

6. Reasonableness in the Optional Protocol to the ICESCR

*Bruce Porter**

Article 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.

1. Introduction

Article 8(4) is arguably the heart and pulse of the OP-ICESCR.¹ It is a unique provision developed in response to the central problematic and historic debates regarding the justiciability of economic, social, and cultural [ESC] rights claims. It provides direction as to how the Committee should adjudicate claims of violations resulting from States' failures to adopt reasonable measures to realise Covenant rights and addresses the critical relationship between individual communications and broader issues of socio-economic policy. Article 8(4) represents the OP-ICESCR drafters' constructive response to concerns about properly delineating the Committee's role from that of governments in relation to socio-economic policy choices and program design. At the same time as responding constructively to traditional concerns about the adjudication of ESC rights claims, article 8(4) also remains true to the broader purpose of the OP-ICESCR, which is to provide access to justice and ensure fair and competent adjudication of claims engaging all violations of ESC rights.

Understood in the context of its drafting history and the debates within the Open-Ended Working Group mandated to draft the OP-ICESCR, article 8(4) should be read as a clear rejection of attempts to limit the justiciability of claims relating to the substantive obligations to realise rights under article 2(1), or to demarcate particular spheres of state policy-making for greater deference or a reduced level of scrutiny. Article 8(4) aims to ensure that claims under the OP-ICESCR actually provide new impetus for resolving

*Director, Social Rights Advocacy Centre. This is a Pre-Publication draft of a chapter for R. Brown, M. Langford, B. Porter and J. Rossi (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Capetown: Pretoria University Law Press, forthcoming).

¹UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Sixty-third session, 2008), U.N. Doc A/RES/63/117 (2008).

systemic violations of ESC rights linked to poverty and social exclusion, at the same time as ensuring that individual claimants receive full and fair hearings into their individual circumstances. Recognising the valuable role of individual rights claims in bringing to light the dignity interests and human rights values that are at stake in socio-economic policy choices lays the groundwork for a new dialectic between rights claims and policy design and implementation. The true effectiveness and transformative potential of the OP-ICESCR will rely, to a great extent, on how the Committee interprets and applies the directives contained in 8(4) to this dialectic.

Concerns about creating an ICESCR complaints mechanism comparable to the First Optional Protocol to the ICCPR have historically focused on the fact that alleged violations of the ICESCR often engage positive obligations on States to comply with article 2(1) of the ICESCR: the duty to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’² These concerns were also predominant during the debates over the OP-ICESCR at the Open-Ended Working Group. States opposed to the drafting of an OP at the outset argued that the positive obligations on governments to adopt programs, enact legislation, and allocate resources necessary to implement rights in a manner that is commensurate with institutional and economic capacity are suited to a periodic review procedure—based on a dialogue between independent experts and State delegations—rather than to human rights adjudication by way of an individual petition procedure. In subsequent debates about the scope of the OP-ICESCR and the standard of review, a central issue was whether approaches to formal adjudication of individual civil and political rights claims could be applied to adjudicating ESC rights claims. Traditional approaches to the adjudication of civil and political rights tended to limit the role of adjudicators to reviewing state action, determining whether discrete provisions or actions violated individual rights. States and organisations supportive of a comprehensive OP argued for a less restrictive approach to rights adjudication, in which not only discrete state actions would be reviewable, but also failures of states to implement policies and enact legislation necessary for the realisation of rights. The issue in drafting and implementing an OP-ICESCR was therefore not simply to extend dominant models of judicial review and rights adjudication developed in the civil and

² Ibid., Article 2(1).

political rights arena into the socio-economic domain, but to reconceptualize adjudication so as to do justice to claims in a new terrain.

The relative dominance of civil and political rights in human rights adjudication and the historically marginal status of ESC rights adjudication has encouraged a particular approach to rights adjudication. Courts and other adjudicative bodies have been viewed primarily as referees of state action, charged with deciding whether particular actions are ‘out of bounds’ or contrary to the rules. Under the prevailing paradigm, courts and human rights bodies have been more reluctant to engage with human rights violations linked to states’ failures to legislate or act in order to protect or ensure rights. This negative rights bias has distorted human rights adjudication in the direction of those rights claimants whose rights have been infringed by state actions, at the expense of those whose rights require positive measures, such as those living in poverty or without adequate food, housing, or access to healthcare or education. ESC rights violations, of course, do not always result from failures to take positive measures to realise rights as required under article 2(1). They may also result from discrete and identifiable state action, such as forced evictions or discriminatory exclusion of disadvantaged groups from socio-economic benefits. Similarly, civil and political rights violations may result from failures of states to take positive measures to ensure an independent judiciary, fair trials within a reasonable time, or to remove obstacles to equality and non-discrimination facing disadvantaged groups. The positive/negative rights dichotomy is not a viable or coherent distinction between ESC rights and civil and political rights. Nevertheless, the historic step forward in the adoption of a comprehensive OP-ICESCR lies in the recognition that adjudication and remedies must be available to victims of violations of ESC rights resulting from states’ failures to meet their obligations, as articulated in article 2(1), and to realise the rights in the Covenant to the maximum of available resources and by all appropriate means. Achieving that purpose meant directly confronting a prevailing bias in favour of negative rights oriented adjudication and challenging those who wished to restrict the scope of the OP-ICESCR to the more traditional types of claims. The challenge facing the drafters of the OP-ICESCR was to correct the bias of prevailing rights adjudication, to engage directly with violations emanating from state failures to take appropriate measure while at the same time maintaining a clear distinction between the adjudicative role of courts or human rights bodies on the one hand, and the role of states to enact policy and implement programs on the other. Article 8(4) is the response of the drafters to that challenge.

Many of the most critical violations of ESC rights, affecting the most marginalised groups, result from states' failures to comply with the obligation to take appropriate measures to realise the rights under the Covenant and to put in place plans, policies, and programs that will implement rights over time. The ability of the Committee to adjudicate and remedy claims addressing these critical violations under the OP-ICESCR is thus critical to ensuring access to justice for victims of the most widespread and egregious violations, on the one hand. If the OP-ICESCR were to focus primarily on challenges to discrete provisions, such as discriminatory exclusions from existing social programs or state action leading to homelessness through forced evictions, and leave the decisions regarding the adoption of legislative or programmatic responses to widespread hunger and poverty to the broad discretion of states, the OP-ICESCR would only provide access to justice for complaints that generally fall within the scope of existing civil and political rights complaints mechanisms. It would leave in place the very exclusions that the adoption of the OP-ICESCR was designed to correct. On the other hand, accepting a broad scope for rights claimants to address these issues raised inevitable questions about how to ensure competent and effective adjudication of complex policy issues.

The years of debates over the drafting of the OP-ICESCR ultimately produced a consensus that a procedure designed to ensure access to justice for victims of violations of ESC rights must place squarely within its scope the violations of rights which emanate from states' failures to adopt positive measures to realise rights, including, where appropriate, legislative measures and budgetary allocations. The idea of incorporating a reference to a standard of review for the assessment of compliance with article 2(1) may have originated, at least for some states, from a skepticism about the justiciability of obligations of progressive realization, but in the end 8(4) served the opposite purpose – to affirm that positive measures to implement ESC rights were very much within the proper scope and purview of the new complaints procedure. Article 8(4) recognizes the importance of this aspect of the Committee's new mandate and gives direction to the Committee about how it should assess compliance with the substantive obligations under article 2(1) in the context of the examination of communications. After years of debate about this central issue, article 8(4) reflects a consensus that access to justice in cases where ESC rights violations are linked to failures by states to adopt positive measures requires a robust standard of review of the reasonableness of the steps taken, but it also requires competent and informed adjudication, based on reliable evidence from a wide range of sources and a clear demarcation of the adjudicative role of the Committee from

the policy design and implementation role of the State.

