levels for common law jurisdictions was recognised. Eventually there emerged within the Working Group a consensus in favour of the inclusion of a reference to reasonableness that included States on both sides of the 'justiciability divide'. For sceptical States, reasonableness review was seen as a way of preventing inappropriate or unnecessary incursions into policy choices or resource allocation decisions. For States supportive of a comprehensive and effective Optional Protocol, a reference to reasonableness was seen as affirming a standard of review that had been proven effective at the domestic level, ensuring that all aspects of obligations under Article 2(1) were to be subject to effective review and adjudication under the Optional Protocol.

The lurking unresolved issue, however, was the reference in the Committee's Statement to the European doctrine of "margin of appreciation." Although common in European jurisprudence, the concept has rarely been invoked within the UN treaty body system, and is contained in no U.N. treaties. Moreover, it was strongly associated in common law jurisdictions such as Canada and the U.K. with the systemic abdications of any effective adjudicative role for courts or quasi-judicial bodies in relation to substantive ESC rights claims addressing poverty. Sceptical states led by the U.S., Canada and the U.K. took up the issue of the margin of appreciation or margin of discretion at the third session of the Working Group.[21] There were concerns among many, and particularly among civil society organizations working on ESC rights in domestic law, however, that including an unprecedented reference to this doctrine in a new treaty dealing with the adjudication of ESC rights could be taken as authorising the forms of judicial acquiescence to ESC rights violations that the Optional Protocol was intended to correct.

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[20] International Convention on the Rights of Persons with Disabilities, Article 2.

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

[21] *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session* U.N. Doc, Geneva, U.N. Doc E/CN.4/2006/47 paras, 92, 95, 130.

D. The Evolution of the Text of 8(4)

In the first draft text prepared by the Chairperson for the fourth session of the Working Group in July 2007, the text of Article 8(4) incorporated the reasonableness standard but made no reference to a margin of discretion or margin of appreciation. It remained as close as possible to the text of article 2(1):

> When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, 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.[22]

In response to this draft, sceptical States launched a concerted effort to include a reference to "a broad margin of appreciation" and moreover advocated replacing the reference to assessing the reasonableness of the steps taken with a requirement that the Committee consider whether the steps taken had been "unreasonable".[23] Other States and NGOs expressed concerns about these proposals.[24] Both the proposal for replacing a reasonableness standard with "unreasonableness" and for including a reference to a margin of appreciation were included in square brackets in the subsequent draft of 8(4) stating that "In its assessment, the Committee shall take into account the [broad] margin of appreciation of the State party to determine the optimum use of its resources."[25]

The issue remained unresolved at the end of the fourth session in August 2007. Proposals for replacing a reasonableness standard with a requirement that the Committee make a finding of "unreasonableness" were met with considerable alarm from supportive States and were not included in the subsequent draft. At the suggestion of France, the term 'margin of appreciation' was changed to 'margin of discretion' in the draft text that was prepared for the Open Ended Working Group at its fifth and last session in April, 2008. That draft had the whole of Article 8(4) in square brackets as follows:

> When examining a communication under the present Protocol, the Committee shall consider, where relevant, the reasonableness of the steps taken by a State Party in conformi-

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[22] *Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights Prepared by the Chairperson-Rapporteur, Catarina de Albuquerque (23 April 2007)* U.N. A/HRC/6/WG.4/2 Annex 1 Article 8(4).

[23] *Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session (Geneva 16-27 July 2007)* U.N. A/HRC/6/8 paras 95-98, 153.

[24] Ibid., para. 100.

[25] *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Prepared by the Chairperson-Rapporteur, Catarina de Albuquerque (24 December 2007)* U.N. A/HRC/8/WG.4/2 Annex 1 Article 8(4).

> ty with article 2, paragraph 1, of the Covenant. In doing so, the Committee will respect a margin of discretion of a State Party to determine the appropriateness of policy measures as long as they are consistent with the provisions of the Covenant.[26]

A subsequent redrafting distributed just prior to the session, omitted any reference to margin of discretion, stating in a revised proposal for 8(4) that "the Committee shall consider, where relevant, the reasonableness and appropriateness of the steps taken by a State Party in accordance with article 2, paragraph 1, of the Covenant."

There was little support at the April 2008 session of the Working Group for the inclusion of the term "appropriateness" and considerable opposition was mounted, again by sceptical States, to the removal of the reference to a margin of discretion. The debate over the text of Article 8(4) continued until the final day of the Fifth Session.

At the end of the day, the central issue in the forty years of resistance to the drafting and adoption of an Optional Protocol to the ICESCR and the focus of debate at the Working Group about scope of coverage and the standard of review, came down to the final negotiations around the wording of article 8(4).