2. The Drafting History of 8(4)

As is often the case, the most problematic issue at the outset of the Open-Ended Working Group discussions reappeared at the end and demanded resolution. The wording of article 8(4) was a product of last minute negotiations on the last day of discussions when consensus in favour of a final draft threatened to dissolve over the question of a standard of review of steps taken in accordance with article 2(1) of the ICESCR. The resolution achieved under the pressure of final negotiations, however, drew on a long process of debate, discussion, clarification, and consensus-building.

Discussions at the Open-Ended Working Group invariably circled around the issue of the justiciability of claims engaging with states' positive obligations under article 2(1). It became clear early on that states that were hostile to or skeptical about the justiciability of ESC rights would play a very vocal role in the negotiations, even though most had no intention of ratifying the OP-ICESCR. States such as the USA, China, Canada, Australia, and the UK generally waged their battle against justiciability in three stages: First they opposed the project of drafting a complaints procedure for the ICESCR, arguing that the focus should be on periodic review; Second, they attempted to limit the scope of the Committee's adjudication under any complaints procedure to more traditional areas of civil and political rights adjudication, such as non-discrimination, or providing states with options as to what components of the ICESCR would be covered; And third, they advocated for a reduced level of scrutiny and a general deference to states' policy choices in the adjudication of communications engaging article 2(1) obligations.³

The first meeting of the Open-Ended Working Group in 2004 revealed the extent of prevailing skepticism about the justiciability of ESC rights.⁴ Some delegations expressed doubts as to whether all economic, social, and cultural rights were equally justiciable, referring to the tripartite typology of obligations, according to which states parties have an obligation to respect, protect, and fulfill economic, social, and cultural rights as a

³ Inter-American Institute of Human Rights, International Commission of Jurists, 'Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' English edition, 2010 at 81, Online: <http://www.crin.org/docs/ENG-CommentaryOP-ICESCR.pdf>

⁴ UN Committee on Economic, Social and Cultural Rights, *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* (First Session, 2004), U.N. Doc E/CN.4/2004/44 (2004).

possible basis for limiting the scope of the complaints procedure, excluding obligations to fulfill from the scope of the procedure.⁵ Doubts were expressed as to whether a failure to ‘fulfill’ and ‘take steps to the maximum of available resources’ could reasonably constitute a violation and some delegates questioned whether it was appropriate to review the allocation of resources.⁶ Concerns were expressed by some states about possible interference with budget decisions and policymaking⁷ and others questioned the Committee’s competence to review states’ social policy to determine violations.⁸ A number of delegations proposed an ‘à la carte’ approach that would allow each state to select only those rights or components of rights that it considered justiciable.⁹ Other delegations that only certain types of violations of rights under the ICESCR should be covered by an optional protocol such as discrimination¹⁰ and serious violations of core rights.¹¹ Many others favoured a comprehensive approach arguing that an Optional Protocol should cover all substantive rights contained in the Covenant and feared that proposals for limiting the scope of the OP would deny effective remedies to victims of the most serious violations.¹² Consensus on proceeding to draft a complaints procedure was blocked at the end of the first session. The United States justified blocking consensus on the grounds that ‘the great majority of the states participating in the

⁵Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the first session* (First session, 2004), U.N. Doc E/CN.4/2004/44 at paras. 58-66 (2004).

⁶*Ibid.*, para. 57; Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Fourth session, 2007), U.N. Doc A/HRC/6/WG.4/2 at Explanatory Memorandum (2007).

⁷*Ibid.*, para. 22.

⁸Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the second session* (Second session, 2005), U.N. Doc E/CN.4/2005/52, para. 32 (2005).

⁹ Working Group, *Report of the first session* (n. 5 above), at paras 24 and 65; Working Group, *Report of the second session* (n. 8 above), at paras. 15, 17, 87, 101-2, 109; Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the third session*, (Third session, 2006), U.N. Doc E/CN.4/2006/47 at paras. 30 and 111 (2006); Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the fourth session* (Fourth session, 2007), U.N. Doc A/HRC/6/8 at paras. 36-7 (2007); Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the fifth session* (Fifth session, 2008), U.N. Doc A/HRC/8/7 at paras. 9, 146 and 226 (2008). This approach was opposed by the representative of the Committee (as well as many delegations throughout negotiations), who held that all Covenant rights should be included in the scope of any Optional Protocol and that the Committee should determine which aspects of these rights are justiciable.

¹⁰ Working Group, *Report of the third session* (n. 9 above), at paras. 29 and 93.

¹¹ Working Group, *Report of the second session*, 10 February 2005, E/CN.4/2005/52, para. 88.

¹² UNCESCR, *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* (n. 5 above), at paras. 65-6.

Working Group did not support the drafting of an optional protocol at this time.’¹³ While this may have exaggerated the strength of the opposition, it was certainly clear to those of us involved in the Working Group for the NGO Coalition for an OP-ICESCR that if the Working Group were to proceed with drafting at that time, the result would likely have been an OP-ICESCR which severely limited the mandate of the Committee to engage with the most substantive claims engaging obligations under article 2(1). At this stage of the discussions, many of us were fearful that the OP-ICESCR might actually end up constituting a step backwards by explicitly denying access to remedies and justice to most victims of ESC rights violations and affirming the restrictive approach to justiciability and adjudication that had traditionally denied fair adjudication and remedies to these victims.

A fresh breeze of hope was felt at the second session of the Working Group held in 2005. At the outset of the meeting, Louise Arbour, the High Commissioner for Human Rights, spoke to the prevailing concerns that threatened a project to which she had a strong personal commitment. Drawing on her experience as a judge, including as a Justice of the Supreme Court of Canada, she introduced the concept of reasonableness as a potential resolution to the impasse confronting the Working Group on the issue of justiciability of positive measures in a manner that drew on familiar concepts from civil and political rights adjudication:

From my own experience of working with courts and tribunals, I know how delicate the issue of separation of powers can be and how important it is to acknowledge the connections between legal and political processes without blurring the lines that must separate them. However, reviewing claims related to social, economic and cultural rights is not fundamentally different from the functions involved in the review of petitions concerning other rights. As for normal judicial review functions, the key is often in examining the ‘reasonableness’ of measures adopted by each State - given its specific resources and circumstances - by reference to objective criteria that are developed in accordance with standard judicial experience and with the accumulation of jurisprudence. A petition system at the international level can help provide guidance for the reasonable interpretation of universal norms in the provision of remedies at the domestic level. In many cases, it can also serve to establish if

¹³ C. de Albuquerque, ‘Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights- The Missing Piece of the International Bill of Human Rights’, *Human Rights Quarterly* Vol. 32, No.1 (2010) pp. 144-178, at 158.

there is already the effective or appropriate implementation of existing laws and policies, rather than to determine the reasonableness of such laws and policies.’¹⁴

The High Commissioner returned to the theme of reasonableness in subsequent addresses to the Open Ended Working Group. In 2006 she explained to delegates that issues of budgetary allocation are not beyond the competence of courts or adjudicative bodies to review, suggesting that the Covenant ‘requires States to use limited resources ‘reasonably’ and in a non-discriminatory manner’—and to be held accountable for doing so.

The concept of ‘reasonableness’ of State action is a well-known legal concept and long used in adjudication of civil and political rights. The growing body of jurisprudence at the national and regional levels illustrates that it can be similarly employed to assess the extent to which States respect their obligations in the area of economic, social and cultural rights. Such rights might not be fully achievable for all on an immediate basis, yet they remain rights. The obligations of States in this domain can be fully enforced while taking into account their resource constraints - and judges have an important role to play in this regard.¹⁵

The approach suggested by the High Commissioner resonated with emerging domestic jurisprudence from South Africa and elsewhere. Subsequent discussions at the Open-Ended Working Group and in various other fora on the justiciability of ESC rights focused more attention on the reasonableness approach proposed by the High Commissioner and others, and began to generate more support for the drafting of a complaints procedure. Growing support for recognising ESC rights as justiciable led the Human Rights Council, in June of 2006, to change the mandate of the Open-Ended Working Group to commence negotiating the text of an Optional Protocol.

In response to the new mandate, the Chairperson convened a meeting of international experts and on the basis of their advice, prepared a first draft of an Optional Protocol for the consideration of the Open-Ended Working Group. It was in this draft that a reasonableness standard was first proposed:

¹⁴ Louise Arbour, UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour High Commissioner for Human Rights to the Open-Ended Working Group established by the Commission on Human Rights to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights* (Second session, 2005).

¹⁵ Louise Arbour, UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended WG OP ICESCR* (Third session, 2006).

4. 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.¹⁶

At this stage of the process, however, there was still no consensus on a comprehensive approach to the complaints procedure and the states opposed to the OP-ICESCR continued to press on all fronts to limit justiciability. A provision remained in square brackets in the text providing for ‘a la carte’ options,¹⁷ to permit not only the exclusion of particular rights from the complaints procedure but also the obligations to progressively realise rights as set out in article 2(1).¹⁸ A parallel campaign was initiated by the opposing States for a comprehensive approach to weaken the standard of reasonableness review proposed in the Chairperson’s first draft.¹⁹ States such as Canada, the UK, Australia, Poland, China, and the United States 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.²⁰ They also proposed a substitution of a standard of ‘unreasonableness’ for a standard of ‘reasonableness’.²¹ These proposals were linked to affirmations that states should be free to decide for themselves the ‘appropriate policy measures and allocation of its resources in accordance with domestic priorities’.²² A subsequent draft included bracketed proposals to replace reasonableness with ‘unreasonableness’ and direct the Committee to ‘take into account the [broad] margin of

¹⁶Working Group, *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (n. 6 above), Article 8(4).

¹⁷ UN Committee on Human Rights, *Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Sixty-second session, 2005), U.N. Doc E/CN.4/2006/WG.23/2 at Part 10 (2005).

¹⁸ UN Human Rights Council, *Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights* (Eighth-session, 2008), U.N. Doc A/HRC/8/WG.4/3 (2008).

¹⁹Working Group, *Report of the fourth session* (n. 9 above), at para. 33.

²⁰*Ibid.*, para. 37.

²¹ UN Committee on Human Rights, *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* (Third session, 2006), U.N. Doc E/CN.4/2006/47 at para. 92 (2006). China, Japan, India, China, Norway, Poland, and the United Kingdom were among the States who supported the ‘unreasonableness’ criteria. Working Group, *Report of the fourth session* (n. 9 above), at para. 95.

²² UN Committee on Human Rights, *Report of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fifth Session* (Eighth session, 2008), U.N. Doc. A/HRC/8/7 at 91 (2008).

appreciation of the State party to determine the optimum use of its resources'.²³ However, many other delegations opposed these states proposals.²⁴

It was argued by supporters of a comprehensive OP that the effect of these proposals would be to incorporate into the text of the Optional Protocol the kind of excessive acquiescence to socio-economic decision-making that has traditionally denied adjudication and remedies for ESC rights claims in many domestic jurisdictions. It was pointed out by the NGO Coalition that a standard of review requiring the Committee to consider whether the steps taken were 'unreasonable' was likely to place an insuperable burden on claimants to establish that decisions or policies were demonstrably unreasonable in their formulation or design.²⁵ The vision of adjudication focused on compliance and the right to reasonable measures to realise rights commensurate with available resources, the energizing vision of years of advocacy for the OP-ICESCR would be lost. With an increasing number of delegations persuaded of the legitimacy of these concerns, the text was amended in a subsequent draft to remove any reference to unreasonableness and removing the adjective 'broad' from the reference to a 'margin of discretion'.²⁶

States and others participating in the Open Ended Working Group approached the idea of a standard of review for claims engaging obligations under 2(1) from a range of perspectives. While the intention of the states skeptical of the OP project was generally to limit the scope and application of a complaints procedure that they did not support to more traditional spheres of civil and political rights adjudication, other states 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. Because of the novelty of a complaints process being applied to the unique provisions of article 2(1) of the ICESCR, it was argued that States considering ratification, as well as the Committee charged with adjudicating complaints, would benefit from some clarification about the standard of review that would be applied.

²³ UN Human Rights Committee, *Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights* (Eighth session, 2007), U.N. DocA/HRC/8/WG.4/2 (2007).

²⁴ *Ibid.*, at 114, (Argentina, Bangladesh, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation, and Sri Lanka).

²⁵ Working Group, *Report of the fourth session* (n. 9 above), at paras. 103 and 153.

²⁶ UN Human Rights Committee, *Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights* (n. 18 above), Article 8.

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, 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’.²⁷ Fortunately, the CESCR described in its statement a relatively rigorous standard of reasonableness review within which obligations would be assessed in the context of budgetary constraints, without, however, allowing such constraints to provide justification for inaction, excessive deference to existing policy or legislation or neglect of the needs of the most disadvantaged and marginalized groups.

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 the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.²⁸

In its statement the CESCR explicitly adopted a reasonableness standard, stating that it would assess the ‘reasonableness’ of steps taken. The Committee listed a number of possible factors it would consider in assessing whether steps taken had been reasonable. These included:

- (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

²⁷ Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the ‘Maximum of available resources’ under an optional protocol to the Covenant* (Thirty-eighth session, 2007), U.N. Doc. E/C.12/2007/1 at para. 3 (2007).

²⁸ Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the ‘Maximum of available resources’ under an optional protocol to the Covenant* (n. 27 above), at para. 4.

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.²⁹

The CESCR also stated that it would place a high priority on ‘transparent and participatory decision-making at the national level’.³⁰ Interestingly, the Committee linked participatory decision-making to the provision of a margin of appreciation to states allowing them to tailor policies to particular circumstances through engagement with stakeholders: ‘[t]o 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’.³¹

As will be described below, the Committee’s approach to reasonableness drew considerably on the approach adopted by the South African Constitutional Court in the *Grootboom* case,³² with a similar emphasis on the protection of vulnerable groups and compatibility of decision-making with broader human rights values. Reasonableness was also an emerging concept at the international level at this time, with the incorporation of the language of reasonableness into the text of the International Covenant on the Rights of Person with Disabilities, 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 in violation of the CRPD.³³

²⁹ Ibid., at para. 8.

³⁰ Ibid., at para. 11.

³¹ Ibid.

³² *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) at para. 44.

³³ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly* (Sixty-first session, 2007), U.N. Doc A/RES/61/106 at Article 2 (2007): ‘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.

The Committee's statement was supported by the High Commissioner, Louise Arbour, who noted the importance of equality values and non-discrimination in the assessment of reasonableness. The High Commissioner again emphasized the way in which reasonableness analysis distinguishes the adjudicative role of the Committee from the policy and program implementation role of states. She noted that where the Committee finds that reasonable measures have not been adopted it will generally leave it to the state party to determine, through its own processes, the precise means to remedy any violation.