On the second to last day of the session, the United States' representative stated again that a reference to margin of discretion or to a broad margin of discretion was needed in order to provide an assurance that, where there were different ways of complying with the CESCR, the Committee would not substitute its own policy preference for those of the State party. This position was supported by a significant number of other States – enough to undermine any attempt to reach consensus on referring the text to the Human Rights Council. The NGO Coalition responded by saying that the principle described by the US delegate was one with which everyone agreed, but one which is central to the reasonableness standard. They argued that a reference to a margin of discretion, on the other hand, is often applied in a very different way so as to undermine the very accountability to the substantive obligations within the Covenant that is the purpose of adopting an Optional Protocol to ICESCR in the first place.

In informal discussions compromise wording was sought that would describe the principle that where a number of different options are in compliance with the ICESCR, the Committee ought to leave the choice among those policy options to States. Eventually, wording was taken from the *Grootboom* decision of the South African Constitutional Court, where that Court first described its approach to reasonableness review in relation to the right of access to adequate housing in Article 26 of the South African Constitution.[27]

> The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right.

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[26] Ibid.

[27] Article 26(1) of the South African Constitution states that "Everyone has the right to have access to adequate housing." Article 26(2) states that "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

> The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to *recognise that a wide range of possible measures could be adopted by the state to meet its obligations*. [emphasis added]

Modelling new text on the above wording the Chair then presented the wording that was accepted by consensus for referral to the Human Rights Council:

> 8(4). When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

E. The Reasonableness Standard of Article 8(4): What it Means

The substitution of the reference to "a range of possible measures for the implementation of the rights set forth in the Covenant" in the final version of Article 8(4) for the previous reference to a margin of discretion is significant for its interpretation. The reference point in Article 8(4) is now compliance with the Covenant and the implementation of the Covenant through "a range of possible policy measures". Those States seeking an assurance that the Committee would not overstep its competence or authority by itself choosing among alternative means of achieving compliance received that assurance in the amended text. However, those advocating the unprecedented incorporation of a reference to margin of discretion in relation to a particular category of ESC rights claims – hoping to direct the Committee to compromise on the right to effective remedies in situations where the State's resource allocation or socio-economic policy decisions are at issue, did not receive support. There is no suggestion in the adopted wording of Article 8(4) that a reasonableness standard authorises or permits any denial of adjudication or remedy to any class of rights claimant or category of claim for the reason that the State is better placed to make policy choices or to allocate resources. What is recognised, however, is that the implementation of ESC rights is not simple and will rarely involve a singular policy option. There will, in most cases, be a range of measures and a multiplicity of choices available. Remedies will often need to recommend a process through which compliance can be achieved, rather than recommending the precise details of the solution.

The incorporation of wording from the *Grootboom* judgment suggests, as does the drafting history, that just as the South African Constitutional Court has incorporated jurisprudence

from the CESCR into its own domestic jurisprudence, so has South African jurisprudence now informed the text of an international human rights instrument. There are a number of aspects of the reasonableness standard affirmed in the *Grootboom* decision which should, in turn, inform the interpretation and application of Article 8(4) of the Optional Protocol.

Importantly, the *Grootboom* standard of reasonableness affirms the centrality of human rights values of dignity and equality in any assessment of reasonableness. According to the Constitutional Court, it is human rights values rather than quantitative norms which must ultimately guide a court determining whether the policy choices made by governments are consistent with human rights obligations:

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.[28]

A second principle affirmed in the *Grootboom* judgment is that the assessment of reasonableness in the ESC rights context is results based, not focused on intent. "Policies and programmes must be reasonable both in their conception and their implementation."[29] As Sandra Liebenberg notes, reasonableness review attempts to respect the institutional roles of both courts and governments without compromising the right to a remedy by ensuring a contextual standard of review informed by a contextual analysis of institutional roles, the interest at stake and the situation of the claimant group in society:

> In many respects, reasonableness review provides the courts with a flexible and context-sensitive basis for evaluating socio-economic rights claims. It allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. At the same time, it subjects governments' choices to the requirements of reasonableness, inclusiveness and particularly the threshold requirement that all programmes must provide short-term measures of relief for those whose circumstances are urgent and intolerable. Reasonableness review enables courts to adjust the stringency of its review standard, informed by factors such as the position of the claimant group in society, the nature of the resource or service claimed and the impact of the denial of access to the ser-

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[28] *Grootboom* (note 19 above), at para 44.

[29] Ibid., at para. 42. Further features of reasonable measures include requirements that they be comprehensive, coherent and co-ordinated; properly resourced; provide for short, medium and long-term needs; and publicly transparent. See Sandra Liebenberg: "Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate" in Stu Woolman & Michael Bishop (eds): *Constitutional Conversations* (Pretoria University Law Press: Pretoria, 2008) 303, 324.