As the Committee points out in its Statement, the role of an international quasi-judicial review mechanism is not to prescribe policy measures, but rather to assess the reasonableness of such measures in view of the object and purpose of the treaty. For example, a policy that discriminated against women in the provision of essential medicines would clearly not meet such reasonableness criteria. Again, as the Committee points out, a failure to take reasonable measures, if established by the Committee, would give rise to a recommendation that remedial action be taken, while deferring to the discretion of the State party concerned to decide on the means of doing so.³⁴

There began to emerge within the Working Group a consensus in favour of the inclusion of a reference to reasonableness along the lines proposed by the High Commissioner, supported by States from diverse perspectives. For some States, the inclusion of a reasonableness standard provided assurances that the Committee would not exceed its competence by 'micromanaging' policy choices and resource allocation decisions. For others, a reference to reasonableness in combination with a reference to compliance with Covenant rights was seen as an affirmation that the Committee would engage directly with issues of compliance with article 2(1) in the context of individual complaints, ensuring access to justice for victims of violations linked to failures of States to adopt positive measures and effective strategies. Moreover, the reasonableness standard of review was seen as providing a reassuring link to jurisprudence at the domestic level.

The lurking, unresolved issue, however, was the remaining proposal to include a reference to 'margin of discretion' in article 8(4).³⁵ Although this term, and the related

³⁴ Louise Arbour, UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended WG OP ICESCR* (n. 15 above).

³⁵ B. Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review*, Vol.11, No. 2 (2011), pp. 275-327, at 295.

concept of ‘margin of appreciation’ are common in European jurisprudence,³⁶ the concept has rarely been invoked within the UN treaty body system and is not found in any UN treaties. Incorporating a unique reference to ‘margin of discretion’ in the OP-ICESCR could be interpreted as a signal in favour of differential treatment of this class of rights claims in comparison to others. It was unclear what the principle would mean in the context of the OP-ICESCR. The CESCR seemed to apply the term in its statement, simply to suggest that the Committee would recognise the distinctive competence of the state to design and implement programs and policies with appropriate participation from affected stakeholders. This this would be uncontentious. However, references to margin of discretion or appreciation are strongly associated in many jurisdictions with the notion of a reduced standard of scrutiny, a broad deference to states in relation to socio-economic policy and often to a systemic abdication of any effective adjudicative role for courts or quasi-judicial bodies in relation to substantive ESC rights claims. Courts in many common law countries are likely to throw up their hands in response to virtually any human rights claim engaging with ESC rights, declaring that courts ought to defer to states’ competence and authority in the socio-economic domain. It was clear that when skeptical states led by the USA, the UK, and Canada took up the issue of the margin discretion at the third session of the Working Group, they were seeking to promote a more categorical deference to states’ decisions about socio-economic policy that would seriously affect access to justice for victims of violations of ESCR and promote the type of judicial acquiescence to ESC rights violations that the Optional Protocol was intended to correct.³⁷ Even if the CESCR were to avoid any blanket deference in the key areas where ESC rights violations are most likely to occur, the inclusion of the reference to a margin of discretion was likely to be used by some domestic courts in many jurisdictions as a basis for dismissing claims engaging with socio-economic policy choices.

After eloquent submissions from a number of states during the final days of the drafting about these dangers of a reference to a ‘margin of discretion’, led by Portugal and Finland and strongly supported by the NGO Coalition for the OP-ICESCR, the Chairperson removed from the draft any reference to ‘margin of discretion’ or ‘margin of appreciation’. The session on the second last day, however, began with a demonstration

³⁶ M. Forowicz, ‘State Discretion as a Paradox of EU Evolution’ *Max Weber Programme* (Florence: European University Press, 2011), pp.1-33.

³⁷ UN Committee on Human Rights, *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* (n. 21 above), at paras. 92, 95, 130; Working Group, *Report of the third session* (n. 9 above), at para. 93.

of very effective lobbying by Canada, backed by the US and a number of other states, insisting that a reference to ‘margin of discretion’ or ‘margin of appreciation’ must be reinserted if they were to support the referral of the draft to the Human Rights Council.³⁸ It was clear that some kind of alternative language would be necessary to save the protocol.

It was critical at this juncture to distinguish between the two understandings of the margin of discretion at play. Those most concerned about the concept feared that it would be interpreted as meaning that the Committee should exercise deference to what the state considered reasonable, thus abdicating an important component of the assessment of compliance with the Covenant to the state under review. Another interpretation suggested that the reference to a margin of discretion simply meant that the Committee should recognise that where there are a number of options available to the state to achieve compliance, it is up to the state to make the choice of means and not for the Committee to choose what it considers the best policies and programs. What was needed was wording that affirmed the latter point, without suggesting that the Committee would abdicate its mandated role of assessing compliance with the Covenant by simply deferring to the state’s decisions regarding what is ‘reasonable’.

Lillian Chenwi, a member of the NGO coalition pulled up the *Grootboom* decision on her laptop and referred delegates informally to the wording of paragraph 41 of the decision:

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. Many of these would meet the requirement of reasonableness.³⁹

The reference to a range of possible measures from which the State can choose did not suggest deference to the state in the assessment of reasonableness itself. Rather, the Constitutional Court of South Africa had simply recognised the role of the state in exercising policy choices and in crafting the precise contours of programs and policies. The chairperson inserted this wording into a revised text and presented it to the delegates,

³⁸ Working Group, *Report of the fifth session*, 23 May 2008, A/HRC/8/7 at para 168. See drafting proposals by the Chairperson-Rapporteur of the Open-ended Working Group, fifth session, 25 March 2008, A/HRC/8/WG.4/3 at para 173. This amendment mirrored proposals put forward earlier in the session by Canada and New Zealand, to interpret ‘reasonableness’ to be ‘consistent’, in ‘compliance’ or in ‘accordance’ with Part II of the Covenant: see Draft 4 of Article 8(4), fifth session, 25 March 2008, A/HRC/8/WG.4/3 at paras 90 and 168, online: http://www2.ohchr.org/english/issues/escr/documents_5.htm.

³⁹ *Grootboom* (n. 33 above), at para 41.

explaining that the intention behind the new wording was to acknowledge that there could be different policies that are legitimately compliant with Covenant obligations and that it would be up to states, not the Committee, to make those policy choices.⁴⁰ Enough states were satisfied with this proposal that the Chairperson was able to announce on 4 April 2008 that there were no objections to the transmission of the draft⁴¹ for consideration by the Human Rights Council. The text was subsequently adopted without any changes to article 8(4).

3. Reasonableness Review: the Demarcation of Roles

What are we to deduce from the fact that reference to a ‘margin of discretion’ was removed from article 8(4) and replaced with an acknowledgement that the state may adopt a range of policies to implement the rights in the Covenant? The most important point to acknowledge is that the final wording of 8(4) certainly addresses the concerns of many states about a blurring of roles of adjudication and governance. 8(4) recognises a clear distinction between the adjudicative role of the Committee and the policy-making role of states, just as Louise Arbour proposed in her opening remarks to the Open Ended Working Group. As Justice Arbour described it, a reasonableness standard clearly assigns to the courts the role of adjudicating rights claims and reviewing policies and programs alleged to violate rights in order to determine if the state has acted reasonably, in the context of available resources and other constraints. That role is not to be confused with the roles of governments, of designing and implementing policies and programs. Deference to states’ legitimate policy choices does not entail deference to what the state might consider to be reasonable in relation to compliance with rights under the Covenant.

As suggested by Justice Arbour, reasonableness under the OP-ICESCR must be understood in the context of adjudicating rights claims. It does not put the CESCR forward as an expert in social policy charged with reviewing State policies to assess whether they are reasonable in the abstract. Rights claims and the realities of the experience of rights claimants are as much a part of the context in which reasonableness

⁴⁰ C. de Albuquerque, ‘Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights- The Missing Piece of the International Bill of Human Rights’, (n. 13 above) at 175 (mostly European Union member states, African, and Latin American states).

⁴¹ Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Letter from the Chairperson-Rapporteur, Catarina de Albuquerque, to the Members of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Fifth session, 2008), U.N. Doc. A/HRC/8/WG.4/3 (2008).

must be assessed as the policy-making and budgetary realities that the state will bring to light. The dignity issues at stake are brought to life by rights claimants and these must be central to the Committee's assessment of reasonableness. States, for their part, bear the responsibility of providing to the Committee information about the broader context in which policies have been adopted and decisions, made. They must ensure that evidence of competing needs, of limitations on capacity, or of policy concerns that are not part of the experience of the rights claimants are placed before the Committee in the form of objective and reliable evidence. In many cases, the Committee will also want to benefit from the expertise and perspectives of other parties, which are permitted, under the unique wording of article 8(1) of the OP-ICESCR, to provide information and documentation independently of either of the parties.

Under the OP-ICESCR it is the role of the Committee to assess, in light of all of the evidence before it, the reasonableness of the steps taken. Where there is a range of policies or programs through which Covenant rights may be implemented, consistent with the requirements of the Covenant, and properly informed by the dignity interests and experiences of rights claimants, article 8(4) establishes that it is not the Committee's role to decide which policies should be adopted. Rather, the Committee will recommend a course of action necessary for the state to remedy a violation of rights. In most cases, this will at least require immediate action by the state party to put in place an effective and coherent strategy as well as a longer term plan for ongoing dialogue involving governments, rights-claimants, and other affected groups, to put in place monitoring and accountability mechanisms. In many instance, there may be no 'range of policy options' in relation to immediate obligations. An eviction may be required to be halted, a discriminatory policy may have to be rescinded, or immediate needs for housing or food may be required to be provided. These immediate remedies will in most cases be combined with longer term strategic remedies consistent with what the CESCR has described as necessary for reasonable policies and strategies and to realise rights.⁴²

It is only in this sense of demarcating the committee's adjudicative role from the State's implementation role, that article 8(4) directs the Committee to defer to the state's expertise and democratic legitimacy to choose from policy options, implement programs, and adopt legislative measures. The assessment of what constitutes reasonable steps to comply with Covenant rights remains the mandated role of the Committee as the

⁴² See discussion of CESCR jurisprudence below.

adjudicative body and the Committee should not abdicate its adjudicative role to the State. Justice Binnie of Supreme Court of Canada made a similar point in relation to domestic separation of powers in an appeal of from a decision of the Newfoundland Court of Appeal in which that Court had proposed a different approach to the question of ‘reasonable limits’ under section 1 of the *Canadian Charter of Rights and Freedoms* when challenged decision involves budgetary measures. In response to the suggestion that courts should generally defer to legislatures’ assessment of what constitute reasonable budgetary measures rather than engaging in its own assessment, Justice Binnie responded:

No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.⁴³

The same principle of separation of the adjudicative and policy-making roles applies to the consideration of reasonableness as mandated by article 8(4). 8(4) recognizes that the Committee ought not to assume the role of designing and implementing policy, which is the proper function of the state, and nor should the state be accorded the role of determining what constitutes compliance with the Covenant on the basis of a reasonableness standard. The State has the opportunity to advocate before the Committee for its view of what constitutes reasonable policy and budgetary allocations and the claimant has the opportunity to respond with an alternative view. It is the Committee’s role to adjudicate the question with independence and neutrality, giving no more deference to one side than to the other.

The reasonableness standard affirmed in article 8(4) should also be clearly distinguished from a variety of standards of reasonableness applied in judicial review by domestic courts. Reasonableness is widely applied by courts as a standard of review of decisions of other adjudicative bodies, embodying, to varying degrees, the principle that courts ought to defer to the unique competence of administrative decision-makers or of lower courts when the adjudicators or judicial bodies being reviewed are better situated to make

⁴³*Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381, at para 103.

findings of fact or to apply law in their field of expertise. There are also various deferential standards of rationality review according to which decisions of specialised bodies will not be interfered with unless there have been serious errors compromising procedural fairness or rendering decisions patently unreasonable.

These principles of deference to other decision-makers do not apply under the OP-ICESCR because the Committee is not reviewing decisions of other adjudicative bodies. In adjudicating complaints of violations of the ICESCR, the Committee may defer to the competence of domestic courts when they have made findings of fact that are relevant to a complaint, as other treaty bodies have done.⁴⁴ The Committee will certainly rely on the domestic policy expertise available to the state and to domestic agencies, just as it will rely on the evidence adduced by rights claimants, their experts, or intervening groups about the effect of programs or policies on their dignity interests and on those of others. Competent assessment of reasonableness will rely heavily on expert evidence and opinion presented both by the author of the petition and by the state, as well as by third parties. Recognising the distinctive expertise of parties or domestic experts in relation to the subject matter of the complaint, however, is quite different from exercising deference to either party in relation to the determination of whether the state has acted reasonably to realise the rights in question. Confusion about deference and competency issues largely stems from a confusion of the adjudicative role from the policy design and implementation role. If the CDESCR is misconceived as a kind of expert body in social and economic policy, then the problem of its competence to sit in judgment of the decisions of domestic policy experts and governments becomes problematic. If, however, the CDESCR is properly conceived as a body which, under the OP-ICESCR, adjudicates rights claims, in light of the best evidence available on both the effect of challenged policies or failures to act, and the justification for these, against the human rights standards of the Covenant, then there is no longer a conceptual problem. The Committee must assess the evidence, including opinion evidence provided by the State as to why particular measures were or were not adopted. The Committee must determine what weight to accord evidence and adjudicate independently and fairly whether a right has been infringed or whether, on the contrary, the State has complied with the Covenant in the circumstances. The adjudicative role now accorded the Committee must not be

⁴⁴ UN Human Rights Committee, *Zwaan de Vries v Netherlands Communication No. 182/1984*, U.N. Doc Supp. No. 40 A/42/40 (1987).

abdicated to either of the parties, including in the determination of what is reasonable in accordance with Covenant rights and available resources.

4. Reasonableness as Substantive Compliance with ESC Rights

The fact that the wording of the reasonableness standard incorporated into the OP-ICESCR was adapted from a paragraph of the *Grootboom* decision of the Constitutional Court of South Africa is of some value in interpreting how it should be applied. While the Committee is in no way bound to follow the jurisprudence of the Constitutional Court of South Africa on reasonableness, it should certainly recognise that the standard of reasonableness around which consensus was reached was heavily influenced by the *Grootboom* ruling. Indeed, it is helpful to distinguish the *Grootboom* decision, which was a key reference point for the drafters, from subsequent jurisprudence of that Court, which was not. There are a number of critical aspects of the approach to reasonableness affirmed by the Court in *Grootboom* that resonate with the Committee's own jurisprudence and are key to its proper application in the context of the OP-ICESCR.

The Court in *Grootboom* recognised that reasonableness should not be understood solely or even primarily as a limit or constraint on socio-economic rights but, rather, as a guarantee of rights—a measure of compliance with the obligation of progressive realisation, framed by constitutional values and assessed in the context of the dignity interests and the fundamental rights of claimants.⁴⁵ The Court affirmed dignity in rights as the foundation of reasonableness review so as to make reasonableness as much about the content of rights in particular circumstances as about justifying failures to realise them. Resource constraints or limits on institutional capacity may justify certain limits to the immediate enjoyment of socio-economic rights but available budgets and institutional capacity also create obligations on the state to utilise this capacity reasonably in accordance with the priority that must be accorded to human rights.