[30] Liebenberg, ibid., 321-22.

vice or resource in question on the claimant group.[30]

F. Meeting the Challenges of Reasonableness Review

A challenge within the model of reasonableness review that has been raised in South Africa is that it may at times fail to give adequate weight to the perspective and voice of rights claimants and their communities in the application of human rights norms to particular contexts and in the implementation of appropriate remedies. Marisus Pieterse has raised important concerns that "the current formulation [by the South African Constitutional Court] of the reasonableness approach appears to divert the bulk of the dialogue over the meaning of socio-economic rights to the political process, to silence the voices of certain vital participants to the dialogue and to restrict the judicial role in the overarching societal discussion over the means and ends of transformation." Pieterse has joined with Sandra Liebenberg in calling for a "more principled and systematic interpretation of the content of the various socio-economic rights, the values at stake in particular cases and the impact of the denial of access to these rights on the complainant group."[31] It will be important, in interpreting and applying Article 8(4) of the OP-ICESCR, therefore, to ensure that the voice and perspective of the rights claimants are adequately heard, and that appropriate remedies are fashioned so as to address the context and needs from which their claims have been advanced It will be important to ensure that the claimants of ESC rights are not simply treated as triggers for reviews of the reasonableness of programs or policies, with no reference back to fundamental right to effective remedies that is the underlying principle of the Optional Protocol.

Standards of reasonableness under the OP-ICESCR must also be allowed to interact with the emerging standards of reasonableness elsewhere, such as under the new ICRPD and its Optional Protocol. Reasonable accommodation of disability is a very contextual and individualized approach to reasonableness review which may provide a useful framework to ensure reasonableness review of rights claims under the Optional Protocol to ICESCR is also framed around individual dignity and equality, not confused with abstract policy review disconnected from rights claiming.

The "range of possible policy measures for the implementation of ESC rights", referred to in Article 8(4) should also be interpreted as an acknowledgement of the multiplicity of actors and entitlements which may be involved in allegations of violations of ESC rights. Amartya Sen has shown how "entitlements system failures" leading to hunger, homelessness and other violations of ESC cannot be explained as shortages of resources.[32] They are usually the result of the interaction of a number of factors, including legal entitlement systems as well as State action and inaction and often private actors as well. The entitlement system failures behind the most serious violations of ESC rights are not problems which lend themselves to the identification of singular acts or violations or simple remedial orders. Nevertheless,

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[31] Pieterse (note 31 below).

[32] Amartya Sen: *Poverty and Famines: An Essay on Entitlement and Deprivation* (New York: Oxford University Press, 1981).

and, as Pieterse suggests, the role of individual entitlement claims may be critical in developing a transformative human rights framework capable of challenging and remedying these broader entitlement system failures.[33]

If the claims from the margins of society to adequate food, housing or healthcare are to be adequately adjudicated and remedied under the new Optional Protocol, the CESCR will have to apply Article 8(4) in light of the purpose of the protocol. The guiding principle of reasonableness review should be the right to adjudication and effective remedies for ESC rights claimants, with a particular focus on the claims advanced by marginalised and disadvantaged groups. Rather than compromising the right to adjudication and remedy in any way because of institutional roles or limitations, Article 8(4) suggests that the CESCR ought to focus instead on determining how the unique challenges of ESC rights adjudication can be finessed. The Committee may have to create procedures that are new to treaty bodies, in order, for example, to hear the evidence of rights claimants, access independent experts, or hear from NGO interveners. Where a range of possible policy measures are available for the implementation of Covenant rights, remedial recommendations may focus on implementing accountable and participatory processes through which choices can be exercised and remedies implemented in a manner which includes rights claimants and affected constituencies in a meaningful role.

The Optional Protocol revitalizes an older vision of a unified system of human rights and effective remedies. But there is much that is very new and challenging about it. It is a project which, to be successful, will require commitments from a range of actors – States, claimants, and the CESCR alike.

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[33] Marius Pieterse: "On 'Dialogue', 'Translation' and 'Voice': Reply to Sandra Liebenberg" in Stu Woolman & Michael Bishop (eds) *Constitutional Conversations* (Pretoria University Law Press: Pretoria, 2008) at 33. See also Marius Pieterse: "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" (2004) 26(4) *Human Rights Quarterly* 882. It is encouraging that commentators such as Pieterse and Liebenberg are now emphasizing the importance of recognizing the role of individual entitlement claims without affirming the concept of "minimum core content." I have noted elsewhere that the "minimum core" concept is too simplistic and formalized to support the kind of value-focused adjudication that I believe is promoted in Article 8(4). Further, it may provoke excessively precise remedial interventions by adjudicative bodies. Proposals for including references to "minimum core content" in the Optional Protocol did not receive broad support, so I would expect that the CESCR will not emphasize this concept into its jurisprudence under the new Optional Protocol. See Bruce Porter: "The Crisis in ESC Rights and Strategies for Addressing It" in John Squires, Bret Thiele and Malcolm Langford (eds.): *Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Sydney: University of South Wales Press 2005), 48