It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. ... Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances

⁴⁵ *Grootboom* (n. 33 above), at paras. 41-4 and 83.

and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.⁴⁶

Although some subsequent decisions of the Constitutional Court of South Africa have raised concerns that the Court has focused the assessment of reasonableness too squarely on the rationale provided by governments,⁴⁷ the *Grootboom* decision from which the OP text draws inspiration presents a substantive conception of reasonableness based on the obligation to realise socio-economic rights consistently with the foundational value of human dignity.⁴⁸ The paragraph from which the wording of the article 8(4) is taken affirms that reasonable policies ‘must be capable of facilitating the realisation of the right’.⁴⁹ The reasonableness standard affirmed in *Grootboom* thus emphasises the transformative dimension of socio-economic rights, affirming that the commitment to ‘transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order’.⁵⁰

The standard of reasonableness affirmed in the *Grootboom* decision represents a rejection of the deferential standard proposed by States advocating for a reference to a ‘wide margin of discretion’ in the OP-ICESCR. As Sandra Liebenberg has noted, ‘while *Soobramoney* raised the spectre of the Court adopting a thin standard of rationality scrutiny for socio-economic rights claims, the Court in *Grootboom* and *TAC* proceeded to develop a more substantive set of criteria for assessing the reasonableness of the state’s acts or omissions’⁵¹. Critical to the reasonableness standard affirmed in *Grootboom* is the requirement that reasonable policies do not ignore the needs of those who are marginal or in the most desperate circumstances. Just as the CESCR has emphasised in its statement to the Open Ended Working Group that reasonable policies must prioritise those who are marginalised and at greatest risk, so too did the Constitutional Court affirm that ‘[t]hose whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right’.⁵²

⁴⁶ Ibid., at para. 83.

⁴⁷ S. Wilson and J. Dugard, ‘Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights’, *Stellenbosch Law Review*, Vol. 3 (2011), pp.664-682, at 679.

⁴⁸ On the importance of the dignity interest in reasonableness review see S. Liebenberg, ‘The value of human dignity in interpreting socio-economic rights’, *South African Journal on Human Rights*, Vol. 21 (2005), pp. 1-31.

⁴⁹ Ibid., at para. 41.

⁵⁰ Ibid., at para. 25; See S Liebenberg, ‘Towards a transformative adjudication of socio-economic rights’, *Speculum Juris*, Vol. 21 (2007), pp. 41-59.

⁵¹

⁵² *Grootboom* (n. 33 above), at para. 44.

The Court also affirmed in *Grootboom* that a reasonable policy must be consistent with the obligation to progressively realise socio-economic rights, ensuring that barriers to the realisation of the right are eliminated over time and avoiding what the CESCR has called ‘deliberately retrogressive measures’.⁵³

Liebenburg lists the following additional features identified by the Constitutional Court as characterising a reasonable policy capable of facilitating the realisation of socio-economic rights, many of which were taken up by the CESCR in its Statement to the Open Ended Working Group:

- It must be comprehensive, coherent and coordinated;
- Appropriate financial and human resources must be made available for the programme;
- It must be balanced and flexible and make appropriate provision for short, medium and long-term needs;
- It must be reasonably conceived and implemented; and
- It must be transparent, and its contents must be made known effectively to the public.⁵⁴

While the Court in *Grootboom* refers to the characteristics of a housing policy in the singular, it recognised that all socio-economic rights are interrelated, such that it is impossible to isolate housing policy from policies and programs implementing the right to social security, food, or an adequate income. ‘Socio-economic rights must all be read together in the setting of the Constitution as a whole.’⁵⁵ Article 8(4) refers to the Committee’s role in assessing the reasonableness of the ‘steps taken’, in the plural. It is often difficult and, indeed, counter-productive to tie violations of ESC rights to a singular policy or provision. Socio-economic rights violations are usually the result of complex interaction of different programs and administrative decisions, acts, and omissions by public actors, and affected by a range of structural factors as well as multiple roles of private actors. Article 8(4) appropriately mandates the Committee to assess whether

⁵³Ibid., at para. 45.

⁵⁴Sandra Liebenburg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Co: Claremont, 2010), p. 309.

⁵⁵*Grootboom* (n.33 above), at para. 24.

reasonable steps have been taken, without requiring it to pinpoint a particular policy or measure required or to consider only if a particular provision is reasonable.

As explained in the chapter on remedies in this Commentary, the Committee may often elect to recommend that the State, in dialogue with various stakeholders, review the range of policy options available and implement a plan that combines both immediate steps and longer term strategies that engage with multiple policies and programs. In many cases, it will not be necessary or even helpful for the Committee to make specific recommendations about discrete provisions, budgetary allocations, or program design. The complexity often lies in the implementation of remedies rather than in the assessment of reasonableness. Understood in the context of the dignity interests of the claimant and others in her community, the transformative aspirations of the new South African Constitution and the continuation of dramatic socio-economic inequality as a legacy of apartheid, the task of assessing whether the failure to address the needs of Irene Grootboom and her community did not strain the competence of the Constitutional Court. Addressing the complex interaction of various policies and programs in order to remedy the violation was the proper role of the governmental respondents, with meaningful participation by stakeholders. Rather than undermining the policy-making role of governments, the adjudicative process should enhance democratic accountability, providing a greater understanding of dignity interests within a cultural and historical context and ensuring that the experience and ‘voice’ of claimants is fully heard. The adjudication of rights emphasises transparency and reinforces democratic and participatory decision-making.

In line with the substantive approach to reasonableness affirmed by the Constitutional Court in *Grootboom*, article 8(4) affirms a distinctive standard for assessing compliance with positive obligations under the ICESCR in the context of individual communications. Reasonableness of steps taken is assessed ‘in accordance with the content of the rights in Part II of the Covenant’ and the policy measures that the Committee is mandated to assess are those which are required ‘for the implementation of the rights set forth in the Covenant’. Article 8(4) thus articulates a standard of compliance with the Covenant that considers not simply the State’s justification of its policies based on competing needs or limits on resources but, more fundamentally, whether the steps taken by the State party would allow realization of the rights at stake in the particular socio-economic and historical context, in a manner that provides full participatory rights and recognises the

dignity and rights of those whose rights have been denied. Reasonableness is a contextual inquiry into the content of Covenant rights in particular circumstances, attending equally to both the voice and experience of claimants and to the realities, restraints and difficult choices faced by governments. What is reasonable will depend as much on the nature of the interest at stake and the unique circumstances of the particular claimant or group as on budgetary constraints, competing needs and policy rationale presented by the State .

5. Jurisprudence of the CESCR on Reasonableness

Beyond the CESCR's 2007 statement on the reasonableness standard under the *Optional Protocol*, there is extensive jurisprudence in the Committee's General Comments and in its Concluding Observations on Periodic Reviews of State parties that provides clarification as to the requirements of policies and strategies for compliance with article 2(1) of the *ICESCR*. While the approach to reasonableness and the review of policies for compliance with the Covenant will be different in the context of period reviews and General Comments than when it is situated in the context of particular rights claims, the Committee's views on what constitutes reasonable policies will certainly inform its approach to reasonableness in the context of the OP-ICESCR.

In the CESCR's view, all reasonable strategies must be informed by an equality framework, prioritising the needs of disadvantaged groups and ensuring protection from discrimination.⁵⁶ States have an immediate, unqualified duty to ensure both formal and substantive equality in the implementation of policies.⁵⁷ Strategies must specifically address issues of systemic discrimination and the barriers faced by individuals who have suffered historic discrimination or presently suffer from prejudice.⁵⁸ There must be 'adequate legislative protection from discrimination either by state or non-state actors'.⁵⁹ Reasonable policies are not simply policies which allocate an appropriate level of

⁵⁶ UN Committee on Economic and Social Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art 2 para 2)* (Forty second session, 2009), U.N. Doc E/C.12/GC/20 at para. 9 (2009). See also: UN Committee on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles')* (Forty-third session, 1987), U.N. Doc E/CN.4/1987/17 at para. 39 (1987): 'Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination'.

⁵⁷ M. Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', *International Journal of Human Rights*, Vol. 15, No. 6 (2011), pp. 969-1012.

⁵⁸ UNCESCR, *General Comment 20* (n. 56 above), at para. 8.

⁵⁹ Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law' (n. 57 above), p. 976.

resources to programs. They should also address the structural and systemic causes of poverty and social exclusion, and should include ‘efforts to overcome negative stereotyped images’.⁶⁰ Additionally, policies should rely on effective ‘coordination between the national ministries, regional and local authorities’.⁶¹ Among other agencies, human rights institutions should play an important role in overseeing implementation strategies by scrutinising existing laws, identifying appropriate goals and benchmarks, providing research, monitoring compliance, examining complaints of alleged infringements or disseminating educational materials.⁶²

Strategies for the realisation of rights should be, themselves, based on rights and provide effective judicial or administrative remedies. A rights framework is both the means and the ends of reasonable policies, programs and strategies. As stated in the CESCR’s *General Comment No. 9*, administrative remedies must be accessible, affordable, timely and effective.⁶³ Meaningful participation informed by the rights of affected constituencies is a critical procedural component of reasonable policies and programmes. As stated in *General Comment No. 4*, ‘both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, [a housing] strategy should reflect extensive genuine consultation with, and participation by, all of those affected’.⁶⁴ Strategies for realising ESC rights should operate according to the principles of accountability which the Committee has identified as including: transparency, participation, decentralisation, legislative capacity, judicial independence, institutional responsibility for process, monitoring procedures, and redress procedures.⁶⁵ Both long- and short-term timelines should be adopted, with particular attention paid to interim steps such as ‘temporary special measures [that] may sometimes be needed in order to bring

⁶⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment 6: The Economic, Social and Cultural Rights of Older Persons* (Thirteenth session, 1996), U.N. Doc E/1996/22 at para 41 (1996).

⁶¹ UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The right to water* (Twenty-ninth session, 2002), U.N. Doc E/C.12/2002/11 (2002).

⁶² UN Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (Nineteenth session, 1998), U.N. Doc E/C.12/1998/25 at para. 3 (1998).

⁶³ UN Committee on Economic, Social and Cultural Rights, *General Comment 9: The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 at para. 9 (1998).

⁶⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The right to adequate housing* (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114, para. 12 (1991).

⁶⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment 12: Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 at paras. 23, 29 (1999).

disadvantaged or marginalised persons or groups of persons to the same substantive level as others'.⁶⁶

The CESCR has emphasised that reasonable programs and policies should also include independent monitoring and assessment of budgetary measures. Effective participatory rights and monitoring depend on the transparent allocation and expenditure of resources.⁶⁷ The reasonableness of budgetary allotment can be assessed based on information about the percentage of the budget allocated to specific rights under the ICESCR in comparison to areas of spending that are not related to fulfilling human rights. The state party's resource allocation may also be compared to that of other states with similar levels of development.⁶⁸ Substantive elements required of a reasonable policy have been characterised by the 'Four A's':

- Availability (access to relevant services).
- Accessibility (physical and economic accessibility and non-discriminatory access).
- Acceptability (based on qualitative standards)
- Adaptability (flexible and geared to meeting of particular cultural and other needs, as well as responsive to changes in circumstances).⁶⁹

From the CESCR's earliest General Comment adopted in 1989 to clarify states' reporting requirements, it has emphasised that resource and other constraints do not relieve governments from immediate obligations to put in place strategic policies to facilitate the

⁶⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (art 3)* (Thirty-fourth session, 2005), U.N. Doc E/C.12/2005/4 at para. 15 (2005).

⁶⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86, para. 11 (1990).

⁶⁸ Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law' (n. 57 above), at 980-81. See e.g., UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of Congo* (Forty-third session, 2009), U.N. Doc E/C.12/COD/CO/4 at para.16 (2009), where the Committee found that the state's decreased allocation of resources to social sector development combined with increased levels of military spending resulted in a violation of its Covenant obligations; Griffey, 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (n. 35 above) at 290.

⁶⁹ Components of the 'four A's' vary with each specific right. See e.g., UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The Role of Education (art 13)* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 at para. 6 (1999); UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 at para.12 (2000); UNCESCR, *General Comment 15* (n. 61 above) at para. 11.

realisation of Covenant rights over time.⁷⁰ The Committee emphasised the overriding obligation to develop ‘clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant’.⁷¹ There is also a specific obligation ‘to work out and adopt a detailed plan of action for the progressive implementation’ of each of the rights contained in the Covenant.⁷² This is clearly implied, according to the CESCR, by the obligation in Article 2(1) ‘to take steps ... by all appropriate means’.⁷³

The reasonableness standard in 8(4) will require compliance with the obligation to develop clear strategies and plans and to monitor progress toward identified goals at the same time as meeting immediate obligations commensurate with the available resources and other historical/contextual challenges. The CESCR explained in *General Comment No. 3, on the nature of States parties obligations (art. 2, para. 1 of the Covenant)*,⁷⁴ that while *Covenant* rights are subject to progressive realisation, there are two overriding obligations which are of immediate effect: the obligation to ensure non-discrimination and the obligation ‘to take steps’. The reasonableness standard will incorporate both of these immediate obligations. The steps taken, according to *General Comment No. 3*, ‘should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant’.⁷⁵ ‘Moreover, the obligations to monitor the extent of the realisation, or more especially of the non-realization, of economic, social, and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints’.⁷⁶ Legislative measures are almost always desirable and in some cases indispensable. The CESCR notes that it will be particularly interested in whether legislative measures ‘create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized’.⁷⁷ In *General Comments* relating to the right to adequate food,⁷⁸ the right to social security,⁷⁹

⁷⁰United Nations Committee on Economic, Social and Cultural Rights, *General Comment 1: Report by States Parties* (Third session, 1989), U.N. Doc E/1989/22 (1989).

⁷¹*Ibid.*, at para. 4.

⁷² *Ibid.*

⁷³UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series, Vol. 993, p. 3 at Article 2(1) (Entry into force 3 January 1976).

⁷⁴UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1990).

⁷⁵*Ibid.*, at para. 2.

⁷⁶*Ibid.*, at para. 11

⁷⁷*Ibid.*, at para. 6.

⁷⁸UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (art 11)* (Twentieth session, 1999), U.N. Doc E/C.12/1999/5 (1999).

the right to work,⁸⁰ the right to health,⁸¹ and the right to water⁸² the CESCR calls on states to create targeted national strategies based on human rights principles to ensure the realisation of Covenant rights. In *General Comment No. 18* on the right to work, the CESCR calls for state governments to adopt an ‘employment strategy targeting disadvantaged and marginalised individuals and groups’, which includes ‘indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed’.⁸³ In *General Comment No. 12* on the right to food, the CESCR ‘affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person’ and requires states to adopt ‘appropriate economic, environmental and social policies...oriented to the eradication of poverty and the fulfillment of all human rights’, as well as ‘a national strategy to ensure food and nutrition security for all’.⁸⁴ In *General Comment No. 14* on the right to health, CESCR outlines state parties’ core obligation to adopt and implement national health strategies and plans of action based on a ‘participatory and transparent process’.⁸⁵ National health strategies must include measures of prevention and ‘right to health indicators and benchmarks, by which progress can be closely monitored’.⁸⁶ Strategies and plans of action must also pay ‘particular attention to all vulnerable or marginalized groups’ and address the social determinants of health.⁸⁷ Similar obligations are enumerated with respect to the development of ‘comprehensive and integrated strategies and programmes’ to implement the right to water.⁸⁸

It is clear from the Committee’s jurisprudence in these diverse areas that even in the context of resource constraints and other limitations on capacity, the reasonableness review mandated by article 8(4) will require states to develop targeted and coherent strategies which are, in the words of the Constitutional Court of South Africa, ‘capable of realizing the right’.⁸⁹ As Brian Griffey notes, ‘questions remain as to how the

⁷⁹UN Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art 9)* (Thirty-ninth session, 2007), U.N. Doc E/C.12/GC/19 (2008).

⁸⁰UN Committee on Economic, Social and Cultural Rights, *General Comment 18: Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006).

⁸¹UNCESCR, *General Comment 14* (n. 69 above).

⁸²UNCESCR, *General Comment 15* (n. 61 above).

⁸³ *Ibid.*, para 31.

⁸⁴UNCESCR, *General Comment 12* (n. 78 above), at paras. 4 and 21.

⁸⁵UNCESCR, *General Comment 14* (n. 69 above), at para. 43(f).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸UNCESCR, *General Comment 15* (n. 61 above), at para. 28.

⁸⁹

‘reasonableness’ test will be applied, but the answer must be consistent with *ICESCR* obligations and the object and purpose of the *Optional Protocol*.⁹⁰ The transformative and purposive dimensions of the reasonableness standard in 8(4) must provide the overriding interpretive framework for its application in particular contexts.

6. Converging and Overlapping Standards of Reasonableness

While the standard of reasonableness under the *Optional Protocol* to the *ICESCR* should be developed as a distinctive standard consistent with the purposes of the *ICESCR*, there will also be inevitable cross-referencing and cross-pollination among treaty bodies, particularly when they are adjudicating similar issues. When the CESCR is adjudicating complaints of discrimination in relation to access to social benefits, it may wish to bring its approach to reasonableness as a justification for discrimination in line with approaches developed by the UN Human Rights Committee and other bodies dealing with complaints of discrimination on various grounds. Where it is addressing failures of States to adopt reasonable measures to address the needs of persons with disabilities, it will want to cross-reference the reasonableness standard under the OP-ICESCR with that being applied to ensure reasonable accommodation of disabilities under the OP-CRPD.

The UN Human Rights Committee has affirmed a number of principles of reasonableness in this context which may be helpful to the CESCR in developing its own jurisprudence. The HRC has affirmed that the assessment of reasonableness must be both purposive and contextual and that a policy must be consistent with the purpose of the *Covenant* read as a whole.⁹¹ These principles have been incorporated into the approach to reasonableness in the sphere of socio-economic rights in domestic jurisprudence, and should also be useful under the OP-ICESCR. In other cases, the Human Rights Committee has considered, in the context of assessing reasonableness, the importance of promoting equality for women and other groups, whether policies have ensured access to basic requirements of subsistence for disadvantaged groups, whether they are consistent with provisions of other international treaties and ILO conventions, and how policies compare with common practice in other countries.⁹²

⁹⁰ B. Griffey, ‘The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (n. 35 above), at 304.

⁹¹ United Nations Human Rights Committee, *Sandra Lovelace v Canada*, *Communication No R.6/24*, (Thirty-sixth session, 1981), U.N. Doc Supp. No. 40 A/36/40 (1981).

⁹² United Nations Human Rights Committee, *John K. Love, William L. Bone, William J. Craig, and Peter B. Ivanoff (represented by counsel, Kathryn Fawcett) v Australia*, *Communication No. 983/2001* (Seventy-

The Committee on the Rights of the Child has similarly affirmed that a strategy to implement children's rights must go beyond a list of good intentions or vague commitments: it must set specific, attainable goals with implementation measures, timelines, and provisions for necessary resource allocation.⁹³ These norms are in line with those that have been put forward by the CESCR.

Emerging jurisprudence from the Optional Protocol to the Convention on the Rights of Persons with Disabilities will be of particular importance in determining future directions of reasonableness review, and will be of considerable benefit to the CESCR. The CRPD affirms a right to reasonable measures to accommodate disability as well as the obligation of states to progressively realise ESC rights. It will thus be applying the reasonableness review in relation to individual accommodation requirements, systemic, societal barriers to equality facing people with disabilities, and to failures by states to realise self-standing ESC rights of persons with disabilities. The jurisprudence emerging from these considerations will be of tremendous value to the CESCR as it wrestles with its own historically important mandate.

seventh session, 2003), U.N. Doc CCPR/C/77/D/983/2001 at paras. 18.2-18.3 (2003). The Committee found that while the International Labour Organisation had built up an elaborate regime of protection against discrimination in employment, mandatory retirement age for airline pilots did not appear to be prohibited in any of their Conventions. It was found that widespread national and international practice was taken into account and the aim of maximising safety to passengers, crew, and persons otherwise affected by flight travel was a legitimate aim under the International Labour Organisation Covenants; United Nations Human Rights Committee, *Guido Jacobs v Belgium*, *Communication No. 943/2000* (Eighty-first session, 2004), U.N. Doc CCPR/C/81/D/943/2000 at para. 9.5 (2004). The Committee found that an introduction of a gender requirement in the judicial code was proportionally reasonable when considering the purpose of the requirement to promote equality between men and women in consultative bodies, the means applied, and its modalities; and one of the aims of the law, which is to establish a High Council made up of qualified individuals; United Nations Human Rights Committee, *Hendrika S. Vos (represented by M. E. Diepstraten) v The Netherlands*, *Communication No. 218/1986* (Thirty-fourth session, 1989), U.N. Doc CCPR/C/35/D/218/1986 at para 12 (1989). The Committee found that the applicant was not discriminated against under the General Disablement Benefits Act when applying a uniform rule that there should be avoidance of overlapping benefits (as she was covered under the General Disablement Benefits Act). This was decided in light of the arguments by the State party of the legislative history, purpose, and application of both Acts and it was found the rule was based on objective and reasonable criteria. United Nations Human Rights Committee, *Mr. Rupert Althammer et al. (represented by counsel, Mr. Alexander H. E. Morawa) v Austria*, *Communication No 998/2001* (Seventy-eighth session, 2003), U.N. Doc CCPR/C/78/D/998/2001 at paras. 2.3 and 10.2 (2003). The Committee found that an abolition of household entitlements for retired persons (employees) of the Social Insurance Board was not part of the essential entitlements of retirement benefits. This was found to be justified in times of financial constraints and a legitimate motive of social policy because the result is an increase for the children's benefits. See also United Nations Human Rights Committee, *Rubén Santiago HinostrozaSolís v Peru*, *Communication No. 1016/2001* (Eighty-sixth session, 2006), U.N. Doc CCPR/C/86/D/1016/2001 (2006).

⁹³United Nations Committee on the Rights of the Child, *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child* (Thirty-fourth session, 2003), U.N. Doc CRC/GC/2003/5 at paras. 32-33 (2003).

At the same time, it will be important for social rights advocates and claimants to bring to these other procedures the substantive and transformative approach to reasonableness that has been developed in ESCR jurisprudence and incorporated into 8(4) of the OP-ICESCR. The adoption of the OP-ICESCR represents an historic convergence of civil and political and ESCR rights practice, drawing on developments in diverse fora and from domestic, regional and international sources. The reasonableness standard under the OP-ICESCR will draw nourishment from many sources, and sprout and take root in many places. What is most critical, however, is that reasonableness be given life and content through the hearing of ESCR claims themselves and that it be contoured to the broad purposes and transformative aspirations of the ICESCR as these find voice and meaning through local struggles, sometimes individual, sometimes as groups, for dignity and human rights.

